

# SURVEY ON THE LAW OF PROFESSIONAL RESPONSIBILITY

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There were several significant matters in various stages of development during the survey period. Among the selected cases are those that deal with the contingent fee. What follows is an examination of the contingent fee and its treatment in Indiana law up to the current year. Also in this edition is an examination of a new creation in the realm of professional regulation of lawyers: the business counsel license.

## I. THE CONTINGENT FEE

### A. *Historical Perspectives*

Use of the contingent fee was originally frowned upon in the practice as being to akin to the concepts of champerty and maintenance.<sup>1</sup> Although disfavored, it was an acceptable way for an attorney to be compensated for his services.<sup>2</sup> As the practice developed, however, the use of the contingent fee was increasingly accepted to the point where, when the *Code of Professional Responsibility* was adopted in Indiana in 1972, the use of the contingent fee was relatively commonplace.<sup>3</sup> This evolution was justified, at least in part, by the rationale that by deferring any legal fees until the actual recovery by the client was in hand, the contingent fee opened the doors to the courthouse for potential litigants with otherwise legitimate claims who could not otherwise afford legal services on a “pay-as-you-go” basis.

The justification for contingent fees can be cast entirely on utilitarian

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1. “A bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered.” BLACK’S LAW DICTIONARY 209 (5th ed. 1979).

2. Canon 13 of the 1908 CANONS OF PROFESSIONAL ETHICS of the American Bar Association provided:

A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness.

3.

Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid.

CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 2-20 (1984 ed.).

grounds: persons who lack any other means should be able to employ the present economic value of possible future recoveries to hire a lawyer. Two other justifications are also often mentioned: the contingent fee permits persons, regardless of their poverty, to spread the risk of defeat in litigation; and the contingent fee puts the lawyer squarely on the side of the client because both will succeed or fail together. If there were a market for buying and selling causes of action, contingent fees would probably not be necessary. Injured parties could sell part of their claims in that market and use the funds to hire lawyers. But such a market is prohibited by laws that ban champertous exchanges and limit the assignability of causes of action. Banks, lacking assignable security, thus cannot justify lending funds for legal fees on the unsecured hop that a statistical likelihood of recovering will pay off the loan.<sup>4</sup>

Some flavor of the historical judicial disfavor of contingent fees is present in the case of *Kizer v. Davis*.<sup>5</sup> In that case, attorney James Kizer sued his former client, Joyce Davis to recover his fee in quantum meruit for unpaid work done on Davis' marriage dissolution case.<sup>6</sup> In order to support his fee claim, Kizer presented the trial court with records listing the number of hours he had expended in advancing the representation.<sup>7</sup> The trial court engaged in a detailed inspection of Kizer's bill before determining that it was going to deny relief.<sup>8</sup> First, Kizer did not spend as much time on the representation as he claimed to the court. In addition, Davis was pushing Kizer to hire co-counsel fairly early in the representation which should have been a signal to the lawyer that the professional relationship was in trouble.<sup>9</sup> Finally, the Ethical Considerations ("EC's") of the *Code of Professional Responsibility* indicated that Kizer should not sue his client unless it was absolutely necessary to prevent a fraud or "gross imposition" on the client and neither of those features was present in the instant case.<sup>10</sup> Kizer appealed the trial court's refusal to grant him fees and the court of appeals reversed the trial court's denial. The court acknowledged that the trial judge recognized that lawyers could recover quantum meruit and Davis wanted the court of appeals to ignore that. In addition, the EC's did not apply. In fact, there was no single case that barred the lawyer from collecting his fee.<sup>11</sup> "In determining the reasonable value of the legal services rendered," the court held, "the time expended by an attorney alone is not the controlling factor. Among

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4. C. WOLFRAM, *MODERN LEGAL ETHICS* 528 (1986).

5. 369 N.E.2d 439 (Ind. App. 1977).

6. *Id.* at 441.

7. *Id.*

8. *Id.* at 442.

9. *Id.*

10. *Id.* at 445. The fraud or "gross imposition" standard was formalized in Canon 13 of the *CANONS OF PROFESSIONAL ETHICS* (1908) and discusses the advisability (or, more accurately, the inadvisability) of suing clients to collect fees.

