UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 97-875

MITCHELL SCATES, JR., APPELLANT,

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

KENNETH B. MASON, JR., INTERVENOR

On Appeal from the Board of Veterans' Appeals

(Argued May 24, 1999 Decided October 13, 1999)

Mitchell Scates, *pro se*

R. Randall Campbell, with whom *Robert E. Coy*, Acting General Counsel; and *Ron Garvin*, Assistant General Counsel, were on the brief, for the appellee.

Kenneth M. Carpenter was on the brief for Kenneth B. Mason, Jr., as intervenor.

James C. McKay was on the brief as amicus curiae for the appellant.

Before NEBEKER, *Chief Judge*, and FARLEY and HOLDAWAY, *Judges*.

NEBEKER, *Chief Judge*, filed the opinion of the Court. HOLDAWAY, *Judge*, filed a dissenting opinion.

NEBEKER, *Chief Judge*: This is a dispute between the appellant, Mitchell Scates, and his former attorney, Kenneth Mason, over the dispersal of funds from the award of back benefits representing attorney fees, withheld by the Secretary purportedly pursuant to 38 U.S.C. § 5904(d)(3) and a fee agreement. The appellant appeals the April 30, 1997, Board of Veterans' Appeals (BVA or Board) decision which determined that Mr. Mason was eligible for the payment of attorney fees from past-due benefits for legal services rendered on behalf of Mr. Scates. Upon consideration of the arguments of counsel, the pleadings of the parties, and a review of the record on appeal before

this Court, the Court will hold that the Board erred as a matter of law when it determined that the fee agreement on record between Mr. Scates and Mr. Mason was still in force after the termination of the attorney-client relationship, and will hold that, accordingly, the Secretary had no authority to award attorney fees to Mr. Mason and withhold monies belonging to Mr. Scates because no fee agreement existed as a predicate for such action.

I. FACTS

The facts in this matter are undisputed. On January 14, 1991, Mitchell Scates, a veteran, and Kenneth Mason, a New York attorney, entered into a Fee Retainer Contract [hereinafter "fee agreement"] which was drafted on Mr. Mason's letterhead. Record (R.) at 44-46. The fee agreement gave recitals as to the payment of a fixed fee, a contingent fee, and costs and expenses. Additionally, the document addressed the effect that any future discharge or withdrawal of Mr. Mason would have on monies due under the fee agreement. *Id.* Specifically, a paragraph headed "discharge and withdrawal" stated:

> You may discharge me at any time. I may withdraw with your consent or for good cause . . . . If I withdraw before completing my duties under this Contract, you may be entitled to a refund of some or all of the Fixed Fee, if any, depending on the facts and circumstances.

Id. The fee agreement was renewed on April 27, 1993, by supplemental letter. The renewed document was amended, inter alia, to include reference to an award of contingent fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 and an admonition to the "DVA to withhold twenty percent (20%) of past due benefits payable . . . and to pay such amount to" Mr. Mason. R. at 62-63. In addition, the amendments provided an express recital of the remedies available to Mr. Mason, under New York law, in the event that Mr. Scates failed to comply with the amended document. R. at 62-63. Specifically, the amendments provided:

> I [Mr. Scates] hereby give you a lien on my claim and on any sum recovered, whether by judgement, settlement, or administrative action, to the extent of the amount due under this Agreement for your fees and expenses. It is further agreed that you [Mr. Mason] shall have all general, possessory or retaining liens and all special or charging liens known to the common law or available *under the laws of the State of New York.*

Id. (emphasis added). In May 1992, during Mr. Mason's representation of Mr. Scates, this Court vacated the BVA's decision against Mr. Scates and "grant[ed] the Secretary of Veterans Affairs . . . motion for remand." R. at 52. The BVA subsequently remanded the matter to the regional office (RO). The record before the Court is unclear as to the efforts of Mr. Mason on behalf of Mr. Scates during his representation; however, the docket from the proceedings below shows that Mr. Mason filed a statement of the issues, a brief, and several procedural motions. *See* Amicus Curiae Brief (Br.) at 10. Additionally, the record of the instant proceedings shows that Mr. Mason did correspond with the BVA on Mr. Scates' behalf while representing him, but the extent of this correspondence is not clear from the record. R. at 56, 68-69; *see also* Amicus Curiae Br. at 10.

