GETTING PAID

BEFORE, DURING AND AFTER TRIAL

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I. BEFORE TRIAL: THE CONTRACT.

Although unnecessary to establish an attorney-client relationship[2] (an implied contract arises by operation of law), a written contract provides an opportunity to explain the representation to the client, inform them of your expectations, and gain an understanding of their expectations.[3]

For example, are you being retained to generally represent the client or just in a specific matter? What exactly is the scope of your work? Does it include all trial-level work, including multiple complex qualified domestic relations orders and other post trial work? Appeals? When does your representation terminate? Defining the scope of representation is important in any arrangement, but particularly important in flat fee arrangements.

Some attorneys discuss the terms of representation during the initial meeting and send a confirmatory "letter agreement" thereafter. Some do not require the client to sign the "letter agreement". But most attorneys I know require, in various degrees of specificity, a more formal contract. I generally will not represent a client without a formal contract, which I go over with them, provision by provision. Additionally, unless the matter requires an immediate entry of appearance or an emergency hearing, I provide clients a 48-hour window to review the contract, ask any questions, and change their mind and receive a full refund of their full initial retainer. The in-person discussion and subsequent review period makes it hard for them to later argue that they did not understand the contract or entered into it in haste.

The contract provides a good opportunity to clarify or expand upon what the law otherwise implies. Depending upon the nature of the case and representation, I use the contract, among other things, to:

- Define the scope of work;
- Set the flat fee or hourly fee including any discounted hourly rates (if applicable);
- Set the higher standard rate if in default;
- Address attorney's liens;
- Explain the retainer, including how much is a nonrefundable general retainer (a requirement under the rules of ethics of many state bars);
- Set up a payment plan (if applicable);
- Set the interest rate on past due balances (a requirement under the rules of ethics of many state bars);
- Set the hourly rate for collection activities (whether performed inhouse or by others);

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- Obtain informed consent to electronic communications;
- Obtain a waiver of objections to any line item on a bill if not disputed within ten days of an invoice;
- Address a wide range of issues relating to default, including waiver of jury trial and mandatory venue in collections proceedings;
- Preclude any settlement from affecting the terms of the contract;
- Address guarantors;
- Explain the attorney-client privilege;
- Preclude waivers by future accommodations; and,
- Explain the integrated nature of the contract.

Simply stated, it is important—pragmatically and ethically—to make the terms of your representation and the client's obligations clear from the beginning. Taking the extra time to explain the contract and obligations may seem bothersome, but most clients appreciate it. Most clients also appreciate detailed invoices that tell them precisely what you are doing for them.

Detailed invoices also make it easier to substantiate and separate (as required in in many cases) your charges for fees and expenses when seeking recovery in court. For example, what does an invoice with a line item for 8 hours for "work on the case" mean? How is a court supposed to view that entry if a fee award is limited to contempt or some other specific issue in the case? What if you anticipate that an appellate court may limit fees to your client's defense of the appeal?

Instead of billing 8 hours for "work on the case", lawyers should consider billing those 8 hours with greater specificity, for example: "meeting with opposing counsel regarding [subject matter] (1.5), preparing lengthy letter to opposing counsel regarding [subject matter] (.5), review and analysis of corporate minutes, articles of incorporation, and shareholder agreement (1.5), legal research and analysis regarding jurisdictional and joinder issues related to foreign corporation (2.0), preparing lengthy memorandum regarding analysis of corporate documents referenced above and jurisdictional/joinder issues (3.5)." While brevity is fine if you are billing 8 hours for "attending trial", particularly since the client is with you, substantive entries help the client understand and help the client when you seek attorney's fees from the court.

Educating the client about the case and about his or her role is an important and continuing task. As a matter of habit, I tell clients two things in the first meeting: (1) if you ever lie to me or misrepresent or withhold something from me, I will fire you, even if I discover it in the middle of your testimony at trial, and (2) their main job is to make me the "master of the facts", whether good, bad, or seemingly neutral. I also explain to them that other than the significant expense of hiring an expert, a decision which I ultimately leave to them (with the caveat that if in my judgment an expert is necessary and they refuse to pay for one, I will withdraw from representation), the only things they have ultimate decision making power over are the goals and objectives of the representation, the right to fire me at any time for any reason, and settlement-related matters.

