Attorney-Client Fee Agreements That Offend Public Policy

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ATTORNEY–CLIENT FEE AGREEMENTS THAT OFFEND PUBLIC POLICY

ALEX B. LONG*

I. INTRODUCTION ........................................................................................................ 288

II. CONTRACTS THAT OFFEND PUBLIC POLICY .................................................... 291
    A. Unenforceability on Public Policy Grounds .................................................. 291
    B. Recovery in Quantum Meruit or Restitution .............................................. 293

III. AN ATTORNEY’S RIGHT TO COMPENSATION UNDER A FEE AGREEMENT
     THAT VIOLATES ETHICAL RULES: THE VIEW OF THE RESTATEMENT (THIRD)
     OF THE LAW GOVERNING LAWYERS ................................................................. 296
    A. General Rules Regarding Unenforceable Attorney–Client Fee Agreements .. 296
    B. The Extent to Which the Ethical Rules Governing Attorneys Can Articulate Public Policy ................................................................. 299

IV. THE COURTS’ TREATMENT OF ATTORNEY–CLIENT FEE AGREEMENTS THAT
    VIOLATE THE ETHICAL RULES GOVERNING ATTORNEYS .............................. 301
    A. Fee Agreements that Fail to Comply with Ethical Rules that Expressly Regulate Fee Agreements ................................................................. 301
       1. Unreasonable Fees ............................................................................... 302
       2. Contingency Fees in Domestic Relations Cases .................................. 306
       3. Oral Contingent Fees ......................................................................... 309
    B. Other Fee Agreements that Offend Public Policy ..................................... 312
       1. Limitations on a Client’s Ability to Settle ........................................... 312
       2. Nonrefundable Retainers .................................................................... 317

V. WHY THINGS ARE THE WAY THEY ARE AND THE WAY THEY SHOULD BE .... 321
    A. Why the Special Rules for Attorney Fee Agreements? .............................. 322
    B. Why the Preferential Treatment for Attorney Fee Agreements? ............. 324
    C. What Approach Should Courts Take? ..................................................... 328
       1. Negative Consequences of the Current Approach ............................... 328
       2. Precluding Quantum Meruit Recovery and Vindicating the Policies Underlying the Rules .......................................................... 332

VI. CONCLUSION ........................................................................................................ 334

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287
I. INTRODUCTION

"The law of lawyers’ contracts is different," Professor Joseph M. Perillo tells us.\(^1\) This idea appears often in judicial opinions. Courts frequently observe that “a fee agreement between lawyer and client is not an ordinary business contract” given the legal profession’s “obligation of public service and duties to clients which transcend ordinary business relationships.”\(^2\) As a result, courts often state that they will scrutinize these agreements more closely than other agreements.\(^3\) Lawyers must not only comply with generally applicable contract rules, but they are also constrained by the special ethical rules governing lawyers—rules that courts often apply as essentially substantive law in lawyers’ contract disputes—in their ability to make and enforce contracts.\(^4\) As a result, contracts that would be inoffensive when nonlawyers are involved may become objectionable in the eyes of a court when a lawyer is a party to the agreement. Examples include contracts containing nonrefundable retainer provisions,\(^5\) referral provisions,\(^6\) and covenants not to compete.\(^7\)

According to Perillo, courts engage in this more exacting scrutiny of lawyers’ contracts for various reasons.\(^8\) They do so, in part, to deter unethical behavior on the part of lawyers and to enforce the values of the legal profession.\(^9\) But courts are also concerned with how the general public views the legal profession.\(^10\) According to Perillo, “courts have forged rules designed to create respect for the legal profession and confidence in the system for the administration of law.”\(^11\)

Perillo is undoubtedly correct that, when it comes to making contracts and attempting to have them enforced, lawyers are subject to more constraints than nonlawyers. He is also unquestionably correct that various kinds of lawyers’ contracts can be unenforceable as a result of these constraints.\(^12\) However, when one examines the decisional law involving one particular aspect of the business and profession of the law, one sees a more complicated picture. When it comes

\(^{2}\) In re Swartz, 686 P.2d 1236, 1243 (Ariz. 1984).
\(^{3}\) See, e.g., Marcus v. DuPerry, 611 A.2d 859, 861 (Conn. 1992) (noting that courts apply close judicial scrutiny to contracts involving the attorney–client relationship).
\(^{4}\) See Perillo, supra note 1, at 445.
\(^{5}\) See id. at 451.
\(^{6}\) See id. at 461.
\(^{7}\) See id. at 479.
\(^{8}\) See id. at 444.
\(^{9}\) Id.
\(^{10}\) See id.
\(^{11}\) Id.
\(^{12}\) Professor Perillo does identify some instances in which courts have adopted contract rules that seem to favor attorneys. See id. at 448 (noting some “pro-lawyer cases [that] differ from the general law of contracts” by permitting a discharged attorney operating under a contingent fee agreement to recover in quantum meruit).
to fee agreements and the ability of a lawyer to recover compensation from a client for services rendered, the law of lawyers’ contracts is indeed quite different. And it is different in a manner more friendly to lawyers than traditional contract law doctrine suggests should be the case.

There is a long history in the law of special protection for attorneys and their fees. One example is the judicial creation and continued tolerance of an attorney’s lien—a lien “‘not strictly like any other lien known to the law.’” An attorney’s charging lien gives an attorney a security interest in a judgment in favor of a client and works to ensure that the judgment cannot be paid to the prejudice of the attorney’s claim to his or her fees. An attorney’s retaining lien permits an attorney to withhold a client’s papers until the lawyer gets paid. According to one court, the attorney’s lien “‘was a device invented by the courts for the protection of attorneys against the knavery of their clients, by disabling clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained.’” Notably, it is also a device that is not available to members of other professions.

As this Article attempts to demonstrate, in numerous instances in which traditional contract doctrine would suggest that a contracting party should receive no compensation for services provided to the other party, courts—to varying degrees—nonetheless permit lawyers to recover from clients for the lawyers’ professional services. There are some fairly extreme examples of this.

13. For a discussion of some of the special prolawyer rules developed by courts in other contexts, see Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453 (2008). See also Lester Brickman & Jonathan Klein, *The Use of Advance Fee Attorney Retainer Agreements in Bankruptcy: Another Special Law for Lawyers?*, 43 S.C. L. REV. 1037, 1039 (1992) (stating that lawyers have been successful in “creat[ing] rules exempting themselves from the reach of laws and doctrines that they, as lawyers, have been instrumental in establishing or enacting to regulate the conduct of others”).


15. *Id.* (quoting BROWN, supra note 14, at 559); see also Perillo, *supra* note 1, at 469 (“The charging lien is a security interest that the lawyer has in a judgment or settlement brought about by the lawyer’s efforts.”).


17. *Estate of Clarks*, 202 F.3d at 856 (quoting BROWN, supra note 14, at 559).


19. In *Jackson v. Griffith*, 421 So. 2d 677 (Fla. Dist. Ct. App. 1982), the attorney induced the client to sign a fee agreement through coercion, duress, and undue influence. *Id.* at 677. Apparently, this misconduct was not enough to convince the trial judge that the attorney should be denied any recovery for the services provided. *Id.* Fortunately, the appellate court reversed. *Id.* In *Gray v. Atkins*, 331 So. 2d 157 (La. Ct. App. 1976), an attorney obtained his client’s signature on a document authorizing the attorney to retain the proceeds of a settlement by lying to the client about the nature of the document. *Id.* at 162–63. Eventually, the client sued to recover the funds being held by her lawyer. *Id.* at 159. On appeal, a Louisiana appellate court held that the “settlement” agreement was void because it had been obtained through fraud and that the attorney was not entitled to recover attorney’s fees for his services. *Id.* at 166. Despite the fraud, the trial court had permitted the attorney to retain at least some portion of the settlement proceeds. *Id.* at 163. The
Putting those cases aside as outliers, this Article focuses on one legal theory in particular—the ability of public policy to render an otherwise valid contract unenforceable.\(^{20}\)

Under traditional contract law principles, a court may deem an agreement unenforceable because it so clearly offends established public policy that recovery under the contract is inappropriate.\(^{21}\) In such cases, there has traditionally been a presumption against permitting the offending party to recover, either under the contract or in quantum meruit.\(^{22}\) Yet, the legal profession—through the *Restatement (Third) of the Law Governing Lawyers*\(^{23}\)—and the courts—through their decisions—have effectively reversed that presumption and have created a general rule in favor of permitting lawyers to recover fees, even when their fee agreements clearly offend well-established, strong public policy.\(^{24}\) Moreover, although the majority of courts are likely to hold that a fee agreement that fails to comply with an ethical rule is void as against public policy, a significant minority of courts have demonstrated a reluctance to do so in certain situations.\(^{25}\)

Part II discusses the traditional contract rules pertaining to agreements that allegedly offend public policy. Part III then compares those rules with the rules on the same topic contained in the *Restatement (Third) of the Law Governing Lawyers*. Part IV examines some common situations involving fee disputes between lawyers and clients in which courts have found fee agreements to offend public policy and how the courts have resolved lawyers' claims for recovery, either under the contract or in quantum meruit.\(^{26}\) Finally, Part V discusses some possible explanations for the generally prolawyer approach of courts in these cases and advocates for a return to the approach of general contract law that would ordinarily deny recovery in quantum meruit where a fee agreement is unenforceable on policy grounds.

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\(\text{appellate court raised a question as to whether the client might be entitled to a greater amount, but because the client failed to answer the attorney's appeal of the trial court's decision, the appellate court left the trial court's award in place. Id. at 166.}\)


\(21.\) *See infra* Part II.A.

\(22.\) *See infra* Part II.B.


\(24.\) *See infra* Parts III, IV.

\(25.\) *See infra* Part IV.

\(26.\) As the Article focuses on fee disputes between lawyers and their clients, the discussion generally excludes cases involving retainer agreements that might violate ethical rules having little or nothing to do with fees, *see*, e.g., *In re Lewis*, 562 N.E.2d 198, 212 (Ill. 1990) (involving a "no-accounting clause" under which an attorney did not have to provide an accounting of expenses to client), and fee disputes that are primarily between lawyers (as opposed to clients), *see*, e.g., Chambers v. Kay, 56 P.3d 645, 647–48 (Cal. 2002) (involving fee dispute between attorneys where one attorney failed to comply with ethical rules regarding fee splitting).
II. CONTRACTS THAT OFFEND PUBLIC POLICY

Courts have a number of legal doctrines at their disposal—misrepresentation, duress, undue influence, etc.—to police and void objectionable contracts. However, when a court refuses to enforce a contract on the grounds that the contract offends public policy, it is attacking a decidedly different problem than it is in these other instances. The doctrines of misrepresentation, duress, and undue influence serve to police the bargaining process.27 In contrast, when a court refuses to enforce an agreement on the grounds that it violates public policy, there may be nothing suspect about the bargaining process.28 Instead, the court is basing its decision on the grounds that, in the words of the Restatement (Second) of Contracts, “the interest in freedom of contract is outweighed by some overriding interest of society.”29 Courts have long claimed the authority to refuse to enforce agreements that are contrary to public policy and have exercised that authority in numerous situations.30 However, they have also expressed hesitation about being too quick to resort to policy grounds to void contracts lest the “unruly horse” of policy later take them in directions they could not anticipate.31 The following sections discuss the traditional rules governing contracts that offend public policy.

A. Unenforceability on Public Policy Grounds

Under the traditional formulation of the rule, courts will not enforce contracts where the public policy against enforcement outweighs the interest in enforcement.32 Thus, to use two obvious examples, contracts that call for the performance of an intentional tort or that amount to an illegal restraint of trade are unenforceable on public policy grounds.33 Traditionally, there have been two primary justifications for this rule: (1) deterring parties from making such contracts and (2) preserving the dignity of courts by preventing them from being used to accomplish ends contrary to the public interest.34

28. See id.
29. Id.
32. RESTATEMENT (SECOND) OF CONTRACTS § 178(1).
33. Id. § 178 cmt. d, illus. 9 & 10.
Defining the scope of this limitation on the enforcement of otherwise enforceable agreements has proven difficult. Given the strong public policy in favor of freedom of contract, courts sometimes demand a strong showing that the countervailing public policy outweighs the interest in freedom of contract. This sentiment is repeated in the Restatement (Second) of Contracts' admonition that for an agreement to be unenforceable on public policy grounds, the interests in enforcing the agreement must be "clearly outweighed" by a public policy against enforcement. The Restatement (Second) of Contracts directs courts to consider a host of factors in making this determination. When weighing the interest in enforcing the disputed term, courts should consider "the parties’ justified expectations, ... any forfeiture that would result if enforcement were denied, and ... any special public interest in the enforcement of the particular term." When weighing the public policy against enforcing the term, courts should consider the following factors:

(a) the strength of that policy as manifested by legislation or judicial decisions,
(b) the likelihood that a refusal to enforce the term will further that policy,
(c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
(d) the directness of the connection between that misconduct and the term.

This balancing-of-factors approach is obviously not conducive to the development of many bright-line rules. However, the comments contain some potentially useful guidance for courts. When considering the strength of the policy in question, a comment advises that not every piece of legislation articulates a public policy substantial enough to outweigh other considerations. This is particularly likely "in the case of minor administrative regulations or local ordinances that may not be indicative of the general welfare." By emphasizing that the policy must be indicative of the general welfare, the

35. See Md.-Nat’l Capital Park & Planning Comm’n v. Wash. Nat’l Arena, 386 A.2d 1216, 1228 (Md. 1978) ("[J]urists to this day have been unable to fashion a truly workable definition of public policy.").
37. Restatement (Second) of Contracts § 178(1) (emphasis added); see also Harry G. Prince, Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?, 70 Minn. L. Rev. 163, 182 (1985) ("[T]he whole of the Restatement is concerned with making private agreements enforceable, and ... public policy limits are among the exceptional limitations.” (citing E. Allan Farnsworth, Discussion of Restatement of the Law, Second, Contracts, Tentative Draft No. 12, 54 A.L.I. Proc. 54, 72–73 (1978))).
38. Restatement (Second) of Contracts § 178(2).
39. Id. § 178(3).
40. Id. § 178 cmt. c.
41. Id.
comment suggests that legislation designed to protect a narrow interest may be too insubstantial to justify nonenforcement of a contractual term.

Ultimately, the Restatement (Second) of Contracts and the numerous courts that have adopted its reasoning take a flexible approach to the question of unenforceability on public policy grounds.\(^\text{42}\) The approach has allowed some bright-line rules to develop, such as the rule that an exculpatory clause eliminating liability for intentional torts or gross negligence is unenforceable.\(^\text{43}\) But it has also allowed courts to examine how the purposes underlying a stated public policy would be affected by permitting enforcement of the agreement in a given case.\(^\text{44}\)

\[\text{B. Recovery in Quantum Meruit or Restitution}\]

Declaring an agreement unenforceable may have potentially harsh consequences.\(^\text{45}\) When one party has conferred a benefit to another in the absence of an enforceable agreement, the law sometimes permits that party to recover the reasonable value of the services provided under a theory of quantum meruit or restitution.\(^\text{46}\) Restitution in full or at least in part is the norm in numerous situations in which a contract is unenforceable. Examples include where one of the parties lacks mental capacity,\(^\text{47}\) where there has been a unilateral mistake,\(^\text{48}\) and where an agreement fails to comply with the statute of frauds.\(^\text{49}\) The difficult question that often arises is whether a party who has performed under an agreement that is unenforceable on public policy grounds may nonetheless recover in quantum meruit for the services provided.

