**2.7: Financial Relationships with Clients**

**Client Trust Accounts**

*Business? It’s quite simple; it’s other people’s money.*[[1]](#footnote-0)

*Oh, can somebody explain why things go on this way? I thought they were my friends. I can't believe it's me, I can't believe that I'm so green. Eyes down, round and round, let’s all sit and watch the moneygoround. Everyone take a little bit here and a little bit there.*[[2]](#footnote-1)

When attorneys hold money or property in trust for their clients they must never commingle it with their own funds or property, on pain of sanction, typically suspension or disbarment. In other words, if a client deposits funds with an attorney, the attorney must place those funds in a trust account, and if a client deposits physical property, the attorney must also hold that property separately, typically in a safety deposit box. Commingling funds or property is a per se violation, with few exceptions, primarily in order to enable an attorney to pay any banking fees on a client’s trust account.

State bar associations carefully monitor attorney trust accounts and punish any commingling of funds. Some state bar associations even randomly audit attorney trust accounts, looking for violations. State rules of professional conduct typically require attorneys to deposit client funds in an interest-bearing trust account. Many states require attorneys to deposit some or all of the interest generated by client trust accounts into a common fund. This Interest on Lawyers’ Trust Accounts (“IOLTA”) fund is used to provide legal services to indigent clients.

An attorney may withdraw funds from a client’s trust account in order to pay the client’s attorney fees, as they are earned. The rule against commingling prohibits attorneys from using funds from a client trust account to pay business or personal expenses, and the attorney must return any funds remaining in a client’s trust account to the client when the representation ends. When a client receives a settlement or award, the attorney must deposit the funds in the client’s trust account, and then withdraw funds to pay the client’s attorney fees and disburse to the client. Specifically, if the attorney and the client have a contingent fee agreement, the attorney must pay the client’s contingent fee from the client trust account.

| [**Model Rule 1.15: Safekeeping Property**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_15_safekeeping_property/) |
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| 1. A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Funds shall be kept in a separate account maintained in the state where the lawyer’s office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation. 2. A lawyer may deposit the lawyer’s own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose. 3. A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred. 4. Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property. 5. When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute. |

| [***Neb. State Bar Ass’n v. Statmore*, 352 N.W.2d 875 (Neb. 1984).**](https://scholar.google.com/scholar_case?case=1309528854957331434) |
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| **Summary:** Statmore (Attorney) represented Kuzara for a 2nd offense DUI. Kuzara gave Statmore $500 for representation. Statmore deposited the check, but it was returned twice due to insufficient funds. Then Kuzara provided Stratmore with a check for $540 to cover the original $500 fee plus the returned check fees incurred from the bank. Without Statmore’s knowledge, the bank deposited $495 from the first check. Still believing he had not received any funds, Statmore requested criminal prosecution to collect from Kuzara. Kuzara hired a different attorney and prosecution delivered $540 to Statmore. Kuzara contacted Statmore about potential double payment and requested a reply, but Statmore did not reply. Statmore realized the double payment in February. Statmore acknowledged double payment but didn’t have funds to reimburse Kuzara. Statmore brought a $250 check to pay Kuzara and did not pay the remaining amount until the day of the hearing before the disciplinary board. Mistake did not relieve Stratmore of his professional duty regarding his client’s funds. |

PER CURIAM.

This is an original disciplinary proceeding by the Nebraska State Bar Association against Clay B. Statmore, an attorney admitted to practice in Nebraska. After a hearing before the Committee on Inquiry of the First Disciplinary District and a review by the Disciplinary Review Board, formal charges against Statmore have been filed in this court.

Statmore does not deny the charges. The charges allege violations of the following:

CANON 1. A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.

DR 1-102. Misconduct.

A. A lawyer shall not:

1. Violate a Disciplinary Rule.

6. Engage in any other conduct that adversely reflects on his fitness to practice law.

CANON 9. A Lawyer Should Avoid Even the Appearance of Professional Impropriety.

DR 9-102. Preserving Identity of Funds and Property of a Client.

B. A lawyer shall:

1. Promptly notify a client of the receipt of his funds, securities, or other properties.

4. Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

We review the evidence de novo to determine if discipline should be imposed and, if discipline is warranted, the nature of the discipline which is appropriate under the circumstances.

On April 15, 1982, Statmore undertook representation of Deborah A. Kuzara regarding a charge of driving while intoxicated, second offense. Kuzara, on June 2, gave Statmore her check for $500—the agreed fee for the representation. Statmore deposited Kuzara’s June 2 check, which was returned twice by the bank due to insufficiency of Kuzara’s account. Statmore contacted Kuzara and her father in New Jersey about the insufficient fund check.

