1965

Acquiring Interest in Litigation--The Role of the Contingent Fee

Jerry P. Rhoads
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Legal Ethics and Professional Responsibility Commons
Click here to let us know how access to this document benefits you.

Recommended Citation
Rhoads, Jerry P. (1965) "Acquiring Interest in Litigation--The Role of the Contingent Fee," Kentucky Law Journal: Vol. 54 : Iss. 1 , Article 10.
Available at: https://uknowledge.uky.edu/klj/vol54/iss1/10

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledges@lsv.uky.edu.
ACQUIRING INTEREST IN LITIGATION—
THE ROLE OF THE CONTINGENT FEE

INTRODUCTION

The specific problem handled in this paper is that of acquiring interest in litigation by an attorney. As we shall see, a lawyer may breach certain ethical standards, particularly Canon 10, when his stake in the outcome is too great. One of the purposes of this paper is to show when an attorney has become too interested in the litigation.

The advent of the contingent fee has complicated the matter of acquiring an interest. Much of this paper has therefore been devoted to a discussion of the contingent fee. Beginning with the common-law attitude and tracing the development of the contingent fee forward to modern ideas, it is shown that the system has attracted abuses along the way. It is pointed out that abuses of the system of charging contingent fees inevitably involves infractions of ethical standards.

Specific violations of Canon 10 are also shown by reviewing court decisions and bar association opinions. As different situations are presented, it is hoped that the reader will gain an understanding of the requisite degree and type of interest in litigation required by Canon 10 before an attorney should be disciplined for a violation thereof.

I. THE CONTINGENT FEE SYSTEM

The approval and general acceptance of the contingent fee has brought on many problems in legal ethics. A discussion of the growth and development of the contingent fee system, together with certain common-law crimes relative to the contract between attorney and client is necessary to show how ideas toward certain ethical standards in the legal profession have changed. In analyzing Canon 10, this paper necessarily accords a full treatment to the development of the contingent fee system. There was relatively little difficulty with the concept embodied in Canon 10, "Acquiring Interest in Litigation,"1 before the contingent fee was approved, but now a rather fine distinction is drawn.2 There is often a sharp conflict between the bar associations and the courts, and it is therefore helpful to

---

1 American Bar Association, Canons of Professional Ethics, Canon 10 at 9 (Acquiring Interest in Litigation) (rev. ed. 1945-1946): "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."  
2 Trumbull, Materials on the Lawyer's Professional Responsibility 166 (1957).
examine specific decisions by each and the reasons advanced in support. It must be remembered that the American Bar Association Canons of Legal Ethics invariably overlap, and for a full understanding of a particular consideration, we must often show how other Canons are affected.

Contracts for contingent fees paid attorneys were not tolerated at all at common law. The traditional method of administering justice was the retaining of attorneys at prices which parties could not afford to pay. This defective method greatly handicapped workmen who were injured. A bad situation was created as the great industrial expansion began about 1880, when the emphasis on business was on production, on stepping up output and not on safety. Since employment was so hazardous, thousands of workmen faced long and difficult litigation requiring much expenditure for lawyers' fees. The practice of law was directly affected by this commercial expansion. The workman was helpless, as he was unable to procure the services of a lawyer. There was a void in the system and the contingent fee came in to fill this gap. It may be noted that the system of charging fees depending on the success of the litigation was the necessary result of the conditions which were allowed to exist. Even honorable lawyers took cases on a contingent basis, and conducted their cases honestly and charged as small a percentage of the recovery as they could.

