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LIMITING THE WRONGFULLY DISCHARGED ATTORNEY'S RECOVERY TO QUANTUM MERUIT—FRACASSE v. BRENT

What remedies should be available to an attorney who, after part performance under a contract of employment, is discharged without cause by the client? In Fracasse v. Brent, California recently adopted the rule of a minority of jurisdictions which limits the discharged attorney’s recovery to the reasonable value of services actually rendered. The purpose of this quantum meruit limitation is to enable a client to discharge the attorney with or without cause without fear of having to pay the discharged attorney for all services agreed upon in the contract—even those not yet rendered. In contrast, most states permit the wrongfully discharged attorney to recover damages measured by the full contract price; such a recovery is consonant with ordinary contract principles. The minority rule departs from these ordinary contract principles in order to make the employment of substitute counsel less burdensome to the client. Greater freedom to substitute legal representation promotes the client’s ability to be confident in the skill, loyalty and integrity of his attorney. The basis for the minority rule is a public policy which regards such confidence as beneficial, if not necessary, to the administration of justice. This note will examine the bases for the majority and minority rules, analyze the scope of Fracasse, and conclude that the benefits of limiting an attorney’s recovery to quantum meruit are significant, whereas the possible undesirable consequences are relatively small and, for the most part, speculative.

The Majority and Minority Rules

Upon wrongful discharge, an attorney in most states may recover as

1. 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972).
2. See note 20 infra.
3. See text accompanying notes 99-102 infra.
4. See note 8 infra.
5. See note 9 infra.
6. See text accompanying notes 116-18 infra.
7. This note will use the terms “majority rule” and “minority rule” without further reference to mean, respectively, the rule permitting a wrongfully discharged attorney to recover damages and the rule limiting such attorney’s recovery to quantum meruit where, in each case, the attorney has not fully performed.
damages the full contract price. This measure of damages is a product of the attorney's status as an independent contractor as opposed to an employee. The prima facie measure of recovery for both independent contractors and employees is the contract price; however, the employee has a duty to mitigate damages by securing substitute employment. On the theory that the original contract of employment does not preclude an attorney "independent contractor" from accepting other concurrent employment, the duty to mitigate upon wrongful discharge is deemed inapplicable and damages may be recovered by the attorney-independent contractor at the full contract price. For example, if an attorney contracts to perform a specific service for a fixed fee of $500.00 and is thereafter discharged by the client without cause prior to having completed the service, the attorney, because of his status as an independent contractor, would be entitled to damages amounting to $500.00. The full contract price would be awarded under the majority rule even though it might far exceed the reasonable value of services rendered.

States which permit the wrongfully discharged attorney to seek damages generally also permit an alternative recovery based on quantum meruit. In two instances the option to pursue quantum meruit

8. E.g., Goodkind v. Wolkowsky, 151 Fla. 62, 9 So. 2d 533 (1942); Higgins v. Beatty, 242 N.C. 479, 88 S.E.2d 80 (1955); Kent v. Fishblate, 247 Pa. 361, 93 A. 509 (1915); Mandell & Wright v. Thomas, 441 S.W.2d 841, 847 (Tex. 1969); see Fracasse v. Brent, 6 Cal. 3d 784, 797 n.3, 494 P.2d 9, 18 n.3, 100 Cal. Rptr. 385, 394 n.3 (1972); Annot., 54 A.L.R.2d 604, 609-15 (1957) (noncontingent fee contracts); Annot., 136 A.L.R. 231, 245-51 (1942) (contingent fee contracts).

Some jurisdictions, while allowing a wrongfully discharged attorney to recover damages, cut back from the full contract price, but not to the extent of requiring mitigation. In Arkansas, for example, the contract price is reduced by out-of-pocket expenses which would have been incurred in performing the balance of the contract provided the client has not separately agreed to reimburse the attorney for such expenses. Bockman v. Rorex, 212 Ark. 948, 953-54, 208 S.W.2d 991, 995 (1948). In Wisconsin the measure of damages is the contract price less fair allowance for services and expenses saved the attorney by reason of discharge. Tonn v. Reuter, 6 Wis. 2d 498, 505, 95 N.W.2d 261, 265 (1959). See generally 1960 Wis. L. Rev. 156.

9. See, e.g., Associated Indem. Corp. v. Industrial Accident Comm'n, 56 Cal. App. 2d 804, 808, 133 P.2d 698, 700 (1943) (attorney under general retainer not entitled to workmen's compensation because independent contractor not employee); Restatement (Second) of Agency § 1, comment e at 11 (1957) (attorney is independent contractor).


11. See note 10 supra.

is particularly advantageous to the attorney. First, since the contract price is not ordinarily considered a limit on *quantum meruit* recovery,\textsuperscript{13} the attorney may recover more on *quantum meruit* than in damages where unexpectedly lengthy and difficult services were rendered.\textsuperscript{14} Second, the attorney's cause of action to recover the contract price under a contingent fee contract does not accrue until the happening of the contingency;\textsuperscript{15} the cause of action for *quantum meruit*, on the other hand, accrues immediately upon discharge. The attorney may, in this situation, prefer the more immediate and certain recovery of *quantum meruit*.

Under the majority rule it is said that the client has a "right" to discharge his attorney,\textsuperscript{16} but where the discharge is without cause, the client, for exercising this "right" becomes subject to a liability for damages.\textsuperscript{17} It would be more accurate to say that the client has a power to discharge without cause, subject to incurring a liability for damages. A right to discharge would exist only when the attorney has given the client cause for discontinuing his employment and the jurisdiction, in such cases, denies even *quantum meruit* recovery.\textsuperscript{18}


\textsuperscript{14} See generally, Annot., 109 A.L.R. 674 (1937).

\textsuperscript{15} See, e.g., Weil v. Finneran, 70 Ark. 509, 511, 69 S.W. 310, 311 (1902); In re Downs, 363 S.W.2d 679, 686 (Mo. 1963) (dictum). But see Williams v. Philadelphia, 208 Pa. 282, 291, 57 A. 578, 579 (1904) (full fee may be recovered on establishing collectibility of client's claim).

\textsuperscript{16} E.g., Tonn v. Reuter, 6 Wis. 2d 498, 503, 95 N.W.2d 261, 264 (1959).

\textsuperscript{17} Id. In addition, in most states—including those which have adopted the minority rule—an attorney's lien for his services is created by virtue of statutory or common law. See generally 7 C.J.S. *Attorney and Client* §§ 207-11 (1937). California lacks a statutory attorney's lien and does not recognize common law attorney's liens. *Ex Parte Kyle*, 1 Cal. 331 (1850). However, in dictum the California Supreme Court recently stated, "[I]t is problematical whether much vitality remains in the Kyle rule." *Isrin v. Superior Court*, 63 Cal. 2d 153, 158, 403 P.2d 728, 732, 45 Cal. Rptr. 320, 324 (1965).