On June 22 Kuzara issued another check (check A) for $500, which Statmore deposited but which was returned to Statmore’s Lincoln bank on account of Kuzara’s insufficient funds. On June 30 Kuzara sent Statmore still another check (check B) in the amount of $540—$500 for Statmore’s fee, plus $40 for the check service charges regarding the other Kuzara checks. Check B was returned on account of insufficient funds. Unbeknown to Statmore, his bank had held check A and collected that check on July 9, 1982, with credit to Statmore's business account in the sum of $495 ($500 less a $5 service charge). Statmore again contacted Kuzara about the insufficient fund checks. At this time Statmore was still unaware that the bank had credited his account $495 for check A on July 9.

Statmore took check B to the Lancaster County attorney and requested criminal prosecution. Notified by the county attorney regarding prosecution on check B, Kuzara hired attorney George Thompson of Bellevue, Nebraska. Kuzara later delivered $540 to the county attorney for check B. On November 12 the county attorney sent $540 to Statmore regarding check B.

Kuzara contacted Statmore about the possibility of a double payment, that is, check A credited to Statmore on July 9 and the funds from the county attorney on November 12 regarding check B. Statmore asked for verification from Kuzara that there was in fact a double payment, and felt he was getting a “runaround” about the checks.

Attorney Thompson wrote Statmore on January 5, 1983, pointed out the double payment, and requested a reply. Statmore did not respond to Thompson's letter. Early in February, Statmore checked his deposit slips and saw that there indeed had been the “$495 deposit” (check A) to his account on July 9. This was apparently Statmore’s first verification of payment on check A. Thompson again wrote to Statmore on March 2 and demanded Kuzara's $495 by return mail. Statmore never responded to that letter. By March 14 Statmore conclusively realized that he had received double payment from Kuzara. On March 16 Thompson telephoned Statmore, who then acknowledged the double payment and told Thompson he did not have the funds to reimburse Kuzara.

On May 23 Kuzara filed a complaint with the Counsel for Discipline of the Nebraska State Bar Association. Counsel for Discipline wrote Statmore as soon as Kuzara filed her complaint. Statmore paid Kuzara $250 on June 28 and the same day wrote the Counsel for Discipline that he had “recently” paid Kuzara $250. In his June 28 letter to the Counsel for Discipline, Statmore also mentioned that the “remaining $245 should be repaid within the next fourteen days.” Statmore paid nothing further until the day of the hearing before the Committee on Inquiry.

On the day of the hearing before the Committee on Inquiry, September 20, Statmore brought the Counsel for Discipline a check for $245 to pay Kuzara, and stated he “didn't know who to send it to.”

Statmore says he never reconciles his monthly bank statement and, therefore, had no knowledge that check A had cleared and been credited to his account on July 9. Such ignorance regarding check A existed at the time Statmore received the money from the Lancaster County attorney regarding check B.

Throughout all the time in question, Statmore was having financial problems: failed to pay utilities (some of which were disconnected) and did not pay office rent (moved his office after delinquency in rent). Statmore implies that the somewhat chaotic office situation explains, if not excuses, the sorry state of affairs during his representation of Kuzara.

Implicit in the license to practice law is the requirement that the recipient of the license shall demean himself in a proper manner and shall refrain from practices which bring discredit upon the lawyer, the profession, and the courts.

Any violation of the ethical standards relating to the practice of law, or any conduct of an attorney which tends to bring reproach upon the courts or the legal profession, constitutes grounds for suspension or disbarment.

When the double payment occurred, Statmore held Kuzara’s money, which he was not authorized to retain. Kuzara’s conduct or mistake concerning payment of her checks did not relieve Statmore of his professional duty regarding his client's funds. Accurate accountability of a client’s funds is the responsibility of the lawyer, not the client. Statmore’s slipshod office management and careless bookkeeping prevented any semblance of the accurate accounting lawyers must maintain with respect to a client’s funds. As a result of Statmore’s poor management and failure to keep track of payment from Kuzara, there was a commingling of a client’s money—an area of gravest concern of this court in reviewing claimed lawyer misconduct. The prohibition against commingling of funds is a salutary rule adopted

to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients’ money. Moral turpitude is not necessarily involved in the commingling of a client’s money with an attorney’s own money if the client’s money is not endangered by such procedure and is always available to him. However, inherently there is danger in such practice for frequently unforeseen circumstances arise jeopardizing the safety of the client’s funds, and as far as the client is concerned the result is the same whether his money is deliberately misappropriated by an attorney or is unintentionally lost by circumstances beyond the control of the attorney.

A lawyer’s poor accounting procedures and sloppy office management are not excuses or mitigating circumstances in reference to commingled funds.

We realize that Statmore has repaid Kuzara the overpayment. However, a lawyer’s restitution of a client’s funds after being faced with legal accountability does not exonerate professional misconduct.