11. *Id.* at 443.

other things, consideration may be given to the general quality of the effort expended by the attorney.”<sup>12</sup>

*B. Historical Treatment of Contingent Fee Issues in Disciplinary Cases*

As far as disciplinary treatment for lawyers who were in contingent fee disputes, Indiana has a number of cases that should inform the astute lawyer of the major contours of this area of law. These cases almost invariably turn on some consideration of whether the lawyer's claimed fee was reasonable as required by Rule of Professional Conduct 1.5(a).<sup>13</sup> In *In re Myers*, the respondent undertook an attempt to recover funds for a group of clients based on an investment scheme gone bad.<sup>14</sup> The respondent lawyer entered into a contingent fee agreement whereby he would take ten percent of the gross amount recovered.<sup>15</sup> He negotiated a settlement whereby the opponent would pay a settlement for \$550,000. The amount was to be paid in installments beginning with a \$50,000 lump sum payment and then payments of \$15,000 per month until the balance was paid off.<sup>16</sup> The respondent took \$50,000 of his fee out of the first two payments and waived the remaining \$5000. The clients were unhappy about the lawyer taking his full fee out of the first two payments. The payment stopped after \$160,000 was paid. The respondent filed suit, but no recovery was had.<sup>17</sup>

Disciplinary action was initiated because the clients claimed the respondent had taken an unreasonable fee.<sup>18</sup> The respondent lawyer argued that the term “gross recovery” in the contingent fee contract involved the total amount settled

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12. *Id.* at 446.

13. Rule 1.5(a) of the RULES OF PROFESSIONAL CONDUCT provides:

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, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2001).

14. 663 N.E.2d 771, 772 (Ind. 1996).

15. *Id.*

16. *Id.*

17. *Id.*

18. \$50,000 of the \$160,000 equals about a thirty-one percent total fee.

for.<sup>19</sup> In settling the case for a public reprimand, however, the respondent lawyer admitted that his interpretation of the term “gross recovery” was incorrect and that it referred to the amounts *actually* recovered and that the clients’ interpretation of the contract was the correct one.<sup>20</sup> The supreme court reasoned that if the cost of delivering legal services was too high, the public is deterred from using the system to protect their rights.

Lawyers are obligated to act with an allegiance to the interests of their clients. Most clients must pay lawyers engaged in private practice for their services, thus creating a risk of conflicting economic interests. Lawyers almost always possess the more sophisticated understanding of fee arrangements. It is therefore appropriate to place the balance of the burden of fair dealing and the allotment of risk in the hands of the lawyer in regard to fee arrangements with clients. In this case, the respondent employed his superior position in the bargaining and settlement process to exact an inflated legal fee from his clients. However, because he ultimately relented and made restitution and because he reached an agreement for discipline with the commission, we conclude that a public reprimand is not inappropriate.<sup>21</sup>

The upshot is that the court considered the relative power positions of the parties and determined that the lawyer is almost always in a position of superior power and knowledge when compared to the client.

Some of the above analysis later appeared in 1996 when the court decided *In re Maley*.<sup>22</sup> In *Maley*, the respondent lawyer undertook a client matter involving a workers compensation claim. In the underlying matter, the lawyer negotiated with and had the client sign a contingent fee contract allowing him to collect a fee of thirty-three and one-third percent.<sup>23</sup> Apparently unbeknownst to the client, the fees in workers compensation matters are fixed by a statutory formula.<sup>24</sup> Once the Hearing Member of the Industrial Board reached his decision to award the claimant \$89,000, the respondent lawyer’s fee under the statute would have \$10,500.<sup>25</sup> The lawyer, however petitioned the full board for the award of his one-third contingent under the terms of the contract with his client. Although it was within the power of the Board to grant additional fees, it did not do so.<sup>26</sup> Maley wanted to initiate an appeal of the denial of his fee award, but the client refused. Thereafter, the defendant employer issued a check to the claimant for more than \$34,000 and Maley kept \$27,000.<sup>27</sup> This was

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19. *In re Myers*, 663 N.E.2d at 773.

20. *Id.* at 773.

21. *Id.* at 774-75 (citations omitted).

22. 674 N.E.2d 544 (Ind. 1996).

23. *Id.* at 545.

24. *Id.* See IND. ADMIN. CODE tit. 631, § 1-1.24 (1996).

25. *In re Myers*, 674 N.E.2d at 546.

26. *Id.* at 545-46.

