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CONTINGENT FEES IN CALIFORNIA AFTER FRACASSE V. BRENT

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The various methods by which professional legal services are financed are a major determinant in the ultimate accessibility of quality legal representation and services to the public. The expense of obtaining the services of an attorney is often prohibitive to the average citizen interested in availing himself of the supposedly inalienable rights of due process and equal protection of the law. Because of the traditionally high fees exacted by attorneys for their time and services, there are many grievances which are not resolved because an otherwise eligible client cannot afford the services of an attorney.

Various methods of advancing the rights of those who cannot afford the high cost of legal services have been utilized by the practicing bar. Perhaps the most prevalent and successful of these methods is the contingent fee contract, whereby an attorney is

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paid only if his client recovers or benefits as a result of the attorney's services. Under a contingent fee arrangement the attorney's fee is generally a percentage of the ultimate recovery; such an arrangement permits the client who could not otherwise afford the services of an attorney to obtain representation at a cost he can afford. This arrangement also permits the contracting attorney to handle claims on a speculative basis. The relatively high cost to the client can be justified on the theory that the case is a gamble for the attorney—if he fails to derive some economic benefit for his client, he receives nothing and is out of pocket his expenses.

The economics of the contingent fee aside, the effects of such an arrangement on the rights and obligations of attorneys and their clients must be closely scrutinized. The purpose of this article is to investigate the current status of the law in California regarding the discharge of an attorney retained under a contingent fee contract in light of the 1972 decision of *Fracasse v. Brent.*[1]

One of the basic features of the attorney-client relationship is that it can be terminated at the option of the client, with or without cause. Because of the importance of mutual trust and confidence to this relationship, strong policy reasons favor the client's absolute power to discharge his attorney at any time, and discourage the continuance of the relationship if this confidence no longer exists. Therefore, courts generally will not prevent the release of an attorney by his client and remain hesitant to interfere with the confidential relationship which exists between them.[2]

It has generally been held that an attorney who has been discharged by a client with good cause—for example, where the attorney has mishandled the case—cannot recover upon his contingent fee contract and is entitled only to the reasonable value

[1]6 Cal. 3d 784, 100 Cal. Rptr. 385, 494 P.2d 9 (1972).

[2]Gangwere v. Bernstein, 199 F.Supp. 38 (S.D.N.Y. 1961); Donavan v. Shaheen, 34 Misc. 2d 522, 232 N.Y.S.2d 64 (Sup. Ct. 1962); Holt v. Beam, 178 Cal. App. 2d 736, 3 Cal. Rptr. 191 (1960); Irwin v. Superior Court of Los Angeles County, 63 Cal. 2d 153, 45 Cal. Rptr. 320 (1965). *See also* CAL. CODE CIV. PRO. § 284(2) (West 1954).

of services rendered up to the time of termination.[3] On the other hand, where the attorney appears to have been discharged without cause, he can immediately bring an action for the reasonable value of his services rendered before discharge without waiting for the client to recover.[4] In this case he is limited by the contract amount if the contract amount is certain.[5] Alternatively, the attorney can wait for the client to recover a judgment or settlement and collect his full contract fee, not limited by the reasonable value of the services he rendered.[6] The cases cited do not discuss how such recovery affects the "absolute power" of the client to discharge his attorney with or without cause, nor do they tell how to measure the discharged attorney's reasonable fees.

Until very recently the power of a client in the state of California to discharge his attorney without cause was potentially very expensive to the client. The California courts allowed the attorney discharged without cause to recover his full contract fee.[7] However, since the compensation was contingent upon the success of the representation or litigation, it was not owed until the occurrence of the contingency constituting the condition for payment of the fee. If the client ultimately did recover, the discharged attorney was entitled to the full amount specified in his contingent fee contract, as was the successor attorney,[8] with the result that often the client was left with little or nothing.[9]

Perhaps recognizing that the rule permitting an attorney discharged without cause to recover the entire agreed-upon fee

[3]*Salopek v. Schoemann*, 20 Cal. 2d 150, 124 P.2d 21 (1942); Moser v. Western Harness Racing Assn., 89 Cal. App. 2d 1, 200 P.2d 7 (1948); Moore v. Fellner, 50 Cal. 2d 330, 325 P.2d 857 (1958); Oliver v. Campbell, 43 Cal. 2d 298, 273 P.2d 15 (1954).

[4]Tracy v. MacIntyre, 29 Cal. App. 2d 145, 84 P.2d 526 (1938).

[5]Moore v. Fellner, 50 Cal. 2d 330, 325 P.2d 857 (1958); Oliver v. Campbell, 43 Cal. 2d 298, 273 P.2d 15 (1954).

[6]*Zurich General Acc. & Lia. Ins. Co. v. Kinsler*, 12 Cal. App. 2d 98, 81 P.2d 913 (1938); Echlin v. Superior Court, 13 Cal. 2d 368, 90 P.2d 631 (1939); Bartlett v. O.F. Savings Bank, 79 Cal. 218, 21 P. 734 (1899).

[7]*Id.*

[8]*Id.*

[9]Jones v. Brown, 84 Cal. App. 2d 390, 190 P.2d 956 (1948).

exacted a high price for the exercise of what was deemed an absolute power, some judges have attacked that measure of recovery and have preferred to allow only the reasonable value of the attorney's services prior to the discharge.[10] Justice Gibson and Justice Traynor reasoned in dicta, in the case of *Salopek v. Schoemann,* the predecessor of the current California rule, that:

> [T]he right of discharge is of little value if the client must risk paying the full contract price for services not rendered upon a determination by the court that the discharge was without legal cause. The client may frequently be forced to choose between continuing the employment of an attorney in whom he has lost faith, or risking the payment of double contingent fees equal to the greater portion of any amount eventually recovered . . . Unless the rule is adopted allowing an attorney as full compensation on the reasonable value of services rendered to the time of discharge, clients will often feel required to continue in their services attorneys in whose integrity, judgment or capacity they have lost confidence.[11]

The force and reason of the *Salopek* case cited above was given weighty consideration by the California Supreme Court in *Fracasse v. Brent,* wherein the modern California rule was unequivocally stated. *Fracasse v. Brent* held that an attorney discharged, with or without cause, is entitled to recover only the reasonable value of his services to the time of discharge, and that the cause of action to recover compensation for services rendered under a contingent fee contract does not accrue until the occurrence of the stated contingency. The discharged attorney will thus be denied any recovery in the event that the contingency is not met. In so holding, the California Supreme Court quoted extensively from the *Salopek* case, reasoning in part that the right to

[10]Salopek v. Schoeman, 20 Cal. 2d 150, 124 P.2d 21 (1942), *concurring opinion.*

[11] *Id.* at 156, 157.

discharge is of little value if the client must risk paying the full contract price twice if the court determines that the discharge was without legal cause.

The client is deemed to have an absolute right to discharge his attorney with or without good cause; the discharged attorney is allowed the reasonable value of his services, rather than the formerly allowed contract price agreed upon; and the attorney's action for reasonable compensation accrues only when the client has recovered a settlement or judgment. It follows that the discharged attorney will be denied compensation entirely in the event such recovery is not obtained.[12] *Fracasse v. Brent* thus represents the modern California rule, which although designed to expedite settlement of attorney-discharge cases, appears to be yet another factor in determining what constitutes "reasonable" attorneys' fees. While adding certainty and security for the client who discharges his attorney, *Fracasse v. Brent* does not resolve the problem of ascertaining reasonable fees. Fee contests and litigation will thus undoubtedly continue to plague clients, attorneys, and courts.