When the contract is for a contingent fee, California has taken the position that an equitable lien upon the client's recovery is automatically created. Fifield Manor v. Finston, 54 Cal. 2d 632, 641, 354 P.2d 1073, 1079, 7 Cal. Rptr. 377, 383 (1960) (dictum). Furthermore, California courts have permitted a lien to be created by the express terms of the attorney-client contract of employment. Haupt v. Charlie's Kosher Mkt., 17 Cal. 2d 843, 845, 112 P.2d 627, 628 (1941). Therefore, an attorney in California may acquire lien protection equivalent to attorneys in other states.

In contrast to the majority rule, a minority of jurisdictions refuse to afford the same remedies to a discharged attorney as are available to discharged independent contractors. Under this minority view, a client is given not only the power, but the "right" to terminate the employment relationship regardless of the contract's express terms by virtue of an implied term that the client may discharge the attorney with or without cause. Since the client has not breached the contract in exercising the right of discharge, the attorney cannot recover damages. Therefore, if the discharged attorney has only partially performed, he may recover from the client only on quantum meruit.

In most states under either the majority or minority view, the contract price is not a limit of the discharged attorney's recovery under quantum meruit, and whether this restitutionary remedy should be limited by the contract has been the subject of academic debate. The protection afforded to the client becomes illusory if the discharged attorney's recovery on quantum meruit exceeds the contract price. At least one state has limited the discharged attorney's quantum meruit recovery to the contract price.

19. Courts using the minority rule speak in terms of perfecting the client's right of discharge. See note 62 infra. Nevertheless, because the client remains liable in quantum meruit to the wrongfully discharged attorney, it would be more accurate to say that under both the minority and majority views, the client has a power to discharge the attorney, except that under the minority rule the exercise of such power gives rise to fewer liabilities. Such semantical difficulties would arise less frequently were the attorney's rights after part performance under a contract of employment limited to a reliance interest. See text accompanying notes 59-63 infra.


23. See Henry v. Vance, 111 Ky. 72, 63 S.W. 273 (1901): "[I]n estimating such value the jury should consider the extent of services rendered, and those to be rendered, allowing the contract price, as abated by such sum as is reasonably represented by the unperformed part of the labor." Id. at 82, 63 S.W. at 276.
The California Experience—Fracasse v. Brent

Prior to Fracasse v. Brent,24 California adhered to the majority rule; adoption of the minority rule required the overruling of a long line of precedent.25 Cases enabling the wrongfully discharged attorney to recover the contract price as damages date back to 1854. In Baldwin v. Bennett,26 the attorney was to be paid a fixed $5,000 fee contingent upon securing certain realty to the client. Prior to litigation, the client, without the knowledge of the attorney, settled his claim and conveyed his interest to the opposing party. The client was deemed to have breached the contract, thereby entitling the attorney to damages equal to the contract price.27

The Baldwin rule was further entrenched by subsequent decisions. For example, in Webb v. Trescony,28 an attorney agreed to defend a client in a criminal case for a fixed fee of $950. The attorney appeared and conducted the defense during the course of a year. Thereafter, he was discharged without cause. The attorney was awarded the full contract price as damages.29 Furthermore, the Baldwin rule was applied to contingency fee situations. In Bartlett v. Odd Fellows’ Savings Bank,30 a wrongfully discharged attorney operating on a contingent fee contract was allowed the previously agreed percentage of any subsequent recovery. The cause of action for damages, however, was held not to accrue until the happening of the agreed contingency.31

A later case, Brown v. Connolly32 stated the reason for delaying the accrual of a cause of action for damages under a contingent fee contract until the happening of the contingency. In Brown, the attorney sought to recover $4,500,000 for his client under a 25 percent contingent fee contract. After filing the action and rendering substantial services, the attorney was discharged without cause. The attorney then sought $1,125,000 damages from his former client—one-quarter of the total claim. The client had not then recovered on his claim, and, reaffirming the rule of Bartlett, the court said:

Any contrary rule would be palpably unjust. Experience has shown that more often than not the size of a party’s claim bears little relation to its value. Such a rule . . . allowing judgment for attorney fees based upon a percentage of a wishful esti-
mate (often by the attorney) of the client's claim before its liqui-
dation or any recovery thereon, would often lead to grossly unfair
consequences. A client, unfortunate enough to have misconceived
a reason to discharge his attorney, without any recovery on his claim
could find himself adjudged to pay many times its value—a disas-
ter to the client and a windfall to the attorney.33

In applying the majority rule as formulated by Baldwin, other Cali-
ifornia cases allowed an election of quantum meruit recovery where the
attorney was wrongfully discharged,34 and restricted recovery to quan-
tum meruit where the discharge was for cause.35

Despite this precedent, the California Supreme Court abandoned the
majority rule in Fracasse v. Brent.36 In that case, an attorney, Fra-
casse, was employed by Brent, a woman of modest means, to prosecute
on her behalf an action to recover damages for personal injuries. An
express written contingent fee contract was entered into in March,
1969.37 About nine months later, but prior to any recovery, Brent
discharged Fracasse and retained another attorney.38 Attorney Fra-
casse elected not to sue in quantum meruit and, since there had been
no recovery, his cause of action for damages under the contingent fee
contract had not accrued. He therefore brought an action for a decla-
ration that the client discharged him without cause, thereby breaching
the contract. Fracasse also sought a declaration that he would be en-
titled to a one-third interest in any subsequent recovery. The California
Supreme Court affirmed the judgment of the trial court which had dis-
missed the complaint without leave to amend.

This holding may be divided into three parts: (1) An attorney
who is discharged with or without cause may recover only the reason-

33. Id. at 870-71, 83 Cal. Rptr. at 160.
34. Kirk v. Culley, 202 Cal. 501, 506, 261 P. 994, 996 (1927) (contingent fee);
Elconin v. Yalen, 208 Cal. 546, 548-49, 282 P. 791, 792 (1929) (noncontingent fee,
semble).
36. 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972).
37. By the terms of the contract the attorney would receive one-third of any
settlement made at least thirty days before the date originally set for trial and forty
percent of any recovery obtained thereafter. Id. at 786, 494 P.2d at 10, 100 Cal. Rptr.
at 386.
38. Whether the client had cause for discharge was not at issue on appeal. The
trial court sustained a demurrer against the plaintiff attorney holding that the action
for declaratory relief was premature under Brown v. Connolly, 2 Cal. App. 3d 867, 83
Cal. Rptr. 158 (1969). In Brown, the court held that an action for damages by a wrong-
fully discharged attorney under a contingent fee contract does not accrue until the hap-
pening of the contingency. The court of appeal in Fracasse reversed, holding that
Brown does not apply to actions for declaratory relief. The California Supreme
Court, however, affirmed the judgment of the trial court, but on an entirely different
theory. See text accompanying notes 40-43 infra.
able value of services rendered on behalf of the former client;\textsuperscript{39} (2) the discharged attorney's cause of action to recover the reasonable value of services rendered under a contingent fee contract accrues on the happening of the contingency;\textsuperscript{40} (3) the trial court was correct in refusing to exercise its discretion to allow declaratory relief prior to the accrual of the cause of action for \textit{quantum meruit}.\textsuperscript{41} Thus, the \textit{Fracasse} decision extends the conventional minority position by affording special protection to clients who contract for a contingent fee; if the contract is for such a fee, the discharged attorney's \textit{quantum meruit} cause of action will not accrue until the happening of the contingency. For example, if an attorney attempts to recover personal injury damages for his client under a contingent fee contract, and, after part performance, is discharged without legal cause, the discharged attorney must wait until the former client recovers on his claim before he may seek to recover the reasonable value of his services. Should the client be unsuccessful, the discharged attorney is not entitled to compensation.