One danger in voiding a contract on public policy grounds is that a contracting party may use the doctrine as a shield to avoid payment and thereby reap a windfall.\(^\text{50}\) In older decisions, courts often justified their conclusions as to whether to permit recovery on a quantum meruit theory by inquiring whether the contract in question was *malum in se*, in which case the agreement is void and

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\(\text{42}\) Prince, *supra* note 37, at 180–82.

\(\text{43}\) *Id.* at 186; see also Joseph H. King, Jr., *Exculpatory Agreements for Volunteers in Youth Activities—The Alternative to “Nef”* Tidylwynks, 53 OHIO ST. L.J. 683, 684 (1992) ("[E]ven when an exculpatory agreement is otherwise generally valid, ... most courts have held that such agreements may not preclude liability for more extreme forms of negligence such as recklessness or gross negligence.").

\(\text{44}\) See Prince, *supra* note 37, at 180 n.75 (citing cases as examples).

\(\text{45}\) In order to offset the potentially harsh consequences of declaring a contract unenforceable on policy grounds, courts sometimes resort to the rules concerning the severability of unenforceable terms. See *infra* notes 186–210 and accompanying text.

\(\text{46}\) FARNSWORTH, *supra* note 34, § 2.20, at 103 (citing *RESTATEMENT OF RESTITUTION* § 1 (1937)).

\(\text{47}\) *Id.* § 4.8, at 239.

\(\text{48}\) *Id.* § 9.4, at 636.

\(\text{49}\) *Id.* § 6.11, at 414.

\(\text{50}\) McIntosh v. Mills, 17 Cal. Rptr. 3d 66, 76 (Ct. App. 2004) (citing Lewis & Queen v. N. M. Ball Sons, 308 P.2d 713, 719 (Cal. 1957)).
the performing party may not recover in quantum meruit, or *malum prohibitum*, in which case the agreement *may* be void or voidable depending upon the nature of the agreed-upon act and the court *may* permit recovery in quantum meruit.51 Other courts have rejected such distinctions and instead have decided restitution issues on a case-by-case basis.52

The general rule of contract law is that quantum meruit recovery is not available in the event a contract is unenforceable on public policy grounds.53 For example, the Restatement (Second) of Contracts takes the position that restitution should be the exception, rather than the norm, in the event that a term is unenforceable on public policy grounds.54 Professor Dan Dobbs has explained the justification for this presumption:

If restitution were granted, this may in some situations, prove tantamount to enforcement. At the very least, it would provide a floor or cushion on which an illegal actor might fall back, sure that if his illegal conduct were not challenged, he could profit by it, and that if it were challenged, he could at least get his money or property back. This would no doubt encourage such illegal contracts. In quite a few situations, then, it seems proper to deny both enforcement of the bargain on a contract basis and restitution. Though a denial of restitution leads . . . to

51. See, e.g., Vitek, Inc. v. Alvarado Ice Palace, Inc., 110 Cal. Rpt. 86, 91 (Ct. App. 1973) ("The courts often make a distinction between acts which are *malum in se* and those which are *malum prohibitum* . . . ."); Coleman v. Bossier City, 305 So. 2d 444, 446 (La. 1974) (allowing recovery where "[t]he transactions were not malum in se but merely malum prohibitum"); CALAMARI & PERILLO, supra note 30, § 22.1, at 822 ("[A] party who has performed under the agreement tainted with illegality may recover if the offense is merely *malum prohibitum* 'and the denial of relief is wholly out of proportion to the requirements of public policy or appropriate individual punishment.'" (quoting John E. Rosaco Creameries, Inc. v. Cohen, 11 N.E.2d 908, 909 (N.Y. 1937))).

52. See Cimmino v. Town of Trumbull, No. 293612, 1994 WL 76859, at *2 (Conn. Super. Ct. Feb. 28, 1994) ("Generally, a contract made in violation of a statute is illegal and unenforceable, and it is usually immaterial whether the thing forbidden by statute is malum in se or malum prohibitum." (internal quotation marks omitted)).

53. See CALAMARI & PERILLO, supra note 30, § 22.8, at 833 (stating "the general rule that the court leaves the parties to an illegal bargain where it finds them" and that quantum meruit recovery is usually not permitted); FARNSWORTH, supra note 34, § 5.9, at 357 ("Courts generally do not grant restitution under agreements that are unenforceable on grounds of public policy."); 8 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 19:76, at 576 (4th ed. 1998) ("It is the general rule that where a contract is either partially or wholly illegal, not even a quasi-contractual recovery is available.").

54. RESTATEMENT (SECOND) OF CONTRACTS § 197 (1981) ("Except as stated in §§ 198 and 199, a party has no claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy unless denial of restitution would cause disproportionate forfeiture.").
unjust enrichment, this has generally been deemed a less weighty consideration than the policy of discouraging illegal bargains.\(^{55}\)

In short, the general rule is that, where a strong public policy is well-established and clearly articulated, quantum meruit recovery is inappropriate, lest future wrongdoing of a similar nature be encouraged.\(^{56}\)

Restitution, therefore, is only appropriate in a limited number of situations, such as where denial of restitution would result in disproportionate forfeiture.\(^{57}\) Importantly, according to the *Restatement (Second) of Contracts*, the forfeiture must be "disproportionate in relation to the contravention of public policy involved" before restitution is appropriate.\(^{58}\) Therefore, the fact that the other party to the transaction receives the benefit of the bargain without paying for that benefit does not necessarily render a forfeiture disproportionate. In deciding whether forfeiture would be disproportionate to the public policy at issue, the *Restatement* directs courts to consider "such factors as the extent of the party’s deliberate involvement in any misconduct, the gravity of that misconduct, and the strength of the public policy."\(^{59}\)

There are several other common exceptions that permit a party to recover the reasonable value of services provided,\(^{60}\) the most relevant of which, for purposes of this Article, is the situation in which the party seeking restitution was "excusably ignorant" of the facts or of the prohibition on the conduct.\(^{61}\) This exception is likely to apply only where the party seeking restitution is "ignorant of legislation of a minor character from which the policy is derived," such as legislation "of a local, specialized or technical nature."\(^{62}\) However, the fact that the legislation is of a minor character will not be enough to excuse the ignorance where the party seeking restitution has specialized knowledge of the field.\(^{63}\)

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57. *RESTATEMENT (SECOND) OF CONTRACTS* § 197.
58. Id. cmt. b (emphasis added).
59. Id.
60. These exceptions include where the party seeking restitution was not equally in the wrong with the other party, id. § 198(b), where the party seeking restitution withdrew from the transaction before the improper purpose was achieved, id. § 199(a), or when allowance of the claim for restitution "would put an end to a continuing situation that is contrary to the public interest," id. § 199(b), such as permitting a stakeholder to retain money obtained as part of an illegal wager, id. cmt. b. See also CALAMARI & PERILLO, *supra* note 30, § 22.7 (discussing situations in which restitution is appropriate).
61. *RESTATEMENT (SECOND) OF CONTRACTS* § 198(a).
62. Id. § 180 cmt. a; see id. § 198 cmt. a.
63. Id. § 180 cmt. b.
III. AN ATTORNEY’S RIGHT TO COMPENSATION UNDER A FEE AGREEMENT THAT VIOLATES ETHICAL RULES: THE VIEW OF THE RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS

As its name suggests, the Restatement (Third) of the Law Governing Lawyers aspires “to restate much of the law governing lawyers.”64 As the authors recognized, the Restatement “represents something of a departure in . . . focusing as it does on a specific vocation.”65 As discussed below, the Restatement’s articulation of the standards governing fee agreements that offend public policy also represents something of a departure from the normal rules governing contract law.

A. General Rules Regarding Unenforceable Attorney–Client Fee Agreements

The Restatement (Third) of the Law Governing Lawyers articulates a general rule providing for quantum meruit recovery in the event that a fee agreement is unenforceable: “If a client and lawyer have not made a valid contract providing for another measure of compensation, a client owes a lawyer who has performed legal services for the client the fair value of the lawyer’s services.”66 In such cases, a lawyer is entitled to quantum meruit recovery unless the lawyer has engaged in a “clear and serious violation of duty to a client.”67 Where the lawyer has engaged in such a violation, forfeiture of some or all of the lawyer’s compensation is appropriate in order to deter future misconduct and as a recognition that the lawyer’s misconduct “destroys or severely impairs the client-lawyer relationship and thereby the justification of the lawyer’s claim to compensation.”68

A violation of duty is “clear,” according to the Restatement, where “a reasonable lawyer, knowing the relevant facts and law reasonably accessible to the lawyer, would have known that the conduct was wrongful.”69 A violation of duty must also be “serious” to justify complete or partial fee forfeiture.70 “Minor violations,” according to the Restatement, “do not justify leaving the lawyer entirely unpaid for valuable services rendered to a client, although some such violations will reduce the size of the fee.”71 Ultimately, the amount, if any, of fee forfeiture that is appropriate for a violation of a duty to a client depends upon a

64. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS intro. at 3 (2000).
66. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 39.
67. Id. § 37.
68. Id. cmt. b.
69. Id. cmt. d.
70. Id.
71. Id.
number of factors, including "the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies."\footnote{72}

The black letter rule of the \textit{Restatement (Third) of the Law Governing Lawyers} and the accompanying commentary contain a great deal of lawyerly hedging on the questions of when fee forfeiture is appropriate and to what extent it is appropriate.\footnote{73} As Professor Perillo observes, however, "[O]ne thing about the provision is clear; it is lawyer-friendly."\footnote{74} Perillo explains as follows:

Even if the lawyer engages in a "clear and serious violation of a duty to the client," the lawyer may be entitled to some or all of the agreed fee or \textit{quantum meruit}. . . . After many re-readings of the Restatement section, one concludes that all its verbiage simply states that the courts have total discretion on the question of whether the lawyer is entitled to compensation despite a violation of the lawyer's duties to the client.\footnote{75}

Thus, even in the case of a "clear and serious violation of a duty to a client," recovery, either under the contract or in quantum meruit, remains a possibility for a lawyer.\footnote{76} As Professor Perillo points out, "[O]ther fiduciaries are not so privileged."\footnote{77}

Unlike the \textit{Restatement (Second) of Contracts}, the \textit{Restatement (Third) of the Law Governing Lawyers} fails to establish a presumption against restitution in the event of unenforceability on policy grounds.\footnote{78} In fact, the \textit{Restatement (Third) of the Law Governing Lawyers} establishes the opposite presumption, providing that a client owes the lawyer the fair value of his services despite the unenforceability of the contract.\footnote{79} A lawyer should only be deprived of the reasonable value of his services when he has engaged in a clear and serious violation of a duty to a client, and then, \textit{perhaps} only a partial forfeiture is appropriate.\footnote{80} In support of this presumption, the drafters offer perhaps the simplest of justifications: the

\footnotesize{72. Id. § 37.}
\footnotesize{73. According to Professor Perillo, the relevant section "has the clarity of the Milky Way as seen during a thermal inversion." Perillo, supra note 1, at 447.}
\footnotesize{74. Id.}
\footnotesize{75. Id. at 447–48 (quoting \textit{RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS} § 49 (Proposed Final Draft No. 1, 1996)).}
\footnotesize{76. Id. at 447 (quoting \textit{RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS} § 49 (Proposed Final Draft No. 1, 1996)).}
\footnotesize{77. Id. at 448.}
\footnotesize{79. See \textit{RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS} § 39.
\footnotesize{80. See id. §§ 37, 39 & cmt. a.
parties to a contract usually expect that the party providing services to the other will be paid for those services. 81

The rule from the Restatement (Third) of the Law Governing Lawyers is lawyer-friendly in another way. The rule focuses almost exclusively on the relationship between lawyer and client. 82 Largely omitted from consideration is the public’s interest in whether the lawyer is compensated. 83 The Restatement (Second) of Contracts directs courts to take into account the public’s interest both when considering whether to enforce the contractual term that allegedly violates public policy and when considering whether to permit restitution in the event the term is unenforceable. 84 For example, one exception to the rule that restitution is inappropriate when a provision is unenforceable on policy grounds is that restitution is appropriate when forfeiture would be “disproportionate in relation to the contravention of public policy involved.” 85 Thus, the strength of the public’s interest in preventing a party to a contract from engaging in a particular course of conduct may tip the balance for or against allowing recovery.

In contrast, the Restatement (Third) of the Law Governing Lawyers is focused almost exclusively on the parties to the contract—the lawyer and the client. 86 The black letter rule and comments repeatedly stress that the focus should be on the parties to the fee agreement. 87 One comment specifically disavows the harm a third party may suffer as a result of the lawyer–client relationship as being a factor in deciding whether a lawyer should be entitled to recover the fair value of her services. 88 Thus, according to the drafters, the interests of third parties and the public more generally are not part of the analysis.

By focusing solely on the lawyer’s duty to the client, the Restatement (Third) of the Law Governing Lawyers generally makes it more difficult to

81. Id. § 39 cmt. b(i).
82. See id. cmt. a.
83. See id.
84. See supra notes 39 & 59 and accompanying text.
85. Restatement (Second) of Contracts § 197 cmt. b (1981) (emphasis added); see also id. cmt. a (“In general, if a court will not, on grounds of public policy, aid a promise by enforcing the promise, it will not aid him by granting him restitution for performance that he has rendered in return for the unenforceable promise.”); id. § 198 cmt. b (explaining that a party claiming restitution can be considered “less in the wrong” and therefore entitled to restitution “because the public policy is intended to protect persons of the class to which he belongs and, as a member of that protected class, he is regarded as less culpable”). The comments to the Restatement (Second) of Contracts also provide that the exception permitting restitution in the event the other party is equally in the wrong “is not usually available to a claimant whose misconduct is serious when viewed in the light of the threatened social harm.” Id.; see also id. § 199(b) (permitting restitution when “allowance of the claim would put an end to a continuing situation that is contrary to the public interest”).
86. The only real hint that societal interests may be relevant appears in the comments, in which the authors note briefly that forfeiture may be a deterrent. See Restatement (Third) of the Law Governing Lawyers § 37 cmts. a & b.
87. See id. cmts. a–e.
88. Id. cmt. c (“The Section refers only to duties that a lawyer owes to a client, not to those owed to other persons.”).
deprive a lawyer of all or part of his fee. When one turns a blind eye to the larger interests of the public, it will often become more difficult to justify forfeiture. For example, the comments suggest that actual harm to the client flowing from the breach, while not a requirement, should ordinarily occur before forfeiture is appropriate unless the violation is "flagrant." Similarly, the comments explain that "[n]ormally, forfeiture is more appropriate for repeated or continuing violations than for a single incident." Apparently, this is true despite the strength of the public's interest in preventing the violation from occurring in the first place.

Depending upon the facts of a case, a decision to permit a lawyer to recover for the reasonable value of services provided may greatly influence the amount of money the lawyer ultimately collects. In some cases, a lawyer's recovery is reduced dramatically. In other instances, however, lawyers have received only slightly less than they would have received under an enforceable agreement.