It is difficult to anticipate how the California Bar will react to the *Fracasse* rule, but it is certain that the rule will meet with some dissatisfaction by attorneys who operate extensively under the contingent fee method. The new rule clearly takes away some of the attraction of the contingent fee, for the attorney is now limited to recovery under a *quantum meruit* theory if he is discharged—a measure of recovery which is far less satisfying than one based upon the original contract fee.

AN OVERVIEW

The treatment which other jurisdictions give the contingent fee contract helps one understand the impact of the new California rule as expressed in *Fracasse.*

The professional relationship between an attorney and his

[12]Fracasse v. Brent, 6 Cal. 3d 784, 494 P.2d 9 (1972).

client is generally treated differently than a normal employment contract. The traditional view is stated in *Kikuchi v. Richie:*

> The general rule as to damages in cases of breach of contract for personal employment is that the employee can recover only the difference between what he received or might have received from others and the price agreed upon. But the contract of employment of an attorney by a client is recognized as an exception to the rule. One reason for the exception is that such service is not easily partible or apportioned to the time or the labor performed or to be performed by the attorney. Another reason is that often the most difficult and valuable services of the attorney to his client are rendered in advising him of his legal rights before any papers are prepared or appearances made in court. Another is that by the contract the attorney loses the possible opportunity of employment by the adverse party.[13]

Attorney-client contracts, especially contingent fee contracts, are, because of their unique nature, subject to the close supervision of the courts.[14] The importance of the courts' role in determining the compensation due a discharged attorney has been emphasized:

> Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of

[13]202 F. 857, 859 (9th Cir. 1913).

[14]AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS, Canon 13.

> the public in the bench and bar. It does more than that; it brings the court into disrepute and destroys its power to perform adequately the function of its creation.[15]

In the United States today there are two major approaches to the problem of ascertaining the compensation due an attorney discharged without cause from a contingent fee contract.[16] For the purpose of this discussion, these approaches shall be called the contract measure of recovery and the *quantum meruit* measure of recovery. In general, the contract measure of recovery treats discharge without cause as a breach of contract and holds the client liable on the contract for damages. This view reflects the policy of the law to protect contracts and to prevent discharged attorneys from being unjustly deprived of the benefits of their bargains.[17]

The *quantum meruit* measure of recovery focuses not on the contract itself, but on the unique necessity of confidence involved in an attorney-client relationship. This view maintains that the client's right to discharge his attorney, with or without cause, is implied in all attorney-client contracts, and therefore, no breach is involved in such discharges. To award damages in such a case is thought to unjustly penalize the client and to render meaningless his power to discharge his attorney at will. The attorney's only recourse is to seek compensation in *quantum meruit* for the reasonable value of the services rendered prior to the discharge.[18]

Quantum Meruit Measure of Recovery

Although *quantum meruit* is available in most states,[19] some states limit the discharged attorney to a recovery in *quantum*

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[15]Baruch v. Giblin, 122 Fla. 59, 164 So. 831, 833 (1936).

[16]*See generally*, Annot., 136 A.L.R. 231 (1942).

[17]WILLISTON ON CONTRACTS § 1285A (3rd ed. 1968).

[18]Martin v. Camp, 219 N.Y. 170, 114 N.E. 46 (1916).

[19]7 C.J.S. *Attorney and Client* §§ 189, 190 and cases cited therein.

meruit.[20] *Quantum meruit* has been defined as: "The common count in an action of assumpsit for work and labor, founded on an implied *assumpsit* or promise on the part of the defendant to pay the plaintiff as *much as he* reasonably *deserved* to have for his labor."[21] A recovery in *quantum meruit,* " . . . must be predicated on something tangible and definite like services performed, advice given, means expended, effort put out, or energy exploited through some other legally approved channel. The abstract statement of witnesses as to the reputed worth or what constitutes a reasonable fee in a cause like this is not sufficient to support a verdict for *quantum meruit.* Their opinion must be supported by tangible evidence of something expended, done, or accomplished in behalf of the claimant."[22]

A thorough discussion of the factors involved in determining the reasonable value of services rendered by an attorney prior to discharge may be found in *Paolillo v. American Export Isbrandtsen Lines, Inc.*[23] In *Paolillo,* after the attorney was discharged without cause, the client, with the aid of a substituted attorney, settled a personal injury suit with the defendant. The court stated:

> The factors to be considered in answering the question [of what is the reasonable value of services rendered by the discharged attorney] are set out in Canon 12 of the Canons of Professional Ethics of the American Bar Association. They are: (1) time; (2) standing of the lawyer at the bar; (3) amount involved; (4) benefit to the client and (5) skill demanded.[24]

The time spent by the attorney in the furtherance of his client's cause of action is probably the most important factor. The

[20]Cole v. Meyers, 128 Conn. 223, 21 A.2d 396 (1941); Pye v. Diebold, 204 Minn. 319, 283 N.W. 487 (1939); Martin v. Camp, 219 N.Y. 170, 114 N.E. 46 (1916).

[21]BLACK'S LAW DICTIONARY 1408 (1968 ed.) *citing* 3 Bl. Comm. 161.

[22]Baruch v. Giblin, 122 Fla. 59, 164 So. 831 834 (1936).

[23]305 F. Supp. 250 (S.D.N.Y. 1969).

[24]*Id.* at 251.

other factors mentioned are used by the court primarily to determine a fair and reasonable hourly rate of compensation for the time and work expended. The court in *Paolillo* pointed out the importance of keeping accurate and current records of work done and time spent.[25] It was recognized that the time and effort spent outside of the courtroom, in careful investigation of the case and in establishing liability and the extent of the injuries, was of clear benefit to the client and should be fairly compensated.[26] The point was made that the experience and skill of the attorney are important factors in determining the value of the services rendered and that it is customary to charge more for a senior attorney's time.[27]

The amount involved, or the amount ultimately recovered by the client, should be considered in determining the reasonable compensation due the original attorney.[28] In *O'Brien v. Mulcahy,*[29] the court reversed a lower court's order fixing the discharged attorney's fee at $500; the court stated that such fee was unreasonable and inadequate because the lower court did not take into account the fact that the attorney's original contingent fee contract called for 25 per cent of his client's recovery, and that the client ultimately recovered $15,000. On the question of the effect of the ultimate recovery in determining the reasonable value of the discharged attorney's services, it has also been stated that an attorney's right to compensation should not depend upon the success or failure of another member of the bar.[30] Furthermore, there is authority to the effect that the original attorney's recovery in *quantum meruit* should not be limited by what he would have recovered had he fulfilled the contract.[31]

[25] *Id.* at 252. See Cavers v. Old National Bank & Union Trust, 166 Wash. 499, 7 P.2d 23 (1932) where, even though he had proceeded as far as filing the client's suit, the discharged attorney's failure to present adequate proof of services rendered was held to preclude him from any recovery in *quantum meruit.*

[26] *Id.* at 252.

[27] *Id.* at 253.

[28] Shattuck v. Pennsylvania R. Co., 48 F.2d 346, 348 (W.D.N.Y. 1931).

[29] 230 App. Div. 790, 244 N.Y.S. 701 (1930).

[30] Zimmerman v. Kallimopolou, 56 Misc. 2d 828, 290 N.Y.S.2d 270, 272 (1967).

[31] In re Montgomery's Estate, 272 N.Y. 372, 6 N.E.2d 40 (1936).