There is little doubt that if a modern contingent fee agreement had been offered to any judge a hundred years ago, it would unhesitatingly have been declared illegal and of no effect. Bar associations did not sanction the arrangement without a struggle. To uphold it courts indulged in fictions. This attitude represented a carry-over from the common law. At common law there were three kinds of illegal tampering with legal rights: champerty, which was substantially the acquisition by purchase of a cause of action, together with the attempt to enforce it; maintenance, which was the payment of the court expenses of another to enable him to bring suit, generally with an agreement to divide the profits; and barratry, which was the going about stirring up legal strife. All three of these were crimes at common law and were punishable by fine or imprisonment. All three are still crimes today, although of course modi-

---

5 Smith, Justice and the Poor, Bulletin Number 13, Carnegie Foundation for the Advancement of Teaching 8586 (1919).
6 Cheatam, Cases and Materials on the Legal Profession 139 (1938).
fied everywhere, more or less, by statutes and judicial decisions.\(^7\) That the law of champerty and maintenance does not prevent an attorney at law from validly contracting to defend a suit for a money consideration is a well-established proposition. It is usually held in contracting to defend a suit an attorney may validly stipulate to receive as compensation a share of the subject of the litigation.\(^8\)

It has been stated that the contingent fee system as a whole has been, and is, the greatest blot on the history of the American Bar.\(^9\) In actuality the contingent fee system is a practice whereby the lawyer gambles on the outcome of the litigation. It is an investment in a case and if the lawyer loses his investment he must recoup out of his winnings in the next. Quite obviously it is inconsistent with any theory that the lawyer is a minister of justice. Because he is betting on the outcome of the case, the lawyer is an interested party.\(^10\) However strongly we may justify it, we can not deny the truth of the matter. As will be subsequently noted, the contingent fee system brought about many abuses of its own.

The contingent fee has attracted undesirable persons to become members of the legal profession. It undoubtedly induced the “unholy triumvirate” of lawyer-runner-doctor conspiring to fraudulently win cases, because the stakes were high and the players were essentially gamblers.\(^11\) Many contingent fee abuses involve the problem of solicitation. Since most cases are taken on a contingent fee basis, the client is likely to suffer from two tendencies. The first is the potential for the inadequate settlement used by the attorney’s manifest desire to make his business as lucrative as possible.\(^12\) Attorneys will often settle in preference to litigation because the gain of litigation is not proportionally great enough to outweigh the added time the attorney would have to spend if the case were litigated. By settling out of court the attorney will therefore have more cases and his income will be increased. The result is that his client settles for less money than he might have otherwise attained had the case

\(^7\) A typical champerty statute is Ky. Rev. Stat. 372.060: “Any contract, agreement, or conveyance made in consideration of services to be rendered in the prosecution or defense, or aiding in the prosecution or defense, in or out of court, of any suit, by any person not a party on record in the suit, whereby the thing sued for or in controversy or any part thereof is to be taken, paid or received for such service or assistance is void”; Millard v. Jordan, 76 Mich. 131, 42 N.W. 1085 (1889); Ratliff et al. v. Sinberg, 258 Ky. 203, 79 S.W.2d 717 (1935); Craig v. Maher, 153 Ore. 40, 74 P.2d 396 (1937).

\(^8\) Cases, supra note 7.

\(^9\) Smith, supra note 5 at 8586.

\(^10\) Ibid.

\(^11\) Ibid.

\(^12\) Luther, Legal Ethics: The Problem of Solicitation, 44 A.B.A.J. 554, 555 (1958).
been litigated. The second abuse is the tendency of the soliciting attorney to charge exhorbitant fees.\textsuperscript{13} One study has revealed that, of the cases involving solicitation of personal injury actions, the client received on the average slightly less than half the amount of the damages paid by the defendant. Contingent fees in these cases usually ranged from 40 to 50 per cent of the gross recovery.\textsuperscript{14} The bar association committee recommends 35 per cent of net recovery as the highest contingent fee allowable in personal injury cases.

States now not only allow, but favor such contracts. This is on the ground that otherwise a party, without the means to employ an attorney and pay his fee certain, and having a meritorious cause of action or defense, would find himself powerless to protect his rights. Modern courts have allowed the system because of its practical value in enabling a poor man with a meritorious cause of action to obtain competent counsel. Although contingent fee contracts have not been outlawed by law, the courts have continued to exercise a wary supervision over them, and contingent fees may be disallowed as between attorney and client even in spite of contingent fee retainer agreements, where the amount becomes large enough to be all out of proportion to the value of the professional services rendered.\textsuperscript{15} The attorney will not be censured unless he accepts a fee in an amount which has been found to be "unconscionable."\textsuperscript{16}