On June 27, 1994, Mr. Scates executed a power of attorney for the Veterans of Foreign Wars (VFW) that stated, "the organization named herein will be recognized as the sole agent for presentation of [Mr. Scates'] claim." R. at 73. Shortly after receiving notice of the termination of his representation of Mr. Scates (R. at 82-83), Mr. Mason wrote a letter to Mr. Scates stating, "[Y]ou have terminated our relationship and, therefore, I am closing my file." R. at 85. The letter was dated August 1, 1994. *Id.* The VA acknowledged the termination of the attorney-client relationship. R. at 80, 82-83.

On March 3, 1996, almost two years after the dissolution of the attorney-client relationship between Mr. Mason and Mr. Scates, for reasons that are unclear from the record before the Court, the RO granted service connection for paranoid-type schizophrenia, and assigned a 100% disability rating from June 1988. R. at 94-96. The RO awarded Mr. Scates $154,119 in retroactive benefits and withheld 20%, or $30,823, pursuant to a determination of Mr. Mason's "entitlement to direct payment out of the past-due amount," based on the January 1991 fee agreement. R. at 98-103. On April 30, 1997, the BVA determined that the "fee agreement satisfied the governing criteria for payment by VA from past-due benefits[,] . . . that the agreement had been properly executed and filed, and that the contingent-fee provisions had been fulfilled." Secretary's Br. at 3. Although the BVA acknowledged that Mr. Scates had revoked the appointment of Mr. Mason, citing VA General Counsel Precedent Opinion 22-95 (Sept. 22, 1995) [hereinafter G.C. Prec. 22-95], the BVA concluded "that [Mr. Scates'] revocation of [Mr. Mason's] authority to act on his behalf does not bar payment of attorney fees to [Mr. Mason] that are otherwise due." R. at 9. This appeal followed.

II. ANALYSIS

A. Jurisdiction

As a preliminary matter, the Court must determine whether it has jurisdiction to entertain this appeal. This Court's appellate jurisdiction derives exclusively from statutory grants of authority provided by Congress and may not be extended beyond that permitted by law. *See Skinner v. Derwinski*, 1 Vet.App. 2, 3 (1990); *see also Harris v. West*, 11 Vet.App. 456, 459 (1998). The parties assert that this Court has jurisdiction under 38 U.S.C. § 7263(d). *See* Secretary's Br. at 2; Intervenor's Supplemental (Suppl.) Br. at 14. Indeed, the Court has been granted specific, but limited, jurisdiction under that statute to review the reasonableness of fee agreements filed with the Court and those reviewed by the Board pursuant to 38 U.S.C. § 5904(c)(2). "An order of the Court under [section 7263(d)] is final and may not be reviewed in any other court." 38 U.S.C. § 7263(d). However, the critical issue presented by this matter at this stage is not the reasonableness of a fee agreement but the threshold question whether, in view of the termination of the attorney-client relationship, there is a fee agreement. *See Huckabay v. Moore*, 142 F.3d 233, 237 (5th Cir. 1998) (citations omitted) (federal courts of appeals "may liberally construe briefs to determine what issues are presented); *see also United States Bank of Oregon v. Independent Insurance Agents of America*, 508 U.S. 439, 477 (1993); *Kamen v. Kemper Financial Services*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."); *Lear v. Adkins*, 395 U.S. 553, 662 n.10 (1969) (appellate court may decide case based on issue not identified or briefed by parties). Neither section 7263(d) nor section 5904(c)(2) affords the Court jurisdiction to address that issue. Therefore, we conclude that the parties' reliance on 38 U.S.C. §§ 7263(d), 5904(c)(2) is misplaced.