There is some authority that a *quantum meruit* recovery should not be measured by the terms of the contingent fee agreement.[32] However, substantial authority states that once the contingent fee contract has been cancelled by the client's discharge of his attorney, the terms of the contract cannot establish the *sole* standard for compensation. However, the terms of the contract may be taken into consideration, together with other factors, as guides for ascertaining recovery under *quantum meruit.*[33]

In most states a trial judge is deemed capable of making a determination of attorney's fees based upon his own knowledge and experience.[34] In New York the courts often leave the determination of the reasonable value of services rendered to a court appointed referee, whose findings are subject to review by the court.[35] However, in some states it has been held that a trial judge may not direct a verdict setting a reasonable fee, because such a question can only be settled by a jury.[36]

In addition to the standard method of determining the reasonable value of services rendered as a fixed sum, New York has devised an alternative basis for compensating the discharged attorney in *quantum meruit.* The New York courts often determine the value of the discharged attorney's services by examining his contribution to the client's ultimate recovery. For example, in *Kodenski v. Baruch Oil Corp.*[37] the attorney had originally been retained on a contingent fee contract for 33⅓ per cent of the clients' recovery. The court determined that, considering the time

[32]In re McCrory Stores Corp., 91 F.2d 947, 949 (2d Cir. 1937).

[33]Tillman v. Komar, 259 N.Y. 133, 181 N.E. 75 (1932).

[34]Knoll v. Klatt, 168 N.W.2d 555 (Wisc. 1969); Scott, Blake and Wynne v. Summit Ridge Estates, Inc., 251 Cal. App. 2d 347, 59 Cal. Rptr. 587 (1967).

[35]Kodenski v. Baruch Oil Corp., 5 Misc. 2d 809, 161 N.Y.S.2d 301 (1957).

[36]Carter v. Wyatt, 113 Ga. App. 235, 148 S.E.2d 74 (1966).

[37]5 Misc. 2d 809, 161 N.Y.S.2d 301 (1957).

and effort expended prior to discharge, the value of the attorney's services was $6,600. The court also determined that the value of the attorney's services represented 21 per cent of any recovery by the client. The attorney was required to elect whether to take the fixed sum or 21 per cent of the client's ultimate recovery as his measure of compensation. There is, however, a limitation placed on the use of this alternative method of measuring *quantum meruit.* Compensation may not be fixed on a percentage basis if either the discharged attorney or the client objects.[38] Of course, on terminating the relationship, the client and the attorney can agree to whatever terms they wish without leave of the court, provided that the terms are not unconscionable and do not violate any rule of the court.[39]

As a general rule, an attorney who is discharged under a contingent fee contract is entitled to recover for the reasonable value of his services, even where the client did not later recover by judgment or settlement. This is true even where the client has discontinued the action after discharging the attorney without cause.[40] Where the client continues the original action with a substituted attorney, the discharged attorney is usually entitled to compensation without being required to await the outcome of the action and rely upon the abilities of the substituted attorney.[41] There is authority that an attorney should be made secure as to his fee prior to the granting of an order of substitution by the court.[42] Where the client is not able to make immediate payment to the discharged attorney protection may be afforded the attorney by giving him a lien on the cause of action.[43]

Attorneys' liens are security for the attorney's fees, and are

[38]Bradbury v. Farber, 31 App. Div. 2d 824, 298 N.Y.S.2d 29 (1969).

[39]Gair v. Peck, 6 N.Y.2d 97, 188 N.Y.S.2d 491, *cert. den.* and *appeal dismissed,* 361 U.S. 374 (1960).

[40]Andrewes v. Haas, 214 N.Y. 255, 108 N.E. 423 (1915).

[41]Zimmerman v. Kallimopolou, 56 Misc. 2d 828, 290 N.Y.S.2d 270, 272 (1967).

[42]Dorsey v. Edge, 75 Ga. App. 388, 43 S.E.2d 425 (1947).

[43]Kodenski v. Baruch Oil Corp., 5 Misc. 2d 809, 161 N.Y.S.2d 301 (1957).

often made an express part of the contingent fee contract.[44] Many states have statutes providing for attorneys' liens.[45] "A discharged attorney, other than one discharged for cause, (*citation omitted*), has two distinct liens to secure payment for past services: (1) a retaining lien on all the client's property in his possession, and (2) a charging lien upon the client's claim and any recovery which may be obtained."[46] The retaining lien affords the attorney "the same advantage as any other workman who is entitled to retain the things upon which he has worked, until he is paid for his work."[47] The court may force the attorney to turn over to the client the papers and data in his possession so that the client can proceed with his case, but in so doing, the court will often require that the client post adequate security to assure the attorney of his payment.[48]

The charging lien is more often used to secure payment, especially if the client lacks funds to pay the discharged attorney immediately. It secures compensation for the attorney's services by creating an interest in the proceeds of the client's ultimate recovery by judgment or by settlement.[49] A lien does not affect the measure of compensation due when a client discharges his attorney without cause from a contingent fee contract, but only secures the attorney's claim for his fee, whether the claim is based upon *quantum meruit* or is determined by the contract measure of damages.

Contract Measure of Recovery

Under the contract measure of recovery, when an attorney is discharged without cause from a contingent fee contract and the client subsequently recovers through judgment or settlement,

[44]F. B. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES, 70 (1964).

[45]*For example*, see N.Y. JUDICIARY LAW, § 475 (McKinney 1968).

[46]Gangwere v. Bernstein, 199 F. Supp. 38 (S.D.N.Y. 1961).

[47]Mercantini v. Innamorati, 27 Misc. 2d 881, 882, 209 N.Y.S.2d 581, 582 (1960).

[48]Kraut v. Raab, 24 App. Div. 2d 571, N.Y.S.2d 950 (1965).

[49]Robinson v. Rogers, 237 N.Y. 467, 143 N.E. 647 (1924).

the measure of damages is the fee or percentage provided in the contract.

> Where one employs an attorney and makes an express valid contract, stipulating for the compensation which the attorney is to receive for his services, such contract is generally speaking, conclusive as to the amount of such compensation ... [W]here an attorney is prematurely discharged by the client, or is otherwise wrongfully prevented from performing the professional duties for which he was employed, without fault on the part of the attorney, the latter is entitled to compensation. This is so even though the arrangement was for a contingent fee, provided the contingency has happened. The client by wrongfully preventing the performance of the act which entitled the attorney to specific compensation, becomes liable in damages in such amount.[50]

Some courts use language to the effect that if a valid contingent fee contract existed before the discharge, the client is bound to compensate in accordance with it.[51] Such language indicates that the court finds the contract fee to be *prima facie* evidence of the amount of compensation due the discharged attorney. It has been suggested that where an attorney is permitted to recover the full stipulated fee, the courts may be implicitly applying the doctrine of constructive performance.[52] This seems to be the case in *Neeper v. Heinbach,*[53] where the court stated that when the client prevents full performance by discharging the attorney the attorney may recover his fee as if he had fully performed. Other courts seem to apply the stipulated fee as the measure of damages because no other measure is easily ascertainable. By breaching the contract and discharging his attorney without cause, the client "

[50]Dolph v. Speckart, 94 Or. 550, 186 P. 32, 35 (1920).

[51]Warner v. Basten, 118 Ill. App. 2d 419, 255 N.E.2d 72 (1969).

[52]Annot., 136 A.L.R. 231, 233 (1942).

[53]249 S.W. 440, 441 (Mo. App. 1923).

. . . at least makes it difficult, and in some cases impossible, for the attorney to show the amount of his injury under the rules of quantum meruit . . . "[54]

One problem that may arise when the full stipulated contingent fee is awarded is that the discharged attorney and the substituted attorney may each be permitted to receive a large percentage of the client's recovery as their fee. This may impose hardship on the client, especially in a personal injury suit where the client's future may depend upon the recovery that he receives.[55]

If the attorney has been discharged for cause, then he is not entitled to the stipulated contingent fee.[56] It has been suggested that courts may exercise their judicial discretion to protect a client faced with a real hardship by expanding the concept of good cause for discharge:

> If the client is justified in discharging the attorney because of his conduct, the client pays no damages (citations omitted). The concept of cause will have to be determined on a case by case basis, but it is an available tool for the judicial craftsman. The danger of using this device, however, is that while enabling the client to terminate the contract, it may seriously impair the professional reputation of the attorney involved. Thus, while justified on the affirmative grounds of protecting the professional relationship, it has the negative effect of injuring the profession.[57]

Not all of the jurisdictions which consider the discharge of an attorney from a contingent fee contract a breach of contract

[54]White v. American Law Books Co., 106 Okla. 166, 233 P. 426, 427 (1924).