A. THE RETAINER: GENERAL, SPECIAL OR HYBRID.

If you charge an initial retainer, how much of the initial retainer is a "general, nonrefundable retainer"? A "special retainer"? A "hybrid retainer"? In Ethics Opinion No. 250, the Mississippi Bar explained its view of general, special, and what can fairly be called a hybrid retainer:

> Historically, the term "retainer", when used to describe payments to a lawyer, had nothing to do with compensation for services. Rather, a retainer was a sum of money paid to a lawyer to secure his availability to a client over a given period of time regardless of whether the lawyer actually performs any service for the client. *See* Black's Law Dictionary Revised 5th Edition (1979). Referred to as a "general retainer", the fee is earned when paid since the lawyer is entitled to the money regardless of whether he actually performs any services for the client. *E.g., In Re: Viscount Furniture Corp.*, 133 B.R. 360, 364 (N.D. Miss 1991). The general retainer is paid for availability only and is not applied against the attorney's hourly rate; instead, there is an additional bill for services actually rendered. By its nature, a general retainer is "non-refundable".
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> Over time, a second class of "special retainer" arrangements has come into existence. In the typical "special retainer" arrangement, the client pays, in advance, for some or all of the services the attorney is expected to perform on the client's behalf. Such an arrangement is permitted in Mississippi. Comment, M.R.P.C. Rule 1.5. In the usual situation, the advance fee payment is applied against the attorney's hourly fee and the attorney spends down the advance payment as services are performed. Under Rule 1.16(d) of the Mississippi Rules of Professional Conduct and Opinion No. 219, an attorney must refund any advance fee payment that has not been earned.
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> The potential ethical dilemma arises when an attorney enters into a "special retainer" arrangement whereby an advance fee payment is required, some and/or all of which

is categorized as a "non-refundable retainer". An analysis of M.R.P.C. Rule 1.5(a) does not per se prohibit "non-refundable retainers" provided the retainer is reasonable. However, should a client discharge the lawyer or the lawyer withdraws from representation, M.R.P.C. Rule 1.16(d) requires an attorney to refund "any advance payment that has not been earned" which would include any "unreasonable portion" of a "non-refundable retainer". As advised in Opinion No. 219, the fee arrangement should be in writing and the written agreement should contain a provision which specifically states what part of the initial fee is non-refundable.

Miss. Bar Ethics Op. 250 (2002).

A simple contractual provision explained to the client can remove confusion about the retainer. For example, if you charge an initial general retainer of $XXX, explain in the contract that "$XXX of the initial retainer is a general nonrefundable retainer, which means you agree to pay us that minimum amount regardless of the amount of time we spend on your case or whether either party terminates the relationship."[4]

Miss. Bar Ethics Op. 219 (1994).

B. ATTORNEY'S LIEN.

As explained in Section V below, a statement of dicta originating in *Halsell v. Turner*, 84 Miss. 432 (Miss. 1904) creates some confusion in Mississippi law about the distinction between a retaining lien and a charging lien. To clarify the lien, use the contract and explain to the client the nature and scope of the lien, its purpose, and obtain the client's written, informed consent. A sample provision reads as follows:

> **D. Liens.** To secure payment of all sums due for our representation of the matter described in Section 1, you grant us a first priority lien on all of your documents, property, money in our possession, property and money in your possession or control, money and property awarded to and/or received by you by settlement or judgment, or otherwise. The first priority lien described in the preceding sentence shall not vest in property that is the subject matter of this litigation until final judgment is entered or the matter is finally settled, but the first priority lien shall immediately vest upon final judgment or settlement with respect to property that is the subject matter of this litigation.

The contract should clearly define the role of the guarantor either in a single contract with the client and guarantor or in a separate contract with the guarantor.

> The first priority lien described in the first sentence of this provision shall immediately vest in all other property (that is not the subject matter of this litigation) upon all sums due under this agreement and shall increase or decrease, from time to time, as the sums due increase or decrease. The first priority lien shall not be affected by any legal or equitable exemption, which you specifically waive, including without limitation any homestead or other exemption. The first priority lien shall not be affected by termination of this contract, whether you terminate us or we withdraw from representation for breach of this agreement or because the rules governing the practice of law require us to withdraw. The first priority lien may be asserted in the proceeding described in Section 1 or in a collection proceeding and by filing a lis pendens against your real property,[5] but the first priority lien shall remain valid regardless of whether it is formally asserted in any action. The first priority lien shall increase to include any and all amounts incurred or generated in perfecting the lien and in any collection proceeding. You may discharge the lien only by paying the amount due. We agree not to formally assert the lien in any proceeding as long as you are in full compliance with your payment obligations under this agreement.