B. The Extent to Which the Ethical Rules Governing Attorneys Can Articulate Public Policy

Courts have sometimes differed in their conclusions as to which sources are capable of articulating public policy for purposes of contract law. The Restatement (Second) of Contracts identifies "legislation" as a source of public policy. However, the comments explain that "[t]he term 'legislation' is used here in the broadest sense to include any fixed text enacted by a body with

89. See id. cmt. d ("[A] lawyer's failure to keep a client's funds segregated in a separate account should not result in forfeiture if the funds are preserved undiminished for the client. But forfeiture is justified for a flagrant violation even though no harm can be proved." (internal citation omitted)).
90. Id.
91. See Gaines, Gaines & Gaines, P.C. v. Hare, Wynn, Newell & Newton, 554 So. 2d 445, 446-47 (Ala. Civ. App. 1989) (permitting a law firm to recover in quantum meruit where the fee agreement was unenforceable, resulting in the law firm receiving $7,500 for services rendered rather than the 12.5% of the ultimate $1.5 million recovery as called for under the fee agreement).
92. See Mulhern v. Roach, 494 N.E.2d 1327, 1330-31, 1334-35 (Mass. 1986) (refusing to enforce one-third contingency fee agreement but allowing lawyer to recover, in quantum meruit, almost one-third of what client recovered). Sometimes, of course, a lawyer will receive far less in quantum meruit than the lawyer would have been entitled to receive under the fee agreement but still receive more than a reasonable fee at the low end of the reasonableness scale would be in such a case. For example, in Thompson v. Thompson, 319 S.E.2d 315, 319 (N.C. Ct. App. 1984), rev'd on other grounds, 328 S.E.2d 288 (N.C. 1985), the law firm would have been entitled to collect $250,000 had its contingency fee agreement been enforceable. An expert concluded that, "using the relevant hourly basis as a guide, a reasonable fee would [have been] at least $20,000." Id. Ultimately, the trial court set $85,000 as the reasonable fee. Id.
authority to promulgate rules, including not only statutes, but constitutions and local ordinances, as well as administrative regulations issued pursuant to them.  

Under the Restatement (Second) of Contracts’ approach, the ethical rules governing lawyers should qualify as “legislation” capable of articulating public policy. Because the rules are adopted by a state’s highest court pursuant to its authority to regulate the legal profession, they should ordinarily qualify as a source of public policy. The Restatement (Third) of the Law Governing Lawyers similarly takes the position that a violation of an ethical rule of the legal profession may result in forfeiture of the lawyer’s fee because the ethical rules are a source of a lawyer’s duty to a client. 

The language appearing in the introductory Scope of the Model Rules of Professional Conduct somewhat complicates the matter. The Scope emphasizes the disciplinary character of the Rules and cautions that “violation of a Rule does not necessarily warrant any ... nondisciplinary remedy.” A few courts have seized on this language and have consequently been reluctant to invalidate fee agreements that violate the ethical rules.

95. Id. cmt. a. Some courts take a more restrictive approach, limiting the sources of public policy to statutes, constitutional provisions, or perhaps common law. See Adler v. Am. Standard Corp., 432 A.2d 464, 472 (Md. 1981) (“[R]ecognition of an otherwise undeclared public policy as a basis for a judicial decision involves the application of a very nebulous concept to the facts of a given case, and . . . declaration of public policy is normally the function of the legislative branch.”); In re Estate of Walker, 476 N.E.2d 298, 301 (N.Y. 1985) (“[W]hen we speak of the public policy of the state, we mean the law of the state, whether found in the Constitution, the statutes or judicial records.”) (alteration in original) (quoting People v. Hawkins, 51 N.E. 257, 260 (N.Y. 1898)); Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 840 (Wis. 1983) (“The public policy must be evidenced by a constitutional or statutory provision.”). Other courts take a more expansive view. For example, one court has declared agreements between a sports agent and college athletes unenforceable primarily because the agreements violated several rules of the constitution of the National Collegiate Athletic Association (NCAA), a private, voluntary organization. Walters v. Fullwood, 675 F. Supp. 155, 160 (S.D.N.Y. 1987).

96. See RESTATEMENT (SECOND) OF CONTRACTS § 178 cmt. a.
97. See Long, supra note 93, at 1081–82 (citing CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.2.2, at 24 (1986)).
100. It bears mentioning that these decisions often involve disputes between two lawyers rather than between a lawyer and a client, see, e.g., Freeman v. Mayer, 95 F.3d 569, 575–76 (7th Cir. 1996) (citing Trotter v. Nelson, 657 N.E.2d 426, 428 (Ind. Ct. App. 1995), vacated, 684 N.E.2d 1150, 1155 (Ind. 1997)) (applying Indiana law in support of the idea that an attorney should not be permitted to use the ethics rules as a shield to avoid the terms of a fee-sharing agreement between two lawyers); Gagne v. Vaccaro, 766 A.2d 416, 424–25 (Conn. 2001) (citing CONN. RULES OF PROF’L CONDUCT Scope at 3 (2000)) (noting that, in a dispute between two attorneys, one attorney could not use the other attorney’s violation of the ethics rules as a basis for avoiding terms of a fee agreement), or disputes involving a stranger to the original fee agreement who seeks to use the fact that the agreement violated the ethical rules as an excuse for avoiding liability, see, e.g., Cross v. Am. Country Ins. Co., 875 F.2d 625, 628–29 (7th Cir. 1989) (involving an effort by an insurance company accused of tortiously interfering with a lawyer’s contingency fee agreement with a client to avoid liability by asserting that the lawyer’s failure to abide by the ethical rule regarding oral
Most courts, however, have agreed with the authors of the *Restatement (Third) of the Law Governing Lawyers* and have generally refused, on policy grounds, to enforce fee agreements that run afoul of the ethical rules governing attorneys. Some courts have paused to reflect on the matter and have expressly held that the rules of professional conduct governing lawyers represent an expression of public policy and that a fee agreement that violates one of those rules is unenforceable. Other courts have stopped short of formally recognizing a lawyer’s ethics code as a source of public policy but have nonetheless refused, in the name of public policy, to enforce fee agreements that violate such rules.

IV. THE COURTS’ TREATMENT OF ATTORNEY–CLIENT FEE AGREEMENTS THAT VIOLATE THE ETHICAL RULES GOVERNING ATTORNEYS

There are numerous ethical rules that regulate attorney–client fee agreements. Courts have generally shown a reluctance either to declare agreements that fail to comply with these rules unenforceable on policy grounds or, more commonly, to preclude the possibility of recovery in quantum meruit. Instead, courts have tended to exercise the broad discretion the *Restatement (Third) of the Law Governing Lawyers* describes and have permitted at least some type of recovery. In short, the fact that an attorney–client agreement violates the ethical rules governing lawyers will not typically bar an attorney from recovering at least on a quantum meruit basis—despite the traditional contract rule to the contrary.

A. Fee Agreements that Fail to Comply with Ethical Rules that Expressly Regulate Fee Agreements

There are several ethical rules that speak directly to attorney–client fee agreements. These include the rules against charging an unreasonable fee, 

contingency fees rendered the agreement unenforceable), *overruled by* Kaplan v. Pavalon & Gifford, 12 F.3d 87, 90–91 (7th Cir. 1993).

101. See Perillo, *supra* note 1, at 454 (stating that while the ethical rules regarding unreasonable and clearly excessive fees are disciplinary rules, “courts have generally regarded them also as rules of contract law”).


104. See King v. Young, Berkman, Berman & Karpf, P.A., 709 So. 2d 572, 574 (Fla. Dist. Ct. App. 1998) (“When a fee agreement between attorney and client fails to comply with the Rules Regulating the Florida Bar, the attorney is entitled to recover on the basis of quantum meruit.”).

charging a contingent fee in a divorce proceeding, and entering into an oral contingency fee agreement. In most instances, a lawyer who violates one of these rules can nonetheless expect to receive some type of compensation for the services provided to the client under the unethical fee agreement.

1. Unreasonable Fees

One example of where contract law is, on its face, stricter on lawyers than nonlawyers is the situation in which a lawyer charges an unreasonable or clearly excessive fee. Under traditional contract law principles, the fact that one party agreed to grossly overpay for goods or services is typically not enough to excuse that party from paying. Only where there is some problem, such as fraud, in the bargaining process or where the agreement is unconscionable, which also typically involves some serious procedural concerns, is a party likely to be excused after entering into a bad deal. With an attorney-client fee agreement, however, a client may be able to avoid payment of legal fees on the grounds that the agreed-upon fee is merely “unreasonable” under the jurisdiction’s legal ethics code. Sometimes a statute will place a ceiling on the fees a lawyer may

106. Id. R. 1.5(d)(1).

107. Id. R. 1.5(e). Two ethical rules speak to fee-splitting arrangements. Model Rule 1.5(e) places limits on the ability of a lawyer to enter into a fee-splitting or referral arrangement with another lawyer. See id. R. 1.5(e). There are numerous cases involving one lawyer seeking to recover from another lawyer who was a party to an arrangement that violated a jurisdiction’s applicable ethical rule. See J.G. Wahlert, Annotation, Validity and Enforceability of Express Fee-Splitting Agreements Between Attorneys, 11 A.L.R.6th 587 (2006) (collecting cases). Similarly, Model Rule 5.4(a) prohibits a lawyer from sharing a fee with a nonlawyer. MODEL RULES OF PROF’L CONDUCT R. 5.4(a). There are also cases in which a fee agreement that fails to comply with this ethical rule remains enforceable. See, e.g., “We the People” Paralegal Servs., L.L.C. v. Watley, 766 So. 2d 744, 748–49 (La. Ct. App. 2000) (allowing for recovery even though the fee-splitting arrangement violated Rule 5.4(e)). In addition, Model Rule 5.6(b) prohibits a lawyer from entering into a settlement agreement in which the lawyer agrees not to represent another client against the defendant. MODEL RULES OF PROF’L CONDUCT R. 5.6(b); see Jarvis v. Jarvis, 758 P.2d 244, 247 (Kan. Ct. App. 1988) (declaring such agreements void as against public policy). Because the vast majority of these cases do not involve a client seeking to avoid payment of fees to an attorney, these cases are, by and large, beyond the scope of this Article.

108. See Perillo, supra note 1, at 453–54.

109. See id. (explaining that, in the absence of fraud or the like, courts generally do not inquire into the adequacy of consideration).


ATTORNEY–CLIENT FEE AGREEMENTS

charge a client. More prevalent, however, is the prohibition on unreasonable fees contained in Model Rule 1.5(a).

The American Bar Association’s (ABA) older Model Code of Professional Responsibility prohibited attorneys from charging “clearly excessive” fees. The Ethical Considerations accompanying the rule explained the public’s interest in the rule: “A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client.” Although the Model Code and Model Rules use slightly different terminology, both address the same evil.

Model Rule 1.5(a) lists eight factors to consider in determining whether a fee is reasonable:

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.

In most instances, fee agreements that establish unreasonable or clearly excessive fees present a situation in which the public interest against such agreements clearly outweighs the opposing public interest in freedom of contract. Unlike parties who negotiate fee agreements at arm’s length, the

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112. See Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 225–26 (2d Cir. 2009) (involving an attorney who negotiated a settlement and made a fee request that exceeded the amount permitted by statute); Am. Home Assurance Co. v. Golomb, 606 N.E.2d 793, 797 (Ill. App. Ct. 1992) (involving an attorney who charged fees in medical malpractice cases that exceeded the statutory cap).
113. MODEL RULES OF PROF’L CONDUCT R. 1.5(a) (2009).
114. MODEL CODE OF PROF’L RESPONSIBILITY DR 2-106(A) (1980).
115. Id. EC 2-17 (footnote omitted).
116. MODEL RULES OF PROF’L CONDUCT R. 1.5(a).
attorney–client relationship is a fiduciary relationship; thus, a lawyer who charges an unreasonable or clearly excessive fee has taken advantage of a fiduciary. This concern is particularly acute in light of the fact that many clients lack information about fees for legal services and are at a marked disadvantage in the negotiation process.

Moreover, these cases also directly implicate the policy concerns underlying the presumption against restitution where an agreement has been declared to be unenforceable on policy grounds. Many clients will be unlikely to contest such agreements, if for no other reason than that they will probably have to hire another lawyer to pursue the matter. In contrast, the costs to the original lawyer in defending the action will usually be minimal. Even when a client is successful in challenging a fee agreement, permitting a lawyer to recover on a quantum meruit basis may provide the type of safety net that will encourage lawyers to continue drafting unreasonable fee agreements in the future. Thus, permitting recovery in quantum meruit would seem to do little to deter attorneys from charging unreasonable fees in violation of their ethical obligations and might actually encourage such behavior.

Indeed, in some instances, courts have relied on this logic in refusing to permit a lawyer to recover even the reasonable value of the services after the lawyer charged the client an unreasonable or clearly excessive fee. In White v. McBride, the Tennessee Supreme Court had to decide whether a lawyer who had charged a contingency fee in an estate case was entitled to any recovery for his services. The attorney entered into a fee agreement with regard to the estate of his client’s late wife. The agreement provided that the attorney “was to be paid a $2,500 retainer plus one-third of gross recovery above and in excess of retainer.” Eventually, the attorney sought to recover $108,291, which was approximately one-third the value of the estate. The probate court ruled that the one-third contingency fee was “clearly excessive,” in part because the attorney assumed no real risk of nonrecovery in the matter. However, the probate court concluded that the attorney could still recover on a theory of quantum meruit in the amount of $12,500. On appeal, the Tennessee Supreme Court upheld the finding that the fee was clearly excessive but also held that the

118. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34 cmt. b (2000).
119. See Perillo, supra note 1, at 457.
120. Id.
121. See DOBBS, supra note 55, § 13.5, at 995.
122. 937 S.W.2d 796 (Tenn. 1996).
123. Id. at 797.
124. Id.
125. Id. (internal quotation marks omitted).
126. Id. at 799.
127. See id. at 799, 801.
128. Id. at 799.
attorney was not entitled to recover under a quantum meruit theory. The attorney's ethical violation was "of a most flagrant sort as it goes directly to the heart of the fiduciary relationship that exists between attorney and client."

Permitting an attorney to recover anything under those circumstances "would encourage attorneys to enter exorbitant fee contracts, secure that the safety net of *quantum meruit* is there in case of a subsequent fall."

Not all courts have taken this approach, however. At least one court has suggested that a fee agreement that establishes a fee in excess of a statutory cap is not per se unenforceable. In a few cases, courts have permitted quantum meruit recovery where the fee agreement was held to be unenforceable because the fee charged was clearly excessive or unreasonable, sometimes with no explanation as to why quantum meruit recovery was appropriate. By failing to offer any explanation for permitting quantum meruit recovery, these decisions effectively eliminate the presumption established in the *Restatement (Second) of Contracts* against an award of restitution in the event a contract is unenforceable on policy grounds and replace it with the presumption in favor of compensation contained in the *Restatement (Third) of the Law Governing Lawyers*. Although other courts have refused to permit quantum meruit recovery in the case of unreasonable fees, these cases sometimes involve additional factors upon which courts have relied to deny recovery. For example, the Nebraska Supreme Court denied a lawyer any type of recovery, in part, because the lawyer did not reduce the excessive contingent fee agreement to writing. The failure to put the agreement in writing was not, by itself, a violation of Nebraska's ethical rules at the time, but it did, under prior decisions, require the attorney to prove by clear and convincing evidence that he had disclosed all material terms and that the client had agreed to them. The lawyer's failure to establish this requirement helped the court justify its decision not to allow recovery in quantum meruit.

Despite the strong public interests implicated when an attorney charges an unreasonable fee, not every case justifies total forfeiture. For example, the Iowa Supreme Court permitted a defense lawyer to recover the reasonable value of his

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129. *Id.* at 801, 803.
130. *Id.* at 803.
131. *Id.*
133. *See Krause v. Rhodes*, 640 F.2d 214, 218–19 (6th Cir. 1981); *Brillhart v. Hudson*, 455 P.2d 878, 881 (Colo. 1969). Some courts justify recovery on quantum meruit grounds on the older *malum in se–malum prohibitum* distinction. *See Wunschel Law Firm, P.C. v. Clabaugh*, 291 N.W.2d 331, 337 (Iowa 1980) (concluding that an attorney was entitled to compensation in quantum meruit because the contract was "not invalid because of illegality of the services" and because attorney provided valuable services to client).
134. *See supra* Parts II.B, III.A.
136. *Id.* at 182 (citing MODEL CODE OF PROF'L RESPONSIBILITY EC 2–19, EC 2–20 (1980)).
137. *Id.* at 183.
services despite the fact that the method used to compute his fee, which was based on a percentage of the difference between the amount prayed for in the petition and the amount actually awarded, was unreasonable and the fee agreement unenforceable. According to the court, this was the first time it had considered the question of the permissibility of that type of fee agreement.