Amicus curiae, on the other hand, maintains that the Court has jurisdiction over the appeal by virtue of its general grant of jurisdiction under 38 U.S.C. § 7252. *See* Amicus Curiae Br. at 4-5. We agree. Pursuant to 38 U.S.C. § 511(a), the "Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans." The Board's appellate jurisdiction is defined in 38 U.S.C. § 7104(a): "All questions in a matter which under section 511(a) of this title is subject to a decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions

on such appeals shall be made by the Board." Finally, section 7252(a) provides that this Court has exclusive jurisdiction over decisions by the Board, and the scope of this review includes that authority to "decide all relevant questions of law." See 38 U.S.C. § 7261(a)(1). Indeed, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has traced this jurisdictional chain of authority in the specific context of fee agreements: "[T]here is more to [title 38] than section 5904. . . . [S]ection 7104 of title 38 confers jurisdiction on the Board over questions arising under section 511(a), and a claimant may in turn appeal an adverse Board ruling to [this Court] under 38 U.S.C. § 7252(a)." *Cox v. West*, 149 F.3d 1360, 1364 (Fed. Cir. 1998).

There is a final Board decision over which this Court can and must exercise jurisdiction. In April 1997, the Board made a decision awarding attorney fees to Mr. Mason. R. at 1-11. The decision to award Mr. Mason attorney fees deprives Mr. Scates of monies otherwise due him. Therefore, Mr. Scates has been "adversely affected" by the Secretary's decision and has standing to contest that decision. *Corchado v. Derwinski*, 1 Vet.App. 160, 162-63 (1991); *see also Deeper Life Christian Fellowship, Inc. v. Sobol*, 948 F.2d 79, 81 (2nd Cir. 1991) (standing doctrine requires that party have suffered injury beyond a citizen's general concern that government may not be following law). Mr. Scates filed a timely Notice of Appeal (NOA). *See* 38 U.S.C. § 7266(a). Thus, the record on appeal reflects that two of the requisite jurisdictional elements, a final Board decision and a timely NOA, have been satisfied and that the appellant has standing to seek judicial review.

Turning to the remaining jurisdictional prerequisite, the Court has jurisdiction to review only those final BVA decisions which stem from a Notice of Disagreement (NOD), which was filed on or after November 18, 1988, as to an underlying decision of an RO or other agency of original jurisdiction (AOJ). See Veterans' Judicial Review Act, Pub. L. No. 100-687 § 402, 102 Stat. 4105, 4122 (1988) (found at 38 U.S.C. § 7251 note) [hereinafter VJRA § 402]; 38 U.S.C. § 7105; *Barrera v. Gober*, 122 F.3d 1030, 1031 (Fed. Cir. 1997); *Grantham v. Brown*, 114 F.3d 1156, 1157 (Fed. Cir. 1997), *rev'g* 8 Vet.App. 228 (1995). This appeal began with an adverse RO decision rendered against Mr. Scates' claim for service connection for PTSD in January 1989. R. at 56. An NOD was received by the Board from Mr. Scates in April 1989. R. at 56. In *Barrera*, *supra*, the Federal Circuit recently determined that:

> [A] veteran's overall claim is comprised of separate issues, and . . . the Court of Veterans Appeals has jurisdiction to consider one or

> more of those issues, provided an NOD has been filed after the effective date of the Veterans Judicial Review Act with regard to the particular issue. Thus, our precedent recognizes that multiple NODs may be filed by a veteran concerning the claim for benefits. The NOD which must serve to confer jurisdiction on the Court of Veterans Appeals is the first one filed with respect to a given issue, *i.e.*, the NOD which initiates judicial review of the issue on which the veteran has received an unfavorable administrative determination.