27. *Id.*

enough to find that the lawyer had taken an unreasonable fee in violation of the *Rules of Professional Conduct*. In imposing a public reprimand on the lawyer, the supreme court noted that the Workers Compensation Board could have awarded an enhanced fee, it did not do so and, therefore the lawyer's fee grab violated the rules.<sup>28</sup> Although the court found Maley's long service in the bar to be a mitigating factor, it also found there was no way that this conduct could have been a good faith, albeit erroneous belief that taking the enhanced fee was acceptable.<sup>29</sup> Were it not for the facts in mitigation, the lawyer might otherwise have been suspended.<sup>30</sup>

### *C. Recent Cases More Fully Flesh-out the Rule*

In 1997, a public reprimand was imposed on a lawyer after trial on agreed facts in the case of *In re Lehman*.<sup>31</sup> In that case, the respondent lawyer represented the plaintiff in a 1994 automobile accident case. He and the client entered into a contingent fee contract providing for the payment of one-third of any and all amounts recovered prior to the first pre-trial conference and escalating percentages thereafter.<sup>32</sup> The client eventually agreed to settle the claim for a total of \$12,000. Once expenses were totaled, the client received a check for \$4044.04 and the lawyer noted for the client that the total settlement amount was reduced by \$3710 due to a subrogation claim from State Farm Insurance and \$1188.80 for another subrogation claim by the Hod Carriers Union.<sup>33</sup> What the client didn't know was that the lawyer thereafter issued checks to the two insurers in the amounts of \$2473.33 and \$792.53, respectively.<sup>34</sup> The lawyer had reduced the subrogation payments by one-third to accommodate his fee, thereafter giving him a total compensation above that agreed to in the original written contingent fee contract.

Eventually, the Hod Carriers informed the client about the payment and that's when the inquiry began. When the disciplinary action went to trial, the Hearing Officer concluded that the lawyer's retention of a total of \$5632.94<sup>35</sup> was not an unreasonable fee and did not create a conflict of interest between the lawyer and the client.<sup>36</sup> The Indiana Supreme Court held that the written contract

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28. *Id.*

29. *Id.* at 547.

30. *Id.* The Indiana Supreme Court determined that the lawyer's long practice experience was a mitigating fact. Under the ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (1991), Standard 9.22(i), substantial experience in the practice of law is considered an aggravating factor when determining sanction.

31. 690 N.E.2d 696 (Ind. 1997).

32. *Id.* at 698.

33. *Id.* at 699.

34. *Id.*

35. That amount calculates out to approximately a 46.9% contingent fee.

36. *In re Lehman*, 690 N.E.2d at 701.

controls.<sup>37</sup>

The lawyer's conduct was clearly improper in their view: the settlement statement indicated the lawyer got \$4000, but he kept \$5632.94 and twice he failed to disclose the total amount of his retention to his client.<sup>38</sup> Relying on *Myers* and *Maley*, discussed above, the court reiterated the analysis that where the written contingent fee contract calls for a specific fee, any amount retained by the lawyer in excess of that amount is strongly indicative of an unreasonable fee.<sup>39</sup> Here, they found he had, in fact, exacted an unreasonable fee in violation of Rule of Professional Conduct 1.5(a).<sup>40</sup> Although the lawyer argued that the total of payments from defendants was over \$16,000, the court held that there was no settlement in excess of \$12,000 and the lawyer's arguments to the contrary were without merit.

The lawyer also argued that the negotiation of a contingent fee with a client did not constitute a conflict of interest, but the supreme court noted that there was room for debate on the issue.<sup>41</sup> In this case, they held, the issue was foreclosed because the lawyer did not make the appropriate disclosures to the clients.<sup>42</sup> Therefore, his self-interest in this case affected the client adversely. Although the court imposed a public reprimand on the lawyer, the Chief Justice dissented from the sanction and would have suspended him from the practice of law.<sup>43</sup>

In 1999, the Indiana Supreme Court spent a considerable amount of its attention to addressing contingent fee issues in two cases: *Galanis v. Lyons & Truitt*<sup>44</sup> and *In re Benjamin*.<sup>45</sup> In *Galanis* ("*Galanis I*"), the contingent fee issue involved a recurring problem for cases in this area: what do the parties do when the fee agreement is silent?

The client, Brown was injured in an automobile accident in 1988. She was originally represented by Truitt, one of the partners in the law firm.<sup>46</sup> Truitt was appointed to a judgeship in 1993, and Brown needed to find a new lawyer. She hired Galanis to represent her. Galanis' contingent fee agreement with Brown called for a fee of forty percent of any recovery if the case was settled or taken to trial.<sup>47</sup> If an appeal ensued, then an additional ten percent of the recovery would be due to Galanis. In the contingent fee agreement between Brown and Galanis, there was no mention of any fee payments to the prior law firm, Lyons & Truitt, but Galanis knew that the contingent fee agreement Brown had with

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37. *Id.*

38. *Id.*

39. *Id.* at 702.

40. *Id.*

41. *Id.* at 704.

42. *Id.*

43. *Id.*

44. 715 N.E.2d 858 (Ind. 1999) [hereinafter *Galanis I*].

45. 718 N.E.2d 1111 (Ind. 1999).

46. *Galanis I*, 715 N.E.2d 858 at 860.