[55]Warner v. Basten, 118 Ill. App. 2d 419, 255 N.E.2d 72 (1969), *dissenting opinion.* The dissent objected to the majority rule which enabled the discharged attorney and the substituted attorney to each take as their fee 25 per cent of the client's recovery.

[56]Manning v. Clark, 40 F. 121 (3rd Cir. 1889).

[57]1960 WISC. L. REV. 156, 159 (1960).

apply the full stipulated contingent fee as the measure of damages. The courts in come jurisdictions, although stating that a discharge without cause is a breach of contract and that the discharged attorney is entitled to damages, measure damages by the reasonable value of services rendered.[58] Some jurisdictions seem to be unsure whether an attorney's recovery, based on the reasonable value of services rendered, may be properly construed as a recovery of "damages" based on a breach of contract.[59] It would seem that the ultimate recovery by the attorney in such jurisdictions would not substantially differ from recovery in jurisdictions which deny that a breach of contract occurred and apply pure *quantum meruit.*

In some jurisdictions the discharged attorney is given an express option. He can treat the discharge without cause as a breach of contract and sue for damages, or he can treat the discharge as rescinding the contract and sue for the reasonable value of services rendered.[60]

A modification of the traditional contract measure of recovery which appears to have merit is the "contract-deduction measure of recovery." In a well-reasoned opinion, the court in *Tonn v. Reuter,*[61] determined the discharged attorney's measure of recovery to be the amount of the stipulated contingent fee, based upon the the judgment ultimately realized by the client, less a fair allowance for the services and expenses which would necessarily have been expended by the discharged attorney in performing the balance of the contract. The court emphasized that the amount deducted is not based simply upon the mathematical fraction of the actual work unperformed, rather the deduction is measured by the value of the unperformed legal services. For example, if an

[58]Clayton v. Martin, 108 W. Va. 571, 151 S.E. 855 (1930).

[59]*See* Wright v. Johanson, 132 Wash. 682, 233 P. 16 (1925), where the court specifically objects to earlier courts' references to damages and breach of contract in this situation. Later Washington cases, however, seem to have discontinued use of such language; *see* Hamlin v. Case & Case, 188 Wash. 150, 61 P.2d 1287 (1936).

[60]Barthels v. Garrels, 206 Mo. App. 199, 227 S.W. 910 (1920); Weil v. Finneran, 70 Ark. 509, 69 S.W. 310 (1902).

[61]6 Wis. 2d 498, 95 N.W.2d 261 (1959).

attorney performed 75 per cent of the total work involved in the recovery, the amount of the deduction would not necessarily be 25 per cent of the contingent fee, but rather the value of the unperformed 25 per cent of the work. Here the court is implicitly recognizing that services performed at various stages in the litigation may have a value to the ultimate recovery not entirely proportional to the actual time and effort expended.

The majority of the courts which follow the contract measure of damages will not allow the discharged attorney to recover on the contract prior to the final determination of lawsuit.[62] Typically, the contract itself stipulates that the attorney is to receive his fee out of the recovery itself—the contract does not create a general obligation against the client.[63] Although denied an action on the contract, the attorney is usually entitled to recover the value of the services he performed prior to discharge.[64] In most states the discharged attorney may treat the contract as rescinded and sue immediately for the value of his services, or he may wait until the client ultimately recovers on the action and then sue on the contract.[65] If the attorney chooses to await the outcome of the original suit, his claim may be protected at the time of discharge by lien or otherwise.

In a few isolated cases the discharged attorney has been allowed to recover his contingent fee prior to recovery by the client. In *Williams v. City of Philadelphia*,[67] an attorney retained to prosecute a city's claim against the state for tax credits was to receive a percentage of any payment obtained. After successfully procuring tax credits of $30,000 and commencing further actions against the state, the attorney was discharged and the action was discontinued. The attorney produced evidence to show that he

[62]1st Nat'l Bank and Trust Co. v. Bassett, 183 Okla. 592, 83 P.2d 837 (1938); Harris v. Root, 28 Mont. 159, 72 P 429 (1903); Goldberg v. Perlmutter, 308 Ill. App. 84, 31 N.E.2d 333 (1941).

[63]F. B. MacKinnon, *supra* note 44, at 71.

[64]Sundheim v. Beaver County Bldg. & Loan Assoc., 140 Pa. 529 14 A.2d 349 (1940).

[65]Cases cited note 60 *supra.*

[67]208 Pa. 282, 57 A. 578 (1904).

was prevented from procuring credits amounting to over $80,000, and he sued for a percentage of this amount as damages for breach of contract. Although the court recognized the right of the client to abandon the suit at any time, the court found in favor of the attorney. The court reasoned, "[w]here the contract is to perform something in the future, the successful result of which is prevented by the other party, a speculative element is unavoidably introduced into the question of damages, but cannot take away the right to just compensation. In such cases, all that can reasonably be required of the plaintiff is to produce to the jury sufficient evidence, of the best character attainable, of a fair prospect of success, and the compensation which would have followed."[68] The court approved of the lower court's charge to the jury that if the jury was reasonably certain of the probability of the attorney's success, he could recover the damages proved; but if the probable success of the attorney's claim "was so based on conjecture and speculation," then the jury should resort to the value of the services actually rendered, without regard to the contingent fee.[69]

In *Scheinesohn v. Lemonek*,[70] an attorney had been retained to collect a claim against a third party, the fee being a percentage of the amount collected. Before the attorney had rendered any services, he was discharged. The court stated that if the attorney could show the collectibility of the claim, then he had a cause of action for breach of contract as soon as he was discharged, and the action did not depend on whether the claim was later collected by another attorney. Proof that the claim was later collected might establish the collectibility of the claim, but not the attorney's right to recover against his client. The court held that since the attorney had performed no service, *quantum meruit* did not apply. Since it was so difficult to determine an alternative basis of recovery other than the full fee agreed upon, the court also held that the measure of damages was the rate of

[68] *Id.* at 580.

[69] *Id.* at 580.

[70] 84 Ohio St. 424, 95 N.E. 913 (1911).

compensation agreed to be paid. These two cases have received little support in later case law.

Although Canon 10 of the *Canons of Professional Ethics* of the American Bar Association prohibits an attorney from acquiring an interest in the subject matter of the litigation, a few states do permit this type of contingent fee arrangement. In Louisiana a contingent fee contract may grant the attorney an interest in the subject matter of the suit, and an attempt by the client to discontinue or settle the suit without the attorney's consent is void; the attorney may proceed with the suit as if no discontinuance had been made.[71] Contingent fee contracts which are coupled with a partial assignment of the client's cause of action are well established in Texas.[72] In a case involving this type of attorney-client contract, when the client failed to appear at the trial and the defendant filed a motion to dismiss, the attorney was allowed to intervene on his own behalf to protect his share of the claim.[73]

Contingent fee contracts coupled with assignments have been criticized as being attorney oriented to an extreme: "The introduction of the attorney as an interested third party into what is normally a two-party compromise situation necessarily frustrates the settled policy of the law to encourage settlement and discourage litigation . . . The historical justification for contingent fee contracts was to enable the penniless client to obtain competent legal counsel. Assignment contracts shift the emphasis from the layman's plight to overprotection for the attorney."[74]

In cases where the client settles his claim, jurisdictions which follow the contract measure of recovery hold that the attorney is entitled to the contractual contingent fee as applied to the settlement amount realized.[75] However, where the client settles the

[71]37 LA. STAT. ANN. § 218; Carlson v. Nopal Lines, 460 F.2d 1209 (5th Cir. 1972).