Barrera, 122 F.3d at 1032. Unlike the situation in *Barrera*, which was concerned with the effect of pre-VJRA NODs on the jurisdiction of the Court over all of the issues in a veteran's claim, the matter of attorney fees in the instant case arises out of the "appeal process stemming from the first NOD." *Grantham*, 114 F.3d at 1158 . That *Barrera* permits multiple NODs for the various issues involved in a claim does not mean that there *must* be multiple NODs. It follows, therefore, that the April 1989 NOD constitutes the requisite jurisdiction-conferring NOD. Alternatively, the procedural history of this case demonstrates that, from the moment Mr. Scates initiated his appeal of the original RO decision by filing a post-1988 NOD, his claim has remained in appellate status. At the time of the Board's remand to the RO, Mr. Scates was informed that "[n]o action [was] required of [him]." R. at 59-60. On remand from the BVA, the RO granted the appellant's claim but withheld $30,832.00 in past-due benefits from the veteran and left the matter of "determin[ing] eligibility for payment of attorney fees from any past-due benefits" up to the Board. R. at 99. In fact, the RO specifically informed Mr. Scates that "a decision by the Board of Veterans Appeals" was pending regarding the issue of Mr. Mason's entitlement to attorney fees. R. at 98. Accordingly, while there is no NOD of record specifically addressing the award of attorney fees, the matter of attorney fees was inchoate to the award of past-due benefits and never would have emerged but for that award. Thus, the NOD which initially conferred jurisdiction as to the merits of Mr. Scates' claim, to borrow a phrase from the criminal law, had not gone stale. *See, e.g. , U.S. v. Watson*, 423 U.S. 411, 432 (1976) (Powell, J. concurring).

"Thus, the three basic prerequisites for the Court to have jurisdiction over an appeal[,] . . . a final BVA decision, a post-November 17, 1998, NOD as to the VARO decision leading to that BVA decision, and a timely NOA[,]" are satisfied in this case and the Court has jurisdiction to review the Board's decision granting attorney fees from past-due benefits. *Smith v. Brown*, 10 Vet.App. 330, 332 (1997).

B. Merits

1.

The responsibility for regulating lawyers and the attorney-client relationship historically has been reserved to the sovereign states. *See Leis v. Flynt*, 439 U.S. 438, 442 (1979) (per curiam) ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions."). Similarly, "the relationship of client and attorney is created and controlled by the law[s] of the various states; and that . . . creation and control is recognized, followed, and approved by the federal courts." *Baird v. Koerner*, 279 F.2d 623, 632 (9th Cir. 1960); *see also Novinger v. E.I. DuPont de Nemours &* Co., 809 F.2d 212, 217 (3rd Cir. 1987), *cert. denied sub nom. Novinger v. Kramer*, 481 U.S. 1069 (1987) (attorney fee agreements are matters primarily of state contract law); *United States v. Whitley*, 1978 WL 1200, *10 (E.D.N.C. 1978) (state law "governs the basic attorney-client relationship generally."); ***but see Heathman v. U.S. District Court***, 503 F.2d 1032, 1034 (9th Cir. 1974) (application of federal common law or state law to attorney-client relationship depends on nature of action). If a contingent-fee contract exists independent of federal law, then it must be a creature of state law. *See*, *e.g.*, *Sentry Corp. v. Harris*, 802 F.2d 229, 232, 233 (7th Cir. 1986) (where federal law is silent there is presumption in favor of state law under Rules of Decision Act 28 U.S.C. § 1652 (1982)). As a creature of state law, the terms of the contract, and, even its very existence, are governed by state law and the common law of contracts.

The attorney-client relationship is one of fiduciary and beneficiary. Lawrence A. Cunningham and Arthur J. Jacobson, CORBIN ON CONTRACTS §1095 at 223 (1998 Pocket Part). In order to protect that fiduciary relationship, most jurisdictions now hold that a client is entitled, as a right of contract, to terminate the attorney-client relationship at any time, for any reason, however arbitrary. *Id.* Thus, when a client discharges a lawyer, the client is exercising a contract right implied in law. *Id.* This principle is reflected in the traditional state law rule that when a client terminates an attorney relationship, the contingent-fee contract ceases to exist, the contingency is no longer operative, and the discharged attorney must pursue compensation for any services rendered before the discharge on a quantum meruit basis. *See, e.g., Albert Brooks Friedman, Ltd. v. Malevitis, et. al.*, 710 N.E.2d 843, 847 (Ill. 1999); *see also Agresta v. Sambor*, __ F.Supp.__,