Although the court ultimately concluded that such agreements are void, the case presents one of the few situations in which a lawyer could plausibly assert the “excusable ignorance” exception contained in the Restatement (Second) of Contracts that permits recovery in quantum meruit despite the unenforceability of a contractual provision. Indeed, given the ABA’s subsequent conclusion in a formal ethics opinion that, contrary to the Iowa Supreme Court’s decision, there is nothing per se inappropriate about such fee agreements, the attorney’s argument for quantum meruit recovery seems much stronger. What is noteworthy about the decision, however, is that the court makes no allusion to the excusable ignorance exception or the other applicable exceptions allowing for recovery of the reasonable value of the services provided. Instead, the court appears to have proceeded from the assumption that unless there is something illegal about the contract itself, quantum meruit recovery should be the presumption, despite the strong public interests at stake.

2. Contingency Fees in Domestic Relations Cases

One of the most striking examples of the courts’ tendency to rule that conduct that offends the policies underlying the rules of professional conduct for attorneys is not sufficiently offensive so as to deprive an attorney of the ability to recover fees lies in cases involving contingent fee agreements in divorce cases. Model Rule 1.5(d)(1) prohibits an attorney from entering into a fee agreement in a domestic relations case, “the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.” The policy underlying the rule is one of “encourag[ing] reconciliation by removing any incentive to the attorney to press forward with the divorce.”

138. See Clabaugh, 291 N.W.2d at 337.
139. Id. at 333 (“No case has involved a contingent defense fee predicated on a percentage of the amount saved under the prayer in defending an unliquidated tort claim.”).
140. See RESTATEMENT (SECOND) OF CONTRACTS § 198(a) (1981).
142. See Clabaugh, 291 N.W.2d 331.
143. See id. at 337 (explaining that lawyers were entitled to recover the reasonable value of the services they provided because they provided valuable services and because “[t]he contract [was not] invalid because of illegality of the services but merely [invalid] because on policy grounds [the court could not] approve the way in which the fee was to be calculated”).
Courts refused to enforce contingent fee agreements in these instances well before the organized bar adopted formal codes of ethics.146 The Minnesota Supreme Court once remarked that these agreements were so offensive to public policy that “they must be eradicated from our practice,” even if it meant refusing to permit an attorney to recover under a quantum meruit theory.147 Indeed, courts rarely hesitate to declare agreements in violation of this rule unenforceable as a matter of law.148

Despite the public’s obviously strong interest in preserving marriage, the majority of courts nonetheless permit an attorney who is in violation of the rule to recover the reasonable value of the services rendered in most instances.149 In some instances, courts simply adopt a blanket approach that, while deeming such agreements void as against public policy, permits an attorney to recover in quantum meruit.150 This is often done with little or no explanation of the court’s reasoning.151 Again, this approach amounts to a reversing of the traditional presumption against quantum meruit recovery in the event a contract is unenforceable on policy grounds.

Other courts simply rely on the notion that basic fairness demands that the attorney should be compensated for the services rendered.152 At least one court has permitted recovery in quantum meruit where the contract was not executed until after the parties established an attorney–client relationship for the purpose

146. See, e.g., McCurdy v. Dillon, 98 N.W. 746, 747–48 (Mich. 1904) (holding “that portion of the contract providing for a percentage of what should be recovered in a divorce case” unenforceable); Lynde v. Lynde, 52 A. 694, 702 (N.J. 1902) (“[A]limony . . . cannot be subjected in advance to a charge in favor of the soliciot through whose services it is awarded . . . .”).

147. Baskerville v. Baskerville, 75 N.W.2d 762, 773 (Minn. 1956) (citing McCarthy v. Santangelo, 78 A.2d 240, 241 (Conn. 1951)).

148. See, e.g., Oynby v. Prisock, 138 So. 2d 279, 280 (Miss. 1962) (holding that the contingent fee agreement was enforceable but that valuable services were rendered, and therefore, attorney was entitled to reasonable payment based on quantum meruit).

149. Hay v. Erwin, 419 P.2d 32, 34 (Or. 1966) (stating that the majority of courts have so held); see also King v. Young, Berkman, Berman & Karpf, P.A., 709 So. 2d 572, 573–74 (Fla. Dist. Ct. App. 1998) (holding that the bonus provision in a fee agreement that made the fee charged by a firm in a dissolution action contingent upon the results obtained was unenforceable but that the firm was still entitled to quantum meruit recovery in the amount of $342,989). Recovery in quantum meruit also appears to have been fairly common in older cases as well. See McCurdy, 98 N.W. at 748; Lynde, 52 A. at 703.

150. See King, 709 So. 2d at 574 (“When a fee agreement between attorney and client fails to comply with the Rules Regulating the Florida Bar, the attorney is entitled to recover on the basis of quantum meruit.”).


of obtaining a divorce; thus, the “taint of illegality” only permeated part of the attorney–client relationship.\textsuperscript{153}

Given the law’s longstanding abhorrence of these types of fee agreements, a court could not rely on the exception permitting quantum meruit recovery where the lawyer seeking recovery was excusably ignorant of the prohibition.\textsuperscript{154} Absent unusual circumstances, the only possible exception to the traditional presumption against restitution against restitution that might apply would be the disproportionate forfeiture exception.\textsuperscript{155} Indeed, when courts do offer an explanation as to why they permit an attorney to recover in quantum meruit, they often rely on the potential loss to the attorney and the windfall to the client if no recovery was permitted.\textsuperscript{156}

But by only taking into account the interests of lawyers and their clients, courts tend to give little weight to the public’s strong interest in not placing attorneys in the position where they have an incentive to discourage reconciliation.\textsuperscript{157} Because under the approach of the Restatement (Second) of Torts, a forfeiture must be disproportionate in relation to the public policy at stake before quantum meruit is appropriate,\textsuperscript{158} it would seem that recovery in such cases would be the exception. A handful of courts have, in fact, concluded that the policy justifications compelling the conclusion that agreements that violate Model Rule 1.5(d)(1) are unenforceable also compel the conclusion that no recovery may be had in quantum meruit.\textsuperscript{159} Thus, “[the public’s] interest in the preservation of the marital relationship is so strong as to outweigh . . . concerns that the [client] may have been unjustly enriched.”\textsuperscript{160} Yet, the majority of courts have permitted attorneys to recover for the value of their services despite the fact that their fee agreements conflict with the public policy articulated in Rule 1.5(d)(1).\textsuperscript{161}

\textsuperscript{153} Id. at 322 (internal quotation marks omitted); see also Robinson, Bradshaw & Hinson, P.A. v. Smith, 498 S.E.2d 841, 847 (N.C. Ct. App. 1998) (severing the offending clause and enforcing the remainder of the fee agreement).

\textsuperscript{154} See supra note 61 and accompanying text. But see Alexander v. Inman, 974 S.W.2d 689, 693 (Tenn. 1998) (stating that contingent fees are “begrudgingly permitted in domestic relations cases” but “are subjected to enhanced scrutiny and rarely . . . justified”).

\textsuperscript{155} See supra notes 57–59 and accompanying text.

\textsuperscript{156} See, e.g., Guenard v. Burke, 443 N.E.2d 892, 895 (Mass. 1982) (“The loss to the defendant of a reasonable fee and the windfall to the plaintiff in being relieved of the obligation to pay any attorney’s fee for the defendant’s proper services indicate that denial of a fair fee would be unreasonable in the circumstances.”) (citing Town Planning & Eng’g Asso’s v. Amesbury Specialty Co., 342 N.E.2d 706, 711 (Mass. 1975)).

\textsuperscript{157} See Baskerville v. Baskerville, 75 N.W.2d 762, 768 (Minn. 1956) (“[T]he continuance of the marriage relation is deemed essential to the public welfare . . . .”).

\textsuperscript{158} RESTATEMENT (SECOND) OF CONTRACTS § 197 cmt. b (1981).


\textsuperscript{160} Malec, 562 N.E.2d at 1021.

\textsuperscript{161} See supra notes 149–151 and accompanying text.
3. Oral Contingent Fees

Another recurring issue involving fee agreements is the extent to which an attorney is entitled to compensation where the attorney enters into a contingency fee agreement that the attorney does not reduce to writing as required by a jurisdiction’s ethical rules. ABA Model Rule 1.5(c) permits an attorney to charge a contingent fee but requires that the agreement be in a writing signed by the client.162 Although often the subject of intense criticism, contingent fees have been justified on the grounds that they allow individuals with limited financial resources to obtain legal representation they otherwise would not be able to obtain.163 Contingent fees are, in the words of one court, "the ‘poor man’s key to the courthouse door."164 As the client in a contingent fee case will often be legally unsophisticated, the need to police such agreements is greater.165 Accordingly, the purposes behind requiring contingency fee agreements to be in a writing signed by the client are to prevent misunderstanding and fraud.166

The Restatement (Third) of the Law Governing Lawyers addresses this scenario in at least two comments. In one comment, the authors opine that the failure of a lawyer to put a fee agreement in writing as required by an ethics rule does not make the agreement unenforceable—at least where the client does not dispute the amount owed.167 In another comment, the authors opine that even when an oral contingency fee agreement is unenforceable, courts should permit recovery in quantum meruit because the law presumes that both the lawyer and

162. MODEL RULES OF PROF’L CONDUCT R. 1.5(c) (2009). The full text of the rule is as follows:
A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Id.


164. Id. (citing Arnold, 506 N.E.2d at 1281) (internal quotation marks omitted).

165. Lester Brickman, Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?, 37 UCLA L. REV. 29, 65 (1989) (stating that most personal injury clients are “not legally sophisticated and do not have access to legal counsel to evaluate the proposed contingent fee retainer agreement”).


167. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34 cmt. g (2000).
the client usually expect that the client will pay for legal services. According to the *Restatement*, "[q]uantum meruit recovery then provides compensation in circumstances in which it would be contrary to the parties' expectation to deprive the lawyer of all compensation."169

Most courts have held that oral contingency fee agreements in violation of the jurisdiction's ethical rules are unenforceable in violation of public policy but that a lawyer may nonetheless recover under a quantum meruit theory.170 Enforcing oral contingency fee agreements, as at least one court has explained, would undermine the purposes behind the rule and, interestingly, potentially place those lawyers who do comply with the rules at a competitive disadvantage.171 Despite these policy concerns and the traditional rule to the contrary, recovery under quantum meruit remains the norm in these cases.

The justifications offered by courts for permitting recovery in quantum meruit are typically those justifications one might expect. A court may express the frequent concern over clients being unjustly enriched or receiving a windfall

168. Id. § 39 cmt. b(i).
169. Id.
170. See Calm C's Inc. v. Shamburger (In re Complaint of Calm C's Inc.), 179 F. App'x 911, 913 (5th Cir. 2006) (applying Florida and Louisiana law); United States v. 36.06 Acres of Land, 70 F. Supp. 2d 1272, 1276 (D.N.M. 1999) (applying New Mexico law); Mullens v. Hansel–Henderson, 65 P.3d 992, 999 (Colo. 2002); Chandris, S.A. v. Yanakakis, 668 So. 2d 180, 186 n.4 (Fla. 1995); Young v. Southgate Dev. Corp., 399 N.E.2d 27, 29 (Mass. 1980); *Estate of Nicolaysen*, 796 A.2d at 242–43; Vaccaro v. Estate of Gorovoy, 696 A.2d 724, 727 (N.J. Super. Ct. App. Div. 1997); see also Gagne v. Vaccaro, 766 A.2d 416, 427 (Conn. 2001) (permitting recovery of a reasonable fee by a lawyer against a successor lawyer where the original contingency fee agreement was not in writing); Much Shelist Fred Denenberg & Ament, P.C. v. Lison, 696 N.E.2d 1196, 1202 (Ill. App. Ct. 1998) (permitting an attorney to recover in quantum meruit despite the fact that the contingent fee agreement was not in writing as required by the ethical rules and the client did not receive a tangible benefit from the attorney's representation). But see Novinger v. E.I. DuPont de Nemours & Co., 809 F.2d 212, 218 (3d Cir. 1987) (applying Pennsylvania law and stating that the failure to put a contingency fee in writing “does not make oral contingent fee arrangements unenforceable” (citing Silverstein v. Hirst, 103 A.2d 734, 737 (Pa. 1954))); Weatherford v. Price, 340 S.C. 572, 581, 532 S.E.2d 310, 315 (Ct. App. 2000) (concluding that the state supreme court had not yet “ruled that a fee agreement which violates Rule 1.5 . . . is unenforceable in all circumstances as against public policy”). On a few occasions, courts have held that such agreements remain enforceable; however, these decisions have generally involved attempts by strangers to the original fee agreement to declare the agreements unenforceable, see, e.g., Cross v. Am. Country Ins. Co., 875 F.2d 625, 629 (7th Cir. 1989) (involving an effort by an insurance company, accused of tortiously interfering with a lawyer's contingency fee agreement with his client, to avoid liability by asserting that the lawyer's failure to abide by the ethical rule regarding oral contingency fees rendered the agreement unenforceable), overruled by Kaplan v. Pavalon & Giﬀord, 12 F.3d 87, 90–91 (7th Cir. 1993); Griggs v. Webber (In re Webber), 350 B.R. 344, 381 (Bankr. S.D. Tex. 2006) (stating that “an oral contingency fee agreement is voidable if a person with standing challenges the contract” and “[t]he only person who has standing to challenge the oral agreement is the client” (citing TEX. GOV'T CODE ANN. § 82.065(b) (Vernon 2005)), or have been limited to their facts, see, e.g., Lowrey v. Will of Smith, 543 So. 2d 1155, 1163 (Miss. 1989) (permitting attorney to recover under the agreement “under the unusual facts of [the] case”).

171. Chandris, 668 So. 2d at 186.
by receiving the lawyer’s services without paying for them.\textsuperscript{172} A court may express the justification offered by the \textit{Restatement (Third) of the Law Governing Lawyers}—denying any recovery would frustrate the expectations of the parties that the lawyer would receive some compensation—sometimes by relying on the \textit{Restatement} as authority.\textsuperscript{173} Some courts view the writing requirement of Model Rule 1.5(c) as merely “technical” in nature.\textsuperscript{174} Therefore, they are reluctant to deny an attorney any recovery based on “minor technical deficiencies” with respect to a fee agreement.\textsuperscript{175} Finally, at least one court has suggested that the loss of the ability to recover under the contract (and thereby not recover as much as the lawyer might have otherwise recovered), coupled with a threat of discipline, should be an adequate deterrent to breaking the ethical rule.\textsuperscript{176}

In some instances, the willingness of courts to permit lawyers to recover the fair value of their services is understandable. Although the rule that contingent fees must be in writing and signed by the client serves an important purpose, the rule feels less weighty than the rules prohibiting unreasonable fees or contingent fees in divorce cases.\textsuperscript{177} Therefore, while it might be a stretch to refer to the rule as merely “technical” in nature, it might be easier to conclude that the forfeiture that would result to the attorney by denying any recovery would be disproportionate to the public policy involved, particularly where there is no suggestion of bad faith on the part of the attorney.\textsuperscript{178} Moreover, where the client is sophisticated, represented by counsel, or both, the policies of preventing fraud or misunderstandings about fees are unlikely to be implicated. However, courts have sometimes permitted recovery in quantum meruit even when the policies underlying the rule are implicated, such as when the client is unsophisticated or particularly susceptible to overreaching or when there is a dispute as to the percentage to which the lawyer and client agreed.\textsuperscript{179}

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\textsuperscript{172} Mullens, 65 P.3d at 999.