Any abuse of the system of charging contingent fees inevitably involves serious breaches of certain ethical standards. Canon 10, entitled "Acquiring Interest in Litigation," states that a lawyer may not purchase any interest in the subject matter of the litigation which he is conducting. This would technically preclude attorneys from charging contingent fees, because the lawyer necessarily acquires interest in the litigation when he has a stake in the outcome. Lawyers are interested in the successful outcome of cases because they affect not only their reputation, but also the amount of compensation to be paid. However, Canon 10 must be interpreted in light of Canon 13 which reads:

A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness.\textsuperscript{17}

\textsuperscript{13}\textit{Ibid.}
\textsuperscript{14}\textit{Ibid.}
\textsuperscript{16}\textit{Id.} at 113, 160 N.E.2d at 53.
\textsuperscript{17}A.B.A. Canons, supra note 3, at 10.
Since the lawyer is permitted by Canon 13 to contract for a contingent fee, it would be ridiculous to assert that the Canons preclude a lawyer from having a stake in the outcome of the litigation. Professor Cheatham pointed out that there is an inescapable conflict of interest between the lawyer and the client in the matter of fees. It is thus clear that in view of Canon 13, Canon 10 does not preclude attorney arrangements whereby the lawyer’s fee is payable only out of the results of the litigation. For an insight into the early attitude of the proper relationship between contingent fees and an interest in the client’s cause, a resolution by David Hoffman has been set forth. It was intended as a guide for young lawyers. His resolution XXIV reads as follows:

I will never be tempted by any pecuniary advantage however great, not be persuaded by any appeal to my feelings however strong, to purchase, in whole or in part my client’s cause. Should his wants be pressing, it will be an act of humanity to relieve them myself, if I am able, and if I am not, then to induce others to do so. But in no case will I permit either my benevolence or avarice, his wants or his ignorance, to seduce me into any participation of his pending claim or defense. Cases may arise in which it would be mutually advantageous thus to bargain, but the experiment is too dangerous, and my rule too sacred to admit of any exception, persuaded as I am that the relation of client and counsel, to be preserved in absolute purity, must admit of no such privilege, however guarded it may be by the circumstances; and should the special case alluded to arise, better would it be that my client should suffer, and I lose a great and honest advantage, than that any discretion should exist in a matter so extremely liable to abuse, and so dangerous in precedent.

And though I have thus strongly worded my resolution, I do not thereby mean to repudiate, as wholly inadmissible the taking of contingent fees—on the contrary, they are sometimes perfectly proper and are called for by public policy, no less than by humanity. The distinction is very clear. A claim or defense may be perfectly good in law, and in justice, and yet the expenses of litigation would be much beyond the means of the claimant or defendant—and equally so as to counsel, who, if not thus contingently compensated in the ratio of the risk, might not be compensated at all. A contingent fee looks to professional compensation only on the final result of the matter in favor of the client. None other is offered or is attainable. The claim or defense can never be made without such an arrangement; it is voluntarily tendered, and necessarily accepted or rejected, before the institution of any proceedings.

It flows not from the influence of counsel over client, both parties have the option to be off; no expenses have been incurred; no moneys have been paid by the counsel to the client; the relation of borrower and lender, or vendor and vendee, does not subsist between them—but it is an independent contract for the services of counsel to be rendered for the contingent avails of the matter to be litigated. Were this denied to the poor man, he could neither prosecute or be defended.

---

18 Cheatham, supra note 6 at 170.
All of this differs essentially from the object of my resolution, which is against purchasing, in whole or in part, my client's rights after the relation of client and counsel, in respect to it, had been fully established—after the strength of his case has become known to me—after his total pecuniary inability is equally known—after expenses have been incurred which he is unable to meet—after he stands to me in the relation of a debtor and after he desires money from me in exchange for his pending rights. With this explanation I renew my resolution never so to purchase my client's cause, in whole or in part; but still reserve to myself, on proper occasions and with proper guards, the professional privilege... of agreeing to receive a contingent compensation freely offered for services wholly to be rendered, and when it is the only means by which the matter can either be prosecuted or defended. Under all other circumstances, I shall regard contingent fees as obnoxious to the present resolution.