1994 WL 70347, *2 (Pa. 1994) (fee contract abrogated on termination of attorney-client relationship, but attorney not deprived of right to quantum meruit recovery). *Cf. Broughten v. Voss*, 634 F.2d 880, 882 (5th Cir. 1981) (citations omitted) ("The law seems well settled that a federal district court may condition the substitution of attorneys in litigation pending before it upon the client's either paying the attorney or posting security for the attorney's reasonable fees and disbursements, as these may be determined."). "'[T]ermination' . . . of a contract means to abrogate so much of it as remains unperformed, or doing away with an existing agreement upon the terms and with the consequences mentioned in the writing." 17A C.J.S. *Contracts* § 385(2) (1980); *see also Blodgett v. Merritt Annex Oil Co.*, 65 P.2d 123, 125 (Cal. 1939). The mortality of contracts is demonstrated by the fact that most state courts "are prone to hold against the theory that a contract confers a perpetuity of right or imposes a perpetuity of obligation." *Preferred Physicians Mutual Management Group, Inc. v. Preferred Physicians Mutual Risk Retention Group, Inc.*, 961 S.W.2d 100, 103-104 (Mo. 1998).

The record in the case before the Court reflects that the appellant discharged Mr. Mason on June 27, 1994, when Mr. Scates executed a power of attorney in favor of the VFW. *Cf.* 38 C.F.R. § 20.607 ("An appropriate designation of a new representative will automatically revoke any prior designation of representation."). Mr. Mason's August 1, 1994, letter to Mr. Scates confirmed the termination of the attorney-client relationship. R. at 73, 85, 98-103. *See Wozniak v. Tonidandel*, 699 N.E.2d 555, 557 (Ohio 1997) (attorney-client relationship is consensual in nature and action of either party dissolving essential mutual confidence may signal termination of relationship). *Cf. Gansert v. Corder*, __ P.2d __, 1999 WL 301372, *1 (Kan. 1999) (recognizing de facto termination of attorney-client relationship). The record also reflects two other matters of significance apparent from the original fee agreement and its April 1993 amendments. First, there is nothing in the original agreement with respect to the creation or continuation of any definite rights or obligations following the exercise of Mr. Scates' unlimited right to terminate the relationship or Mr. Mason's right to terminate the relationship "with . . . consent or for good cause." R. at 45. Second, the fee agreement, as amended in April 1993, expressly provides that New York law will control any remedies available to Mr. Mason. R. at 63. Accordingly, this Court will briefly examine the law of the sovereign state of New York to see whether the contract was terminated.

New York law recognizes that the discharge of an attorney by a client terminates the existence of a contingent fee agreement. *See Wojcik v. Miller Bakeries Corp.*, 142 N.E.2d 409, 411

(N.Y. 1957); *see also Tillman v. Komar*, 181 N.E. 75 (N.Y. 1932) ("The client is entitled to cancel his [fee agreement] but such an agreement cannot be partially abrogated. Either it wholly stands or totally falls. After [termination], its terms no longer serve to establish the sole standard for the attorney's compensation."). Furthermore, under New York law, it is well established that "[a] client may always discharge his attorney, with or without cause, and in the absence of an agreement providing otherwise an attorney discharged without cause is entitled to be compensated in *quantum meruit*." *Jacobson v. Sassower*, 489 N.E.2d 1283, 1284 (N.Y. 1985). In fact, upon the termination of a fee agreement, "a cause of action for the reasonable value of his services immediately accrues to the attorney." *Zimmerman v. Kallimopoulou*, 290 N.Y.S.2d 270, 273 (1967). Thus, it appears that New York adheres to the general principle that when a client terminates an attorney relationship, the contingent-fee contract ceases to exist, the contingency is no longer operative, and the discharged attorney must pursue compensation for any services rendered before the discharge on a quantum meruit basis.

The Court concludes that, under the general state law rule, when the attorney-client relationship was terminated, the contingent-fee contract between the claimant and the representative ceased to exist. New York law is not to the contrary. In purporting to enforce that agreement by awarding attorney fees to Mr. Mason, the Board erred as a matter of law.

2.