\textsuperscript{173} Estate of Nicolaysen, 796 A.2d at 243 (quoting \textit{RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS} § 39 cmt. b(i) (2000)); Vaccaro, 696 A.2d at 727 (quoting \textit{RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS} § 51 cmt. b(i) (Proposed Final Draft No. 1, 1996)).


\textsuperscript{175} See Farnsworth, supra note 34, § 5.9, at 358 (noting that courts often permit recovery in the case of violations of technical rules or regulations).

\textsuperscript{176} Estate of Nicolaysen, 796 A.2d at 243–44.

\textsuperscript{177} See supra Parts IV.A.1, IV.A.2.

\textsuperscript{178} See Estate of Nicolaysen, 796 A.2d at 243.

\textsuperscript{179} See Clam C’s Inc. v. Shamburger (\textit{In re Complaint of Calm C’s Inc.}), 179 F. App’x 911, 913 (5th Cir. 2006) (permitting recovery in personal injury case); United States v. 36.06 Acres of Land, 70 F. Supp. 2d 1272, 1274 n.1 (D.N.M. 1999) (permitting recovery where the law firm and its client disagreed as to the percentage that the law firm would receive); Mullens v. Hansel–Henderson, 65 P.3d 992, 999 (Colo. 2002) (permitting recovery where the attorney was hired to obtain workers compensation benefits); Lowrey v. Will of Smith, 543 So. 2d 1155, 1156–57 (Miss. 1989) (enforcing an oral contingency fee where the lawyer represented an elderly client whose husband had just died).
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B. Other Fee Agreements that Offend Public Policy

In addition to the ethical rules that explicitly limit a lawyer’s ability to enter into certain fee agreements with clients, there are other indirect limitations that have developed over time. Although no ethical rule may speak directly to a lawyer’s ability to include a particular term in a fee agreement, the policies that naturally flow from the ethical rules governing lawyers and that are enshrined within the broader law governing lawyers may nonetheless so limit a lawyer. Two examples are fee agreements that purport to limit a client’s ability to settle a matter without the lawyer’s consent and that provide for nonrefundable retainers.180

1. Limitations on a Client’s Ability to Settle

One of the fundamental principles of the lawyer–client relationship is that the client retains the absolute right to decide whether to settle a matter. This principle had been enshrined in legal decisions long before the ABA promulgated the Model Code of Professional Responsibility.181 It now finds its clearest expression in Model Rule 1.2(a), which explicitly provides that “[a] lawyer shall abide by a client’s decision whether to settle a matter.”182 A comment to the rule emphasizes that the client has “the ultimate authority to determine the purposes to be served by legal representation,” including the decision whether to settle.183 As a result, it is well-established that any provision in a fee agreement that attempts to inhibit the client’s ability to exercise this right is unenforceable.184

Despite this well-established rule, a lawyer who includes a provision limiting the client’s ability to settle a matter without the lawyer’s prior approval

180. Other examples include situations in which a lawyer includes a provision in a fee agreement that requires the client to pay the lawyer all legal fees and costs prior to discharging the lawyer, see Jacobsen v. Oliver, 555 F. Supp. 2d 72, 79 (D.D.C. 2008), in which a lawyer engages in unethical solicitation of a client, thereby calling into question the lawyer’s right to compensation from that client, see Spence, Payne, Masington & Grossman, P.A. v. Philip M. Gerson, P.A., 483 So. 2d 775, 776 (Fla. Dist. Ct. App. 1986), and in which a lawyer enters into a fee agreement with a client whom the lawyer may be prohibited from representing due to a conflict of interest, see Lustig v. Horn, 732 N.E.2d 613, 620 (Ill. App. Ct. 2000).

181. See, e.g., Lewis v. Lewis’s Adm’x, 15 Ohio 715, 716 (1846) (“A contract with an attorney to prosecute a suit containing a stipulation, that the party should not have the privilege to settle or discontinue it, without the assent of the attorney, would be so much against good policy, that the Court would not enforce it.”).

182. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2009).

183. Id. cmt. 1.

184. See, e.g., Mattioni, Mattioni & Mattioni, Ltd. v. Ecological Shipping Corp., 530 F. Supp. 910, 917 (E.D. Pa. 1981) (“[T]he attorney-consent clause contravened public policy . . . .”); Potter v. Ajax Min. Co., 61 P. 999, 1003 (Utah 1900) (holding that the provision which required consent of both parties to settle is unenforceable); see also Amy Owen, Commentary, May a Lawyer Agree with the Client that the Lawyer Must Approve All Settlements?, 17 J. LEGAL PROF. 311, 311–12 (1992) (discussing whether a contractual right of attorney to veto a settlement is unenforceable).
or who otherwise attempts to inhibit the client in the exercise of this right can usually rest assured that she will receive at least some compensation for the services provided to the client. In the overwhelming majority of cases, courts permit lawyers who are parties to such agreements to recover, either under the contract or in quantum meruit. 185 Courts reach these results in several ways.

First, some courts have held that a provision limiting the client’s ability to settle may be severed from the rest of the agreement, thus rendering the rest of the agreement enforceable. 186 According to the general contract rule, if a court determines that a contractual term is unenforceable on public policy grounds, it may nonetheless enforce the remainder of the agreement if performance of the offending term is not an essential part of the contract. 187 In other words, if the unenforceable section of the contract was not so central to the agreement that the parties would not have agreed absent that provision, the section may be severed and the remainder of contract enforced. 188

Some courts have held that, in fee agreements, restrictions on a client’s right to settle are not an essential part of the agreement and may therefore be severed—at least where the lawyer does not attempt to enforce the term or where the possibility of settlement is never discussed. 189 For example, one federal district court concluded that because there was never any discussion of settling a client’s underlying case, the fact that the firm had included a clause in the fee agreement prohibiting the client from settling without the firm’s permission did not render the entire fee agreement unenforceable. 190 In the court’s view, the inclusion of the offending clause rendered the fee agreement contrary to public policy “only in the most academic sense.” 191 In short, the mere presence of a term that violates an ethical rule does not render the contract void as against

185. This is true of older decisions, see e.g., Davis v Webber, 49 S.W. 822, 825 (Ark. 1899) (holding that an attorney may recover under quantum meruit even though the contract was void), as well as more modern decisions, see Jacobsen, 555 F. Supp. 2d at 80; Mattioni, 530 F. Supp. at 917; Jones v. Feiger, Collison & Killmer, 903 P.2d 27, 36 (Colo. App. 1994), rev’d on other grounds, 926 P.2d 1244 (Colo. 1996); Parents Against Drunk Drivers v. Graystone Pines Homeowners’ Ass’n, 789 P.2d 52, 57 (Utah Ct. App. 1990).

186. See, e.g., Jacobsen, 555 F. Supp. 2d at 80 (holding that a right-to-settle provision may be severed from the contract); Calvert v. Stoner, 199 P.2d 297, 300–01 (Cal. 1948) (holding that the compensation provisions of an agreement are not affected and citing cases that do the same).


189. See Sweeney v. Athens Reg’l Med. Ctr., 917 F.2d 1560, 1568 (11th Cir. 1990) ("[E]ven if portions of the fee agreement violate the canons of ethics the agreement is still enforceable if the objectionable provisions are not at issue and can be severed from the rest of the agreement." (citing Rasmussen v. Nodvin, 329 S.E.2d 541, 543 (Ga. Ct. App. 1985))); Jacobsen, 555 F. Supp. 2d at 80 (concluding that a right-to-settle clause that was never invoked was not an essential part of the bargain and therefore was severable).


191. Id.
public policy.\textsuperscript{192} Even if the law firm had sought to enforce the clause, the court explained, the rest of the fee agreement would have still been enforceable because the offending no-settlement provision could have been severed.\textsuperscript{193} According to the court, the fact that settlement never became an issue indicated that the no-settlement clause was not an essential part of the bargain.\textsuperscript{194} As such, the provision could be severed and the rest of the agreement enforced.\textsuperscript{195}

Other courts have severed clauses limiting the right of clients to accept a settlement offer even when settlement was discussed and became a possibility.\textsuperscript{196} According to one court, the test for severability is whether “the good and bad are so interwoven that they cannot be separated without altering or destroying the general meaning and purpose of the contract.”\textsuperscript{197} If that is the case, “the good must go with the bad, and the whole contract be set aside.”\textsuperscript{198} Reasoning that the general purpose of a fee agreement is to provide for the exchange of legal services for payment, these courts have concluded that a restriction on a client’s ability to settle is not material to this exchange.\textsuperscript{199}

Even if an offending term is not an essential part of an agreement, in order to take advantage of the severability rule, the party seeking enforcement of the rest of the agreement must not have engaged in “serious misconduct.”\textsuperscript{200} Whether misconduct is sufficiently “serious” to justify the refusal to enforce the entire agreement depends, in part, on the gravity of the public policy involved.\textsuperscript{201} Similarly, an individual term within an unenforceable provision may only be enforced if, according to the Restatement (Second) of Contracts, “the party who seeks to enforce the term obtained it in good faith and in accordance with reasonable standards of fair dealing.”\textsuperscript{202}

According to the Restatement (Second) of Contracts, courts should refuse to sever an offending term where a party’s misconduct “is so serious that a refusal to enforce the entire agreement is a proper sanction to discourage such conduct.”\textsuperscript{203} In making this determination and the determination of whether the party obtained a term in bad faith and not in accordance with reasonable standards of fair dealing, courts have looked to a variety of factors. The relationship between the parties is one such factor.\textsuperscript{204} According to the

\textsuperscript{192} See id.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} See, e.g., Calvert v. Stoner, 199 P.2d 297, 300–01 (Cal. 1948) (citing cases with similar holdings).
\textsuperscript{197} Newport Rolling Mill Co. v. Hall, 144 S.W. 760, 763 (Ky. Ct. App. 1912).
\textsuperscript{198} Id. at 763.
\textsuperscript{199} Id.
\textsuperscript{200} RESTATEMENT (SECOND) OF CONTRACTS § 184(1) (1981).
\textsuperscript{201} Id. § 183 cmt. b.
\textsuperscript{202} Id. § 184(2).
\textsuperscript{203} Id. § 183 cmt. b.
\textsuperscript{204} See Stamatakis Indus., Inc. v. King, 520 N.E.2d 770, 777 (Ill. App. Ct. 1987) (explaining that a court should consider the relative positions of the parties when deciding whether the
Restatement (Second) of Contracts, the fact that one party “has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy” cuts against enforcement, as does the fact that the dominant party included the term in a standard form.205 The fact that the party seeking enforcement purposefully overreached also cuts against enforcement.206 In addition, the court must judge the conduct of the party seeking enforcement in light of the applicable standards of that party’s business or profession, including any ethical norms that may apply.207

Applying those factors to the situation in which a lawyer includes or attempts to enforce a fee agreement limiting a client’s right to settle would logically seem to result in a finding in most cases that the offending provision is not severable. As a starting point, the rule reflects a fundamental policy value in the law governing lawyers. Regarding the nature of the relationship between the parties, the lawyer–client relationship is, of course, fiduciary in nature; it is a relationship built on confidence and trust.208 Aside from this fact, one of the concerns underlying the ethical rules regarding fee agreements is that clients are often in a weaker bargaining position when it comes to negotiating fee agreements with lawyers.209 In addition, a lawyer who has placed a limitation on a client’s ability to settle has almost certainly purposefully overreached. The rule prohibiting these kinds of no-settlement provisions is so clear and well-established that no practicing lawyer can claim in good faith to be unaware of it.

Accordingly, a lawyer’s inclusion of a provision limiting a client’s right to settle almost certainly represents a deliberate attempt by the lawyer—a person who occupies a special position of trust—to deny the client a fundamental right associated with the lawyer–client relationship. Thus, it is difficult to see how one could classify this behavior as anything other than serious misconduct in most cases. Yet, a significant number of courts have severed these types of provisions from the rest of a fee agreement and enforced the remainder of the agreement.210

Other courts have concluded that these types of restrictions on a client’s right to settle are not severable. At least one court has concluded that a provision

misconduct was serious); Technical Aid Corp. v. Allen, 591 A.2d 262, 272 (N.H. 1991) (stating that an employer who purposefully overreaches by “creating multiple covenants sharing the same subject matter but of slightly varying scope, is guilty of ‘serious misconduct’” (quoting Restatement (Second) of Contracts § 184(1))).

205. Restatement (Second) of Contracts § 184 cmt. b.

206. See Technical Aid Corp., 591 A.2d at 272 (quoting Restatement (Second) of Contracts § 184(1)).

207. See Seidenberg v. Summit Bank, 791 A.2d 1068, 1080 (N.J. Super. Ct. App. Div. 2002) (explaining that the concept of good faith must be judged by reference to the standards applicable to the business of the parties); Restatement (Second) of Contracts § 161 cmt. d (stating that reasonable standards of fair dealing are reflected in prevailing business ethics).

208. Richmond, supra note 117, at 78.


210. See supra notes 186–188 and accompanying text.
limiting a client’s right to settle is not severable where it is directly linked to another contractual provision involving the calculation of fee, such as a provision granting the firm the right to withdraw from representation and receive a potentially higher compensation if the client turns down a reasonable settlement offer.\(^{211}\) In other instances, courts have concluded that a provision limiting a client’s right to settle taints the entire agreement, regardless of whether it is specifically linked to another clause related to fees.\(^{212}\) In keeping with the Restatement (Second) of Contracts’ view that a provision is not severable where the party seeking enforcement of the rest of the contract engaged in serious misconduct, a few courts have taken into consideration the fact that it has a lawyer who tried to impose the term on a client, rather than a party negotiating at arm’s length with a relative stranger as in a standard commercial transaction.\(^{213}\) Thus, for example, one court has suggested that the fiduciary nature of the relationship between a lawyer and a client is a factor to consider in deciding whether this type of restriction on settlement is severable from the rest of the fee agreement.\(^{214}\)

Even where courts have refused to sever the offending provision from the remainder of the agreement and have declared the entire agreement to be void as against public policy, they have routinely permitted lawyers to recover in quantum meruit.\(^{215}\) Occasionally, courts qualify their decisions with the observation that recovery is appropriate at least where there has been no showing of fraud, grossly unprofessional conduct, or other similar conduct.\(^{216}\) But the