In holding that an attorney's cause of action to recover \textit{quantum meruit} under a contingent fee contract does not accrue until the happening of the contingency, \textit{Fracasse} adopted a position not found in any other state. Two reasons were advanced for such an innovation. First, the "result obtained" and "amount involved," both recognized factors in determining the reasonableness of an attorney's compensation, cannot be fairly determined until the happening of the contingency.\textsuperscript{42} Second, the fact that the contract is for a contingent fee indicates that the client is probably a person of limited means. It would, therefore, be unduly burdensome for the client to become liable to pay the first attorney regardless of whether the underlying claim is ever successfully recovered.\textsuperscript{43}

In so changing the California rule, the \textit{Fracasse} majority could not find substantive support in the long line of California cases following \textit{Baldwin} for limiting an attorney's measure of recovery to \textit{quantum meruit}.\textsuperscript{44} This is not unexpected, since those cases simply applied, with-

\begin{itemize}
  \item \textsuperscript{39} Fracasse v. Brent, 6 Cal. 3d 784, 792, 494 P.2d 9, 14-15, 100 Cal. Rptr. 385, 390-91 (1972).
  \item \textsuperscript{40} Id. at 792, 494 P.2d at 15, 100 Cal. Rptr. at 391.
  \item \textsuperscript{41} Id. at 792-93, 494 P.2d at 15, 100 Cal. Rptr. at 391. The court refused to decide whether there might be cases in which declaratory relief might be proper prior to the occurrence of the stated contingency. \textit{Id.} at 793, 494 P.2d at 15, 100 Cal. Rptr. at 391.
  \item \textsuperscript{42} Id. at 792, 494 P.2d at 14, 100 Cal. Rptr. at 391.
  \item \textsuperscript{43} Id.
  \item \textsuperscript{44} In 1942 Chief Justice Gibson and Justice Traynor urged adoption of the minority position in Salopek v. Schoemann, 20 Cal. 2d at 156-58, 124 P.2d at 24-25 (concurring opinion). \textit{See also Denio v. City of Huntington Beach}, 22 Cal. 2d 580, 613-14, 140 P.2d 392, 404-05 (1943) (dissenting opinion). The \textit{Salopek} concurrence,
out much examination, a familiar damages formula. Furthermore, the
equities in favor of the client in Fracasse, although substantial, were not
overwhelming.\textsuperscript{45} Rather, the primary basis for the decision was the
court's conviction that, on \textit{public policy} grounds, the former rule was
undesirable.\textsuperscript{46} Two inquiries must be made in order to evaluate this
judicial intervention into the attorney-client contract of employment. First, the theoretical underpinnings and operational utility of permitting a recovery of damages must be assessed.\textsuperscript{47} Then the relevant public policies allegedly promoted by limiting the attorney's recovery to \textit{quantum meruit} must be defined.\textsuperscript{48}

The Majority Rule—Theoretical Basis and Operational Utility

The reasons for permitting wrongfully discharged attorneys to recover as damages the full contract price are similar to those used to justify such recovery by other independent contractors, namely the impracticability of demonstrating mitigation and the difficulty of apportioning the value of professional services.\textsuperscript{49} In addition, the attorney's duty to avoid conflicts of interest is sometimes advanced as a special reason for allowing such recovery.\textsuperscript{50} The concept of prevention of performance by a party, sometimes cited in support of the majority rule,\textsuperscript{51} does not reach the critical issue. Prevention merely defines the circumstance of the breach;\textsuperscript{52} it does not help in deciding whether the aggrieved person should be required to mitigate damages.

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\textsuperscript{45} Extensively quoted by the majority in Fracasse, was the only direct support available in prior cases. The majority in Fracasse cited language in two prior California cases which it felt was "irreconcilable" with the rule of Baldwin v. Bennett. 6 Cal. 3d at 790, 494 P.2d at 13, 100 Cal. Rptr. at 389. Justice Sullivan's dissent, however, pointed out that this language was dictum and, indeed, each of the cases contained language directly supporting the former rule. \textit{Id.} at 800-02, 494 P.2d at 20-21, 100 Cal. Rptr. at 396-97.

\textsuperscript{46} The client was forced to defend in the action for declaratory relief while at the same time pursuing her underlying claim for personal injuries. The discharged attorney already had an equitable lien upon the client's recovery provided the discharge had been wrongful. See note 17 \textit{supra}. Thus, although the client's limited resources were diverted, the attorney had a legitimate interest in determining in advance of the former client's recovery whether the discharge was without cause.

\textsuperscript{47} See text accompanying note 117 \textit{infra}.

\textsuperscript{48} See text accompanying notes 49-84 \textit{infra}.

\textsuperscript{49} E.g., Brodie v. Watkins, 33 Ark. 545, 548 (1878).

\textsuperscript{50} Scheinesohn v. Lemonek, 84 Ohio St. 424, 95 N.E. 913 (1911).

\textsuperscript{51} E.g., Fracasse v. Brent, 6 Cal. 3d 784, 799, 494 P.2d 9, 19, 100 Cal. Rptr. 385, 395 (1972) (dissenting opinion). The dissent, in attempting to refute the majority's conclusion that Baldwin v. Bennett, 4 Cal. 392 (1854), contained no persuasive rationale for permitting the recovery of damages, maintained that \textit{Baldwin} implicitly adopted the prevention analysis of Hunt v. Test, 8 Ala. 713 (1845).