[72]61 MICH. L. REV. 177 (1962).

[73]Benton v. Dow Chemical Co., 351 S.W.2d 899 (Tex. Civ. App. 1961).

[74]61 MICH. L. REV. 177, 180 (1962).

[75]15 U. DET. L. J. 146 (1952).

action without his attorney's knowledge and consent, and where proof exists that a third party has maliciously induced the client to so act, the attorney may have grounds for a tort action against the intervening party.[76] In *Katapodis v. Liberian S/T Olympic Sun,*[77] the attorney sued the interfering party and was awarded a recovery measured by the original contingent fee as applied to a settlement offer which had earlier been made by the defendant. The court voiced strong disapproval of the defendant's conduct and stated: "While awards in such cases should not necessarily be made as punishment to a defendant, it should be firm enough to let such a party know that the courts will not approve of or permit such interference."[78]

Generally courts have held that any limitation of the client's right to settle his case is invalid, even if the contract contains such an agreement.[79] In Oklahoma, however, an attorney whose client has settled without his knowledge may bring suit to establish the merits of his client's case, and to let the courts determine the value of the client's claim had it been prosecuted to judgment. The purpose of this procedure is " . . . to prevent an attorney from being bound by the amount of a settlement made without his knowledge and consent and to reserve for him the right to come forward and establish the true value of his client's cause of action, thereby establishing the resultant value of his contingent fee contract."[80]

Probably the largest discrepancy in the actual amount of compensation received by the discharged attorney, when comparing the contract measure of recovery and *quantum meruit,* occurs where the attorney has performed little or no services prior to

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[76] *See generally* 26 A.L.R.3d 679 (1969).

[77] 282 F. Supp. 369 (D.C. Va. 1968).

[78] *Id.* at 372.

[79] F. B. MACKINNON, *supra* note 44, at 75.

[80] Jones v. Farmers Ins. Exchange of Los Angeles, Cal., 112 F. Supp. 952, 955 (W.D. Okla. 1953).

discharge. In *Goldsberg v. Perlmutter*,[81] in a jurisdiction which applied the traditional contract remedy, the court held that the attorney was entitled, not just to the reasonable value of the services rendered (which were negligible) but to the full stipulated contingent fee as applied to the ultimate recovery by the client. Under a *quantum meruit* measure of recovery, the attorney in such a case would have received little or no compensation.[82] Advocates of the contract measure of damages argue that damages may be justified, even where the attorney has done little or nothing in the furtherance of his client's cause of action, on the basis of the doctrine of failure of consideration:

> [T]he client has bargained not only for the performance of representative services but also for the status of representation; a claimant represented by skilled counsel often gains much simply from their undertaking whatever services may be needed. Failure to perform actual services, then, is not a failure of consideration underlying the promise of representation which is both formally and actually the consideration for the promise to pay.[83]

FRACASSE V. BRENT

The California case of *Fracasse v. Brent*[84] presents the most recent rule relating to contingent fee contracts. The facts which gave rise to that rule were summarized in the opinion:

> Plaintiff, George Fracasse, is a duly licensed attorney at law, who was retained by defendant Ray Raka Brent to prosecute a claim for personal injuries in her behalf. On or about March 12, 1969, Fracasse and Brent entered into a written contingency fee agreement, un-

[81]308 Ill. App. 84, 31 N.E.2d 333 (1941).

[82]Ramey v. Graves, 112 Wash. 88, 191 P. 801 (1920).

[83]Dombey, Tyler, Richards & Grieser v. Detroit T. & L. R. Co., 351 F.2d 121 (6th Cir. 1965).

[84]6 Cal. 3d 784, 100 Cal. Rptr. 385, 494 P.2d 9 (1972) [hereinafter cited as Fracasse].

> der which Brent agreed that Fracasse's compensation would be 33⅓ per cent of any settlement made at least 30 days prior to the original trial date and 40 per cent of any recovery obtained thereafter, whether by settlement or judgment.
>
> Some time thereafter, but before any recovery had been obtained in the personal injury suit, Brent informed Fracasse that she wished to discharge him and retain another attorney. She did so and, on January 16, 1970, Fracasse filed the instant action, entitled "Complaint for Declaratory Relief." Alleging that his discharge was without cause, and that Brent had breached her contract and had refused to give Fracasse the fee to which he would have been entitled thereunder, Fracasse prayed for a declaration that the contract was valid and that he had a one-third interest in any monies ultimately recovered in the personal injury action. Brent demurred generally and specially to the complaint. The trial court did not rule on the special demurrers, but held that the complaint did not state a cause of action and sustained the general demurrer without leave to amend on the authority of *Brown v. Connolly* (*citation omitted*). This appeal followed.[85]

Brown was an action to foreclose an attorney's lien brought by a discharged attorney retained under a contract similar to that in *Fracasse.* The attorney's suit, which was brought before the client had obtained a judgment or any recovery, asked for the full contracted-for percentage of the amount prayed for in the client's original suit. The attorney was asking for a money judgment, not a declaration of his rights. Both the trial court and the court of appeals sustained a demurrer without leave to amend on the basis that a wrongfully discharged attorney has no cause of action against his former client for compensation based on a contingent

[85] *Id.* at 786, 787.

fee contract until the stated contingency occurs. If there has been no judgment or settlement, the attorney must look to an action in *quantum meruit,* and cannot sue on the contract.[86] The Supreme Court in its opinion in *Fracasse* recognized the distinction between an action on a contract and an action to establish a party's rights under a contract, and did not rely upon *Brown v. Connolly.*[87]

In *Fracasse,* the majority opinion held that an attorney retained under a contingent fee contract who is discharged by the client, either with or without cause, is entitled to recover only the reasonable value of his services rendered to the time of discharge and that the cause of action does not accrue until the contingency occurs. The court further stated that:

> In light of these rules, it seems clear that there is no present controversy such as would justify the court in exercising its discretion to entertain an action for declaratory relief (Code Civ. Proc., § 1060 *et seq.*). Whether there might be some circumstances in which a declaratory relief action might properly be brought by an attorney we need not decide.[88]

The majority in *Fracasse* gave the history of the prior California rule on contingent fee recovery, placing special emphasis on a concurring opinion by Chief Justice Gibson and Justice Traynor in the case of *Salopek v. Schoeman*[89] which foreshadowed the opinion in *Fracasse.* Although the concurring justices in *Salopek* were apparently unwilling to require the discharged attorney to wait for the contingency to occur, they did feel that he should be limited to the reasonable value of his

[86]Brown v. Connolly, 2 Cal. App. 3d 867, 870, 83 Cal. Rptr. 158 (1969) *citing* Jones v. Martin, 41 Cal. 2d 23, 256 P.2d 905 (1953); Moore v. Fellner, 50 Cal. 2d 330, 325 P.2d 857 (1958); Brown v. Superior Court, 242 Cal. App. 2d 519, 51 Cal. Rptr. 633 (1966).

[87]Fracasse, note 84 *supra,* at 788.

[88]*Id.* at 792, 793.