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213. See, e.g., Cummings, 442 S.W.2d at 643 (concluding that it would be inappropriate to sever the offending clause where lawyers repeatedly tried to enforce the clause against the client, causing the client to incur costs to defend).
215. See, e.g., Mattioni, 530 F. Supp. at 914 (voiding provision does not prevent attorney from collecting in quantum meruit); Davis v. Webber, 49 S.W. 822, 825–26 (Ark. 1899) (granting recovery in quantum meruit even though contract was against public policy); Jones, 903 P.2d at 35–36 (permitting recovery in quantum meruit when provisions of agreement were unenforceable); Cummings, 442 S.W.2d at 643 (concluding that recovery in quantum meruit was proper even though the provision against settlement and other provisions were not severable); Parents Against Drunk Drivers, 789 P.2d at 57 (concluding that recovery in quantum meruit is appropriate in such cases). Older decisions suggest that there was, at one point, something of a split as to whether quantum meruit was appropriate under these circumstances. See Downey v. N. Pac. Ry. Co., 232 P. 531, 537 (Mont. 1924) (citing cases as recognition of a split). More modern cases almost uniformly permit recovery.
216. See Mattioni, 530 F. Supp. at 914 (permitting recovery in quantum meruit because there was “nothing in the record to show that plaintiff was proceeding in bad faith in attempting to undercut [the client’s] opportunity to settle [the] litigation”); Calvert v. Stoner, 199 P.2d 297, 301 (Cal. 1948) (stating that quantum meruit recovery is appropriate “in the absence of an affirmative showing of fraud or bad faith on the part of the defendant in his dealings with his client”); Jones, 903 P.2d at 35 (“At least when an attorney has not engaged in fraudulent or grossly unprofessional
217. Cummings, 442 S.W.2d at 643.
218. Id.
219. One of the first articles to discuss the issue was Lester Brickman & Lawrence A. Cunningham, Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law, 57 Fordham L. Rev. 149 (1988). Since then, the subject has generated significant discussion, both in legal scholarship and judicial opinions. See David C. Croson & Robert H. Mnookin, Scaling the Stonewall: Retaining Lawyers to Bolster Credibility, 1 Harv. Negot. L. Rev. 65, 69–74 (1996) (arguing that nonrefundable retainers may have strategic benefits in litigation for clients); Steven Lubet, The Rush to Remedies: Some Conceptual Questions About Nonrefundable Retainers, 73 N.C. L. Rev. 271, 274 (citing Brickman & Cunningham, supra) (questioning whether all nonrefundable retainer agreements should be considered unethical); Pamela S. Kunen, Note, No Leg To Stand On: The General Retainer Exception to the Ban on Nonrefundable Retainers Must Fall, 17 Cardozo L. Rev. 719, 721 (1996) (arguing in favor of a ban on all such agreements); cases cited infra notes 220–249 and accompanying text.
221. Id. at 57.
often considered earned upon receipt, courts in many jurisdictions permit general retainers.\textsuperscript{222}

In contrast, special retainers are fees paid in advance for a specific legal service.\textsuperscript{223} Occasionally in their fee agreements, lawyers will assert a right to make these fees nonrefundable, regardless of whether the lawyer performs all of the services contemplated by the agreement.\textsuperscript{224} Thus, the use of these kinds of special nonrefundable retainers has generated much of the controversy. Of course, it is not always so simple to categorize an agreement. There are hybrid agreements in which a client pays both for attorney availability and specific services.\textsuperscript{225} And sometimes lawyers will specifically include a liquidated damages clause in a fee agreement, providing for payment of a designated sum by the client in the event the client terminates the representation early.\textsuperscript{226} Generally, courts deem these types of provisions void as against public policy and unenforceable.\textsuperscript{227} That said, there are still a respectable number of judicial decisions and ethics opinions that permit the use of such provisions,\textsuperscript{228} at least in some circumstances.\textsuperscript{229}

The issues concerning the enforceability of nonrefundable retainers are complex and warrant their own separate discussion. However, the fact that these retainers are permitted in some jurisdictions raises at least of some of the issues addressed in this Article. Critics challenge the use of special nonrefundable

\textsuperscript{222} See id.; Perillo, supra note 1, at 450.
\textsuperscript{223} Apland, 577 N.W.2d at 55 (citing Brickman, supra note 220, at 649).
\textsuperscript{224} See id. at 57.
\textsuperscript{225} Kunen, supra note 219, at 724 (citing Lester Brickman & Lawrence A. Cunningham, Nonrefundable Retainers Revisited, 72 N.C. L. REV. 1, 6 (1993)).
\textsuperscript{226} See Keene v. Reggie, 701 So. 2d 720, 723 (La. Ct. App. 1997); McQueen, Rains & Tresch, LLP v. Citgo Petrol. Corp., 195 P.3d 35, 37 n.3 (Okla. 2008). Given the variety of retainers, relying solely on a definitional approach to determine whether a retainer agreement is permissible may prove problematic. See Alexander K. McKinnon, Note, Analytical Approaches to the Nonrefundable Retainer, 9 GEO. J. LEGAL ETHICS 583, 590–93 (1996) (noting the disadvantages of this approach).
\textsuperscript{227} See, e.g., AFLAC, Inc. v. Williams, 444 S.E.2d 314, 317 (Ga. 1994) (holding that a provision was "unenforceable as a liquidated damages clause"); Apland, 577 N.W.2d at 57 (holding that fees were refundable "notwithstanding any agreement to the contrary"); In re Cooperman, 633 N.E.2d 1069, 1073 (N.Y. 1994) (holding special nonrefundable retainer unenforceable); see also In re Sather, 3 P.3d 403, 413 (Colo. 2000) (holding that attorneys may not enter into nonrefundable fee agreements or otherwise communicate to clients that fees paid are nonrefundable).
\textsuperscript{228} See Bunker v. Meshbesher, 147 F.3d 691, 695 (8th Cir. 1998) (concluding that Minnesota permits reasonable nonrefundable attorney–client fee agreements); Grievance Adm’n, Attorney Grievance Comm’n v. Cooper, 757 N.W.2d 867, 867 (Mich. 2008) (concluding that nonrefundable retainer agreement did not violate ethical rules regarding reasonable fees and retention of client property); McKinnon, supra note 226, at 603–10 (providing survey of ABA and state ethics opinions dealing with nonrefundable retainers and demonstrating that some opinions permit the use of nonrefundable retainers).
\textsuperscript{229} See McQueen, 195 P.3d at 45 (holding that, under "the unique facts presented," liquidated damages clause in a fixed-term retainer agreement was enforceable); see also McKinnon, supra note 226, at 583, 603–10 (describing the states as being "split" on the issue and noting that several states permit the use of nonrefundable retainers with only limited qualifiers).
retainers on a number of grounds. At the most basic level, critics argue that the enforcement of nonrefundable retainer provisions is inconsistent with traditional contract law. Critics argue that special nonrefundable retainers are not valid as a form of liquidated damages because they excuse a lawyer's failure to mitigate damages and they are simply an attempt to secure payment of a lawyer's fee rather than an attempt to compensate a lawyer in the event of client breach. Instead, "the typical nonrefundable retainer is an in terrorem device discouraging client termination rather than a good faith estimate of the net losses the lawyer will sustain upon client breach." Critics also attack nonrefundable retainers on the grounds that they conflict with the policies outlined in legal ethics rules. The use of special nonrefundable retainer provisions implicates several important public policies underlying the ethical rules governing attorneys. Perhaps the most obvious is the policy of protecting a client's absolute right to discharge her lawyer. The rationale underlying the rule in favor of a client's right to discharge an attorney is that the attorney-client relationship is based on trust. Once that trust is lost, the relationship ceases to function effectively. Therefore, given the importance of the attorney-client relationship, a client must retain the ability to discharge an attorney subject only to the requirement that the lawyer is entitled to payment for his services.

Simply stated, a nonrefundable retainer provision serves as a significant disincentive to a client's exercise of the right to discharge her lawyer. In 1994, the New York Court of Appeals concluded that in the clash between the competing policies of freedom of contract and a client's right to discharge a lawyer, the policy in favor of a client's right to discharge should prevail. Consequently, the court held that special nonrefundable retainers are

231. Id. at 178.
232. Id. at 178–79.
233. McKinnon, supra note 226, at 586 (stating that the use of nonrefundable retainers implicates the ethical rules regarding the reasonableness of fees, the client's right to discharge her attorney, and the prohibition against attorneys acquiring a proprietary interest in a cause of action); see also Office of Lawyer Regulation v. Ward (In re Disciplinary Proceedings Against Ward), 691 N.W.2d 689, 694–95 (Wis. 2005) (concluding that a lawyer who refused to return an unearned portion of a retainer violated the ethical rule prohibiting the charging of an unreasonable fee).
234. Lester Brickman & Lawrence A. Cunningham, Nonrefundable Retainers: A Response to Critics of the Absolute Ban, 64 U. Cin. L. Rev. 11, 12–13 (1995) (describing the client's absolute right to discharge an attorney as "the cornerstone upon which the absolute ban on nonrefundable retainers rests").
235. Id. at 14.
236. Id.
238. See Perillo, supra note 1, at 451–52 ("[I]f the client wishes to withdraw from the retainer, recovery by the client of the unearned portion of the fee would be consistent with the law's willingness to allow clients the freedom to change representation.").
239. See In re Cooperman, 633 N.E.2d at 1072.
unenforceable on policy grounds.\textsuperscript{240} Since then, a number of courts have agreed.\textsuperscript{241}

Despite the courts’ general disfavor of special nonrefundable retainers, there are several reasons to be cautious about using the courts’ treatment of such retainers as an example of the tougher approach courts take with respect to attorney fee agreements. First, while courts have expressed concern over special nonrefundable retainers, they have, overall, been accepting of general retainers.\textsuperscript{242} However, in practice, lawyers often use hybrid retainers, thus making it difficult to draw any meaningful distinction between the two.\textsuperscript{243} More importantly, many of the arguments against enforcing special nonrefundable retainers would seem to apply with similar or equal force to general retainers. One of the arguments against special nonrefundable retainers is that a lawyer who has been fired by her client prior to the completion of all of the services contemplated by the fee agreement has not earned all of her fees. Yet, with a general retainer, a lawyer’s fees are based on the lawyer’s availability during a given period. If the client fires the lawyer prior to the end of that period, the lawyer has not been “available” for the entire period. Consequently, the lawyer’s entire fee has not been earned.\textsuperscript{244} Moreover, general retainers implicate nearly all of the same policy concerns regarding client choice as special nonrefundable retainers.\textsuperscript{245} This has led several commentators to assert that there is no principled distinction between general and special retainers that justifies the courts’ different treatment.\textsuperscript{246} Despite this argument, courts have not reexamined the long-standing belief that general retainers are consistent with the ethical rules and hence enforceable.

Second, as mentioned above, a substantial minority of jurisdictions continue to permit the use of special nonrefundable retainers.\textsuperscript{247} In some of these decisions, courts have failed to engage in any type of explicit balancing of competing interests and have instead allowed the use of special nonrefundable retainers with little to no comment.\textsuperscript{248} Finally, even where a court refuses to

\textsuperscript{240} Id.
\textsuperscript{241} See, e.g., Cuyahoga County Bar Ass’n v. Cook, 901 N.E.2d 225, 227 (Ohio 2009) (finding that the special nonrefundable retainer in an attorney–client contract violated the ethical rule prohibiting unreasonable fees).
\textsuperscript{242} See supra note 222 and accompanying text.
\textsuperscript{243} John M.A. DiPippa, Lawyers, Clients, and Money, 18 U. Ark. Little Rock L.J. 95, 109 (1995) (noting the argument that “retainers are almost never exclusively either general or special” but instead “are a mixture of payment for availability and payment for specified services”).
\textsuperscript{244} See Lubet, supra note 219, at 287; Kunen, supra note 219, at 735; McKinnon, supra note 226, at 591.
\textsuperscript{245} See Lubet, supra note 219, at 288; Kunen, supra note 219, at 734.
\textsuperscript{246} Lubet, supra note 219, at 287; Kunen, supra note 219, at 721; see also McKinnon, supra note 226, at 591 (stating that “under certain factual scenarios, the definitions fail”).
\textsuperscript{247} See supra notes 228–229 and accompanying text.
\textsuperscript{248} See, e.g., Bunker v. Meshbesher, 147 F.3d 691, 695 (8th Cir. 1998) (holding that Minnesota law permits reasonable “non-refundable fixed or flat fee retainer agreements”);
enforce a nonrefundable retainer provision on policy grounds, a lawyer can usually rest at least a little easier knowing that quantum meruit recovery is still the norm in these cases.249

V. WHY THINGS ARE THE WAY THEY ARE AND THE WAY THEY SHOULD BE

To recap, in a few situations, courts have been hesitant to declare that a fee agreement that fails to comply with an ethical rule governing the legal profession is unenforceable on policy grounds despite the strong public policy articulated by the rule. Where a court does decide that a fee agreement is unenforceable due to an ethics violation, a lawyer will still normally be able to recover in quantum meruit. This approach, although reflected in the Restatement (Third) of the Law Governing Lawyers, is in contrast with the traditional rules of contract law as reflected in the Restatement (Second) of Contracts and other authorities.250 Typically, courts offer little explanation for their decisions to permit lawyers to recover in the face of fee agreements that violate ethical rules or that otherwise offend public policy. Occasionally, there is some reference to the need to deter unethical behavior with respect to fee agreements,251 but such references are the exception rather than the norm. More often, a court will explain its decision by saying that a client would be unjustly enriched if the client received the lawyer’s services for free.252 But rarely is there much of an attempt to balance this concern against the strength of the policy value underlying the ethical rule at issue.253

Assuming then, that courts treat lawyers more favorably than they do other parties to contracts that offend public policy, the obvious question is why?254

249. See Wong v. Michael Kennedy, P.C., 853 F. Supp. 73, 81 (E.D.N.Y. 1994) (citing In re Cooperman, 633 N.E.2d 1069, 1072 (N.Y. 1994)) (holding that a special nonrefundable retainer agreement was per se violative of public policy but that the attorney could recover under quantum meruit for the reasonable value of the services rendered); Jennings v. Backmeyer, 569 N.E.2d 689, 691 (Ind. Ct. App. 1991) (concluding that a nonrefundable fixed fee contract was illusory and that the attorney was entitled only to the reasonable value of the services actually rendered); see also McQueen, Rains & Tresch, LLP v. Citgo Petrol. Corp., 195 P.3d 35, 44 & nn.21–23 (Okla. 2008) (providing list of cases where courts refused to enforce nonrefundable retainers and, in some cases, allowed recovery in quantum meruit).

250. See supra Parts II, III.

251. See supra note 176 and accompanying text.

252. See supra notes 143, 172 and accompanying text.

253. See supra note 248 and accompanying text.

254. I, of course, concede that courts sometimes enforce nonlawyer fee agreements that violate a professional rule of ethics or consumer protection statute similar to those discussed in this Article. See Gannon & Son, Inc. v. Emerson, 435 A.2d 449, 450 (Md. 1981) (enforcing an oral agreement for home improvement construction work despite the fact that a statute provided that such agreements must be in writing). Nor can I deny that courts sometimes adopt a more liberal approach to the issue of recovery in quantum meruit than that outlined in the Restatement (Second) of Contracts in these kinds of cases. Indeed, some courts seem to take a particularly dim view of total forfeiture in the event a provision runs afoul of some public policy. See Daynard v. Ness, Motley,
Why do courts depart from basic rules of contract law in the case of lawyer fee agreements? And if the approach of the majority of courts is misguided, what are the alternatives?

A. Why the Special Rules for Attorney Fee Agreements?

It is entirely understandable and, indeed, appropriate for state supreme courts to take a special interest in cases involving fee agreements that run afoul of the disciplinary rules governing lawyers. After all, state supreme courts have the authority to regulate the practice of law in their states. Courts have often relied upon this fact as part of their justification for invalidating lawyer fee agreements.

Moreover, the special concerns associated with the lawyer–client fiduciary relationship and the prevalence of disciplinary rules addressing that relationship may, in some instances, justify a departure from traditional contract rules or a different application of those rules. Professor Perillo was absolutely correct when he noted that the law of lawyers’ contracts is different. It is different because of the special concerns associated with the lawyer–client relationship and because of the role that lawyers play as public citizens and in the administration of justice. Attorney’s fees occupy a special place in the

Loadholt, Richardson & Poole, P.A., 188 F. Supp. 2d 115, 125 (D. Mass. 2002) (“Massachusetts courts rarely require complete forfeiture of the contract, sometimes allow recovery for the fair and reasonable value of the services rendered, and sometimes permit recovery on the contract in its entirety.”). That said, one need not look hard to find decisions in which courts refused to enforce fee agreements between nonlawyers that violated professional rules of ethics or consumer protection statutes similar to those discussed in this Article and also refused to permit quantum meruit recovery. See Caulkins v. Petrillo, 513 A.2d 43, 47 (Conn. 1986) (holding that an oral home improvement contract was unenforceable because it failed to comply with a statutory requirement that such contracts be in writing); Osteen v. Morris, 481 So. 2d 1287, 1290 (Fla. Dist. Ct. App. 1986) (refusing to permit a motor vehicle repair shop to recover on a quantum meruit basis where the shop failed to provide a customer with a written estimate as required by statute); Maynes Real Estate, Inc. v. McPherson, 353 N.W.2d 425, 428 (Iowa 1984) (holding an oral real estate listing contract to be unenforceable due to its failure to comply with regulations and refusing to permit quantum meruit recovery). Assuming that the Restatement (Second) of Contracts truly restates the general approach to these kinds of cases, there can be no dispute that the courts have generally adopted a different approach when it comes to lawyer fee agreements.