\textsuperscript{52} 5 S. \textsc{Williston}, \textsc{A Treatise on the Law of Contracts} § 677 (3d ed. W. Jaeger 1961).
Impracticability of Demonstrating Mitigation

Independent contractors, including lawyers, are not required, as are employees, to seek substitute employment upon wrongful discharge. Requiring a discharged employee to seek substitute employment is an example of mitigation, a principle which generally attempts to limit recovery to the loss actually suffered and denies recovery for losses which reasonably could have been avoided. The most common justification for not requiring independent contractors to mitigate is that, unlike the employee, the independent contractor is not precluded by the contract of employment from performing contemporaneous services for other employers. Therefore the discharge of an independent contractor does not free an ascertainable amount of time which may be usefully devoted to other employment. Furthermore, requiring mitigation of wrongfully discharged independent contractors would seem to impose unreasonable evidentiary problems. It would be extremely difficult for a party to demonstrate that other contemporaneous employment did or did not mitigate the loss. In fact, if the concept of mitigation were introduced into the attorney-client relationship, the attorney would usually still recover the full contract price because the employer bears the burden of proving that the discharged employee has or reasonably could have secured employment.

Accepting the impracticability of demonstrating mitigation by independent contractors still leaves the question of what recovery should then ensue. Traditional contracts theory would hold that contracts are enforceable, if at all, to the full extent of their value, and therefore the full contract price should be recovered. On the other hand one must be reconciled, under this thinking, to allowing recovery to exceed actual loss. Excess recovery would occur whenever the independ-

53. See generally Annot., 15 A.L.R. 751 (1921) (lists occupations which have not been required to mitigate damages).
54. E.g., Payne v. Pathe Studios, Inc., 6 Cal. App. 2d 136, 142, 44 P.2d 598, 600 (1935). Formerly, employees were permitted to remain idle after discharge and sue for their compensation as it became due. This rule has been largely abandoned because it creates needless economic waste. 5 A. Corbin, CORBIN ON CONTRACTS § 1095 (1964). Hence a discharged employee is under a “duty” to make reasonable efforts to secure substitute employment. E.g., McClelland v. Climax Hosiery Mills, 252 N.Y. 347, 358-59, 169 N.E. 605, 609-10 (1930).
55. Cf. Baldwin v. Bennett, 4 Cal. 392 (1854). The evidentiary purpose was probably contemplated by the court in Baldwin when it wrote: “The [client] not only breaks his contract, but also deprives the [attorney] of showing the amount of injury under the general rule.” Id. at 394.
ent contractor in fact succeeded in substituting one commitment of resources for another. It would be fiction to suggest that an independent contractor can “tool up” to serve an indefinite number of employers. The impracticability of proving such a substitution, and not the absence in fact of substitution, should be considered the primary basis for not requiring independent contractors to mitigate. The unfairness of permitting excess recoveries by independent contractors in general might be tolerated, but the practice should not persist where important public policies are contravened.

Sufficient policy grounds are present in contracts of employment between attorney and client to necessitate a departure from conventional contract theories in order to avoid unfairness. One such departure, which would limit recovery to actual loss, would be to protect the attorney only to the extent of his reliance upon the contract. Some writers have suggested formal recognition of a reliance interest in contract. Normally quantum meruit is considered a species of restitution entirely apart from the contract; it is therefore not considered a form of damages. Where, however, a reliance interest in contract is recognized, damages recoverable under the contract would be limited to the reasonable value of services using the contract price as an upper limit.

Although Fracasse effectively limits an attorney to a reliance interest in the attorney-client contract, the court did not create doctrinal precedent for damages limited to the reliance interest. Instead, the court injected an implied term into the attorney-client contract rendering such contracts terminable at the will of the client. Hence, the attorney's restitutionary recovery remains separate from the contract because the client who terminates technically has not breached

58. See text accompanying notes 99-118 infra.


61. See Childres & Garamella, supra note 59, at 451-57.

62. “We have concluded that a client should have both the power and the right at any time to discharge his attorney with or without cause. Such a discharge does not constitute a breach of contract for the reason that it is a basic term of the contract, implied by law into it by reason of the special relationship between the contracting parties, that the client may terminate that contract at will.” Fracasse v. Brent, 6 Cal. 3d at 790-91, 494 P.2d at 13, 100 Cal. Rptr. at 389. Since the client does not breach the contract in discharging the attorney, the attorney's recovery cannot be characterized as damages, and falls within the traditional scope of restitutionary recovery apart from the contract. See RESTATEMENT (SECOND) OF AGENCY § 452 (1957).
the contract. The implied term is a patent fiction; under any objective test a client who discharges an attorney without cause has breached the agreement. Resorting to implied terms delays needed reforms in the theory of damages but enables the court to make ad hoc interventions in types of contracts which, for policy reasons, should be protected only to the extent of the reliance interest.

**Difficulty of Apportioning the Value of Legal Services**

Another commonly cited rationale in favor of nonmitigation following an attorney's wrongful discharge is that each hour of a lawyer's service does not produce an equal increment of value to the client. This principle was discussed at length in the leading case of *Brodie v. Watkins*:

Legal services . . . cannot be apportioned either by time, or the amount of physical labor expended in drawing papers, attending courts, and oral arguments. It is the attorney's judgment, his learning, his responsibility and advice, which is relied upon, and which gives the particular value to legal services. Perhaps the most difficult and valuable services of the attorney may be rendered in considering his client's case, and giving him confidential information, before any visible act is done.

The weakness of this argument lies in the fact that it furnishes greater logical support for *quantum meruit* recovery than for damages equal to the contract price. It is true that an attorney's services are not allocable in the same sense as those of a salaried person performing repetitious labor. The first ten hours of work on a legal task ultimately requiring one hundred hours may far exceed ten percent of the value to the client in terms of knowledge of his legal rights and best possible course of action. Nevertheless, the possible unfairness to the attorney of attempting to allocate legal services does not justify awarding the entire contract price as damages. This solution merely transfers the burden of possible unfairness from the attorney to the client. *Quantum meruit*, on the other hand, obviates the major difficulty posed by this rationale—the *quantum meruit* formula accounts for all conceivably relevant factors including the experience of counsel, the difficulty of the subject matter, and the stage of proceedings in which services are rendered.