The Board in its decision and the Secretary in his brief ignores the pivotal and outcome-determinative question of the effect of the termination of the attorney-client relationship on the fee agreement. They focus instead on the agreement's compliance with the statutory and regulatory prerequisites of section 5904 as justification for the fee award to Mr. Mason. Secretary's Br. at 4-5. These prerequisites specify, inter alia, that the representative of a claimant must file a copy of any fee agreement between them with the Secretary, that the award of a fee cannot exceed 20 % of the total amount of past-due benefits awarded on the basis of a claim, that the fee is one to be paid directly to the attorney by VA, and that the fee is contingent on whether the matter is resolved in a manner favorable to the claimant. *See* 38 U.S.C. §§ 5904(c)(2)-(d)(3). It may be taken as given that the fee agreement between Mr. Mason and Mr. Scates initially satisfied these statutory

prerequisites but they simply have no bearing upon the question of the continued existence of a fee agreement upon the subsequent termination of the attorney-client relationship.

The Secretary also purports to rely upon G. C. Prec. 22-95 for the proposition that so long as the statutory and regulatory prerequisites for the direct payment of attorney fees out of past-due benefits are otherwise met, those fees may be paid to an attorney who no longer represents a claimant. *See* Secretary's Br. at 4. The Court notes that, as a matter of law, while the Secretary is bound by precedential opinions issued by the VA General Counsel, this Court is not. *See Sabonis v. Brown*, 6 Vet.App. 426 (1994) (determining this Court is not bound by precedential opinions issued by VA General Counsel). However, after reviewing G.C. Prec. 22-95 in its entirety, this Court holds that the Secretary's reliance on G. C. 22-95, for the absolute proposition that fees may be paid to an attorney who no longer represents a client, was misplaced. The Secretary reads much more into the opinion than is there.

The Secretary relies solely on Comment 8 of G.C. Prec. 22-95. To the extent that Comment 8 authorizes payment of fees to an attorney who no longer represents a client provided the statutory and regulatory prerequisites are met, the Secretary's reliance might be justified. However, by its terms it does not address the situation presented here. On the other hand, Comment 9 of G.C. Prec. 22-95 advises that:

> A claimant is free to change attorneys, or switch from a service organization to an attorney representative, while his or her case is [in appellate status]. We can only advise that in such cases, VA's obligation to pay attorney fees would depend on the terms of the fee agreement and whether the provisions of the applicable fee payment statutes and regulations are met.

Furthermore, G.C. Prec. 22-95 goes on to hold that:

> VA's obligation to pay attorney fees when the attorney fee arrangement was only in place for part of the time the case was [in appellate status] is dependent upon the terms of the fee agreement and whether the statutory and regulatory prerequisites for direct payment of attorney fees have been met.

Thus, G.C. Prec. 22-95 contemplates more than a knee-jerk award of attorney fees under a fee agreement which facially satisfied the statutory and regulatory prerequisites and just happens to be lurking in the claims file. In fact, a footnote to G.C. Prec. 22-95 Comment 9 directs that "[i]n complex cases . . . [the VA general counsel's] assistance in interpreting the applicable fee

agreements or filing motions with [this Court] requesting clarification of . . . VA's obligation to pay attorney fees" may be appropriate. When read in its entirety, G.C. Prec. 22-95 actually limits the absolute position now taken by the Secretary particularly where, as here, the "terms of the fee agreement" contain no provisions for the payment of fees following termination.

Furthermore, while it is true that under section 5904 certain statutory and regulatory prerequisites must be satisfied before attorney fees will be awarded, a close reading of section 5904 discloses that it contemplates the continued existence of a contingent-fee contract between an attorney and a claimant. Indeed, section 5904(c)(2) compels the party acting as the claimant's representative to "file a copy of any fee agreement between them with the Board." *See AVR, Inc. v. Cemstone Products Co.*, __ F.Supp. __ 1993 WL 104933 *4 (D. Minn. 1993) (under contract theory, existence of attorney-client relationship may be shown, in part, by fee agreement); *In re Finley*, 488 S.E.2d 74, 75 (Ga. 1997) (execution of fee agreement by client some evidence of attorney-client relationship); *Larochelle v. Hodsdon*, 690 A.2d 986, 989 (Me. 1997) (existence of fee agreement evidence of attorney-client relationship); *see also Bd. of Overseers v. Dineen*, 500 A.2d 262, 264-265 (Me. 1985) ("an attorney client relationship does not require the payment of a fee or formal retainer but may be implied from the conduct of the parties."); *Cook v. Brown*, 6 Vet.App. 226, 231-232 (1994) (court will not award "attorney" fees to non-attorney). Although the Secretary has authority vis-a-vis the fee agreement, e.g., section 5904(c)(2) authorizes the Secretary to review the fee agreement for reasonableness, the filing of a fee agreement does not make the Secretary a party to the contingent-fee contract. Section 5904 does not intrude on the substance of contingent-fee contract, and this Court is not inclined to read into that statute any additional terms or limitations on the contract that are not specifically provided. See Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 61.02 (5th ed. 1992) (liberal reading of statute should be avoided where such reading would result in derogation of freedom of contract).