255. Long, supra note 93, at 1081–82 (citing WOLFRAM, supra note 97, § 2.2.2).


257. Perillo, supra note 1, at 443–45.

258. See In re Cooperman, 633 N.E.2d 1069, 1072 (N.Y. 1994) (“[A]ttorney–client fee agreements are a matter of special concern to the courts and are enforceable and affected by lofty principles different from those applicable to commonplace commercial contracts.”); MODEL RULES OF PROF’L CONDUCT pmbl. para. 6 (2009) (“As a public citizen, a lawyer should seek improvement
administration of justice. For example, the promise of attorney’s fees in civil rights cases persuades attorneys to take cases they might not otherwise be inclined to take.\textsuperscript{259} The ability of a lawyer to charge a contingent fee may make it possible for an individual to obtain representation he might not otherwise be able to obtain.\textsuperscript{260} There is also growing concern over the ability of people, not just of lower income, but of the middle class, to afford quality legal representation.\textsuperscript{261}

When lawyers charge excessive fees or otherwise frustrate important policy goals through the use of a fee agreement, they limit access to justice and cause the public to lose faith in the legal system. One court explained this concern as follows:

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.\textsuperscript{262}

Therefore, it should hardly be surprising to see special contract rules develop for attorneys.\textsuperscript{263}

Nor should it be surprising to find that judges, for personal reasons, are inclined to take a special interest in cases involving fee agreements that arguably offend public policy. Given their backgrounds as lawyers, judges are likely to view with interest disputes involving lawyers. Fee disputes would seem to be particularly salient issues for judges. As former lawyers, judges know something about the work of lawyers and its value that they do not necessarily know about other professions and occupations. Many judges were not only once lawyers but successful lawyers.\textsuperscript{264} They remember the long hours and the compensation that came with it. Thus, many judges are likely to view fee disputes as special in a

\begin{itemize}
  \item \textsuperscript{260} See supra note 164 and accompanying text.
  \item \textsuperscript{261} See George C. Harris & Derek F. Foran, The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession’s Shift to a Corporate Paradigm, 70 FORDHAM L. REV. 775, 789 (2001).
  \item \textsuperscript{262} Baruch v. Giblin, 164 So. 831, 833 (Fla. 1935).
  \item \textsuperscript{263} See Perillo, supra note 1, at 445 (suggesting that different treatment of lawyer contracts is justified).
  \item \textsuperscript{264} Barton, supra note 13, at 460.
\end{itemize}
way that merits special attention and that can benefit from the special insight a judge may bring to these cases.\textsuperscript{265}

B. Why the Preferential Treatment for Attorney Fee Agreements?

Special interest on the part of a judge is certainly understandable in these cases. But what accounts for the generally lawyer-friendly approach? Professor Ben Barton has suggested one possibility.

Barton hypothesizes that when confronted with an issue that "will significantly affect the interests of the legal profession," courts will decide the issue "in the way that offers the best result for the legal profession,"\textsuperscript{266} In other words, "if there is a clear advantage or disadvantage to the legal profession in any given question of law, . . . judges will choose the route (within the bounds of precedent and sembliness) that benefits the profession as a whole."\textsuperscript{267} Barton offers several examples to prove his hypothesis, including the special rules prohibiting the use of noncompete agreements among attorneys and the lawyer-friendly rules governing legal malpractice claims.\textsuperscript{268} Situations like those discussed in this Article would seem to fit neatly into Barton's list of examples.

Barton also offers several explanations as to why, when presented with the choice, judges will favor the interests of the legal profession.\textsuperscript{269} Although some of the reasons offered by Barton involve subconscious factors, others relate quite directly to judges' self-interests and natural sympathies.\textsuperscript{270} First, as former lawyers, judges may be more sympathetic to the practical realities of the practice of law than they are to the realities of other professions.\textsuperscript{271} Judges are highly dependent upon the goodwill of practicing lawyers for their initial appointments, their tenure in office, and their salaries.\textsuperscript{272} Moreover, judges are, of course, also lawyers and continue to think of themselves as such and socialize with other

\textsuperscript{265} See id. ("On a subconscious level, when judges face a question that will impact the legal profession[,] judges naturally react in terms of how it will affect 'us' more than 'them.'"); Ted Schneyer, Who Should Define Arizona’s Corporate Attorney-Client Privilege?: Asserting Judicial Independence Through the Power to Regulate the Practice of Law, 48 ARIZ. L. REV. 419, 455 (2006) (arguing that judges "have special insight into the value of the attorney-client privilege in fostering candid lawyer-client relations because" the judiciary bears "primary responsibility for regulating law practice"); Ian Weinstein, Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing, 40 AM. CRIM. L. REV. 87, 123 (2003) (explaining that judicial behavior is shaped by an "ego-centric bias," which causes them "to evaluate unrealistically how special" some cases are in comparison to others).

\textsuperscript{266} Barton, supra note 13, at 454.

\textsuperscript{267} Id. at 454–55.

\textsuperscript{268} Id. at 487–503.

\textsuperscript{269} Id. at 458–60.

\textsuperscript{270} See id.

\textsuperscript{271} See id. at 460 (citing Benjamin H. Barton, An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?, 37 GA. L. REV. 1167, 1197–98 (2003)).

\textsuperscript{272} Id. at 458 (citing Barton, supra note 271, at 1198–200).
273. Naturally then, a judge could be expected to "think hard about the reactions of his or her peer group and friends to a decision that will have a substantial effect on them." 274

These considerations would seem to be at play in the fee dispute situations described in this Article. A legal question concerning the enforceability of a fee agreement is the ultimate "pocketbook issue" for a lawyer. Adopting and enforcing a presumption against compensation for services rendered would tend to earn a judge the enmity of the bar. Disputes over the enforceability of fee agreements bring to bear substantial pressure—political, financial, and social—on judges. 275 Indeed, one judge seemed keenly aware of the dilemma judges face in these cases when he observed that "[f]ee disputes require careful and principled consideration because of the public's concern that judges might sympathize with their colleagues at the bar when it comes to fees and because of the legal community's concern that judges are unfamiliar with the economic realities of modern law practice." 276

Consistent with Barton's hypothesis, it makes sense that judges would also tend to focus more on compensation issues than the issue of whether a fee agreement is enforceable. Given long-standing precedent on the subject of unethical fee agreements and the courts' special role in policing these agreements, judges are limited in their ability to enforce fee agreements that fail to comply with the ethical rules governing lawyers. However, questions regarding recovery in quantum meruit or for unjust enrichment are rooted in equity and are generally left to a judge's discretion. 277

Subconscious factors might also be at work. 278 In light of their prior life experiences, one should not be surprised to see judges focus primarily on the question of appropriate compensation rather than the question of enforceability. As former lawyers, judges may view themselves as having special insight into the relative worth of a lawyer's services in a given case and possessing a more complete frame of reference in terms of understanding the realities of the billable hour or sifting through the conflicting testimony of experts as to the dollar value of a lawyer's services. Indeed, some courts have expressly recognized that judges are not limited to the evidence presented as to the value of a lawyer's

273. Id. at 458–59.
274. Id. at 459.
275. See id. at 457–59.
277. See, e.g., Lewis v. Lewis, 189 P.3d 1134, 1141 (Colo. 2008) ("[E]quity rulings generally lie within the discretion of the trial court . . . ."); Reid, Johnson, Downes, Andrachik & Webster v. Lansberry, 629 N.E.2d 431, 437 (Ohio 1994) ("Because the factors to be considered [for determining the reasonableness of attorney fees] are based on the equities of the situation, those factors, as well as the ultimate amount of quantum meruit recovery by a discharged attorney, are matters to be resolved by the trial court within the exercise of its discretion.").
278. See Barton, supra note 13, at 459–60 (discussing subconscious reasons why judges favor the interests of the legal profession).
services and may rely on their prior professional experience in determining the amount of quantum meruit recovery. 279 This might include experiences from their prior lives as lawyers concerning difficult clients and the problems sometimes associated with receiving compensation for their legal services. 280 As a result, the relevant question—or at least the more interesting one—for many judges is not the amorphous question of whether quantum meruit recovery is appropriate, but the more tangible question—and the question they likely believe their prior experience has prepared them to answer—of how much a lawyer should be allowed to recover in quantum meruit.

Another possible and less critical explanation for the reluctance of judges to prohibit completely a lawyer from recovering the value of her services in the face of an ethically questionable fee agreement is that the majority of courts have simply arrived at the proper resolution of the competing interests. Courts are understandably concerned about the potentially harsh consequences of declaring a fee agreement unenforceable on policy grounds. Perhaps then, courts, in the legitimate exercise of the wide discretion afforded to them, 281 have concluded that the case of an attorney—fee agreement that fails to comply with an applicable ethical rule is special enough to warrant departure from traditional contract rules.

Because courts usually treat the ethics rules as substantive law for purposes of fee agreements, 282 lawyers face constraints on their ability to enter into fee agreements that other nonprofessionals do not face. 283 Even when no specific ethical rule governs, courts have imposed seemingly tougher standards on lawyers than other individuals due to the fiduciary nature of the lawyer–client relationship, concerns over “the ability of the lawyer to dominate the client,” and the need to promote the administration of justice. 284 Thus, lawyers may face more land mines in the enforceability of their fee agreements than other professionals.

In some instances, a blanket rule prohibiting recovery for employing certain kinds of fee agreements might unfairly and unnecessarily preclude lawyers and clients from entering into mutually beneficial arrangements. For example, take the case of special nonrefundable retainers. The question of whether special

279. See, e.g., Will v. Nw. Univ., 881 N.E.2d 481, 505 (Ill. App. Ct. 2007) (“[T]he trial court ‘is not limited to the evidence presented in arriving at a reasonable fee but may also use the knowledge it has acquired in the discharge of professional duties to value legal services rendered.’” (quoting Johns v. Klecan, 556 N.E.2d 689, 695 (Ill. App. Ct. 1990))).

280. See Mulhern v. Rosch, 494 N.E.2d 1327, 1335 & n.14 (Mass. 1986) (taking into account, when determining the reasonableness of an attorney’s fee, that the client was “difficult,” having fired several previous attorneys, and that another attorney had difficulty collecting from the client).

281. See supra note 75 and accompanying text.

282. See supra note 4 and accompanying text.

283. See Perillo, supra note 1, at 445 (“[C]ontactual freedom is muted in the lawyer-client and the lawyer-lawyer contexts.”).

284. Id. at 490 (explaining that the presumption of undue influence that exists in contracts between lawyers and clients exists for these reasons, in addition to “the assumption by the client that the lawyer has no interest that conflicts with the client’s own interests”).

https://scholarcommons.sc.edu/sclr/vol61/iss2/4
nonrefundable retainers should be enforceable involves a choice between conflicting public policies, including the policy in favor of freedom of contract285 and the policy in favor of a client’s right to discharge an attorney.286 One could argue, as has Professor Steven Lubet, that the policy in favor of client choice need not always prevail in this conflict.287 For example, Lubet suggests the possibility that sophisticated clients might, with full understanding of the possible ramifications, enter into such agreements because they believe them to be beneficial.288 In these kinds of cases, a blanket rule against the use of nonrefundable retainers might actually run counter to the policy in favor of client autonomy.289

In other instances, the potential land mines imposed by the ethical rules might conceivably trip up even the best-intentioned lawyer.290 In such cases, denying the lawyer the ability to recover for the reasonable value of the services provided truly might amount to a forfeiture that is disproportionate to the policy goals at stake. Accordingly, the more lawyer-friendly approach that permits lawyers to recover for the reasonable value of their services in the face of a fee agreement that conflicts with an ethical rule may simply be a reflection of the reality that the practice of law is, now more than ever, also a business,291 and it is a business that is highly regulated when it comes to compensation agreements.

In deciding whether to permit recovery of a lawyer’s fees, a court must take these realities into account while weighing the competing interests. In light of the fact that a lawyer who violates an ethical rule regarding fee agreements may also face professional discipline, the decision of the majority of courts to refuse to enforce the agreement but permit quantum meruit recovery may, in the minds of most judges, be an appropriate resolution of the competing interests. Because the public policy underlying the ethical rule can still be vindicated through the disciplinary process and by refusing to enforce the fee agreement, complete forfeiture of the fee would be disproportionate to the policy at stake. This is especially true, the argument goes, because the threat of professional discipline and nonenforcement of the fee agreement should be enough to deter most

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285. See id. at 445.
286. See id. at 450.
287. See Lubet, supra note 219, at 274 (challenging the proposition that all nonrefundable retainer agreements are per se unethical).
288. Id. at 276; see also McQueen, Rainis & Tresch, LLP v. Citgo Petrol. Corp., 195 P.3d 35, 47 (Okla. 2008) (“It would be counterproductive, in an era of increasing concerns over the cost of legal services, to preclude a client from bargaining for a reduction in fees in exchange for a reasonable limitation on the right of discharge.” (citing McKenzie Constr., Inc. v. Maynard, 758 F.2d 97, 101–02 (3d Cir. 1985))).
289. See Lubet, supra note 219, at 275–76.
290. See, e.g., Young v. Southgate Dev. Corp., 399 N.E.2d 27, 28 (Mass. 1980) (involving a lawyer who tried but was unable to have his client sign a contingency fee agreement and thus was denied recovery of the contingent fee amount).
lawyers from violating the ethical rule.\textsuperscript{292} Thus, the majority approach in these situations may conceivably be less the result of the inherent bias of judges in favor of other lawyers than it is the result of a principled approach to a difficult problem.

C. What Approach Should Courts Take?

1. Negative Consequences of the Current Approach

The decision to enforce a fee agreement that fails to comply with an ethical rule might be justified in some instances. So too might it make sense in some instances to permit quantum meruit recovery when a fee agreement is held to be unenforceable due to its failure to comply with an ethical rule. However, as the default approach in these cases, permitting lawyers who have drafted unethical fee agreements to recover the value of their services despite the unenforceable nature of the agreement has at least three potential negative consequences.

The first possible negative consequence involves deterrence. At a minimum, the courts’ tendency to permit quantum meruit recovery in the face of unethical fee agreements calls into question the assertion that the combined threat of professional discipline and having an agreement held unenforceable has a significant deterrent effect on the conduct of attorneys. At most, the courts’ approach may actually encourage attorneys to include unethical provisions in their fee agreements, knowing that they have the backstop of quantum meruit recovery. The fact that some lawyers continue to draft fee agreements that blatantly violate well-established legal and ethical rules regarding fee agreements undercuts the argument that the practice of declaring such agreements unenforceable but still permitting quantum meruit recovery is adequate to vindicate the public’s interest and deter similar misconduct. In some cases, the failure to comply with a rule may be understandable. But in others, a lawyer’s failure can only be explained as a willful and blatant attempt to skirt the ethical rules of the profession.