47. *Id.*

them called for the law firm to receive one-third of any recovery.<sup>48</sup> Four months after undertaking Brown's representation, Galanis took the case to jury trial and Brown received a verdict for \$250,000. Thereafter, the defendants offered to settle the case for \$200,000 on the promise of avoiding an appeal and Brown accepted the offer.

Shortly thereafter, Lyons sent a list of the hours and expenses that Lyons & Truitt had in Brown's case but did not make a formal demand for a specific amount of compensation.<sup>49</sup> Galanis responded with an offer to resolve their fee claim for \$4000. Lyons, for the first time, asked for one-third of one-third of the recovery, or \$22,221.98 as settlement for their fee claim.<sup>50</sup> Galanis rejected this offer (as the court would later confirm) as excessive.

Lyons filed a declaratory judgment action against both Brown and Galanis. Brown cross-claimed against Galanis claiming that he was responsible for paying Lyons & Truitt *if anyone was* responsible for paying them. The trial court held that Lyons was entitled to a reasonable fee, commensurate with a reasonable hourly rate multiplied by the number of hours they had in the case.<sup>51</sup> Both sides appealed. Galanis did so because he didn't think he should be responsible for the fee and Lyons complained about the valuation of the firm's services. The Indiana Court of Appeals affirmed the trial court.<sup>52</sup>

The Indiana Supreme Court accepted transfer and reaffirmed that the discharged lawyer has the right to recover the reasonable value of their service in accordance with the principle of quantum meruit and may not recover the full amount provided for under their original fee contract with the client.<sup>53</sup> The court held that even if the agreement with the client calls for a full contingent after the firm is discharged, it is *likely* to be unenforceable.<sup>54</sup> A full contingent fee to the successor lawyer, however, might be unreasonable as well. The successor lawyer must not be allowed to take a windfall at the expense of predecessor counsel. The use of quantum meruit prevents this kind of unjust enrichment.<sup>55</sup> The value conferred on the client is not always equal to the hourly rate times the number of hours worked. It stands to reason that, depending on the case, the mechanical application of this formula can likely over- or under-compensate the terminated

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48. *Id.*

49. *Id.*

50. No one disputes that terminated lawyers are entitled to a fee for the reasonable value of the services they provided to the client, even though the professional relationship ended before any recovery was made. For many years, the payment due to prior or referring counsel was set by custom and practice at, "a third of a third." Aside from a certain literary symmetry, there is no law in Indiana to support this "measure" of compensation under the Indiana Code or the Indiana Rules of Professional Conduct.

51. *Galanis I*, 715 N.E.2d at 860.

52. *Id.*

53. *Id.* at 861.

54. *Id.*

55. *Id.*

lawyer.<sup>56</sup> Consideration must be given to the quality of the effort expended by the terminated lawyer on behalf of the client.<sup>57</sup> For making this determination in the future, the court set the presumptive yardstick as a measurement at the relative amount of time charges, adjusted for any unproductive or unnecessary effort by either the predecessor or successor counsel.<sup>58</sup> The thinking, of course, being that a straight consideration of the hours multiplied by the hourly rate would, in many cases, be a very inaccurate measurement of the appropriate fee.<sup>59</sup>

The court was also mindful of another issue associated with this problem: who pays the predecessor's fee? Borrowing the analysis from the Louisiana case of *Saucier v. Hayes Dairy Products*<sup>60</sup> the court concluded that only one contingency fee should be paid by the client and that fee should be allocated between and among the various lawyers involved in the claim.<sup>61</sup> Hence, *Galanis I* identified and resolved two important issues that arise in the silence of the contingency fee agreement with the client: (1) what is the appropriate measure of the fees to be allocated to predecessor counsel under the quantum meruit analysis; and (2) who is responsible for making that allocation. There was another issue associated with this case that the court did not resolve in *Galanis I*. That issue would be addressed in a subsequent decision.

Later that year, the court identified, but did not specifically resolve an issue in contingent fee contracts associated with medical malpractice representations. In *In re Benjamin*, the client was suing the Fort Wayne hospital where her husband died.<sup>62</sup> She entered into a contingent fee contract with a first lawyer who was not the respondent in this disciplinary action. In this fee contract, the first lawyer would receive forty percent of the total recovery with the total fee not to exceed \$200,000.<sup>63</sup> After this fee was created, the first lawyer and Benjamin became law partners. After their partnership ended, Benjamin got the files from the other lawyer including the medical malpractice case as issue here. In the summer of 1995, a settlement was reached with the health care provider for \$100,000 which was sufficient to allow the client to petition for an additional recovery from the Patient's Compensation Fund.<sup>64</sup>

A year later, Benjamin and the client received a settlement for \$335,000 from the Fund. For his fee, Benjamin kept \$40,000 from the provider's share and an

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56. *Id.* at 862.