[89]20 Cal. 2d 150, 124 P.2d 21 (1942) [hereinafter cited as Salopek].

services rendered to the time of his discharge.[90] The starting point in both opinions is the premise that the client's power to discharge an attorney, with or without cause, is absolute.[91]

Because the client is normally dependent solely upon his attorney in matters regarding his grievance and the law, the attorney-client relationship is considered so unique that it cannot be judged by ordinary contract-of-employment standards. The uniqueness of the relationship leads the court to conclude that mere loss of faith in the attorney, for any reason, is sufficient cause for his discharge.[92] Discharge "without cause" is not defined by the *Fracasse* court and, in light of the liberal definition of "cause," it is difficult to conceive of an example of discharge without cause.

The court went on to examine the usefulness of the client's absolute "power" to discharge his attorney in light of a rule which distinguishes between a discharge with cause and a discharge without cause. An attorney discharged with cause was traditionally entitled to no more than the reasonable value of his services,[93] while an attorney discharged without cause might collect his full contract price after the contingency was met.[94] The concurring justices in *Salopek,* with the facts of that case as an example, pointed out that the trial court and the appellate court frequently cannot agree as to what constitutes cause.[95] Because a wrong decision by the client as to whether he had cause to discharge his attorney can cost him double attorney's fees, "[i]t is of vital importance that the client know whether he has legal cause for terminating the contract. . . . [T]he authorities furnish him with no reliable test."[96]

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[90] *Id.* at 156.

[91] CAL. CODE CIVIL PRO. § 284 (West 1954).

[92] Fracasse, note 84 *supra,* at 790.

[93] Salopek, note 89 *supra.*

[94] Zurich General Acc. & Lia. Ins. Co. v. Kinsler, 12 Cal. 2d 98, 81 P.2d 913 (1938).

[95] Salopek, note 89 *supra,* at 156, 157.

[96] Fracasse, note 84, *supra* at 790 *quoting from* 1 WITKIN, CAL. PROCEDURE 113, 114 (2d ed. 1970).

The court's solution, which considers the client's loss of confidence in his attorney as sufficient cause for his discharge, is somewhat superficial. Certainly the quality of performance rendered by the attorney should affect the reasonable value of his services. The services of an attorney discharged for mistakes or incompetence will undoubtedly be worth less than those of an attorney discharged for no more than loss of faith by the client. There still remains the risk to the client of losing a substantial portion of his recovery to his attorneys if he discharges the first attorney for something less than what the court or jury would objectively consider to be lack of competence.

The court gave two reasons for forcing the discharged attorney to wait for the contingency to occur before receiving his compensation. It pointed out that "one of the significant factors in determining the reasonableness of an attorney's fee is the 'amount involved and the result obtained.' "[97] The court felt that the attorney must wait for the contingency to occur because it is impossible to know either the result or the amount involved until the matter is settled. This is no more than a make-weight. The result and the amount received are ultimately obtained with a second attorney. They are relevant to judging the reasonableness of the second attorney's fee; it is not at all clear how they are relevant to the first attorney's fee. Attorneys normally value their services on a noncontingent basis either by the hour or by the task. If the first attorney must wait until his former client recovers, he should collect more than if he does not have to wait; the increased fee reflects the uncertainty of his collecting at all. At either point in time, however, his services can be valued.

The court's second reason is more meaningful; it would be improper to burden the client with an absolute duty to pay the discharged attorney regardless of the outcome of his case.[98] This would place too high a price on the exercise of the client's "power" to discharge his attorney. The client may be a man of

[97] *Id.* at 792 citing 1 WITKIN, CAL. PROCEDURE 102 (2d ed. 1970).

[98] *Id.* at 792.

limited means for whom a contingent-fee arrangement is the only possible device for financing his case. Because the attorney normally expects to collect a fee only if he is successful in obtaining a recovery for his client it is not unfair to require him to wait until the contingency is met. The fact that another attorney now controls the litigation is not sufficient reason for the first attorney to be compensated at the time he is discharged.

An alternative solution not considered by the court which appears fairer to the client is to allow the client the option of paying the first attorney upon discharge or waiting until the contingency is met. If he pays the discharged attorney before recovery, the fee will be less because the debt will be paid whether or not the client recovers. Admittedly this is somewhat impractical under present circumstances, because the attorney has not yet valued his services, but as will be shown in a later section of this article, the parties can arrange contractually for this scheme and establish an agreed fee or formula for calculating the fee.

In dealing with the question of the compensation to be awarded to the discharged attorney under a *quantum meruit* theory, the court is very sketchy, but does set out some guidelines:

> To the extent that such a discharge occurs "on the courthouse steps," where the client executes a settlement obtained after much work by the attorney, the factors involved in a determination of reasonableness would certainly justify a finding that the entire fee was the reasonable value of the attorney's services (*citations omitted*).[99]

The opinion refers to another case, *Los Angeles v. Los Angeles-Inyo Farms. Co.*,[100] which sets forth the factors to be considered in determining reasonable compensation for an attorney's services. It is stated there that the court must consider

[99] *Id.* at 791, *citing* Oliver v. Campbell, 43 Cal. 2d 298, 273 P.2d 15 (1954).

[100] 134 Cal. App. 268, 25 P.2d 224 (1933).

the nature and difficulty of the litigation; the amount involved; the skill required and employed; the attention given; the success or failure of the suit; and the attorney's skill, learning, and experience.

To a contention that there would be substantial difficulty in ascertaining the reasonable value of the attorney's services, the court pointed out that the present measure of damages for discharge "with cause" remains unchanged and that in those cases courts award damages without difficulty.[101] The fact remains that it is easier to be cold and objective when awarding compensation to an attorney who was discharged because of his own actions than to an attorney discharged on a whim or caprice. The difference is one of kind, not simply one of degree; it is to be expected that there will be some lack of consistency in the results on similar facts.

The court further held that under the facts presented in *Fracasse* an action for declaratory relief did not lie: " . . . in light of our holding regarding the applicable measure of damages, the action is premature. . . . "[102] They concluded that there was no present controversy as required by California Code of Civil Procedure, § 1060. "Whether there might be some circumstances in which a declaratory refief action might properly be brought by an attorney we need not decide."[103]

Section 1060 speaks of the need of an "actual controversy," but also says; "such declaration may be had before there has been any breach of the obligation in respect to which said declaration is brought." A gloss added by the courts is that it must be a "justiciable controversy" and of a character which admits of specific and conclusive relief by judgment.[104]

[101]Fracasse, note 84 *supra*, at 791 *citing* 1 WITKIN, 98-109, note 96 *supra*, and cases cited there.

[102]*Id.* at 788.

[103]*Id.* at 793.

[104]Silva v. City and County of San Francisco, 87 Cal. App. 2d 784, 198 P.2d 78 (1948).

As was pointed out by the dissenting justices in *Fracasse,* an action for declaratory relief may be proper in some circumstances even though the liability which it is sought to establish is dependent upon the outcome of another lawsuit.[105] "[I]n the case before us [*Fracasse*], the fact that no judgment has been rendered in favor of defendant for recovery in his underlying action for damages for personal injuries does not of itself preclude declaratory relief to determine the rights of plaintiff and defendant *inter se* in the event defendant should obtain one.... [D]espite the possibility of a declaratory judgment becoming moot recognition of the parties' right to receive a declaration of rights pursuant to Code of Civil Procedure sections 1060-1062 [is] necessary to preserve the declaratory judgment as a viable concept."[106]

Having decided that the attorney's recovery must be in *quantum meruit,* there was no verdict which the court felt could be given in an action for declaratory relief.[107] Because the reasonable value of services, absent other facts, is dependent upon the ultimate recovery,[108] any verdict would be indefinite both as to amount and liability. Although the court did not explain its reasoning, it must have felt that such a verdict was not "specific and conclusive relief."[109]

Although the court did not rely upon it, the opinion does mention that the defendant argued that "it is grossly unfair to allow a discharged attorney to put a former client to the expense of defending a suit, the result of which can put the attorney in no better position than he was initially and the purpose of which is likely to force an unfair settlement.[110] In view of the fact that it

[105]Fracasse, note 84 *supra,* at 793-795.