C. GUARANTOR ARRANGEMENTS.

The contract should clearly define the role of the guarantor either in a single contract with the client and guarantor or in a separate contract with the guarantor. It should plainly explain that although the guarantor is paying your bill, he or she is not the client and will not be included in attorney-client communications. A sample provision reads as follows:

> **Payor and Unconditional Guarantee.** Although you are responsible for paying the fees and expenses to us under this contract, your _____, Mr. X, has unconditionally agreed to pay the invoices for services and costs directly to us pursuant to this agreement and the separate Guarantor Agreement, though you will be responsible for repaying Mr. X under whatever arrangement you may separately establish. Although Mr. X is paying the fees and expenses directly to us, the attorney-client relationship exists solely between us and you. For that reason, unless you consent below, communications and discussions about this matter will be between us and you only. Even with your consent, there may be certain conservations that we may decide, as a matter of prudence, to keep between us and you to preserve the attorney-client privilege.

That provision creates "space" from the beginning between your client and the guarantor who may otherwise mistakenly think he or she is in a position to "call the shots" because he or she is paying the bill.

II. DURING TRIAL: ADVANCE LITIGATION FEES AND EXPENSES.

A chancery court has authority to award advance litigation fees and expenses or attorney's fees pendente lite and suit money, including money to hire and pay other experts, and otherwise pay the costs of

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litigation in divorce (and separate maintenance) cases under proper circumstances.[6] In larger cases, a spreadsheet breaking down the anticipated fees and expenses is helpful.[7] Advance litigation fees and expenses are an issue committed to the "sound discretion of the chancery court,"[8] but should be awarded periodically during the pendency of the case, rather than in one full advance sum.[9]

Advance litigation fees and expenses are also appropriate in separate maintenance cases. In *Johnston v. Johnston*, 182 Miss. 1, 179 So. 853 (Miss. 1938), the Mississippi Supreme Court held that the power to award solicitor's fees pendent lite is incident to the jurisdiction of the court of chancery court. The Court explained that in advancing fees and expenses, the chancellor was not required to investigate the merits of the underlying action, but rather only to verify the case stated a basis for relief, that the allowance was necessary to prosecute the suit, and to determine the proper allowance based upon the parties' finances, including the ability to pay.[10]

III. FAILURE TO PAY SUPPORT, FRIVOLOUS PLEADINGS AND APPEALS, DISCOVERY VIOLATIONS, AND UNSUBSTANTIATED ALLEGATIONS OF CHILD ABUSE OR NEGLECT.

Although proof under the *McKee* factors is not always required to recover attorney's fees (for example, in contempt, support enforcement, and sanctions actions[11]), it is sound practice to put on proof of *McKee* factors in every case in which there is a possibility of recovering attorney's fees. Mississippi Code § 9-1-41 provides that:

> In any action in which a court is authorized to award reasonable attorneys' fees, the court shall not require the party seeking such fees to put on proof as to the reasonableness of the amount sought, but shall make the award based on the information already before it and the court's own opinion based on experience and observation; provided however, a party may, in its discretion, place before the court other evidence as to the reasonableness of the amount of the award, and the court may consider such evidence in making the award.

The record still must support the award with credible evidence. *See Regency Nissan, Inc. v. Jenkins*, 678 So. 2d 95, 103 (Miss. 1995).[12]

A. FAILURE TO PAY SUPPORT—NO CONTEMPT.

Attorney's fees are recoverable in cases of failure to pay support, regardless of willful contempt or inability to pay.

In *Carter v. Davis*, 241 So. 3d 614 (Miss. 2018), the Mississippi Supreme Court reaffirmed the principle that an obligee who must initiate a court proceeding to enforce support obligations may recover attorney's fees from the obligor even though there was no finding of contempt. Otherwise the support obligation would be unfairly reduced. *Carter* also affirmed the award of fees even though proof under the *McKee* factors was not introduced.[13]

B. FRIVOLOUS PLEADINGS AND APPEALS.

The Mississippi Litigation Accountability Act, Mississippi Code § 11-55-5(1), provides in pertinent part:

> Except as otherwise provided in this chapter, in any civil action commenced or appealed in any court of record in this state, the court shall award, as part of its judgment and in addition to any other costs otherwise assessed, reasonable attorney's fees and costs against any party or attorney if the court, upon the motion of any party or on its own motion, finds that **an attorney or party** brought an action, or asserted any claim or defense, that is **without substantial justification** . . ..
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> (emphasis supplied).