57. *Id.* (citing *Kizer v. Davis*, 369 N.E.2d 439, 441 (Ind. App. 1977)).

58. *Id.*

59. *Id.*

60. 373 So. 2d 102 (La. 1979).

61. *Galanis I*, 715 N.E.2d 858 at 863.

62. 718 N.E.2d 1111, 1112 (Ind. 1999).

63. *Id.*

64. *Id.* The initial \$100,000 payment is referred to as the "provider's" share or the limit of the health care provider's required liability coverage. Once the provider agrees to pay that sum over to a claimant, the patient is eligible to press their claim against the Patient Compensation Fund maintained by the Indiana Department of Insurance. That portion of the recovery is referred to as the "fund" portion.



additional \$83,750 from the Fund portion of the settlement.<sup>65</sup> Attorney fees from the fund portion of medical malpractice recoveries, however, are fixed by statute. Under the statute, his fees from the fund should have amounted to \$50,250 or fifteen percent of the recovery. That brought Benjamin's total fee to \$134,000.<sup>66</sup> The client challenged Benjamin on his retained fees and argued that he should only have kept forty percent of the first \$100,000 and an additional fifteen percent of the fund portion. Benjamin asked his former partner what he contemplated as a fee under the contract and that lawyer indicated that he intended to take forty percent of any recovery up to \$100,000.<sup>67</sup> If the recovery was in excess of the provider's share and a substantial recovery was had from the fund, then he intended to keep all of the provider's share (\$100,000) and fifteen percent of the fund portion.<sup>68</sup>

In essence the former partner intended to have two fee agreements: one if settled with the provider and another if settled through the fund. Using the former partner's intended, but unwritten, fee agreement, Benjamin would have kept one hundred percent of the provider's share and fifteen percent of fund portion of the settlement for a total fee of \$150,250.<sup>69</sup> Because Benjamin had kept a total of \$174,000, he offered to return \$23,750 to the client. The client rejected that solution and filed a declaratory judgment action to resolve the issue on which the contingent fee agreement was silent.<sup>70</sup>

In its opinion in the disciplinary action, the Indiana Supreme Court reiterated its holding from *Maley* in which it held that any fee greater than that permitted under the statutory fee formula indicated unreasonableness. In a footnote, however, the court noted that keeping all of the provider's share plus fifteen percent of the fund portion of the settlement appeared to be an attempt to circumvent the fee calculation in the medical malpractice statute.<sup>71</sup> Without announcing a specific fee formula for resolving conflicts like this in the future, the court left the very strong impression that it viewed lawyer conduct like that in this case to be an attempt to circumvent the statute: "We note, in any event, that an attorney's written disclosure to the client of the fee and the method by which it is to be determined is of key importance in avoiding disputes over the reasonableness of the fee."<sup>72</sup> Thereafter the court found the lawyer's conduct to violate Rule of Professional Conduct 1.5(a) and imposed a public reprimand on him. The sanction might have been significantly more severe, however, had the court not found a number of mitigating factors in evaluating this case.<sup>73</sup> The lawyer had been cooperative, worked out a payback with his client and had no

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 1113 n.2.

72. *Id.*

73. *Id.* at 1114.

prior history of disciplinary action.<sup>74</sup>

In 2001, the Indiana Supreme Court revisited the conduct of attorney Michael Galanis in the disciplinary action in *In re Galanis* (“*Galanis II*”).<sup>75</sup> Like the case discussed above, this disciplinary action centered on his representation of Mrs. Brown, the plaintiff in a civil action for whom he obtained a \$250,000 jury verdict.<sup>76</sup> The case was subsequently settled for \$200,000 in order to avoid an appeal. Galanis kept half the proceeds of the settlement or \$20,000 more than agreed.<sup>77</sup> The defendant in the underlying case was declared incompetent and a guardian was appointed to manage her affairs. In the civil action, the defendant filed a motion to correct errors in the trial court because the verdict had been for \$100,000 more than the defendant’s insurance coverage. Galanis, who represented the plaintiff, investigated the matter to see whether the defendant had a claim against her insurer for acting in bad faith. Galanis then set to work with the defendant’s lawyer in an attempt to work out an arrangement whereby the defendant would assign her bad faith claim against her own insurer to the plaintiff.<sup>78</sup>