63. Justice Sullivan in his dissenting opinion in *Fracasse* refused to acknowledge the validity of the implied term and the entire dissent is based upon the premise that the client had breached the contract. *See* 6 Cal. 3d at 793-804, 494 P.2d at 15-23, 100 Cal. Rptr. at 391-99.
64. 33 Ark. 545 (1878); *see* Kikuchi v. Ritchie, 202 F. 857, 859 (9th Cir. 1913).
65. 33 Ark. at 548.
66. *See*, e.g., *Los Angeles v. Los Angeles-Inyo Farms Co.*, 134 Cal. App. 268, 276, 25 P.2d 224, 227-28 (1933). The factors to be taken into account by the court in computing the reasonable value of an attorney's services include: "[t]he nature of
Finally, the *quantum meruit* determination is normally made by the trial judge, an individual wholly familiar with the matter of attorneys' fees.\(^{67}\)

### Duty to Avoid Conflicts of Interest

Rules prohibiting conflict of interest are sometimes advanced to justify an award of the full contract price. The detriment imposed upon attorneys by the rule against conflicts of interest was discussed as follows in the case of *Scheinesohn v. Lemonek*:\(^{68}\)

Peculiar and confidential relations are often formed, and it not infrequently happens that in the relations thus brought about the attorney obtains private information respecting his client's business which he may not afterwards divulge. This consideration would prevent . . . the discharged attorney from taking employment from the opposite party. Such instances would be rare, still they occasionally occur, and a rule of damage which would entirely ignore this consideration would hardly meet with general approval.\(^{69}\)

Certainly if there were no rules barring conflict of interest, discharged attorneys would be much sought after by opposing parties. In this sense, the obligation to forego employment involves considerable detriment; the purpose of the conflict of interest rules, however, is manifestly to prevent unfair conduct by the attorney.\(^{70}\) It would be inconsistent with high ethical standards to consider abstention from unfair conduct as constituting, in any way, a legally relevant detriment to the attorney. If, on the other hand, this rationale simply means that the set of potential clients has temporarily been reduced by one, the harm to the discharged attorney is normally inconsequential.

\(^{67}\) See, e.g., *Excelsior Union High School Dist. v. Lautrup*, 269 Cal. App. 2d 434, 448, 74 Cal. Rptr. 835, 844 (1969). Judges obtain experience in determining reasonable fees through statutory provisions which provide for the compensation of attorneys in certain types of proceedings. See, e.g., *CAL. CODE CIV. PROC. § 1255(a)* (West 1972) (eminent domain proceedings); *CAL. CIV. CODE § 1717* (West 1970) (action upon contracts which provide for the recovery of attorneys' fees).

\(^{68}\) *84 Ohio St. 424, 95 N.E. 913* (1911); accord, *Myers v. Crockett*, 14 Tex. 257, 259 (1855).

\(^{69}\) 84 Ohio St. at 436-37, 95 N.E. at 916.

\(^{70}\) See, e.g., *CAL. BUS. & PROF. CODE § 6068(a)* (West 1962) (attorney's duty to preserve confidences of the client); *ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-14* (1971).
Operational Utility of the Majority Rule

The previously discussed theoretical unfairness of permitting an attorney to recover the full contract price71 is realized and, in fact, amplified in practice. Having been made liable for the contract price to the original attorney, the client must, in addition, pay substitute counsel to proceed on the claim. The client thus may find the recovery substantially depleted by attorneys' fees. Under a contingent fee contract, the discharged attorney's recovery is not the agreed percentage of an offer of settlement obtained by the discharged attorney, but rather the agreed percentage of the ultimate recovery.72 Under this formula, one client paid 73 1/3 percent of his recovery in attorney's fees.73 Even if the attorney's discharge is for cause, he may recover on quantum meruit in some jurisdictions.74 The financial hardship on the client is not limited to a depletion of ultimate recovery; if the contract was for a noncontingent fee or if the attorney elects to sue for the reasonable value of services, the client may incur substantial liabilities whether or not the underlying claim is successfully prosecuted. Furthermore, whenever the recovery is based upon the contract rate, the attorney often recovers far in excess of the reasonable value of his services.75

Despite these hardships, the proposition is sometimes advanced in support of the majority rule that clients have no cause to complain since they are treated the same as other employers; if the client incurs double liability, it was the result of his own wrongful act.76 Supporting the majority rule on this ground, however, would betray an insensitivity to the difficulties faced by a client who has lost confidence in the ability, loyalty or diligence of his attorney. To a far greater degree than in most employment relationships, the client is unable to assess the quality of the service performed on his behalf.77 This inability denies the client a fair opportunity to predict whether his discharge of the attorney will be legally justifiable.

The unfairness of applying the objective standards for determining whether the client has legal cause for discharge has been a major stimu-

71. See text accompanying notes 53-70 supra.
75. See, e.g., Goldberg v. Perlmutter, 308 Ill. App. 84, 31 N.E.2d 333 (1941) (full contingent fee awarded to attorney who rendered no legal services beyond initial consultation); accord, Dombey, Tyler, Richards & Grieser v. Detroit, T. & I. R.R., 351 F.2d 121, 127 (6th Cir. 1965).
lus for discarding the majority rule. If the client guesses wrongly and the discharge is found to be without cause, he is subjected to an essentially penal liability. Some conduct which has been held to constitute legal cause for discharge clearly is culpable. Such conduct includes counseling adverse parties in the same case, misstating the legal effect of facts, and pursuing a course of action which if carried out would produce results contrary to the client's express intentions. Other, less clear, cases arise where the attorney demands additional fees to prosecute an appeal or ridicules the client in the presence of others. At times, behavior which might cause an average client to suspect diminished loyalty and zeal is sanctioned by currently accepted professional ethics.

It is apparent that where the client is forced by fear of incurring double liability to keep an attorney in whom he has lost confidence, the intimacy of the attorney-client relationship, and hence the quality of legal representation, may be impaired. The policies favoring the maintenance of the client's confidence in his attorney and the promotion of greater efficiency in the adjudicatory process have been the primary justifications for departing from the majority rule.

Policies Favoring the Minority Rule

Since the majority rule is consistent with the normal operation of contract law, the primary justifications for the minority rule are based on other grounds—special considerations of public policy which give the client greater legal freedom to switch legal representatives than an employer would have to switch those employees who perform services as independent contractors. Much of the difficulty inherent in formulating just rules governing the attorney-client relationship may be traced to the divergent roles of the lawyer. A lawyer in private practice representing a client in specific litigation is at once a business man obtaining a livelihood from fees charged for professional services, a trusted agent of the client, and an "officer of the court."
The attorney's interest in his fee focuses upon the business characteristics of the attorney-client relationship. The majority rule denies that the other two aspects of his role should influence the remedies otherwise available. States which limit an attorney's recovery upon discharge to *quantum meruit* justify the exception by reliance upon the special requirements of trust and confidence in the agency relationship and the attorney's role in the adjudicatory process.86

The Attorney as a Purveyor of Professional Services for a Fee

In the United States each party must normally bear the burden of compensating his attorney, and attorney's fees are not ordinarily recoverable as costs.87 The compensation of attorneys is considered a matter of contract between the attorney and client88 subject to judicial scrutiny in case of alleged unreasonableness.89 Historically, the distinction developed in England that solicitors could sue for fees, whereas barristers could not.90 In our country, the legal profession was modeled more after the English solicitor than barrister.91 Attorneys were, however, regarded with considerable hostility.92 It would be natural to expect that, in consonance to the prevailing hostility, the United States (at least on the issue of the attorney's right to sue for his fees) would adopt a position based upon the English rule as to barristers. At least one early case adopts this view. In 1819 the Supreme Court of Pennsylvania said in *Mooney v. Lloyd:*93