Section 11-55-3(a) defines "without substantial justification" as "any action, claim, defense or appeal, including without limitation any motion . . . that it is **frivolous, groundless in fact or in law, or vexatious**, as determined by the court." (emphasis supplied).

Rule 11 of the Mississippi Rules of Civil Procedure provides in pertinent part as follows:

> If any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party, or his attorney, or both, to pay to the opposing party or parties the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorneys' fees.
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> M.R.C.P. 11(b).

The standard for frivolousness under the Mississippi Accountability Act and Rule 11 is the same: a claim or defense made without hope of success. *In re Spencer*, 985 So.2d 330 (Miss. 2008).

The Mississippi Litigation Accountability Act provides a "safe harbor" as follows:

> No attorney's fees or costs shall be assessed if a voluntary dismissal is filed as to any action, claim or defense within a reasonable time after the attorney or party filing the action, claim or defense knows or reasonably should have known that it would not prevail on the action, claim or defense.
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> Miss. Code Ann. § 11-55-5(2).[14]

Mississippi Rule of Appellate Procedure 38 provides for just damages and single or double costs in a civil appeal that it determines to be frivolous. *See Alexander v. Pitts*, 229 So. 3d 1073 (Miss. 2017) (awarding fees, but remanding for determination of fees and costs—appellant appealed on a collateral issue intentionally not raised below); *but see Ferrell v. Cole (In re Estate of Cole)*, 256 So. 3d 1156 (Miss. 2018) (denying attorney's fees where issue was novel, and, even though it had little hope of success, it could not conclude that the appellant had no hope of success).

C. MISSISSIPPI RULE OF CIVIL PROCEDURE 37 ATTORNEY'S FEES AND SANCTIONS.

Rule 37 contains several provisions mandating attorney's fees and expenses. Unless the court finds substantial justification or circumstances making the award unjust, under Rule 37(a) a court must award fees on a motion to compel (or motion for protective order relating to) discovery, and

may apportion fees when a motion is granted in part and denied in part.

After an order is entered, a court may (unless substantial justification or circumstances exist make the award unjust) award attorney's fees, or, impose a number of punitive sanctions including contempt and striking defenses and pleadings under Rule 37(b). No prior order to compel is necessary when there is a total failure to respond to discovery,[15] or when responses are of no substance.[16]

Additionally, an existing court order is not required to impose sanctions under Rule 37(c), (d), or (e). And, a court always has the inherent power to impose sanctions to protect the integrity of the judicial process.[17]

D. UNSUBSTANTIATED ALLEGATIONS OF CHILD ABUSE OR NEGLECT.

Mississippi Code § 93-5-23 provides, in pertinent part, that:

> If after investigation by the Department of Human Services or final disposition by the youth court or family court allegations of child abuse are found to be without foundation, the chancery court shall order the alleging party to pay all court costs and reasonable attorney's fees incurred by the defending party in responding to such allegation.

In *Tidmore v. Tidmore*, 114 So. 3d 753 (Miss. Ct. App. 2013), the Court of Appeals affirmed, in principle, an award of attorney's fees to a spouse for defending against baseless allegations of abuse and contempt. The award of fees under the statute, however, is limited to fees relating to defending against the allegations of abuse and must exclude fees incurred for other aspects of the proceeding.[18]

IV. ATTORNEY'S FEES ON APPEAL.

In *Latham v. Latham*, the Mississippi Supreme Court held that requesting fees in a brief is insufficient—a motion must be filed under Mississippi Rule of Appellate Procedure 27(a).[19] Prior to *Latham*, the customary amount of attorney's fees awarded to prevailing parties on appeal was 50% of the attorney's fees awarded at trial. That was the custom notwithstanding the Court's prior statement in dicta that the better practice would be to file a motion supported by affidavits and time records because a 50% award may not be fair and equitable in all cases.[20]