Eventually, Galanis and the lawyer worked out the \$200,000 settlement that finally resolved the case. When the plaintiff went to the lawyer’s office for the disbursement of the settlement proceeds, she noticed that she only received half the settlement due to Galanis’ retention of fifty percent of the total recovery.<sup>79</sup> When she protested, Galanis explained that he had more than eighty hours invested in the investigation of the bad faith claim against the defendant’s insurer and, when calculated with his regular billing rate, he expended about \$20,000 worth of effort on her behalf.<sup>80</sup> There was no writing that explained this reasoning associated with the disbursement statement to the client.<sup>81</sup> In the disciplinary action associated with his acts, the supreme court held that Galanis had violated Rule of Professional Conduct 1.5(a) by taking an unreasonable fee in excess of his fee agreement with the client.<sup>82</sup> There was nothing to indicate that Galanis and the client ever had any sort of meeting of the minds over the fee overage. The court recognized the Galanis and his client only negotiated one fee deal.<sup>83</sup>

It was also significant that the bad faith claim belonged to the defendant and negotiations had not produced an assignment of that claim to the plaintiff. In light of the substantial amount of the unreasonable fee retained by the respondent, the supreme court determined that a significant period of suspension

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74. *Id.* at 1115.

75. 744 N.E.2d 423 (Ind. 2001) [hereinafter *Galanis II*].

76. *Id.* at 423-24.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. For the text of Indiana Professional Conduct Rule 1.5(a), see *supra* note 13.

83. *Galanis II*, 744 N.E.2d at 424.

was warranted. The court imposed a ninety-day suspension from the practice of law on this lawyer.<sup>84</sup>

*D. Important Developments During the Survey Period*

The Indiana Supreme Court has very recently revisited the topic of lawyers who take fees in excess of those agreed to in the contingent fee agreement with the client. In *In re Hailey*, the respondent lawyer represented a young plaintiff and his family who were involved in an automobile accident.<sup>85</sup>

The client was thirteen years old at the time of the auto accident in 1992 and was very seriously injured.<sup>86</sup> The family did not know which lawyer to hire so they called an uncle who was a lawyer in Alabama. The uncle did not do personal injury work as part of his practice and telephoned another lawyer in Alabama whom he knew to do such work.<sup>87</sup> That lawyer obtained the respondent's name for the family and communicated with the respondent that he was referring the case to him.<sup>88</sup> In January 1993, the respondent and his clients entered in a contingent fee agreement that provided that if the case was settled or tried after one hundred eighty days suit was filed, then the client would pay forty percent of the "gross amount recovered" with expenses to be borne by the client as well.<sup>89</sup> No provision in the fee agreement was made for the eventually of a structured settlement with future periodic payments to the client.

In November 1993, suit was filed against the driver of the car in which the plaintiff was riding, the car's owner, the car's manufacturer and others. The plaintiff's father maintained contact between the respondent lawyer and the Alabama uncle about the case, but the mother and the client were unaware of such contacts.<sup>90</sup> In November 1997, the respondent and various insurers met in two mediation sessions. The respondent lawyer knew that a structured settlement was likely at this point. The plaintiffs were concerned that in the event that the structured settlement consisted of a lump sum payment plus an annuity for the future periodic payments, those amounts would be consumed by the respondent's fees and expenses.<sup>91</sup>

Eventually, they realized that they could not effectively evaluate the defendant's proposed settlement offers unless they knew with some degree of certainty what the fees for the respondent's services were going to be. It was their desire to leave the annuity alone for future expenses and, in order to completely evaluate the proposed settlement, they needed to know what the

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84. *Id.* at 425.

85. 792 N.E.2d 851, 853 (Ind. 2003).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 854.

90. *Id.*

91. *Id.*

respondent's fee claim was going to be.<sup>92</sup>

At this point the respondent discussed for the first time what he believed his fees would be for the representation and about the various methods of its calculation. He proposed taking forty percent of the lump sum cash payment plus forty percent of the gross amount of future guaranteed payments, undiscounted to present value.<sup>93</sup> The plaintiff's father figured out that between the attorney fees, the expert witness fees and related expenses, that the lump sum would be insufficient to cover all their obligations and that they would still owe attorney fees beyond that amount. The respondent lawyer ultimately agreed in writing to cap his fees at a total of \$1.6 million.<sup>94</sup> Both parties later agreed that this was to be a maximum amount and not a settlement of the fee claim. Armed with this information, the plaintiffs agreed to the settlement. The terms included a lump sum payment of about \$2 million and then period future payments that would provide \$80,000 per year for the longer of forty years or the plaintiff's life.<sup>95</sup>