It must be remembered that Hoffman's ideas were espoused in an era in which contingent fees were not commonplace.

Only under certain circumstances would we now regard Canon 10 as having been violated where compensation is paid on a contingent basis. It would be impossible to set out a fast rule as to when a lawyer oversteps his bounds in acquiring an interest in litigation. Because there is such a fine distinction, and it is so difficult to determine just where a reasonable contingent fee ends and a proprietary interest begins, it would be profitable to examine case decisions and bar association opinions dealing with the subject.

II. VIOLATIONS OF CANON 10

The requisite interest within the meaning of Canon 10 is not found in a reasonable contract providing for a contingent fee. It has been held that a contingent fee which reaches or approaches 50 per cent of the recovery ceases to be a measure of due compensation for professional services rendered, and makes the lawyer a partner or proprietor in the lawsuit. In such a case Canon 10 would be violated and such an exaction would render the arrangement a proper subject for investigation and possible disciplinary action.

We must distinguish between buying an interest in the litigation as a speculation, which Canon 10 condemns, and agreeing to accept compensation contingent upon the outcome.

Canon 10 may be applied in cases where a lawyer acquires a chose in action, but the attorney must have been acting in his professional capacity. If his action was intended merely as an investment, even though the realization on or protection of it may involve litigation,

---

19 David Hoffman, A Course of Legal Study 761 (2d ed. 1836).
21 Ohio 2.
Canon 10 should not be applied. Nor should it apply where the litigation is merely a possible incident of the purchase and not its primary reason. The American Bar Association has stated that it is improper for a lawyer to purchase choses in action for the purpose of collecting them at a profit. If an attorney after the completion of litigation accepts on account of his fee, an interest in the assets realized by the litigation, then the Canon likewise does not apply. This clearly differs from a case in which the lawyer speculates on the matter in which he is employed.

Ordinarily the purchase of shares of stock in a corporation by the lawyer is a purchase by the lawyer of an interest in the subject matter of the litigation where the corporation is a party to the litigation in which the attorney is engaged. A successful suit would better the value of the stock to the advantage of its holders and so the lawyer would profit from his purchase, as well as from compensation for his services.

A situation presented before the American Bar Association, illustrating a violation of Canon 10, involved speculation by a lawyer on the outcome of the litigation in which he was employed. Corporation A and the owner of a radio station filed an application with the F.C.C. for approval of transfer of control or assignment of license of the station to corporation A. The question presented was whether a lawyer in view of Canon 10, can purchase or subscribe for stock in corporation B organized for the purpose of filing a competing or counter application. A supplementary question was whether the lawyer could buy stock in the corporation or accept stock in the corporation as payment of his fee for legal services rendered to the corporation without violating Canon 10. The Committee held the purchase of stock and receiving shares as violative of Canon 10, however, the Committee did not say that under no circumstances would it be proper for a lawyer to accept as an attorney's fee a stock interest in a corporation client.

Another violation of Canon 10 occurs where a lawyer buys judgment notes or other choses in action for less than their face value with the intent of collecting them at a profit for himself. A similar forbidden practice is an arrangement by an attorney with a layman who is in the business of buying up legacies and interests in estates.

---

22 Mich. 91.
23 Ibid.
26 A.B.A. Op. 279. Here the lawyer was virtually made a quasi-partner in the enterprise.
under which the lawyer is to investigate and collect the interests, receiving a share thereof as his compensation. Although the lawyer does not advance his own funds for the purchase of the interests involved, the Committee points out that he participates from the beginning to the end of the transaction. This would be a devotion by the lawyer of his training and equipment to accomplish commercial purposes. Such a lawyer represents not only the purchaser, but also himself, as he is a litigant for profit. The consideration in this case is the services rendered by the attorney. Canon 10 would, a fortiori, be violated where the lawyer buys an interest in a claim which he represents.

An attorney does not violate Canon 10 where in order to secure his fees, it is necessary to take title to property for which he is litigating. However, this title is subject to the rights of the adverse party as finally determined by the courts.