Subsequently the Court of Appeals rejected, in *Brown v. Hewlett*, a request for fees for failing to comply with Latham's mandate.[21] The Court did, however, provide the appellee with an opportunity to renew the request by a proper M.R.A.P. 27(a) motion filed before the mandate issued.[22]

In *Thomas v. Thomas*, the Court of Appeals denied attorney's fees in a domestic matter based upon the failure to demonstrate inability to pay, notwithstanding a lower court award of fees for contempt (and multiple false 8.05s submitted by the opposing party to the lower court).[23] The Court also denied attorney's fees on appeal, noting that the attorneys' invoices (though supported by *McKee* affidavits) did not distinguish between the 6 issues they successfully defended on appeal and the issues pursued on cross appeal.[24]

V. ATTORNEY'S LIENS.

The underlying policy of attorney's liens is to protect attorneys from clients who seek to retain the fruits of the attorney's labor without paying for their work. In 1891, the United States Supreme Court aptly stated the purpose of attorney's liens by quoting Lord Kenyon: "the principle has long been settled that a party should not run away with the fruits of a cause without satisfying the legal demands of his attorney, by whose industry and expense these fruits were obtained." *Louisville, E. & S. L. R. Co. v. Wilson*, 138 U.S. 501, 507 (1891).

Two distinct liens arise by operation of the common law for attorney's services. The retaining lien applies to papers and property in the attorney's possession and extends to the general balance for all professional services rendered by the attorney to the client.[25] The charging lien, in contrast, is a special lien that attaches for fees and expenses in a particular case to be paid out of any judgment in that case that the attorney recovers.[26] In the latter case, the attorney is considered the assignee of the judgment to the extent of his fee. Although the dicta in *Halsell* muddies the distinction by suggesting a possessory requirement as it relates to a charging lien, sound reasoning dictates that possession is not a requirement for a charging lien

In *Stewart v. Flowers*, 44 Miss. 513, 522 (Miss. 1871), the attorney (who withdrew prior to judgment because of the client's nonpayment) and client entered a contract without a stipulated price or time of payment. The withdrawn attorney sought payment of a reasonable sum, or quantum meruit recovery from the proceeds obtained from the sale of the real property at issue (which had been sold to the third-party defendant) in the case. After examining numerous authorities, the *Stewart* Court refused to extend the doctrine to the realty purchased by the third-party defendant.

In *Halsell v. Turner*, 84 Miss. 432 (Miss. 1904), the Mississippi Supreme Court rejected a client's contention that the recovery was exempt from the charging lien because it represented his wages,[27] but at the same time

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rejected the attorney's contention that he could apply the full recovery in the case to other balances owed by the client on unrelated matters. The statement in *Halsell* that "[t]his lien applies so long as the attorney has the funds in his possession. . .."[28] is, in my view, dicta (as it was wholly unnecessary to the decision), but as explained below has created confusion as to operation of the charging lien.

In *Webster v. Sweat*, 65 F.2d 109 (5th Cir. 1933), the Fifth Circuit (applying Mississippi law) explained that the nature of the retaining and charging lien. With respect to a retaining lien, the Court explained that:

> At common law an attorney has a lien on all papers of his client which come into his possession in the course of his professional employment. This lien is not limited to the papers in any particular suit, but extends to the general balance due to the attorney for any and all professional services performed by him for his client. It is passive, and ordinarily cannot be enforced by any proceeding in court, but it entitles the attorney to retain possession until all his fees are paid.

Webster, 65 F.2d at 109 (citations omitted). With respect to the charging lien, the Court explained that:

> An attorney also has a special or charging lien which entitles him to have his fee in any particular case paid out of the judgment which he recovers. *He is considered as assignee of the judgment to the extent of his fee.* Liens of both kinds have been adopted in most of the states; and they are recognized in Mississippi. . .. ***

Webster, 65 F.2d at 110 (citations omitted; emphasis supplied). To this writer, *Webster* appears to be the most accurate statement of the law as it applies to retaining and charging liens in Mississippi.