Among the major considerations in determining whether a lawyer should be disciplined is maintenance of the highest trust and confidence essential to the attorney-client relationship. As a profession, the bar continuously strives to build and safeguard such trust and confidence, but conduct such as before us in the present case weakens the efforts of the overwhelming majority of lawyers in Nebraska whose conduct meets, if not exceeds, the Code of Professional Responsibility.

To determine whether and to what extent discipline should be imposed, it is necessary that we consider the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law.

Therefore, under the circumstances we find that a suspension is appropriate discipline for Statmore and that Statmore should be suspended from the practice of law for a period of 6 months. During such suspension, we sincerely suggest that Statmore reappraise the candor, fairness, and responsibility a lawyer owes to his client. We recommend that Statmore revise his accounting procedures and office management to prevent recurrence of any misconduct. Suspension of Statmore shall be effective September 1, 1984, and shall last for 6 months. Statmore shall make suitable arrangements that his clients’ matters pending at and during his suspension shall be suitably protected.

| **CHECK YOUR KNOWLEDGE:** |
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| 1. Was Statmore’s commingling of Kuzara’s funds with his own intentional? Was it reckless? Was Kuzara harmed, and if so, how? |
| 1. Was a 6 month suspension an appropriate sanction under the circumstances? |

**Further Reading:**

* [*ABA Model Rules for Client Trust Account Records* (2010).](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rules_on_client_trust_account_records.pdf)

**Equity as Compensation**

*I’ve got the brains you’ve got the looks. Let’s make lots of money. You’ve got the brawn I’ve got the brains. Let’s make lots of money.*[[3]](#footnote-2)

Sometimes, attorneys agree to accept an equity interest in their client’s property, in lieu of attorney fees. For example, an attorney representing a corporation may accept shares of the company rather than cash. This kind of agreement can benefit both the client and the attorney, especially if the client is cash-poor, but is a promising investment. The client receives legal advice with no upfront expense, and the attorney receives an investment potentially worth much more than the hourly fees. Moreover, the attorney has an incentive to provide the best possible advice, because it will increase the value of the investment.

But equity compensation is not limited to securities. An attorney may agree to represent a client in exchange for an equity interest in the client’s real estate. Or a patent attorney may agree to prosecute a patent in exchange for an interest in the patent.

In any case, the Model Rules of Professional Conduct permits equity compensation, but only if the attorney complies with the requirements of Model Rule 1.8(a). Essentially, the attorney must disclose the terms of the agreement to the client, the attorney must advise the client to seek independent legal counsel, and the client must provide informed consent to the agreement, all of which must be in writing. In addition, the terms of the agreement must be substantively “fair and reasonable” to the client.

The concern is that the attorney’s financial interest in the client’s property could create a conflict of interest. In theory, both the client and the attorney want the property to increase in value. But in some cases, the attorney’s interest in the property could compromise the impartiality of the attorney’s advice, if a potential transaction would benefit the client, but harm the attorney’s property interest.

| [**Model Rule 1.8: Current Clients: Specific Rules**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_8_current_clients_specific_rules/) |
| --- |
| 1. A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:    1. the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;    2. the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and    3. the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction. |

| [***Committee on Prof. Ethics v. Mershon*, 316 N.W.2d 895 (Iowa 1982)**](https://scholar.google.com/scholar_case?case=11585532239969857851) |
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| **Summary:** Mershon did tax and property work for Miller. Miller owned a 100 acre farm he was interested in developing into residential property. Miller hired Schenk, a landscape architect, to prepare a market study of the land. Mershon, Miller, and Schenk formed a corporation to turn the land into a development property. Mershon gave the corporation a $6,250 promissory note and received 200 shares of stock in exchange for his legal services. The project never happened due to lack of funding, and Miller died. Mershon transferred his shares to Miller’s estate but Schenk refused to do so. The court found that Mershon violated the rules of professional responsibility because he and Miller had differing interests in the transaction, and reprimanded Mershon. |

This case involves review of a Grievance Commission report recommending that respondent be reprimanded for alleged ethical violations arising from a business transaction with a client. We adopt the recommendation.

From our de novo review of the record, we find the facts as follows. Respondent is a Cedar Falls attorney. He began to do tax and property work for Leonard O. Miller, a farmer, in 1951. Miller owned 100 acres of farmland adjacent to a country club near the city. In 1969, when he was 68, Miller became interested in developing the land for residential purposes. He employed a landscape architect and R. O. Schenk, of Schenk Engineering Company, to prepare a preliminary plat and market study.

When the preliminary work was completed, Miller brought Schenk to meet with respondent to discuss the project. Miller wished to proceed with the development but did not have sufficient funds to pay engineering costs. Schenk suggested that the three men form a corporation to which Miller would contribute the land, Schenk would contribute engineering services, and respondent would contribute legal services. They agreed the land was worth approximately $400 an acre. Schenk estimated engineering costs at $400 an acre, and he said legal costs were usually one half that amount.