[106]*Id.* at 794, *dissenting opinion citing* Sattinger v. Newbauer, 123 Cal. App. 2d 365, 266 P.2d 586 (1954) and Columbia Pictures Corp. v. DeToth, 26 Cal. 2d 753, 161 P.2d 217, 162 A.L.R. 747 (1945).

[107]*Id.* at 788, 792.

[108]Cases cited notes 97 and 100 *supra.*

[109]Cases cited note 104 *supra.*

[110]Fracasse, note 84 *supra,* at 788.

is considered unethical for an attorney to sue a client for a fee except to prevent injustice, imposition or fraud,[111] perhaps some weight should be given to the above consideration.

The court omited any discussion of the strong and valid interest which the discharged attorney has in facilitating the collection of his fee. If he must wait until the client's suit is settled or finally litigated, he must move quickly to secure any of the judgment money. The client, in all probability, has medical and personal debts, as well as an obligation to pay his new attorney 30 to 40 per cent of the recovery. Under the new rule the first attorney's fee will quite possibly be the subject of a new law suit financed, perhaps, by the client's recovery in the original suit.

The majority opinion implied that the rule enunciated in *Fracasse* followed logically from earlier decisions. As the dissent pointed out in a much longer opinion, the new rule is precisely that—a new rule. Without judging the desirability of the new rule, it appears that the majority did not give much thought to the problems the new rule creates nor offer any suggestions for solutions.

Perhaps the greatest criticism of the course taken by the majority in *Fracasse* is that it substitutes for a definite and easily ascertained measure of damages one which is very unsure and fluid. Because of this it may be the rule, rather than the exception, that these cases are litigated. In the meantime, there is no way in which the attorney who has been discharged can protect his interest. The Court proposes no solution and gives no ideas for how this situation can be improved or resolved. The Court, with its inherent power over attorneys as officers of the court, could have taken a more active role in the question of fees, especially contingent fees.[112]

[111]AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS, Canon 14, *cited in concurring opinion in* Salopek, note 89 *supra*, at 156.

[112]People v. Turner, 1 Cal. 143 (1850); In re Chapelle, 71 Cal. App. 129, 234 P. 906 (1925); In re Hallinan, 43 Cal. 2d 243, 272 P.2d 768 (1954); In re Lavine, 2 Cal. 2d 324, 41 P.2d 311, 42 P.2d 311 (1935).

PROPOSALS

Those factors which the court in *Fracasse* refers to as relevant in determining the reasonable value of an attorney's services[113] are precisely those factors which an attorney and his client should consider in deciding upon a bargained-for contractual fee. In a typical contingent fee contract, the compensation is expressed in terms of a percentage of any ultimate recovery, with perhaps two or more percentages corresponding to the stage at which there is recovery. In a rough way, many, if not all, of the factors referred to as relevant to the determination of the reasonable value are represented in this formula. It is proposed that this formula can be extended to cover the situation where the client discharges his attorney. By the affirmative use of contractual provisions anticipating a discharge of the attorney, perhaps the parties can facilitate a solution to the problem should it arise.

In drafting the contingent fee contract, it can be agreed by both parties that, in the event of discharge and a later recovery, the client owes the attorney the reasonable value of his services as computed by one of several alternative methods. Of course, in a *quantum meruit* action, the contract is not determinative of the reasonable value; however, the contract is admissible evidence tending to show the reasonable value of the services.[114] Thus, a well-drafted contract should have great weight in the determination of reasonable fees.

Two possible contractual provisions are:

> (1) In the event of a discharge the fee is the number of hours expended by the attorney multiplied by an agreed hourly rate. The attorney agrees to keep a complete time record, which, of course, most attorneys presently do.

[113]Cases cited note 100 *supra.*

[114]DeBoom v. Priestly, 1 Cal. 206 (1850); Reynolds v. Jourdan, 6 Cal. 108 (1856); Castagnino v. Balletta, 82 Cal. 250, 23 P. 127 (1889); Tsarnas v. Bailey, 179 Cal. App. 2d 332, 3 Cal. Rptr. 629 (1960).

> The hourly rate can be inflated somewhat from the attorney's standard rate to reflect the uncertainty of the recovery. The attorney will also add on any expenses.
>
> (2) The contract can set up a schedule of percentages for different states in the process, culminating in the percentage for recovery before trial and that for after trial.

The value of the first approach lies in its flexibility; the only fact which must be inserted by the attorney is an hourly rate which reflects his estimate of the chance of recovery. As the work progresses, the total fee increases continuously. The second approach might be difficult to draft so that there is always a reasonable relation between the work expended and the value assigned to it, but there is a certain appealing symmetry in the use of percentages throughout. The first approach does not involve the amount of eventual recovery, and so might be either a very small proportion of the client's recovery or a very large proportion. (In an extreme case, it might exceed the fee the attorney would have received if he had not been discharged. Because an attorney's recovery on a *quantum meruit* theory is limited by the contractual amount,[115] it would be wise to insert a provision limiting the calculated fee to the amount he would receive absent a discharge.)

A contractual approach to the problem of the discharged attorney has several advantages:

> (1) The client is advised of his power and right to discharge his attorney for any reason.
>
> (2) By being made aware of his power, he is also made aware of his duty to pay for the reasonable value of the services which the attorney has rendered.
>
> (3) The client is able to estimate the cost to

[115]Cases cited note 5 *supra.*

himself of exercising that right, and can thus make a more intelligent decision regarding the wisdom of discharging his attorney.

(4) Because that cost can easily be calculated, there is a much greater likelihood that the first attorney will be paid without time-consuming and costly negotiation or litigation.

(5) In the event litigation becomes necessary to determine the reasonable value of services, the court will be presented with an additional piece of persuasive evidence from which a determination can be made.

After *Brown* and *Fracasse,* the discharged attorney on a contingent fee contract has no lien on any recovery,[116] and thus he will be very interested in obtaining a declaratory judgment determining the existence of his interest in any monies ultimately received by the client. Such was the refief prayed for by the attorney in *Fracasse.* Although, in that instance, declaratory relief was denied, the opinion did not preclude declaratory relief in all instances.[117] Perhaps a contract which anticipates a discharge and provides a method of calculating compensation will convince a court to exercise its discretion and allow an action for declaratory relief.

Another contractual approach to the problem of determining reasonable compensation might be for both parties to agree to submit to binding arbitration in the event that the attorney is discharged. This calls for an arbitration board composed of members of the State Bar. In the event that the client and attorney cannot agree on a "fee," they appear before the arbitration board, where all evidence of services rendered can be introduced to enable the board to reach a fair decision.

It is now unclear whether the client is still bound in any way

[116]Brown v. Connolly, 2 Cal. App. 3d 867, 83 Cal. Rptr. 158 (1969); Fracasse, note 84 *supra.*

[117]Fracasse, note 84 *supra,* at 793.

by the contingent fee contract, since he has the right to discharge the attorney and, in a sense, dissolve the contract. It seems reasonable that if the contract provides for arbitration, and if there is a procedure set up by the bar that is fair to all concerned, the courts can enforce the contract, and, in fact, it is likely that the courts will welcome the opportunity to settle the matter without involving the court system in contingent fee disputes. The courts' only function would be to determine the enforceability of the contract.