Another problem relating to Canon 10 and nourished by the advent of the contingent fee is the practice by attorneys of advancing certain costs to clients pending litigation. As previously noted, this was considered champertous and therefore evil at common law. Before a case of champerty is made out it must be shown that a lawyer entered into an agreement with his client to represent him in certain litigation and agreed to pay costs and expenses of litigation himself. An attorney who does this certainly acquires an additional interest in the outcome, as he has made a greater investment than the mere contracting for a contingent fee. Where the American Bar Association has expressed an opinion on the matter, we note a sharp conflict with court decisions. The courts have displayed a more liberal attitude, whereas the A.B.A. has strictly construed Canon 10 as it relates to the problem. Canon 42 appears to specifically renounce the practice in the following language:

A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement.

The A.B.A. has, more or less, accepted this Canon and Canon 10 at face value, at least in the area of living costs. Different types

---

31 Mock v. Higgins, 3 Ill. App. 2d 865 (1954). The court set out the definition of champerty at 871: ... "a bargain with a plaintiff or defendant to divide the land or other matter sued for, between them, if they proceed at law, whereupon the champertee is to carry on the party's suit at his own expense."
32 A.B.A. Canons, supra note 3, at 40.
of advancements have not been accorded the same treatment, and therefore they may be broken down into several areas.

The American Bar Association’s opinion toward the advancement of living expenses during the period while the suit is still pending is that such advancements are unethical. An opinion was asked on the practice of paying substantial sums of money to clients on a regular monthly basis during the pendency of their suits. In some cases the payments were limited to an amount covering the subsistence of the plaintiff and members of his family. In others, money was paid in larger amounts. This was justified by the fact that a badly injured client may not be able to work for several months following an accident and that the payments were merely advances on account of the verdict. The Committee stated that advances to an injured client to cover subsistence for him and his family while the case was still pending did not constitute the advancement of expenses, that “expenses” referred only to court costs, witnesses fees and expenses resulting from the conduct of the litigation itself, and not expenses unconnected with the litigation. It was felt that advancing such living costs was similar to making an advance on account of the prospective verdict and that there was no expectation of reimbursement except out of the verdict. A lawyer who made such advances acquired an interest in the subject matter of the litigation he was conducting. He therefore violated Canon 10. The Committee differed with an Illinois decision in which the court stated that advancements of living expenses by a lawyer is contemplated and justifiable under Canon 42.

Speaking of Professor Cheatam’s remarks on the “inescapable conflict of interest between the attorney and his client with regard to fees,” the Committee said:

[C]onflict . . . should not be extended to permit the lawyer to acquire an additional stake in the outcome of the suit which might lead him to consider his own recovery rather than that of his client and to accept a settlement which might take care of his own interest in the verdict but not advance the interest of the client to the maximum degree.

The Illinois court pointed out that such advancements to needy clients for living expenses during the pendency of the suit was not against public policy or ground for disbarment, and that under proper circumstances advancements for subsistence was proper under Canon 42. In discussing cases where clients were unable to work, had no money or property, and their only asset was the claim for damages

\[34\] People ex rel. Chicago Bar Association v. McCallum, 341 III. 578, 173 N.E. 827 (1930).

\[35\] Cheatam, supra note 6, at 170.

against the railroad, upon which respondent (attorney) had a lien, the court said:

We know of no law which makes it more unethical, under such circumstances, to advance living and medical expenses to the client and so prevent his becoming a public charge, than it would be, if the client's only asset were a piece of real estate, to advance him, on a mortgage thereon, money for such expenses. It is not uncommon for attorneys to commence actions for poor people and make advances of money necessary to the prosecution of the suit upon the credit of the cause. Thus a man in indigent circumstances is enabled to obtain justice in a case where without such aid he would be unable to enforce such a claim.37

Other courts have held that such an arrangement is not void per se as against public policy.38