After several conferences in early 1970, the three men formed a corporation, Union Township Development, Inc. Subsequently Miller conveyed the farmland to the corporation at a capitalized value of $12,500 and received 400 shares of stock. Schenk gave the corporation a $12,500 promissory note and also received 400 shares of stock. Respondent gave the corporation a $6,250 promissory note and received 200 shares of stock. The promissory notes were interest free and due at the discretion of the corporation. They were to represent the services to be rendered by Schenk and respondent.

Development plans were premised on the corporation’s ability to obtain financing on the security of the farmland. As it turned out, the corporation was unable to borrow money unless the three individuals would guarantee the obligation personally. They refused to do so, and financing was never obtained.

The trio met at least annually to discuss the development, but when Miller died on December 31, 1978, at the age of 77, the project was still at a stalemate. Respondent believed the parties had an oral agreement that if development did not occur he and Schenk would relinquish their interests in the corporation to Miller. Three days after Miller’s death, he transferred his stock to the corporation. He asked Schenk to do the same thing, but Schenk refused, denying any obligation to do so.

Respondent was nominated in Miller’s will as executor of his estate. He served in that capacity until Miller’s two daughters expressed dissatisfaction with his role in Miller’s conveyance of the farmland to the corporation. He then resigned as executor. Consistent with his view, he showed Miller as owner of all corporate stock in the preliminary probate inventory. The farmland was appraised at $4,000 an acre.

Although respondent had expended $900 in out-of-pocket expenses for the corporation and performed legal services worth more than $6,000, he did not intend to seek payment. Schenk, however, maintained at the time of the grievance hearing that he still owned one half of the outstanding stock of the corporation.

The determinative question in our review is whether this evidence establishes a violation of the principle in DR5-104(A), which provides:

A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

In order to establish a violation of DR5-104(A) it is necessary to show that the lawyer and client had differing interests in the transaction, that the client expected the lawyer to exercise his professional judgment for the protection of the client, and that the client consented to the transaction without full disclosure.

The definitions section of the code of professional responsibility defines "differing interests":

“Differing interests” include every interest that will adversely affect either the judgment or loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

Miller and Mershon plainly had differing interests in at least two aspects of the transaction. One was the issue of giving respondent a present interest in the corporation in anticipation of future legal services. The fee agreement was made during the existence of the attorney-client relationship and thus was subject to the general principles governing attorney-client transactions. Because respondent’s fee was tied to the amount of his stock in the corporation, he and Miller had differing interests concerning the extent of respondent's stock ownership. Another differing interest involved making respondent a debtor of the corporation to assure that the services would be performed. Because Miller’s interest was aligned wholly with the corporation, he and respondent had differing interests with respect to respondent's promissory note.

No dispute exists that Miller relied on respondent to exercise his professional judgment to protect him. One respect in which respondent did so was in preparing a written agreement to assure that Miller was reimbursed from the first profits of the corporation for the preincorporation expenses of preliminary studies. This, however, was the only agreement of the parties that was reduced to writing.

The fighting issue before the Commission was whether respondent made full disclosure to Miller within the meaning of the Canon before Miller entered the transaction. If full disclosure means only that respondent made Miller fully aware of the nature and terms of the transaction, this requirement was satisfied. Nothing was hidden from Miller, and he was an active participant in the transaction. Full disclosure, however, means more than this.

Because of the fiduciary relationship which exists, the attorney

has the burden of showing that the transaction was in all respects fairly and equitably conducted; that he fully and faithfully discharged all his duties to his client, not only by refraining from any misrepresentation or concealment of any material fact, but by active diligence to see that his client was fully informed of the nature and effect of the transaction proposed and of his own rights and interests in the subject matter involved, and by seeing to it that his client either has independent advice in the matter or else receives from the attorney such advice as the latter would have been expected to give had the transaction been one between his client and a stranger.

Respondent acknowledges he did not suggest to Miller that he obtain independent advice. The record does not show he otherwise gave Miller the kind of advice Miller should have had if the transaction were with a stranger. Respondent let Schenk estimate the value of his legal services and thus the extent of respondent’s stock ownership without any investigation to determine whether the estimate was accurate. Nor did he suggest to Miller that he make such investigation. If Schenk’s estimate was generous, the effect may have been to chill respondent’s scrutiny of the benchmark for the valuation, which was Schenk’s valuation of his own services. Furthermore there was no discussion or investigation concerning the reasonableness or wisdom of tying respondent’s fee for future services to a present twenty percent interest in the corporation. Respondent acknowledges that the arrangement was at least a technical violation.