In *Collins v. Schneider*, 187 Miss. 1 (Miss. 1939), the attorney sued in chancery to enforce his lien on judgment proceeds obtained because of his efforts. There was no written contract between the attorney and client, but the court found an implied contract. After the chancery court suit was filed, the judgment debtor interpled the proceeds into the court registry. The Mississippi Supreme Court reasoned that:

> [A]n attorney's lien on judgments and decrees obtained by them for fees on account of services rendered, belongs to the family of implied common law liens, and is firmly engrafted on the common law. *The lien of attorneys on judgments and decrees obtained by them for fees, is based mainly on possession of such judgments or decrees, but partially also on the merit and value of their services.* It exists upon the money, papers and writings of the client in the attorney's hands, which is denominated a retaining lien. Such lien exists upon judgments and decrees, and the proceeds thereof, and is called a charging lien.
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> *Collins v. Schneider*, 187 Miss. at 9.[29]

In *Brothers in Christ, Inc. v. American Fidelity Fire Ins. Co.*, 680 F. Supp. 815 (S.D. Miss. 1987), the federal district court construed the language in *Halsell* as "engrafting a possession requirement on charging liens as well." *Id.* at 818; *accord Wilson v. Scruggs*, 2006 U.S. Dist. LEXIS 99162 (S.D. Miss. 2006) at *9.

In *Tyson v. Moore*, 613 So. 2d 817 (Miss. 1992), the attorney filed suit over a contingency fee against his client (who asserted malpractice and fraud as defenses). The lower court awarded the attorney $188,841.50 and found his conduct proper. The Mississippi Supreme Court reversed and rendered. The Court affirmed the chancellor's finding that the attorney had not breached the duty of loyalty with respect to asserting liens in light of the "uncertainty of our substantive law on what property the attorney may hold, and retain. . .." *Id.* at 827.[30] The Court also explained that if the lien applies to either real or personal property, the choice between realty, personalty, or cash, belongs to the client.

In *Estate of Stevens v. Wetzel*, 762 So. 2d 293 (Miss. 2000), Stevens (the initial and subsequently deceased) attorney, was retained on a contingency basis in a personal injury case and subsequently discharged by the client and replaced with another attorney who settled the case. Stevens initially sought to intervene to assert his claim of lien in the federal personal injury action, but was denied permission to do so. After settlement, the subsequent attorney tendered a small portion of the expenses claimed by Stevens (but no fees), which Stevens rejected.

Stevens then asserted a claim against the subsequent attorney and an insurance company in chancery based upon breach of ethical duty and violation of the law of assignments. The chancery court found that neither the subsequent attorney nor the insurance company were liable to Stevens, but rather Stevens' only action was against the client. The Mississippi Court of Appeals affirmed as to the insurance company (who purportedly did not have notice) but reversed as to the subsequent attorney, who knew about the claim of lien and was liable under a claim of conversion. The Mississippi Supreme Court reversed the Court of Appeals decision, finding that the pleading in the case was based upon the subsequent attorney's alleged breach of ethical duty, and, that the theory of conversion (relied upon by the Court of Appeals) was never asserted. It affirmed the dismissal in favor of the insurance company based upon abandonment.

More recently, in *Bar-Til, Inc. v. Superior Asphalt, Inc.*, 219 So. 3d 553 (Miss. Ct. App. 2017), the Court of Appeals held that the charging lien attached to a final interpled judgment even though the proceeds were not in the attorney's actual possession. The *Bar-Til* Court also held that the charging lien of the attorney was a first priority lien.[31]

Dicta in a fairly recent Fifth Circuit Court of Appeals case subtly recognizes the tension between the general *holdings* of Mississippi law related to charging liens, i.e., the charging lien attaches by operation of law to any judgment obtained, with the dicta in cases suggesting that possession is necessary to assert a charging lien.[32] If possession is necessary to assert a charging lien, what is the difference between a charging lien and a retaining lien (except the broader nature of a retaining lien)? How would such a possessory requirement further the expressed rationale that "a party should not run away with the fruits of a cause without satisfying the legal demands of his attorney, by whose industry and expense these fruits were obtained"? ■

1 Abridged, adaptive work from the author's seminar presentation at the 2019 Hot Tips from the Experts Seminar, Friday, May 3, 2019, Mississippi Sports Hall of Fame Jackson, Mississippi, a seminar intended for a domestic relations practitioner audience. ©2019 Gregory M. Hunsucker.

2 *Singleton v. Stegall*, 580 So. 2d 1242, 1244 n.2 (Miss. 1991) (citing American Law Institute, *Restatement of the Law: The Law Governing Lawyers* § 26 (Prelim. Draft No. 6, July 25, 1990)).