Arbitration to set attorneys' fees has several advantages. It allows the board to decide each case on its peculiar facts, thus reaching a fair figure without being encumbered by contractual or legislative provisions. At the same time, by accumulating experience and expertise, the board can give uniform recoveries where the facts of cases are similar, and can weigh unusual cases on their own merits. As with other arbitration proceedings, either party will have the right to appeal an unjust decision to the Superior Court.[118] Since fee schedules for possible discharge will be unnecessary, arbitration will eliminate the problem of placing the client in an inferior position with respect to a possible standard form contract.

If the discharged attorney has obtained materials which it will be difficult or time consuming for the new attorney to acquire independently, he is in a good position to obtain compensation because he has a right to retain these materials until he is paid.[119] Under these conditions, some arrangement between the attorneys

[118]CAL. CODE CIVIL PRO. §§ 1285-1287 (West 1954).

[119]"The general, possessory, or retaining lien attaches to all property, papers, books, documents, securities and monies of the client coming into the hands of the attorney in the course of his professional employment. It gives him the right to retain the possession thereof as security, not only for costs, disbursements, and charges insofar as they arise in the particular cause in which they come into his possession, but also for the costs and amount due him for professional business and employment in other causes. In other words, the lien extends to the general balance due for professional services rendered to the client. This lien is a common-law lien founded and depending upon possession. Generally speaking it is a passive lien and cannot be actively enforced either at law or in equity. Conflicting suggestions have been made as to whether such a lien exists under California law, but no reported case from this state dealing with the recognition of such a general, possessory, or retaining lien has been found," 6 CAL. JUR. 2d REV, *Attorneys at Law* § 134.

is likely. Such an arrangement might take two forms: (1) a new agreement between the client and his former attorney under which the attorney will be paid out of any settlement or judgment, or (2) an agreement between the attorneys to split the second attorney's fee. An agreement to split fees is governed by Rule 22 of California's *Rules of Professional Conduct.*[120] This provides that the division must be made in proportion to the services performed or the responsibility assumed by each attorney. Such arrangements may handle the special case smoothly, but are of limited utility for handling the vast majority of cases.

Although it is doubtful that the problem of discharged attorneys ever will be great enough to warrant such action, the legislature could involve itself in the entire area of contingent fees. It is nice to think of each contingent fee contract as being tailor-made for the case, with different percentages for different cases according to the difficulty and chance of recovery; the fact is, however, that most contingent fee contracts are of a standard form with standard percentages that only vary slightly between certain large categories of claims. The legislature might enact a fee schedule for certain classes of cases, with provision for compensating the discharged attorney. However, it is doubtful whether any schedule could be flexible enough to handle all cases fairly, and such a schedule might make it difficult for an injured person to obtain the services of an attorney for an unusual case in which the chance of recovery was very slim.

The legislature might empower the courts to create rules and schedules and oversee their application. In the extreme, such action would remove the entire matter of contingent fees from contractual agreement, and the entire fee would be determined by the judge after verdict or settlement. The judge would examine the nature of the case, the time spent by the attorney and his expenses, and then set a fee. "When a judge is informed of the

[120] *Enacted under* § 6076 of CAL. BUS. & PROF. CODE (West 1954).

extent and nature of legal services, he can determine what is a reasonable fee from his own knowledge and experience without the necessity of other evidence."[121]

In this regard, it is interesting that the predecessor of the present *Code of Civil Procedure* § 284 provided:

> The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows:
>
> 1) Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes;
>
> 2) Upon the order of the court, upon the application of either client or attorney, after notice from one to the other *except that in all civil cases in which the fee or compensation of the attorney is contingent upon the recovery of money, in which case the court shall determine the amount and terms of the payment of the fee or compensation to be paid by the party* (emphasis added).[122]

The italicized portion was declared unconstitutional as violating *California Constitution* Article I, § 11, which provides that all laws of a general nature shall have a uniform application.[123] In 1967 the underlined portions were deleted.[124] Were the legislature to reenact this provision, it seems unlikely, after *Fracasse,* that it would again be declared unconstitutional.

This scheme, under the old law, if developed, would have many similarities to the present law in New York which was cited

[121]Scott, Blake and Wynne v. Summit Ridge Estates, Inc., 251 Cal. App. 2d 347, 59 Cal. Rptr. 587 (1967).

[122]CAL. CODE CIVIL PRO. § 284 (West 1954) (Enacted 1872. As amended Code Am. 1873-1874, c. 383, p. 289, § 26; Code Am. 1880, c. 35, p. 57, § 1; Stats. 1935, c. 560, p. 1647, § 1.)

[123]Echlin v. Superior Court in and for San Mateo County, 13 Cal. 2d 368, 90 P.2d 63, 124 A.L.R. 719 (1939); Cassel v. Gregori, 28 Cal. App. 2d 769, 70 P.2d 721 (1937).

[124]Cal. Stats. 1967, c. 161, p. 1246, § 1.

with approval in *Fracasse.*[125] There, also, the client has an absolute "right" to discharge his attorney.[126] If the attorney is retained under a contingent fee contract and subsequently discharged, the court, usually through a referee, sets the fee which the attorney is to receive.[127] If the client can pay, he does so; if he cannot, the attorney is given a lien on any recovery of the client.[128] The referee may set the attorney's fee as some percentage of the recovery if the client is unable to pay when the attorney is discharged.[129] Under New York law, however, the fee is owed whether the client recovers or not, unless the attorney chooses, with the acquiescence of the client, to wait for recovery and the possibility of greater compensation.[130]

With one modification—that the client have no obligation to pay the attorney until he has recovered—this approach has much to recommend it. Both the discharged attorney and the client are protected: the attorney has a lien on any recovery and the client owes nothing until he recovers. In addition, a speedy, just, and inexpensive procedure is provided for settling the matter.

Fracasse v. Brent presents California with a new rule regarding contingent fee contracts. It is unclear how the courts will deal with the rule, or what the practicing bar's reaction will be. As a result, an attorney discharged under a contingent fee contract is very unsure how much and when he will recover for his services. The rule itself seems to leave many questions unanswered, and, as a result, the entire area of contingent fee contracts appears to be ripe for further action by courts, the practicing bar, or, perhaps, the legislature.

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[125]Fracasse, note 84 *supra*, at 791.

[126]Martin v. Camp, 219 N.Y. 170, 114 N.E. 46 (1916).

[127]Kodenski v. Baruch Oil Corp., 5 Misc. 2d 809, 161 N.Y.S.2d 301 (1957).

[128]Kodenski v. Baruch Oil Corp., 5 Misc. 2d 809, 161 N.Y.S.2d 301 (1957); Gangwere v. Bernstein, 199 F.Supp. 38 (S.D.N.Y. 1961); Robinson v. Rogers, 237 N.Y. 467, 143 N.E. 647 (1924).

[129]Kodenski v. Baruch Oil Corp., note 128 *supra.*

[130]Martin v. Camp, 219 N.Y. 170, 114 N.E. 46 (1916).

One proposed method of clarifying both the attorney's and the client's positions regarding the contingent fee contract is to provide more comprehensive retainer agreements which anticipate the various problems common to attorney discharges. Although approval of such contracts by the courts remains questionable, well-drafted contracts appear to provide a remedy for a now ailing rule.

Arbitration to settle fee disputes between a client and his former attorney has also been suggested. This proposal seems attractive, but may not gain acceptance by attorneys who highly value their freedom of contract.

In view of the various objections to these proposals, perhaps the simplest and the fairest way of dealing with the problem of an attorney retained under a contingent fee contract and subsequently discharged by his client, would be to reenact the long-ignored predecessor to the current *California Code of Civil Procedure* § 284. Such an action would provide for maximum free bargaining between the attorney and client, and would leave the discharged attorney with a valid lien with which he could ensure recovery.