Nothing was done to assure that Miller would get his farm back if either Schenk or respondent did not perform or if the development should not be undertaken. Nothing was done to protect Miller or his estate in the event of the death of any of the parties. The promissory notes could hardly have been on more favorable terms to the debtors. The record does not show whether Miller was informed of the difficulty the corporation might have in enforcing respondent's obligation. So far as the record shows, Miller was not told of any possible effect of respondent's differing interests on the exercise of his professional judgment.

The Commission found respondent is forthright and honest and gained no profit from the transaction. The record confirms this finding. As the Commission also found, however, a violation of DR5-104(A) was nevertheless established. Respondent had three alternatives when the Schenk proposal was first made. The safest and perhaps best course would have been to refuse to participate personally in the transaction. Alternatively, he could have recommended that Miller obtain independent advice. Finally, if Miller refused to seek independent advice or respondent did not recommend he do so, he could have made the least desirable choice. He could have attempted to meet the high standard of disclosure outlined in this opinion.

Having chosen to enter the transaction without recommending that Miller obtain independent advice, respondent was obliged to make full disclosure. Because the record does not show full disclosure was made before Miller consented to the transaction, a violation of DR5-104(A) has been established. This is true even though respondent did not act dishonestly or make a profit on the transaction.

In accordance with the Commission recommendation, we reprimand him for the violation.

| **CHECK YOUR KNOWLEDGE:** |
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| 1. Did Mershon benefit at Miller’s expense? |
| 1. Why was Mershon reprimanded? What should he have done to avoid a reprimand? Would it have changed the outcome? |
| 1. Was Mershon’s punishment sufficient under the circumstances? |
| 1. The court notes that Mershon did not plan for what would happen if Miller died, how far in advance do you feel an attorney should be charged with planning a transaction? |

**Litigation Finance**

Historically, “maintenance,” “champerty,” and “barratry” were illegal and tortious.[[4]](#footnote-3)

* Maintenance is litigation funding by a disinterested third party,
* Champerty is litigation funding in exchange for a percentage of any recovery, and
* Barratry is frivolous litigation.[[5]](#footnote-4)

The prohibition was intended to prevent frivolous and abusive litigation. The concern was that nobles would abuse the courts to harass their enemies and extort settlements.[[6]](#footnote-5)

Until recently, United States courts maintained the prohibition on maintenance and champerty. But people began to question the legitimacy of rules that prevented people from pursuing valid claims simply because they could not pay attorney’s fees. First, courts began permitting contingent fee agreements, which are champerty, but limited to lawyers. And then they began permitting litigation finance agreements, which are champerty for everyone.

Contingent fee agreements are literally champerty, because an attorney agrees to fund litigation in exchange for a percentage of the recovery. And litigation finance agreements are champerty squared, because a third party agrees to fund litigation in exchange for a percentage of the recovery. But courts have held that both contingent fees and litigation finance are fine, because they enable people to pursue valid claims.

| **Contingent Fee Agreements (Champerty) vs. Litigation Finance Agreements** | |
| --- | --- |
| **Contingent Fee** | **Litigation Finance Agreement** |
| Attorney Allen will fund the litigation out of his own pocket and will collect 30% of the final awarded judgment. Client Cathy will not pay Allen and will receive 70% of the final judgment. | Attorney Alice will receive funding from Firm Fanny for the litigation costs. Firm Fanny will collect 10% of the final awarded judgment, Alice will collect 20%, and Client Cliff will receive 70%. |

| [**Model Rule 1.8: Current Clients: Specific Rules**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_8_current_clients_specific_rules/) |
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| 1. A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:    1. a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and    2. a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client. 2. A lawyer shall not accept compensation for representing a client from one other than the client unless:    1. the client gives informed consent;    2. there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and    3. information relating to representation of a client is protected. |

| [**Model Rule 1.8: Current Clients: Specific Rules**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_8_current_clients_specific_rules/) |
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| 1. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:    1. acquire a lien authorized by law to secure the lawyer's fee or expenses; and    2. contract with a client for a reasonable contingent fee in a civil case. |

| **Restatement (Third) of the Law Governing Lawyers § 36: Forbidden Client–Lawyer Financial Arrangements** |
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| 1. A lawyer may not acquire a proprietary interest in the cause of action or subject matter of litigation that the lawyer is conducting for a client, except that the lawyer may:    1. acquire a lien to secure the lawyer’s fee or expenses; and    2. contract with a client for a contingent fee in a civil case except when prohibited. 2. A lawyer may not make or guarantee a loan to a client in connection with pending or contemplated litigation that the lawyer is conducting for the client, except that the lawyer may make or guarantee a loan covering court costs and expenses of litigation, the repayment of which to the lawyer may be contingent on the outcome of the matter. 3. A lawyer may not, before the lawyer ceases to represent a client, make an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation. |