The connection between counsel and client, in contemplation of law, is honorable indeed. The counselor renders his best services, and trusts to the gratitude of his client for reward. In the language of Blackstone, 'a counsel can maintain no action for his fees, which are given, not a *locatio vel conductio*, but as *quid-dam honorarium*; not as salary for hire, but as a mere gratuity which a counselor cannot demand, without doing wrong to his reputation.'94

86. See text accompanying notes 110-18 infra.
88. See, e.g., CAL. CODE Civ. Proc. § 1021 (West 1955): "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties. . . ."
89. See, e.g., Tonn v. Reuter, 6 Wis. 2d 498, 504, 95 N.W.2d 261, 265 (1959).
90. 6 W. HOLDSWORTH, A HISTORY OF THE ENGLISH LAW 440 (1927).
92. See generally R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 177-83 (1953).
93. 5 S. & R. 411 (Pa. 1819).
94. Id. at 414-15.
This position proved to be short lived; in 1830 an attorney in Pennsylvania was allowed to bring suit to recover fees under a contract.  

It would then be logical to assume that the states, having rejected the English rule as to barristers and in view of their hostility to lawyers, would settle upon an intermediate position limiting an attorney's recovery to *quantum meruit*. The early weight of authority, however, is unclear. Ultimately, the American legal profession generally succeeded in obtaining a judicial recognition that the initial contract of employment be treated as if arrived by arm's length bargaining. This recognition is found in the majority rule and in disciplinary rules governing the conduct of lawyers. The disciplinary rules do not prohibit suits by a lawyer to recover fees; the formal standards of professional ethics, however, discourage the practice. One recent case held that a suit to recover compensation under a contract of employment, after a previous action on an attorney's lien had been disallowed, constituted harassment incompatible with canon 14. Such conduct was considered one ground for disbarment.

**The Attorney as Agent of the Client**

At the core of the minority rule is a strong social policy favoring the representation of clients by attorneys in whom they have confidence. This policy is accorded such great weight that, in order to make substitution of legal representatives less burdensome on the client, a “right” to revoke the contract of employment is afforded. Under general agency law a principal has no right to revoke an agency merely for having lost confidence in the agent. To a lesser degree, however, the confidence needed in conventional agency relationships is protected by granting the principal a power to revoke subject to payment of damages. Jurisdictions adhering to the minority rule consider the

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96. Compare Harris v. Root, 28 Mont. 159, 72 P. 429 (1903) (limitation to *quantum meruit* supported by weight of authority), with Annot., 1917 F.L.R.A. 406, 408 (a majority of states allow damages to wrongfully discharged attorney).
97. ABA Canons of Professional Ethics No. 14; ABA Code of Professional Responsibility EC 2-23 (1971): “A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by a client.”
100. Id. See note 19 supra.
power to revoke the attorney's agency insufficient to protect the client's need for confidence in his attorney. A fortiori, the minority rule places a greater value on protecting the principal's need for confidence in his agent in the attorney-client context than in other agency contexts.

In order to justify a rule favoring clients over other types of principals, special characteristics of the attorney-client relationships must be advanced. Factors which may be advanced include:

a. A public policy favoring effective legal representation; this policy may be impaired if clients feel compelled to continue in their employment attorneys in whom they have lost confidence.\footnote{103}

b. The client's lesser ability to evaluate the quality of legal services.\footnote{104}

c. The client's lesser ability to foresee whether he will remain confident in the attorney initially selected.\footnote{105}

Whether to afford a client the right to discharge the attorney is only one issue in a broader controversy concerning the degree to which ordinary rules governing agency relations should apply to the attorney and client.\footnote{106} Some argue that insufficient recognition has been given to the inapplicability of many of the ordinary agency rules.\footnote{107} The client's ignorance of the law contributes to a level of dependence upon the attorney which contradicts the hypothetical principal's ability to control the activities of the agent.\footnote{108} For example, under general agency law a client as principal would be bound by a default judgment entered as a result of his attorney's negligence.\footnote{109}

An attorney's agency is revocable unless the agency is coupled with an interest. An irrevocable agency is rarely found in the attorney-client context. See Annot., 97 A.L.R. 923 (1935). In California, for example, an irrevocable agency is not created by a purported assignment to the attorney of a portion of the client's cause of action. O'Connell v. Superior Court, 2 Cal. 2d 418, 41 P.2d 334 (1935).

\footnote{103. See text accompanying notes 110-18 infra.}
\footnote{104. See note 105 infra.}
\footnote{106. See generally Mazor, Power and Responsibility in the Attorney-Client Relationship, 20 STAN. L. REV. 1120 (1968).}
\footnote{107. E.g., Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases, 59 NW. U.L. REV. 289, 297 (1964).}
\footnote{108. Id.}
\footnote{109. While accepting in principle the notion that the client as principal should be responsible for the negligence of his agent-attorney, the courts generally struggle to afford relief from judgment attributable to the attorney's neglect. Cf., e.g., Daley v. County of Butte, 227 Cal. App. 2d 380, 38 Cal. Rptr. 693 (1964). Some courts deny relief from judgment on the ground that the client may instead recover in a malpractice action against his attorney. Yet, the law of the attorney malpractice is weighted against the client since lawyers are held to a standard of care that excuses errors in judgment. See Note, Attorney Malpractice, 63 COLUM. L. REV. 1229, 1299, 1312}

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The Attorney as an “Officer of the Court”

The status of an attorney as an officer of the court may be traced to seventeenth century England, at a time when the admission and conduct of attorneys was regulated by statute and by orders of the court. This regulatory tradition was adopted in this country and has continued to the present day. To say that an attorney is an “officer of the court” does not mean that he is a public officer in the same sense as judge, bailiff and clerk. Rather, the attorney, as licensee of the state, must comply with rules of conduct which reflect his essential role in the administration of justice. The question then becomes: in what legal relationships does the attorney’s special role in the adjudicatory process justify a departure from legal principles which would otherwise apply? It is submitted that the solution depends in part upon the strength of policy commitments toward making legal services more widely available.

A common goal in recent reforms of the adjudicatory process has been to seek an increase in its efficiency. For purposes of this note, perfect efficiency is defined as the identification and resolution of all meritorious claims. Although perfect efficiency may be neither obtainable nor desirable, there seems to be a consensus that the legal profession should be committed to achieving some greater degree of efficiency. The attorney-client relationship occupies a particularly strategic position in the adjudicatory process and, hence, disproportionately impinges upon its efficiency. An attorney’s services have become virtually indispensable to the settlement or judicial resolution of a legal claim, while the adversary system and professional standards of conduct generally require a civil claimholder to take the initiative in seeking legal counsel. The mobile urban society often forestalls the establishment of legal reputations within a community. Hence, whether a person takes the initiative to consult a lawyer depends in part upon his general confidence in the legal profession.

n.167 (1963). Furthermore, in order to recover the client must prove that he could have recovered on his underlying claim but for his attorney’s negligence. See generally Goggin, Attorney Negligence—A Suit Within a Suit, 60 W. Va. L. Rev. 225 (1958).