Take the case of contingent fee agreements in divorce proceedings. These agreements have been held to be void as against public policy for over 100 years.\textsuperscript{293} The ethical rule prohibiting such agreements is as clear as it could be.\textsuperscript{294} In short, no lawyer charging a fee in a domestic relations matter could reasonably claim ignorance of the rule. Thus, one would expect that these kinds of fee agreements would be exceedingly rare. Yet, fee disputes between lawyers and their clients involving these kinds of arrangements still occasionally make their way into the courts.\textsuperscript{295}

\textsuperscript{292} See supra note 176 and accompanying text.
\textsuperscript{293} See supra note 146 and accompanying text.
\textsuperscript{294} See Model Rules of Prof’l Conduct R. 1.5(d)(1) (2009).
\textsuperscript{295} See supra Part IV.A.2; see also Rachal v. Rachal, 795 So. 2d 1286, 1291 (La. Ct. App. 2001) (involving an application for attorney’s fees where the attorney charged a contingency fee in
A more common example of flagrant rule breaking is the fee agreement that explicitly restricts the right of a client to settle a case without the lawyer’s permission. It is certainly understandable that a lawyer working under a contingency fee arrangement would want to limit the ability of her client to reject a sweetheart settlement offer. But it is also plainly unethical. The prohibition could not be any more well-established. If the threat of professional discipline and the inability to recover the fee provided for in the agreement were truly deterrents, one would expect to see few cases involving such fee agreements in recent times. Yet, cases involving such fee agreements continue to make their way into the reporters.

In theory, the threat of professional discipline might help deter unethical fee agreements. This seems particularly true in jurisdictions in which a disciplinary authority has the authority to recommend restitution or fee forfeiture as part of a

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296. See supra notes 181–184 and accompanying text.

297. See supra Part IV.B.1; see also Ellis Rubin, P.A. v. Alarcon, 892 So. 2d 501, 504 n.5 (Fla. Dist. Ct. App. 2004) (involving an agreement where the law firm conditioned the client’s right to settle on written permission by the law firm); In re Lanksy, 678 N.E.2d 1114, 1117 (Ind. 1997) (imposing discipline on an attorney who included a settlement provision in a fee agreement); In re Kramer, 664 N.Y.S.2d 1, 3 (N.Y. App. Div. 1997) (disciplining an attorney for inserting language into a retainer agreement that prohibited his client from settling for less than $100,000 without the attorney’s consent). Admittedly, there may be some deterrent effect at work because many lawyers now attempt to avoid this rule and yet accomplish roughly the same result by utilizing hybrid contingent fee agreements that require a client to pay an hourly rate in the event the client, over the lawyer’s objection, refuses to settle a matter. See, e.g., Compton v. Kittleson, 171 P.3d 172, 174, 180 (Alaska 2007) (rejecting a hybrid provision entitling an attorney to recover at an hourly rate of $175 if the client agreed to settle for an amount that would entitle the attorney to less than $175 an hour for services rendered); Ingalsbe v. Stewart Agency, Inc., 869 So. 2d 30, 31 (Fla. Dist. Ct. App. 2004) (involving a fee agreement that provided that the client would pay his lawyer $300 an hour if the client settled against the lawyer’s advice); Gilbert v. Evan, 822 So. 2d 4, 46 (La. Ct. App. 2002) (upholding a hybrid agreement that provided for payment of an hourly rate if the client discharged the lawyer prior to settlement or trial); Robinson, Bradshaw & Hinson, P.A. v. Smith, 498 S.E.2d 841, 847 (N.C. Ct. App. 1998) (striking a contingent fee agreement in a divorce proceeding that provided that if the client reconciled with her spouse, the law firm would be entitled to recover 150% of its normal hourly wage). Several ethics opinions have concluded that the inclusion of such hybrid agreements is unethical. See Long, supra note 291, at 956. Some courts have held that such agreements are not per se unenforceable on policy grounds, see Gilbert, 822 So. 2d at 46, but that the agreement in question was unenforceable because it unduly limited the client’s right to settle, see Compton, 171 P.3d at 180. See generally Robinson, Bradshaw & Hinson, P.A., 498 S.E.2d at 847 (declaring a hybrid provision unenforceable but severing that provision and enforcing the rest of the agreement).
sanction. The reality, however, is that the prospect of professional discipline is unlikely to be much of a deterrent in these situations. Professional discipline is, in general, a relatively uncommon occurrence. Discipline related to fee agreements is rarer still. Clients know when their lawyers do not return their phone calls or fail to file within the statute of limitations. These are forms of misconduct that clients can see and intuitively understand. But only fairly sophisticated clients are likely to know that limitations on their ability to settle or the charging of contingent fees in divorce proceedings are ethically prohibited or that there is even anything particularly objectionable about them. Other clients may be sufficiently intimidated by contract language purporting to limit a client’s right to settle or to make fees nonrefundable that they fail to assert their rights. Therefore, the client may have no reason to even suspect that anything potentially objectionable has taken place.

298. See Tenn. Sup. Ct. R. 9 § 4.7 (“Upon order of a hearing panel or court, or upon stipulation of the parties, and in addition to any other type of discipline imposed, the respondent may be required to make restitution to persons or entities financially injured as a result of the respondent’s misconduct.”); In re Hager, 812 A.2d 904, 924 (D.C. 2002) (concluding that fee forfeiture was an appropriate condition to the reinstatement of an attorney who was suspended for entering into a secret agreement to drop a lawsuit against defendant); Fla. Bar v. St. Louis, 967 So. 2d 108, 123–25 (Fla. 2007) (requiring an attorney who agreed as part of an engagement agreement that his firm would not represent future clients in actions against defendant to forfeit over $2 million in fees).

299. See generally Fred C. Zacharias, The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation, 44 Ariz. L. Rev. 829, 857 (2002) (“[U]nderlying most professional regulation is the faulty assumption that professional discipline works to deter lawyer misconduct.”).


302. The authors of the Restatement (Third) of the Law Governing Lawyers explained as follows:

Information about fees for legal services is often difficult for prospective clients to obtain. Many clients do not bargain effectively because of their need and inexp erience. The services required are often unclear beforehand and difficult to monitor as a lawyer provides them. Lawyers usually encourage their clients to trust them.


303. See In re Sather, 3 P.3d 403, 413 (Colo. 2000).
Assuming that client detection of and objection to an unethical fee provision actually is a realistic possibility in a given case, the loss of an expected fee is more likely to be a deterrent to lawyer misconduct than is professional discipline. But here, the legal profession has gone to great lengths to limit the lawyer's potential losses. While the loss of the fee described in an unethical fee agreement may hurt a lawyer, quantum meruit recovery may do much to soften the blow. Therefore, some lawyers may conduct their own cost–benefit analysis and continue to include unethical provisions in their fee agreements, knowing that in the unlikely event a client complains to disciplinary authorities or challenges the agreement in a civil action, the lawyer may fall back on recovery in quantum meruit. And, in some instances, this recovery may still be substantial—sometimes even the same amount as the lawyer would have recovered had the agreement been enforceable.

The second possible adverse consequence of adopting a presumption in favor of quantum meruit recovery is that the public’s faith—as well as the faith of members of the legal profession—in the administration of justice will be undermined. The Restatement (Third) of the Law Governing Lawyers and the Restatement (Second) of Contracts establish two different standards for recovery in the face of an agreement that is unenforceable on policy grounds: one standard for lawyers and one standard for everyone else. Nonlawyers and members of the legal profession can hardly be blamed for looking at these rules with a jaundiced eye. In short, the current approach tends to feed the belief that the legal profession looks after its own.

Third, there is a real possibility that the majority approach fails to vindicate the policy values underlying the ethical rules. With professional discipline sometimes a remote possibility in the case of an unethical fee provision, cases involving the enforceability of such provisions may often be the only opportunity to give effect to the policies underlying an ethical rule and to express the legal profession's lack of tolerance for conduct that violates that rule. Yet, all too often, courts offer little in the way of an explanation as to why permitting a lawyer to recover in the face of an unethical fee agreement is consistent with the policies underlying the ethical rule in question. Allowing attorneys to recover substantial sums, sometimes approaching sums that they would have received had the agreement actually complied with the ethical rules, with little or no explanation as to why such recovery is appropriate, undermines the policy values underlying the ethical rules regarding fee agreements.

304. Cf. Hazard, supra note 65, at xxi ("[T]he Restatement recognizes what everyone involved with the ethics codes knows . . . , namely that the remedy of malpractice liability and the remedy of disqualification are practically of greater importance in most law practice than is the risk of disciplinary proceedings."); Richmond, supra note 117, at 79 ("[P]otential civil liability often deters lawyer misconduct more effectively than does the threat of professional discipline.").

305. See supra note 92 and accompanying text.

306. See supra Parts II, III.
2. Precluding Quantum Meruit Recovery and Vindicating the Policies Underlying the Rules

The law generally seeks to avoid forfeiture, and courts should be cautious about what one court has described as “the sentimental fallacy of piling on sanctions unthinkingly once an illegality is found.”307 There may indeed be situations in which denying a lawyer any recovery would be disproportionate to the public’s interest in promoting the policy value underlying an ethical rule. But in light of the potential negative consequences of permitting lawyers to recover in the face of plainly unethical fee agreements, recovery in quantum meruit should, in keeping with the approach described in the Restatement (Second) of Contracts, be the exception rather than the norm.308 Where it is permitted, courts need to better explain their decisions to depart from the standard presumption against recovery when a contract offends public policy.

In many of the other situations described in this Article, it is difficult to see how, if one applies the approach described in the Restatement (Second) of Contracts in a conscientious manner, recovery in quantum meruit can be justified on any grounds. According to the Restatement, courts should consider factors such as “the extent of the party’s deliberate involvement in any misconduct, the gravity of that misconduct, and the strength of the public policy.”309 For example, applying these factors to the situation in which a lawyer has included a clause in a fee agreement limiting the ability of a client to settle without the lawyer’s permission, there should ordinarily be only one outcome: total forfeiture. Applying the Restatement’s factors, as the party drafting the agreement, the lawyer’s involvement in the misconduct would be extensive; the misconduct amounts to a deliberate attempt to disadvantage a party to whom the lawyer owes a fiduciary obligation, thus rendering the misconduct quite serious; and the public policy at issue—the absolute right of a client to settle a matter—lies at the core of the law governing lawyers. Thus, unless the forfeiture would be extreme or other mitigating factors are present, recovery in any form on the part of a lawyer who included such a provision should be denied.

Even if courts believe that denying any recovery would be unfair, they still need to more clearly examine the underlying objectives of an ethical rule and explain how those objectives may nonetheless be furthered by enforcing the fee agreement or permitting quantum meruit recovery. If the public and the legal profession are to feel confident that courts are truly seeking to advance the values underlying the ethical rules and not simply protecting their own, courts need to be more rigorous in their analysis and explanation of their decisions permitting recovery.

308. See supra notes 57–59 and accompanying text.
For example, the decisional law in Massachusetts on the subject of contracts in violation of public policy unmistakably evinces a reluctance to impose total forfeiture. However, the Massachusetts courts have not gone so far as to carve out an entirely separate approach for lawyer fee agreements that allegedly offend public policy. Instead, after determining that a lawyer fee agreement offends public policy, Massachusetts courts apply the same context-specific, multifaceted test to decide whether quantum meruit recovery should be permitted in disputes involving lawyer fee agreements as they do in other contractual settings. These factors include the following:

[T]he nature of the subject matter of the contract; . . . the extent of the illegal behavior; was that behavior a material or only an incidental part of the performance of the contract (were “the characteristics which gave the plaintiff’s act its value to the defendant . . . the same as those which made it a violation . . . of law”); what was the strength of the public policy underlying the prohibition; how far would effectuation of the policy be defeated by denial of an added sanction; how serious or undeserved would be the forfeiture suffered by the plaintiff, how gross or undeserved the defendant’s windfall.

Therefore, although Massachusetts courts only “rarely require complete forfeiture” of a contract, they nonetheless engage in an explicit consideration of how their decisions will impact the public policy at stake.

Different provisions in a fee agreement and different facts might yield different results. What is important, however, is that courts give greater explicit weight to the public policies at stake in these cases. Far too often, courts seem predisposed toward allowing lawyers to recover the value of their services without giving due regard to the potential harm to the public’s interest in the administration of justice that the lawyers’ transgressions may cause. At a minimum, courts need to conduct the balancing test suggested by the Restatement (Second) of Contracts and explain their conclusions as to how the competing policy interests align in order for the public and the legal profession to have faith in the courts’ decisions.


311. See id. at 127 (“Massachusetts courts have imported the Town Planning [a case involving a contract dispute between an engineering firm and its client] factors into cases involving contracts with attorneys in which the attorneys have violated the rules of ethics that govern them.”).

312. Town Planning, 342 N.E.2d at 711.

313. Daynard, 188 F. Supp. 2d at 125.

314. See Restatement (Second) of Contracts § 197 cmt. b.
Finally, in addition to explicitly weighing the policy interest at stake against the other factors listed in the Restatement during the initial decision as to whether to permit quantum meruit recovery, courts should also take the policy interest into account when determining how much the reasonable value of an offending lawyer’s services are worth. The fact that a lawyer violated the ethical rules of the profession should be a relevant factor in assessing the reasonable value of the lawyer’s services.\textsuperscript{315} For example, in \textit{United States v. 36.06 Acres of Land},\textsuperscript{316} a case from a federal district court in New Mexico, a law firm that withdrew from representation after a client refused to accept a settlement offer sought to recover on an oral contingency fee agreement.\textsuperscript{317} The court concluded that the firm’s failure to comply with the ethical rule governing contingent fees rendered the agreement unenforceable but that quantum meruit recovery was nonetheless appropriate because, in part, the “client’s refusal to accept a reasonable settlement offer” provided the firm with “justifiable cause” to withdraw.\textsuperscript{318} After determining what it believed a reasonable fee would ordinarily be under the circumstances, the court considered what effect the firm’s violation of the ethical rules should have.\textsuperscript{319} The court viewed part of its role in cases in which a lawyer with unclean hands seeks recovery “to vindicate the public policy evidenced by those rules.”\textsuperscript{320} Accordingly, the court concluded “that a reasonable fee under circumstances where the ethical rules have been breached by not putting the fee agreement in writing should be less than a reasonable fee in circumstances where no ethical breach has occurred.”\textsuperscript{321} Ultimately, the court reduced the firm’s quantum meruit recovery by one-third.\textsuperscript{322}

\section*{VI. Conclusion}

Lawyer–client fee agreements occupy an unusual status in the law. Given the important role lawyers’ fees play in the administration of justice, lawyer–client fee agreements are invalidated on public policy grounds more frequently than other types of contracts. In spite of this fact—or perhaps because of it—the law governing lawyer–client fee agreements permits lawyers to recover for the reasonable value of their services when traditional contract law would prohibit such recovery. Although this result can sometimes be explained on a case-by-case basis, the frequency with which courts permit lawyers to recover in the face

\begin{footnotes}
\footnotetext{315. See Sands v. Runyon, 28 F.3d 1323, 1334 (2d Cir. 1994) (approving the lower court’s consideration of a fee agreement that prohibited the client from settling without the attorney’s consent in determining the appropriate attorney’s fees).}
\footnotetext{316. 70 F. Supp. 2d 1272 (D.N.M. 1999).}
\footnotetext{317. \textit{Id.} at 1274.}
\footnotetext{318. \textit{Id.} at 1276–77.}
\footnotetext{319. \textit{Id.} at 1277.}
\footnotetext{320. \textit{Id.}}
\footnotetext{321. \textit{Id.}}
\footnotetext{322. \textit{Id.}}
\end{footnotes}
of fee agreements that violate well-established ethical and legal rules raises some troubling questions. Ultimately, the public’s faith in the legal profession and the policies underlying the ethical rules governing lawyers would be better served by a return to the traditional approach dealing with contracts in violation of public policy and a clearer application of the considerations governing those contracts.