Unbeknownst to the plaintiff and his family, the respondent lawyer had worked out a deal with the Alabama personal injury lawyer. When the lump sum came in, the respondent lawyer put the money in his trust account.<sup>96</sup> He and the Alabama lawyer had previously agreed that the respondent lawyer would provide him with one-third of his fee. He thereafter wrote trust account checks to himself for \$1.07 million and one to the Alabama lawyer for \$533,343 for a total of \$1.6 million.<sup>97</sup> There was no notification to the plaintiff and the clients were not given copies of the confirmatory letters.<sup>98</sup> Other expense withdrawals were made on the client's behalf and no notice was likewise given to the clients or an accounting. Over time, the plaintiff's mother became convinced that the respondent was not paying the creditors because they were contacting her directly.<sup>99</sup>

Eventually, the supreme court held that the respondent took an unreasonable fee in violation of Rule of Professional Conduct 1.5(a).<sup>100</sup> The fee taken, \$1.6 million dollars, was in excess of the forty percent agreed to in the contingent fee contract when accounting is made for the time value of money. By taking his entire fee at the outset of the structured settlement, the respondent realized his entire fee, leaving any risk of loss completely on his client.<sup>101</sup> This was the problem for the lawyer in *In re Myers*.<sup>102</sup> In the end, the court found the

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92. *Id.*

93. *Id.*

94. *Id.* at 855.

95. *Id.*

96. *Id.*

97. The Alabama lawyer subsequently paid one-third of his "third" to the Alabama uncle attorney.

98. *In re Hailey*, 792 N.E.2d at 856.

99. *Id.*

100. *Id.* at 859.

101. *Id.*

102. 663 N.E.2d 771, 774 (Ind. 1996).

respondent lawyer engaged in misconduct in a number of ways including retaining a fee from the settlement in excess of the amount justified by the percent provided in his written fee agreement and thereby taking an unreasonable fee, failing to give his clients a written disbursement statement, he delayed payments to medical and third party creditors, and he engaged in forbidden fee sharing with the Alabama lawyer which occurred without the knowledge or consent of his clients.<sup>103</sup> Based on strong mitigating factors, the lawyer received only a public reprimand for his misconduct.<sup>104</sup> One justice dissented and believed the respondent lawyer's misconduct so serious in this matter that he would have had the court impose a period of suspension.<sup>105</sup>

A very important case was decided on issues of longstanding concern. In *In re Kendall*,<sup>106</sup> the Indiana Supreme Court was presented with two issues that were previously unaddressed in the law governing lawyers in Indiana. First, the court held that advance payment of legal fees must be held in the lawyer's trust account until it can fairly be deemed to be earned. Second, lawyers are certainly free to take fixed or flat fees for their representations, but such fees cannot be considered to be totally nonrefundable.<sup>107</sup>

In *Kendall*, the respondent lawyer had required clients to pay attorney's fees in advance as well as sign a contract that referred to the fees as "nonrefundable."<sup>108</sup> Those fees were not deposited in the firm's trust account, but rather, in the firm's operating account where they were drawn down on immediately and otherwise treated as earned fees.<sup>109</sup> The respondent lawyer stated that it was his intention to refund those fees to any client who terminated the representation despite the fact that he had identified them to the client as nonrefundable in the employment contract.<sup>110</sup>

After the law firm filed bankruptcy, the Internal Revenue Service put a lien on all the assets and the lawyer was unable to refund any money to his clients.<sup>111</sup> Their complaints resulted in disciplinary action in which Kendall was charged with violations that included, inter alia, Rules of Professional Conduct 1.5(a),<sup>112</sup> 1.15(a),<sup>113</sup> 1.15(b)<sup>114</sup> and 1.16(d)<sup>115</sup> based on his handling of the money received

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103. *In re Hailey*, 792 N.E.2d at 861.

104. *Id.* at 864.

105. *Id.* at 865 (Sullivan, J., dissenting).

106. 804 N.E.2d 1152 (Ind. 2004).

107. *Id.* at 1160.

108. *Id.* at 1153.

109. *Id.*

110. *Id.*

111. *Id.* at 1160.

112. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2001). This provision requires that a lawyer fee shall be reasonable and the rule lists a number of factors used to judge the reasonableness of the fee.