The advancement to clients of various sums of money for funeral expenses, medical bills, and other bills, pursuant to arrangements agreed upon at the time of employment has been held grounds for suspending an attorney.39 The contracts were substantially as follows: "We will pay 40 per cent of any recovery that we get for attorney fee and in the event there is no recovery there shall be no costs to us."40 Another contract used read as follows: "We will pay 50 per cent of any settlement that we get for attorneys fees provided we get our actual car damage and medical bills and in the event there is no settlement there shall be no costs to us."41 The attorney contended that the word "costs" referred only to attorneys fees, that his agreement was permissible, in substance only a contingent fee contract, and that if there was no recovery the clients would not be obligated for attorney's fees. The court ruled while "costs" did include attorney's fees, it was also much broader and would mean court costs, sheriff's fees, costs of depositions, etc., and attracting business through such negotiations is contrary to the Canons of Professional Ethics. As to the second contract, the court felt that this was no more than buying a client's business by agreeing in advance to pay his bills. The position of the A.B.A. is that such advances to an injured client for medical bills, car repair, etc., while the case is pending does not constitute the advancement of expenses, the latter term referring to court costs, witness fees and similar expenses resulting from the conduct of the litigation itself. This would be an advancement on account of the prospective verdict. Accordingly, an attorney who made such advances acquired an interest in the subject matter of the litigation.

37 People v. McCallum, supra note 34, at 831.
38 Johnson v. Great Northern Ry. Co., 128 Minn. 315, 151 N.W. 125 (1915).
39 State ex rel. Florida Bar v. Dawson, 111 So. 2d 427 (Fla. 1959).
40 Id., at 430.
41 Ibid.
which he was conducting, in violation of Canon 10. Where the injured client is unable to earn anything other courts have held such advancements proper where they are only for the client’s use.\(^{42}\) California has condoned such practice as a matter of convenience, stating:

> We are not unmindful of the fact that the contracts of employment of petitioner as counsel, contained provisions for the disbursement by him of such portion of the sum recovered as represented the medical services and hospital expenses. But there is nothing improper in such provisions. They do not include solicitation, or an unethical arrangement with the Dr. or hospital. It is merely a convenient method whereby the sums recovered are devoted to one of the purposes for which they were recovered, an element of such recovery being medical and hospital expenses. All too frequently a settlement is made or recovery is had, and the recipient neglects to discharge these obligations. . . .\(^{43}\)

In still another situation it has been held that an attorney may properly advance funds to his client even though they are not directly connected with expenses of litigation.\(^{44}\) The lawyer advanced funds to a solicited client to protect and enforce the rights of his unsolicited client. The court examined the attorney’s *good motives* in helping the case of his unsolicited client and overlooked the additional interest acquired by the attorney.\(^{45}\)

Ordinary costs of litigation and even general loans would appear to come more within the purview of Canon 42 and the word “expenses,” than would the previously discussed advancements. The typical contingent fee contract providing for advancement of court expenses provides for deduction of expenses advanced by attorneys from the gross proceeds of recovery.\(^{46}\) It is necessary in such a case to distinguish between retaining out of the amount recovered any moneys advanced for expenses and supporting litigation at the attorney’s own expenses. The latter would violate Canon 10, whereas the former would be proper. In such a case a Minnesota court said:

> An agreement to loan the client funds with which to carry on the suit or to maintain himself during its pendency is not regarded as per se opposed to public policy. It is only when the attorneys are to ultimately stand the costs, or when the client is indemnified from liability for them in case of no recovery, that the law declares the arrangement void.\(^{47}\)

Although Canon 10 and Canon 12 would permit an attorney to advance costs and court charges for his client, there must be an

---


\(^{44}\) *In re Moore*, 8 Ill. 2d 373, 134 N.E.2d 324 (1956).

\(^{45}\) *Id.* at 377, 134 N.E.2d at 328.

\(^{46}\) Johnson v. Great Northern Ry. Co., *supra* note 38.

\(^{47}\) *Id.* at 377, 151 N.W. at 127.
understanding that the same are to be ultimately paid by the client. If such an ethical arrangement were made and the client settled without his attorney's knowledge and consent, then he would have an enforceable lien against the client.\(^{48}\)

As to advancements, it would seem that the Ethics Committee's opinion is in conflict with the above cases at least to the extent that it holds unethical advancements of living expenses to needy clients where such advancement is subject to reimbursement and made not as an inducement to employment.