| [***Saladini v. Righellis*, 426 Mass. 231 (1997)**](https://scholar.google.com/scholar_case?case=8735776364940564019) |
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| **Summary:** Saladini, an attorney, advanced funds to Righellis to employ separate counsel to pursue his claim. They agreed that if Righellis prevailed in his case, the first payment would go directly to Saladini to reimburse her, and also that she would receive 50% of any additional judgment awarded. Righellis hired an attorney but shortly thereafter changed his representation to a different attorney. Saladin and Righellis agreed that the original terms of their agreement would continue to hold. Righellis settled his case and kept the first disbursement rather than giving it to Saladini, who sued Righellis for her share of the settlement. The court found that the agreement between Saladini and Righellis was champerty, but overturned the Massachusetts rule prohibiting champerty. |

The plaintiff, Lisa Saladini, appeals from the decision of a judge in the Superior Court dismissing her complaint, sua sponte, on the ground that a written agreement she had with the defendant, George P. Righellis, was champertous and unenforceable. Saladini had sought a declaratory judgment establishing her rights under the agreement. We granted Saladini’s application for direct appellate review to consider whether we should continue to enforce the doctrine. We rule that the common law doctrines of champerty, barratry, and maintenance no longer shall be recognized in Massachusetts. We reverse the judgment entered in the Superior Court and remand this case for further proceedings.

I

On September 23, 1992, Saladini and Righellis entered into a written agreement pursuant to which Saladini agreed to advance funds to Righellis to allow him to pursue potential legal claims he had arising out of his interest in real estate in Cambridge, known as Putnam Manor. In return, Righellis agreed that, if pursuit of his claims yielded any recovery, the first amount recovered would be used to reimburse Saladini, and that Saladini would, in addition, receive 50% of any net recovery remaining after payment of attorney’s fees. Saladini, herself, had no interest in Putnam Manor.

Saladini thereafter advanced funds to Righellis that he used to retain an attorney under a contingent fee agreement to bring a lawsuit and to pursue his legal claims. At some point Righellis became dissatisfied with that attorney’s representation and, with the concurrence of Saladini, hired a new lawyer, Robert Potters, to replace him. Righellis signed a new contingent fee agreement with Potters.

The original agreement between Saladini and Righellis did not anticipate retaining a second attorney to represent Righellis in the Putnam Manor lawsuit. Saladini maintains that to deal with this circumstance, she and Righellis agreed that each would pay one-half of the retainer required by Potters, each would pay one-half of the litigation disbursements, and that in all other respects the terms of their original agreement would remain in effect. No new or amended agreement was executed, but Saladini did pay one-half of the retainer to Potters and one-half of the litigation disbursements. All told, Saladini advanced a total of $19,229 to Righellis.

At some point Righellis settled the Putnam Manor lawsuit, with the defendants in that case agreeing to pay him $130,000. The first payment of $10,000 was paid on or about November 2, 1994, with the balance due on January 11, 1995. Neither Potters nor Righellis informed Saladini that a settlement had been reached, or that the first settlement funds had been received.

When Saladini became aware of the settlement, she filed suit, seeking to establish her rights under the agreement. She also sought, and a judge in the Superior Court granted, injunctive relief, enjoining Righellis and Potters from disbursing any of the settlement funds until her claims had been adjudicated.

In November, 1995, Righellis filed a motion for summary judgment that Saladini opposed. After reviewing the submissions of the parties, a judge in the Superior Court, sua sponte, invited both parties to submit memoranda on the issue whether the agreement between Saladini and Righellis was champertous. A hearing followed and, in September, 1996, another judge ruled that the agreement was champertous and unenforceable as against public policy. She ordered that Saladini's complaint be dismissed in its entirety. A judgment to that effect was entered on September 24, 1996. Saladini appealed. A judge granted Saladini’s motion to continue the preliminary injunction pending her appeal.

II

Champerty has been described as the unlawful maintenance of a suit, where a person without an interest in it agrees to finance the suit, in whole or in part, in consideration for receiving a portion of the proceeds of the litigation. We described the doctrine as a “narrow and somewhat technical concept,” a type of maintenance that occurs when a person engages in “officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it.”

The doctrine has a long and, in this country, checkered history. The ancient prohibition against champerty arose in feudal England. More recently the doctrine has been viewed as a check on frivolous or unnecessary litigation, or a mechanism to encourage the settlement of disputes without recourse to litigation. The extent to which courts, here, accepted the doctrine has varied. In some States, champerty was never adopted, or has been abandoned. In others, the doctrine was given narrow application. Massachusetts followed the common law prohibition against champerty, although we have never enforced the doctrine to the same extent as English courts.[[7]](#footnote-6) Nevertheless, under our own development of the doctrine we have little doubt that the agreement between Saladini and Righellis would be champertous were we to continue to recognize the offense. We no longer are inclined to do so.