113. MODEL RULES OF PROF'L CONDUCT R. 1.15(a) (2001). This provision requires a lawyer to keep money or other property that belongs to others separate from the lawyer's own property. Hence, the development of trust accounts and the rules associated with their operation for this

from clients. Although the Hearing Officer that heard the disciplinary action did not agree that the Commission proved the most serious charges,<sup>116</sup> the supreme court found that such was the case.<sup>117</sup> Although the court found the misconduct to be serious, they gave great weight to the “highly respected witnesses” who spoke on the respondent lawyer’s behalf and imposed a public reprimand as a sanction.<sup>118</sup>

Among the very significant holdings in the case, the court reasoned that what lawyers call their fees does not drive the analysis. The key feature of how they look at fees is the actual nature of the attorney-client relationship.<sup>119</sup> The fact that the lawyer named his fee nonrefundable made it an unreasonable fee under Rule of Professional Conduct 1.5(a). Because Rule 1.16(d) requires a terminated lawyer to refund the unearned portion of the fee means that advance payment of fees for future legal services can never be nonrefundable. It flows from that reasoning; therefore, that the fees paid must be retained in the lawyer’s trust account until such time as the lawyer earns part or all of the money paid. At that point, the money can fairly be removed from trust and be treated as the lawyer’s own money. One important feature of the case, however, is the court’s reaffirmation that the use of a fixed or flat fee is still an appropriate way to charge for legal services in many situations.<sup>120</sup>

## II. THE INDIANA BUSINESS COUNSEL LICENSE

Indiana now has a regulatory scheme permitting some non-Indiana lawyers to obtain an Indiana license to practice where they are corporate counsel.<sup>121</sup> The new rule creating the Indiana Business Counsel License (IBCL) adds to the state’s scheme granting provisional license to lawyers licensed elsewhere who wish to become admitted here. The Indiana Board of Law Examiners was regularly faced with applications for admission to the Indiana bar from lawyers admitted in other jurisdictions but had been living in Indiana and representing a business entity. The Board of Law Examiners was powerless to give credit to those lawyers despite years of practice experience successfully representing

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purpose.

114. MODEL RULES OF PROF’L CONDUCT R. 1.15(b) (2001). This rule requires a lawyer to deliver the funds kept in trust to their proper owner promptly and to render a full accounting when requested to do so.

115. MODEL RULES OF PROF’L CONDUCT R. 1.16(d) (2001). Upon the termination of the representation, the lawyer had an affirmative duty to turn over papers, property and money belonging to the client or any third person to its owner.

116. *In re Kendall*, 804 N.E.2d 1152 at 1154.

117. *Id.* at 1158.

118. *Id.* at 1161.

119. *Id.* at 1160.

120. *Id.*

121. IND. ADMISSION & DISCIPLINE R. 6, § 2 (2003).

Indiana businesses.<sup>122</sup> Effective January 1, 2004, those lawyers have an opportunity to join the Indiana bar on a new path through the IBCL.

Among the requirements for licensure, the applying lawyer must be employed full-time as in-house counsel for a business.<sup>123</sup> The business of the business at which the applying lawyer is employed cannot be the practice of law.<sup>124</sup> The rule also requires that the applicant's sole source of income for legal services be the applicant's employment at the business entity where he or she is a full-time employee.<sup>125</sup> The applicant must also be in good standing in the jurisdiction in which they are admitted<sup>126</sup> and meet the character and fitness criteria of the Indiana bar.<sup>127</sup> Requirements also include those things that are required for those otherwise admitted to the Indiana bar including graduation from an ABA accredited law school.<sup>128</sup> Applicants for the IBCL must also not have failed the Indiana bar examination within the last five years.<sup>129</sup> The IBCL is not intended to provide a mechanism for bypassing the other rules for admission for the bar.

The IBCL can be renewed for up to five years.<sup>130</sup> The process is not dead-end, however, as there is a provision for converting the IBCL into a Provisional License.<sup>131</sup> The Provisional License is an existing route to licensure to attorneys not otherwise admitted in Indiana to develop the right to practice here. The benefit of the IBCL is that the years in service to the business entity apply toward the years-in-practice requirement for the Provisional License.<sup>132</sup> If the attorney remains in practice for the Indiana business for five years, at the end of that time, the lawyer can apply for a Provisional License in order to practice for his employer.<sup>133</sup> If the lawyer fails to apply for a Provisional License within seven years after he or she has received an IBCL, then the attorney is no longer eligible for either the Provisional License or the Business Counsel License.<sup>134</sup> One specific requirement of note is that the lawyer granted the IBCL must attend an annual Indiana law update continuing legal education forum and obtain a minimum of twelve hours of continuing education during the first twelve months after receiving the license.<sup>135</sup>

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122. C. Gilliard, *New Indiana Business Counsel License*, RES GESTAE, Jan. 2004.

123. ADMIS. DISC. R. 6, § 2(a) (2004).

124. *Id.*

125. *Id.*

126. *Id.* § 2(b).

127. *Id.* § 2(d).

128. *Id.* § 2(g).

129. *Id.* § 2(f).

130. *Id.* § 4.

131. *Id.* § 1.

132. *Id.* § 4.

133. *Id.*

134. *Id.* § 2.

135. *Id.* § 5.