Even when an attorney is required to post a cost bond, legally obligating himself to pay in whole or in part the plaintiff's expenses, the court has held that Canon 10 is not violated.\(^{49}\) This occurs where a suit is instituted in forma pauperis and the plaintiff's attorney is employed under a contingent fee contract. The suit can not be prosecuted alone on the plaintiff's oath of his poverty, but his counsel must likewise file such an oath or give security for costs.\(^{50}\)

The court has ruled that even if it were to assume that a contract requiring the attorney to pay in whole or in part plaintiff's expenses in carrying on the litigation was invalid, the giving of a cost bond would not be against public policy.\(^{51}\) Unless the giving of a cost bond was unlawful, the court declared that it was not unethical, and referred specifically to Canon 10.\(^{52}\) The court realized the possible consequences inherent in allowing attorneys to finance litigation, unfettered by statutes and stated:

> It would be unfortunate that a deserving plaintiff be denied opportunity to try his case because of his attorney's refusal to furnish security or make excusatory affidavit. But we are disposed to think that in practical effect a much greater evil would result from opening the door to litigation which may or may not prove meritorious by holding the attorney under a contingent fee, conditioned upon recovery, not within the spirit of the rule invoked today.\(^{53}\)

It is not unethical for a lawyer who has such an interest to give such a bond when it is required by court order to prevent a dismissal of the case.

**CONCLUSION**

Problems which have arisen under Canon 10 can not be attributed solely to the contingent fee, but it has undoubtedly induced countless technical violations of Canon 10. When an attorney has a personal


\(^{49}\) United States v. Ross, 298 Fed. 64 (6th Cir. 1924).

\(^{50}\) *Ibid.*


\(^{52}\) *Id.* at 66.

\(^{53}\) *Ibid.*; Bolt v. Reynolds, 42 F. Supp. 58 (W.D. Ky. 1941); 33 A.L.R. 728,
stake in the outcome, contingent upon his success, it is much more likely that he has violated Canon 10, than if his interests were not involved.

The sharp conflict between court decisions and Canons of Ethics has presented the ultimate question of what force and effect the Canons are to have upon lawyers. The courts differ as to the weight to be given to the Canons. A few jurisdictions have adopted canons as law,\(^5\)\(^4\) while the court of another state in citing an A.B.A. Canon, appeared to give it at least the force of previous decisions.\(^5\)\(^5\) A majority of U.S. courts hold that although the Canons constitute a safe guide for professional conduct in the cases to which they apply, the power to discipline an attorney for impropriety is inherent in the court before which he has been admitted and exists independently of Statute.\(^5\)\(^6\)

It may be quite simple to determine that a canon has been violated, but it does not necessarily follow that an attorney should be disciplined. A strict enforcement of Canon 10, for example, would bring undesirable results. Courts have correctly displayed a liberal attitude with respect to this Canon. Although a lawyer may technically violate one or more of the Canons, courts will give lip service to the Canons and then proceed to apply their own rules of law, or disregard the interpretations of the Canons.\(^5\)\(^7\) Because disbarment and suspension proceedings are such extreme measures of discipline they are only resorted to in cases where a lawyer has demonstrated an attitude or course of behavior inconsistent with professional standards. Courts therefore tend to shy away from the Canons when a breach thereof is committed. It is submitted that we should first look at the motive and the surrounding circumstances before examining Canon 10 or any other Canon. If the attorney's motives and conduct were warranted by the circumstances and a violation of the Canons nevertheless exists, censure or reprimand may be the proper punishment, but not suspension or disbarment.

Jerry P. Rhoads

---

\(^5\)\(^4\) Wash. Laws ch. 126, § 15 (1921).
\(^5\)\(^5\) In re Morrison, 43 S. D. 185, 178 N.W. 732 (1920).
\(^5\)\(^6\) Phipps v. Wilson, 186 F.2d 748 (7th Cir. 1951).
\(^5\)\(^7\) In re Moore, supra note 44.