We have long abandoned the view that litigation is suspect, and have recognized that agreements to purchase an interest in an action may actually foster resolution of a dispute. In more recent cases we have questioned whether the doctrine continues to serve any useful purpose. In *McInerney*, we noted that “the decline of champerty, maintenance, and barratry as offences is symptomatic of a fundamental change in society’s view of litigation — from ‘a social ill, which, like other disputes and quarrels, should be minimized’ to ‘a socially useful way to resolve disputes.’” In *Christian v. Mooney*, we declined to consider whether an agreement between a “bounty hunter in troubled titles” and other plaintiffs in a suit was champertous because that issue was not contested by the parties to the agreement — even though that plaintiff's repeated instigation of litigation regarding troubled real estate titles was the very conduct traditionally condemned as violative of the prohibition against champerty. Most recently, in *Berman v. Linnane*, we declined to strike down a contingent fee agreement that did not satisfy the requirements of S.J.C. Rule 3:05 as champertous, relying rather on “the public policy against the recovery of excessive fees” to limit the financial recovery by an attorney. We observed in that case that “at least as to lawyers, other principles fulfill whatever purpose champerty once had.” These decisions all reflect the change in our attitude toward the financing of litigation.

We also no longer are persuaded that the champerty doctrine is needed to protect against the evils once feared: speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining position. There are now other devices that more effectively accomplish these ends. Our rule governing contingent fees between attorneys and clients is based on the principle that an attorney’s fee must be reasonable. We also recognize a public policy against the recovery of excessive fees. Additional devices include Mass. R. Civ. P. 11, providing sanctions for misconduct, and G. L. c. 231, § 6F, regulating the bringing of frivolous lawsuits. General Laws c. 93A, and the doctrines of unconscionability, duress, and good faith, establish standards of fair dealing between opposing parties. To the extent that we continue to have the concerns that the doctrine of champerty was thought to address, we conclude that it is better to do so directly, rather than attempting to mold an ancient doctrine to modern circumstances.[[8]](#footnote-7) As Justice Holmes, then a member of this court, said a century ago: “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”

Other States that no longer recognize the doctrine of champerty have continued to scrutinize an agreement to finance a lawsuit with care. We shall do likewise. This means that if an agreement to finance a lawsuit is challenged, we will consider whether the fees charged are excessive or whether any recovery by a prevailing party is vitiated because of some impermissible overreaching by the financier. Judges also retain their inherent power to disapprove an attorney's fee that is unreasonable. We shall be guided in our analysis by a rule of what is fair and reasonable, looking to all of the circumstances at the time the arrangement is made to determine whether the agreement should be set aside or modified. In this case, for example, had the agreement been challenged, relevant factors might have included the respective bargaining position of the parties at the time the agreement was made, whether both parties were aware of the terms and consequences of the agreement, whether Righellis may have been unable to pursue the lawsuit at all without Saladini’s funds, and whether the claim by Righellis that he will receive but $35,000 of the total $130,000 settlement award if Saladini prevails is unreasonable in the circumstances. We observe that before the judge raised the issue, Righellis had never challenged the validity of his agreement with Saladini. The record before us does not permit any conclusion regarding the reasonableness of the agreement between Righellis and Saladini on the one hand, or Righellis and Potters on the other. We see no reason why Righellis should be the beneficiary of any windfall, or why any adjustment to the financing arrangement — if appropriate at all — should be made solely at Saladini's expense. If pursued, those matters can be decided by the trial judge.