3 A written contract is required in all contingency fee arrangements in Mississippi. Mississippi Rule of Prof. Conduct. 1.5(c). Contingency fees are permissible in limited circumstances in domestic relations matters, specifically post-divorce support collections actions. Miss. Bar Ethics Op. 88 (1983, amended 2013).

4 For the potential perils of not using a written contract to explain the nature of the retainer, among other things, *see Trigg v. Farese*, 266 So.3d 611 (Miss. 2018).

5 *See* Miss. Bar Ethics Op. 244 (1998) (an attorney may not file a lis pendens on real property that is the subject matter of a divorce to collect fees); Miss. Bar Ethics Op. 152 (1988) (an attorney may not accept deed from client for one-half of marital home for fees); M.R.C.P. 1.7(b) (an attorney may not represent client if representation may be materially limited by attorney's own interests unless (a) the representation will not be adversely affected and (b) the client gives knowing and informed consent after consultation).

6 *See Verner v. Verner*, 62 Miss. 260 (Miss. 1884) (wife without means seeking permanent alimony should be awarded the means to maintain her suit).

7 I modeled my spreadsheet on the codes and breakdown of the Uniform Task-Based Management system. *See* https://www. americanbar.org/content/dam/aba/migrated/litigation/utbms/utbms.pdf.

8 *Neely v. Neely*, 52 So. 2d 501, 504 (Miss. 1951).

9 *See Parker v. Parker*, 71 Miss. 164, 14 So. 459 (Miss. 1893.

10 *McNeil v. McNeil*, 127 Miss. 616, 90 So. 327 (Miss. 1922); *Boyd v. Boyd*, 159 Miss. 614, 132 So. 752 (Miss. 1931); *see also Bilbo v. Bilbo*, 180 Miss. 536, 177 So. 772, 776-77 (Miss. 1938) (dicta).

11 *See Lewis v. Pagel, 172 So. 3d 162* (Miss. 2015) (proof under *McKee* factors not necessary in contempt action); *Carter v. Davis*, 241 So. 3d 614 (Miss. 2018) (proof under *McKee* factors not necessary in support enforcement action); *Smith v. Hickman, Goza & Spragins, PLLC*, 2019 Miss. LEXIS 22 (Miss. 2019) (proof under *McKee* factors not necessary to support attorney's fees awarded as sanctions under M.R.C.P. 37 or under inherit authority of court).

12 *Compare McKee v. McKee*, 418 So. 2d 764, 766 (Miss. 1982) (reversing and remanding on issue of amount of attorney's fees where award was based in part upon estimates of time spent by two attorneys in the case rather than detailed billing).

13 *See also Mizell v. Mizell*, 708 So. 2d 55 (Miss. 1998) (affirming $1,000.00 award where chancellor found that action was necessitated because obligor had not fully complied with decree, even though obligor was not found in contempt); *Moore v. Moore*, 372 So. 2d 270 (Miss. 1979) (reversing chancellor and awarding attorney's fees—finding of contempt or inability to pay unnecessary); *see also Pearson v. Hatcher*, 279 So. 2d 654 (Miss. 1973).

14 *See Choctaw, Inc. v. Campbell-Cherry-Harrison-Davis and Dove*, 965 So.2d 1041, 1045 at n.7 (Miss. 2007) (affirming denial of motion for sanctions); *Cont'l Cas. Co. v. Allstate Prop. & Cas. Ins. Co.*, 235 So. 3d 40 (Miss. 2017).

15 *Manning v. King's Daughters Medical Center*, 138 So.3d 109, 118-119 (Miss. 2014); *see also Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 564 So.2d 1346, 1368 (Miss.1990) (affirming sanction of dismissal where party failed to respond to discovery).

16 *Owens v. Whitwell*, 481 So.2d 1071, 1077 (Miss. 1986) (interpreting statutory predecessor of the Rule, Mississippi Code § 13–1–237(d)).

17 *Smith v. Hickman, Goza & Spragins, PLLC*, 265 So.3d 139 (Miss. 2019) (also holding that *McKee* factors need not be proven when the nature of the award is punitive).

18 *Id.*; *see also Campbell v. Campbell*, 269 So. 3d 426 (Miss. Ct. App. 2018).

19 261 So. 3d 1110 (Miss. 2019).