110. 6 W. Holdsworth, A History of English Law 434 (1927).


114. ABA Code of Professional Responsibility EC 2-6, 2-7 (1971).

115. See generally Cheatham, Availability of Legal Services: The Responsibility of
It has been observed that the attorney-client relationship is unique. This is so in large part because of departures from otherwise applicable rules to promote policies inherent in the concept of the attorney as "officer of the court." The minority rule discussed in this note is an illustration of judicial intervention in the attorney-client relationship in the interest of greater efficiency in the adjudicatory process. A basic assumption of the leading cases is that affording the client a right to discharge the attorney without cause will promote public confidence in the legal profession. Increased public confidence in the legal profession would, in turn, encourage more persons who need legal assistance to seek legal advice. Implicitly, public confidence would be lessened by a rule which in effect forces a client to continue to be represented by an attorney in whom he has lost faith.

In sum, the policy grounds for the minority rule have merit. Whether the rule is an efficient means to promote these policies depends upon the extent to which the benefits of the rule are offset by undesirable consequences. The concluding section of this note, therefore, explores the consequences of the Fracasse rule.

Consequences of the Fracasse Decision

Three general inquiries will be made in order to identify and evaluate the consequences of Fracasse: (1) In what remaining situations may a discharged attorney collect damages? (2) Is the delay in accrual of the cause of action in quantum meruit necessary to ef-

the Individual Lawyer and of the Organized Bar, 12 U.C.L.A. Rev. 438 (1965). "A wide gap separates the need for legal services and its satisfaction, as numerous studies reveal. Looked at from the side of the layman, one reason for the gap is poverty and the consequent inability to pay legal fees. Another set of reasons is ignorance and fear on the part of those who could pay. There is ignorance of the need for and the value of legal services, and ignorance of where to find a dependable lawyer. There is fear of the mysterious processes and delays of the law, and there is fear of overreaching and overcharging by lawyers, a fear stimulated by occasional exposure of shysters." Id.

116. See, e.g., Fracasse v. Brent, 6 Cal. 3d 784, 792, 494 P.2d 9, 14, 100 Cal. Rptr. 385, 390 (1972).

117. "Without public confidence in members of the legal profession, which is dependent upon absolute fairness in the dealings between attorney and client, courts cannot function in the proper administration of justice." Id. at 789, 494 P.2d at 12, 100 Cal. Rptr. at 388. A similar observation was made in Martin v. Camp, 219 N.Y. 170, 114 N.E. 46 (1916). "The rule secures the attorney the right to recover the reasonable value of the services which he has rendered and is well calculated to promote public confidence in the members of an honorable profession whose relation to their clients is personal and confidential." Id. at 176, 114 N.E. at 48.

118. 6 Cal. 3d at 789, 494 P.2d at 12, 100 Cal. Rptr. at 388.

119. See text accompanying notes 122-31 infra.
fect the general purpose of the rule?120 (3) Does limiting the attorney's recovery to quantum meruit create possible undesirable consequences, such as reducing an attorney's incentive or encouraging interference with contracts?121

Remaining Situations in Which Damages Are Recoverable

The Fracasse case does not rule out the possibility of an attorney's recovery of damages for wrongful discharge. It is probable that the quantum meruit limitation will be applied only where the attorney is employed to represent the client in a specific legal matter and then discharged after part performance. Recovery of the contract price thus would be available where the attorney is hired on a general retainer, is employed to perform a predominantly nonlegal task, or where the attorney has fully performed. There is a further suggestion in Fracasse that damages might be recoverable if the discharge were made in bad faith.

These grounds for recovery of damages exist in other jurisdictions which have adopted the minority rule. For example, in New York, an attorney who renders general legal services for a specific period at fixed periodic compensation may, upon wrongful discharge, recover damages for breach of contract.122 Damages for wrongful discharge have been awarded under general retainer contracts even though the attorney maintained his own office and conducted other practice.123 When an attorney is employed to perform services which a nonlawyer could have performed, damages for wrongful discharge will be allowed; the fact that such attorney may be called upon to use legal skills does not conclusively create an attorney-client relationship.124

A second area for the recovery of damages is found in Fracasse itself. Although the decision affords a client the right to discharge the attorney with or without cause, there is language to suggest that the client would still be liable for breach of contract if the discharge were made in bad faith.125 Bad faith, in turn, is probably present when the client has not in fact lost confidence in the integrity,
loyalty or ability of his attorney. In order to determine whether the discharge was in bad faith an inquiry will have to be made into the client's motives. As Justice Sullivan's dissent points out, this substitution of subjective for objective tests departs from generally accepted principles commonly employed in determining the existence and breach of contracts.

Finally, if the attorney has fully performed, there is no possibility of limiting the attorney's recovery to quantum meruit. Upon full performance the attorney's right to the contract price vests, and the client's purported termination of employment relation serves not as a discharge but, at most, notice that the client does not intend to pay the agreed compensation. Hence, California's adoption of the minority rule heightens the importance of deciding when the attorney has fully performed. Determining whether full performance has occurred is sometimes difficult in cases of an alleged settlement since an attorney has no implied authority to compromise and settle a claim. In addition, complications can arise in deciding whether full performance has occurred under contracts.

Delay in Accrual of the Cause of Action

The provision in Fracasse delaying the accrual of the discharged attorney's cause of action for quantum meruit under a contingent fee contract until the happening of the contingency is both unique and controversial. Certainly, the position is consistent with the furtherance of the client's right to substitute attorneys, but two objections have been raised. First, the original attorney bargained for the risk that the client might not recover but he did not undertake the risk that the client would discharge him without cause and entrust the case to an incompetent successor. Second, the client, by disaffirming the

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126. For a case that would probably be considered a discharge in bad faith, see Denio v. City of Huntington Beach, 22 Cal. 2d 580, 140 P.2d 394 (1943).
127. Fracasse v. Brent, 6 Cal. 3d at 802, 494 P.2d at 21, 100 Cal. Rptr. at 397; RESTATEMENT OF CONTRACTS § 230 (1932).
131. See Dill v. Public Util. Dist. No. 2, 3 Wash. App. 360, 475 P.2d 309 (1970) (under terms of particular contingent fee contract, attorney may have fully performed even though the contingency did not occur until several years after discharge).
132. See text accompanying notes 40-43 supra.
contract, cannot then selectively enforce its provisions. The contract should either stand or fall in its entirety.\footnote{134. Tillman v. Komar, 259 N.Y. 133, 181 N.E. 75 (1932).}