| **CHECK YOUR KNOWLEDGE:** |
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| 1. On October 4, 2012, the website Gawker published a 2 minute excerpt from a 30 minute video of Terry Gene Bollea, better known as “Hulk Hogan,” having sex with Heather Clem, the wife of Bollea’s friend Bubba the Love Sponge Clem. Bollea claimed the video was made without his knowledge or consent, and filed an [action](https://en.wikipedia.org/wiki/Bollea_v._Gawker) against Gawker in Florida state court, alleging an assortment of tort claims. The jury ruled in favor of Bollea, awarding him $115 million in compensatory damages and $25 million in punitive damages. Gawker could not pay the judgment and filed for bankruptcy. After the trial, Peter Thiel disclosed that he had paid millions of dollars to finance Bollea’s action, which he described as “one of my greater philanthropic things that I've done.” [Many](https://www.vanityfair.com/news/2018/02/the-thiel-gawker-saga-takes-an-even-darker-turn) [people](https://techcrunch.com/2018/03/01/the-dinner-that-destroyed-gawker/) [objected](https://www.theatlantic.com/business/archive/2018/02/hogan-thiel-gawker-trial/554132/) [to](https://www.vox.com/2016/5/26/11784036/gawker-peter-thiel-dangerous) [Thiel’s](https://www.newyorker.com/news/news-desk/how-peter-thiels-gawker-battle-could-open-a-war-against-the-press) [role](https://www.huffingtonpost.com/michelangelo-signorile/gawker-didnt-out-peter-thiel_b_10141996.html) in Bollea’s action. Was it maintenance, champerty, or barratry? Should it have been prohibited? |
| 1. In 2003, residents of [Lago Agrio, Ecuador](https://en.wikipedia.org/wiki/Lago_Agrio_oil_field#Litigation) filed a class action against Chevron in an Ecuadorian court, alleging that its Lago Agrio oil field had polluted the environment. The plaintiffs were represented by the Ecuadorian lawyer Pablo Fajardo Mendoza and the American lawyer Steven Donziger, who obtained more than $32 million in third-party litigation funding. The American documentary filmmaker Joe Berlinger documented the litigation and released the film [*Crude*](https://en.wikipedia.org/wiki/Crude_(2009_film)) in 2009. In 2011, the Ecuadorian court ruled for the plaintiffs and ordered Chevron to pay $18 billion in damages. Chevron’s lawyers at [Gibson, Dunn & Crutcher LLP](https://www.gibsondunn.com/) noticed that an early version of *Crude* had featured an ostensibly impartial environmental expert meeting with Donziger before the trial, and subpoenaed Berlinger’s outtakes, which provided additional evidence of fraud and corruption. In 2014, the United States District Court for the Southern District of New York found that Donziger had used “corrupt means” in the Ecuadorian court and refused to enforce the verdict, and the Second Circuit affirmed. Both New York and the District of Columbia suspended Donziger from the practice of law. Was it improper for Donziger to obtain third-party litigation funding? Did the availability of funding create improper incentives? Are third-party litigation funders in a position to evaluate the legitimacy of the litigation they fund? Should they be? |

**Further Reading:**

* [Max Radin, *Maintenance by Champerty*, 24 Calif. L. Rev. 48 (1935)](https://scholarship.law.berkeley.edu/californialawreview/vol24/iss1/6/)
* [Jeremy Kidd, *Modelling the Likely Effects of Litigation Financing*, 47 Loy. Chi. L.J. 1239 (2016)](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2674252)
* [Anthony J. Sebok, *The Inauthentic Claim*, 64 Vand. L. Rev. 61 (2011)](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1593329)
* [Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. Chi. L. Rev. 367 (2009)](https://chicagounbound.uchicago.edu/uclrev/vol76/iss1/13/)
* [Maya Steinitz, *Whose Claim is This, Anyway? Third-Party Litigation Funding*, 95 Minn. L. Rev. 1268 (2011)](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1586053)
* [Victoria Shannon Sahani, *Reshaping Third Party Funding*, 91 Tulane L. Rev. 405 (2017)](https://scholarlycommons.law.wlu.edu/wlufac/513/)

1. Alexandre Dumas *fils*, *La Question d’argent* (1857) [↑](#footnote-ref-0)
2. The Kinks, *Moneygoround*, Lola Versus Powerman and the Moneygoround (1970). [↑](#footnote-ref-1)
3. Pet Shop Boys, *Opportunities (Let’s Make Lots of Money)*, Please (1986). [↑](#footnote-ref-2)
4. Percy H. Winfield, *History of Maintenance and Champerty*, 35 L.Q. Rev. 50 (1919). In medieval England, maintenance and champerty were both prohibited by statute, and may also have been prohibited by the common law. [↑](#footnote-ref-3)
5. The word “champerty” derived from the Old French word “champart,” which referred to a feudal lord’s claim to a share of the produce of the land worked by a vassal. The word “barratry” derived from the Old French word “barater,” which meant “to deceive.” [↑](#footnote-ref-4)
6. In practice, the law prohibited champerty, but may have permitted maintenance without champerty. [↑](#footnote-ref-5)
7. For example, we consistently have held that it is not unlawful “to engage in the business of buying choses in action and enforcing them by suit if necessary,” although under English common law assignments of choses in action are within the scope of champerty. We have not prohibited agreements otherwise champertous where the party has an independent interest in the suit. We also have recognized the validity of contingent fee arrangements with attorneys, which otherwise would be champertous. [↑](#footnote-ref-6)
8. The doctrine of champerty may also be unworkable or have harsh results. Rather than punishing the owner of the legal claim who has entered into a champertous agreement, the doctrine bestows on him a windfall. In this case, for example, Righellis would be permitted to retain the full benefit of the positive result achieved in the Putnam Manor lawsuit, while he would not have to honor his obligations to Saladini, the person whose support made pursuit of the lawsuit possible. A defendant sued in a champerty-supported litigation may not assert the champerty as a defense, but a court may refuse to enforce a champertous agreement even where the defense of champerty has not been asserted. [↑](#footnote-ref-7)