20 *Hatfield v. Deer Haven Homeowners Ass'n, Inc.*, 234 So. 3d 1269 (Miss. 2017) (awarding attorney's fees in the amount of ½ on appeal of fees awarded below based upon contractual attorney's fees provision).

21 2019 Miss. App. LEXIS 94 (Docket No. 2017-CA-01319-COA).

22 *Id.* at ¶45; *see also Wilkinson v. Wilkinson*, 2019 Miss. App. LEXIS 77 (Docket No. 2017-CA-00973-COA).

23 The party seeking fees on appeal testified in the lower court that she was not seeking attorney's fees. 2019 Miss. App. LEXIS 270 (Docket No. 2017-CA-00175-COA).

24 Unpublished July 23, 2019 *En Banc Order*, https://courts.ms.gov/appellatecourts/docket/sendPDF.php?f=700_455227.pdf&c=85861&a=N&s=2.

25 The Mississippi Bar has addressed the ethical issue related to retention of a client's file in numerous opinions. For example, in Miss. Bar Ethics Op. 144 (1998, amended 2013) the Bar opined that "ethically, a lawyer may not retain a client's file in a pending matter if it would harm the client or the client's cause." In Miss. Bar Ethics Op. 234 (1996) the Bar opined that an "attorney who has been terminated during a pending case may ask the client to sign a receipt for the client's file that releases the attorney from any further responsibility on the client's case or that acknowledges responsibility for payment of an owed legal fee plus interest, but the attorney may not require the client to sign the receipt as a condition for releasing the file." It further opined, in that same opinion, that an "attorney who has concluded a case, however, may require his client to acknowledge receipt of the file and to relieve the attorney of responsibility for maintaining the file."

26 In *Pope v. Armstrong*, 11 Miss. 214, 221 (Miss. 1844), the Mississippi Supreme Court held that money obtained in a particular suit cannot be applied to a general outstanding balance owed to the attorney, but rather only to fees related to that particular suit. In *Dunn v. Vannerson*, 8 Miss. 579, 581 (Miss. 1843) the Mississippi Supreme Court held that an attorney had the right to retain fees for monies collected by execution, but could not withhold funds from the judgment for their unsettled accounts (presumably general balances on other matters) or withhold funds for a creditor asserting rights in a garnishment action.

27 *See also Chattanooga Sewer Pipe Works v. Dumler*, 153 Miss. 276, 290 (Miss. 1929) (reversing lower court judgment finding proceeds from personal injury settlement exempt from attorney's charging lien and rendering judgment for 50% (the contractual contingency percentage) of proceeds in favor of attorney).

28 *Halsell*, 84 Miss. at 434.

29 Although *Collins* uncritically quoted the statement in *Halsell* that the charging lien "applies so long as the attorney has the funds in his possession", it explained that the attorney had a paramount lien (a charging lien) on the proceeds of the judgment even though the proceeds were in the hands of the judgment debtor the attorney sued to enforce his lien. *Collins* appears to have concluded that the proceeds were in the constructive possession of the attorney who procured the judgment because the proceeds had not passed from the judgment debtor to the attorney's client. *Collins*, 187 Miss. at 10. *Collins* also explained that "[i]t is not required that an attorney shall insist upon the enforcement of the lien before the rendition of the judgment procured by his services, but afterwards." *Id.* at 11.

30 Unfortunately, *Tyson* did not resolve the uncertainty relating to the purported possessory requirement repeatedly expressed in dicta when referencing charging liens. The Court characterized the two liens as follows: (1) a retaining lien may be exercised by an attorney on all money his client which comes into the attorney's possession during his course of professional employment, and (2) a special or charging lien attorney's fees may be imposed by an attorney to recover fees from the proceeds of a judgment in a case, but said lien does not attached until judgment is handed down, however, both liens apply to "funds already in the attorney's possession." *Tyson*, 613 So. 2d at 826.

31 "[A]ttorneys deserve payment for their successful services." *Id. at 557; Collins*, 187 Miss. at 23 ("it would be most inequitable and unjust for [other claimants to the judgment] to be allowed to 'ride free'"); *Indianola Tractor Co. v. Tankesly*, 337 So. 2d 705 (Miss. 1976) (affirming attorney's lien on garnishment as priority lien).

32 *United States ex rel. Rigsby v. State Farm & Cas. Co.*, 740 Fed. Appx. 392, 393, nn.24-25 (5th Cir. 2018) (affirming denial of lien on basis of laches).