Based on the preceding analysis, this Court determines that the contingent-fee contract exists independent of title 38 or any other federal law; there is no provision in section 5904 which directs any other conclusion. The fact that Mr. Mason satisfied a ministerial prerequisite by filing a fee agreement neither preserves to him any rights which would have otherwise accrued under section 5904 had the attorney-client relationship survived, nor does it grant the Secretary authority to enforce a contingent-fee contract which no longer exists. In sum, 38 U.S.C. § 5904 does not

and cannot justify the Board's decision to award Mr. Mason attorney fees from the portion of past-due benefits withheld from the appellant and the Board, in deciding otherwise, erred as a matter of law.

III. CONCLUSION

The Court expresses its profound gratitude to James C. McKay, Esq., the amicus curiae who submitted briefs and presented oral argument in this case. His contributions have been of great value to the Court in this and other matters.

It bears repeating that state law governs the attorney-client relationship and, in this instant case, any compensation due Mr. Mason must be pursued elsewhere. Upon consideration of the arguments of counsel, pleadings of the parties, and a review of the record on appeal before this Court, the Court holds that the Secretary had no authority to award attorney fees to Mr. Mason or to withhold monies belonging to Mr. Scates because no fee agreement existed as a predicate for such action, and, therefore, the April 30, 1997, BVA decision is REVERSED and the matter is REMANDED with direction that the Secretary disburse all monies currently withheld from the award of past-due benefits to Mr. Scates. *See* 38 U.S.C. § 7252(a). State law governs the attorney-client relationship and any compensation to which Mr. Mason might be entitled for the professional services he rendered to the appellant, perhaps under a quantum meruit theory, must be pursued elsewhere.

HOLDAWAY, *Judge*, dissenting: I do not agree with the majority's decision that under 38 U.S.C. § 5904(c)(2), the BVA lacked original jurisdiction to review the fee agreement in this matter. Section 5904(c)(2) states the following:

> A person who, acting as agent or attorney . . . , represents a person before the [VA] or the [BVA] after the Board first makes a final decision in the case shall file a copy of any fee agreement between them with the Board. . . . The Board, upon its own motion or the request of either party, *may review such a fee agreement* and may order a reduction in the fee called for in the agreement if the Board finds that the fee is excessive or unreasonable. A finding or order of the Board under the preceding sentence may be reviewed by the United States Court of Appeals for Veterans Claims under section 7263(d) of this title.

(Emphasis added.) Section 5904(c)(2) provides the Board with clear authority to review the validity of an attorney fee agreement that was filed with the Board. *See In re Fee Agreement of Stanley*, 10 Vet.App. 104 (1997) (affirming the Board's decision, made sua sponte pursuant to section 5904(c), that the attorney was not *eligible* under the fee agreement for direct payment of attorney fees from the Secretary); *see also* 38 C.F.R. § 20.609 (1998). Under the plain language of the statute, the Board clearly has the authority to review the terms of the fee agreement that was lodged with it, determine an attorney's eligibility to charge a fee, and reduce the amount of the fee if it was excessive or unreasonable. The laws administered by VA control whether an attorney may charge a fee for services before VA or the BVA, and when an attorney's authority to represent a claimant is terminated. *See* 38 U.S.C. § 5904(c)(1) (stating that attorney fees for services before VA or the BVA may not be charged until after the date the BVA first makes a final decision in the case); 38 C.F.R. § 20.603 (1998) ("Representation by attorneys-at-law."); 38 C.F.R. § 20.607 (1998) (Revocation of representative's authority to act."); 38 C.F.R. § 20.609 ("Payment of representative's fees in proceedings before the [VA] field personnel and before the [BVA]."); 38 C.F.R. § 20.611 (1998) ("Continuation of representation following death of a claimant or appellant."). No statutory or regulatory provision prevents the Board from reviewing a fee agreement under section 5904(c) even after the attorney's authority to represent the claimant before VA or the Board has been revoked by the claimant.