Less onerous means can be devised to effect the general purpose of the provision in \textit{Fracasse} regarding accrual. The primary rationale for delaying the accrual was that the "amount involved" and "results obtained," both factors in determining reasonable value of services, cannot be ascertained in cases where the contract is for a contingent fee until the happening of the contingency. The procedure presently used in New York, a state adhering to the minority rule, more adequately protects both the interests of the discharged attorney and client. A court in New York may, by virtue of an attorney's lien statute, fix an amount upon ordering the substitution of attorneys which becomes a charging lien upon the client's cause of action.\footnote{135. N.Y. JUDICIARY LAW § 475 (McKinney 1968).} In \textit{Martucci v. Brooklyn Children's Aid Society},\footnote{136. 284 N.Y. 408, 31 N.E.2d 506 (1940); accord, Tillman v. Komar, 259 N.Y. 133, 181 N.E. 75 (1932).} a percentage amount of the ultimate recovery was deemed improper because it does not fall within the description of \textit{quantum meruit}.\footnote{137. 284 N.Y. at 409, 31 N.E.2d at 507.}

If approved, this practice would have reached the same result as \textit{Fracasse}; if the client recovers nothing, the attorney receives nothing for his services. The current law in New York has reached a compromise in which the outgoing attorney is given two alternatives. He either may take a fixed dollar amount or he may take a \textit{contingent} amount or percentage determined in an ancillary proceeding at the conclusion of the case.\footnote{138. Kern v. Karnbach, 279 N.Y.S.2d 252 (App. Div. 1967); see Paolillo v. American Export Isbrandtsen Lines, Inc., 305 F. Supp. 250, 251 n.2 (S.D.N.Y. 1969) (dictum).} Presumably, if an attorney elects the present fixing of \textit{quantum meruit}, the value of his services will be reduced by the presently uncertain amount involved and results obtained.

In California, the court is presently not authorized to fix the compensation of the outgoing attorney pursuant to the order of substitution.\footnote{139. See CAL. CODE CIV. PROC. § 284 (West Supp. 1972).} The discharged attorney is not allowed to intervene in the client's suit but must bring an independent action to seek judgment for compensation.\footnote{140. Meadow v. Superior Court, 59 Cal. 2d 610, 381 P.2d 648, 30 Cal. Rptr. 824 (1963).} A statutory amendment enabling the court to fix compensation incident to substitution would be desirable.

\textbf{Possible Undesirable Consequences of Fracasse}

The \textit{Fracasse} decision may produce some undesirable conse-
quences, which, on examination, prove to be small in comparison to the benefits. The potential undesirable consequences include: demand for higher retainers, reluctance to enter into contingent fee contracts, increased incentive for third persons to interfere in the attorney-client contract, decreased incentive for attorneys to work diligently on behalf of clients whom they suspect may discharge them, and finally, attempts to circumvent the quantum meruit limitation.

Fracasse may lead to demands for higher retaining fees, because it is generally agreed that a discharged attorney is entitled to the retaining fee even though it exceeds the reasonable value of his services. Clearly, demands for larger retaining fees would be counterproductive to the goal of increasing the availability of legal services.

It might be argued that limiting the discharged attorney’s recovery to quantum meruit would encourage tortious interference142 with attorney-client contracts of employment. Such an argument might proceed on the recognized principle that no cause of action arises for inducing a party to a contract to exercise an absolute right. For example, an attorney has no cause of action against a person who induces the attorney’s client to settle the claim. The client has an unqualified right to settle; the attorney cannot complain that a larger contingent fee might have been obtained had the cause been pursued to judgment. Under the same reasoning one might argue that no cause of action would arise against one who has induced a client to exercise the implied term affording him the “right” to discharge his attorney with or without cause.

It would be erroneous to conclude that the minority rule affords an absolute right to discharge attorneys and therefore precludes an action for interference with contract. Yet, because courts commonly regard the minority rule as a means of protecting a client’s “right” of discharge, the possibility of reaching this erroneous conclusion is enhanced. Nevertheless, as previously discussed, the minority rule

141. See Annot., 21 A.L.R. 1442 (1922). Theoretically a retaining fee does not compensate but merely secures the services of an attorney. If allowing the discharged attorney to retain such fees threatens to undermine the purpose of the minority rule, a jurisdiction could compel the remittance of retaining fees where the discharge has been for cause. See Rimos v. Rimos, 81 N.Y.S.2d 347 (Sup. Ct. 1948).


146. See note 142 supra.

147. See note 62 supra.

does not afford an unqualified right of discharge.\footnote{149} Actions have been sustained for interference with contractual relations between attorney and client under both the majority\footnote{150} and minority rules.\footnote{161}

It is possible to argue that the Fracasse rule, by rewarding conscientious effort with the same measure of recovery as unconscientious effort, may, in some cases, discourage zealous representation. An attorney who believes that his client may be disposed to discharge him is not given an incentive to guarantee that the discharge will be without cause. This criticism, however, is a two edged sword; it can be used either in support of a return to the majority rule or as an argument that attorneys who are discharged for cause should be denied quant\textit{um} meruit recovery. New York, for example, has taken the latter position.\footnote{152} In order to be consistent with the policy expressed in Fracasse, California might do the same.

In some cases, attorneys may attempt to circumvent the Fracasse rule by suing upon an account stated instead of upon the original contract. In \textit{Meagher v. Kavli}\footnote{153} the court refused to find an account stated in a suit by a discharged attorney. The court observed that in contracts to perform professional services, silence by the recipient of an account has little or no evidentiary value as indicating an acceptance of the amount stated.\footnote{154}

\section*{Conclusion}

In a growing minority of states, the measure of recovery of an attorney discharged by the client after part performance is limited to \textit{quantum meruit}. This limitation upon the attorney's recovery furthers the important public policies of securing for each client an attorney in whom he has confidence and of making legal services more widely available. California's recent adoption of this minority rule hopefully will stimulate other states to re-examine the utility of applying ordinary contract principles to this aspect of the attorney-client contract of employment.

\textit{William D. Hunter}\textsuperscript{*}

\footnote{149. See note 19 supra.}
\footnote{151. Lurie v. New Amsterdam Cas. Co., 270 N.Y. 379, 1 N.E.2d 472 (1936).}
\footnote{152. Crowley v. Wolf, 281 N.Y. 59, 64-65, 22 N.E.2d 234, 237 (1939); see Holmes v. Evans, 129 N.Y. 140, 29 N.E. 233 (1891).}
\footnote{153. 251 Minn. 477, 88 N.W.2d 871 (1958).}
\footnote{154. \textit{Id.} at 498-99, 88 N.W.2d at 883. See generally 6 A. \textsc{Corbin}, \textsc{Corbin on Contracts} § 1313 (1962).}
\footnote{* Member, Third Year Class}