The majority opinion cites to two provisions of the fee agreement in this case that they find controlling. First, the fee agreement states that the appellant may discharge the attorney at any time. However, how and when a claimant can discharge an attorney providing representation before VA or the Board is a question controlled by laws administered by the Secretary. Subject to 38 C.F.R. § 20.1304 (1998), a claimant can revoke an attorney's power to represent him or her at any time. *See* 38 C.F.R. § 20.607. However, written notice of a revocation must be given to VA or the Board. *See id.* Also, pursuant to section 20.1304, an appellant before the Board has ninety days to notify the Board that he or she would like to change representatives. Once the ninety-day period has expired, the appellant may change representatives only with consent of the Board after showing good cause for not filing the request before the expiration of the ninety-day period. *See id.* Therefore, an appellant cannot actually discharge his or her representative at any time. The VA regulations are controlling in this matter, and their effect on the attorney fee agreement is a question

reviewable by the Board. Second, the majority has stated that under the express terms of the fee agreement, the rights of the parties are controlled by the laws of the State of New York. However, the provision referred to by the majority relates only to liens under state law to secure the attorney's right to collect his fees. Clearly any lien created under state law and incorporated into the fee agreement could not be enforced by the Board. This Court has repeatedly stated that a provision in a fee agreement that creates a lien against veterans' benefits is unenforceable. *See Vargas-Gonzalez v. West*, 12 Vet.App. 63, 64 (1998). Therefore, the provision in the fee agreement relating to liens and state law is invalid. As a result, no valid provision of the fee agreement is expressly controlled by state law.

To the contrary, the fee agreement is a contingency fee agreement established under section 5904(d). The fee agreement is therefore controlled by the laws administered by the Secretary, and its appropriate review and interpretation is pursuant to section 5904(c). In fact, under the majority's reasoning, because the claimant can terminate the attorney-client relationship at any time, even after substantial representation on behalf of the claimant, the claimant can effectively avoid application of the provisions under 38 U.S.C. § 5904(d) that permit direct payment by the Secretary to the attorney of 20% of past-due benefits if the fee agreement meets certain requirements, as the fee agreement in this case apparently did. To avoid the Secretary's withholding of 20% of past-due benefits to pay attorney fees, a savvy, judgment-proof claimant might elect to void the agreement by simply discharging his attorney after substantial services have been rendered.

Because the Board has original jurisdiction in this matter, this Court also possesses jurisdiction to review the fee agreement pursuant to 38 U.S.C. § 7263(d). This Court has the authority to "order a reduction in the fee called for in the agreement if it finds that the fee is excessive or unreasonable." 38 U.S.C. § 7263(d). The Board or this Court can review whether the fee called for under the fee agreement is reasonable or excessive based on the services that had been provided when the attorney-client relationship ended. Quantum-meruit type principles would fit easily into either the Board's or this Court's authority to review for reasonableness or excessiveness. In this matter, the attorney helped secure a remand from this Court which in effect preserved the favorable effective date ultimately awarded to the appellant by the Secretary.

For the above reasons, I dissent from the majority's holding that the Board lacked original jurisdiction in this matter to review the fee agreement even though the attorney-client relationship

had been terminated prior to an award of VA benefits. I believe the Board had authority to review the continuing validity of the fee agreement under VA law *and* the reasonableness of the fees called for by the agreement's terms. Because the jurisdiction of the Board was original, I do not express any agreement or disagreement regarding the majority's analysis of the NOD issue.