St. Mary's Law Journal

Volume 4 | Number 2 Article 13

6-1-1972

A Discharged Attorney Is Limited to Quantum Meruit Recovery for the Reasonable Value of His Services and the Right of Recovery under a Contingent Fee Contract Does Not Accrue until the Occurrence of the Contingency.

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Recommended Citation

Sean P. Martinez, *A Discharged Attorney Is Limited to Quantum Meruit Recovery for the Reasonable Value of His Services and the Right of Recovery under a Contingent Fee Contract Does Not Accrue until the Occurrence of the Contingency.*, 4 St. Mary's L.J. (1972).

Available at: https://commons.stmarytx.edu/thestmaryslawjournal/vol4/iss2/13

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Martinez: A Discharged Attorney Is Limited to Quantum Meruit Recovery for t

Colorado River Authority case leaves the meaning of Article XI, Section 9, uncertain. Thus, while the court has succeeded in clarifying the definition of the "public property for public use" clause of Article VIII, Section 2, the interpretation of the "public property" clause in Article XI, Section 9, is more clouded than ever.

Charles T. Locke

ATTORNEY AND CLIENT—CONTINGENT FEE CONTRACTS—DAMAGES—A DISCHARGED ATTORNEY IS LIMITED TO QUANTUM MERUIT RECOVERY FOR THE REASONABLE VALUE OF HIS SERVICES AND THE RIGHT OF RECOVERY UNDER A CONTINGENT FEE CONTRACT DOES NOT ACCRUE UNTIL THE OCCURRENCE OF THE CONTINGENCY. *Fracasse v. Brent,* 494 P.2d 9 (Cal. 1972).

Appellant was a licensed attorney retained under a contingent fee contract by appellee to prosecute a claim for personal injuries. Under the employment contract appellee agreed to compensate the appellant at 33⅓ per cent, if any settlement was made 30 days before the trial date, and at 40 per cent if any recovery was obtained thereafter. Shortly afterwards, before any recovery had been obtained in the suit, appellee discharged the appellant and retained another attorney. Appellant thereupon sought declaratory relief, alleging that his discharge was without cause and that the employment contract was breached by the appellee, asking that the court determine his interest in the contract and that he be allowed to recover such upon the occurrence of the contingency and recovery by the appellee. Appellee specially and generally demurred and the trial court sustained the general demurrer holding that the complaint did not state a cause of action. Held—*Affirmed.* An attorney discharged with or without cause is limited to a quantum meruit recovery for the reasonable value of his services rendered to the time of discharge. Moreover, the right of recovery under the contingent fee contract does not accrue until the occurrence of the stated contingency.[1]

It has been the rule that an attorney discharged without cause is entitled, under a noncontingent fee employment contract, to the reasonable value of his services rendered to the time of discharge.[2] Some jurisdictions do not confine this recovery to quantum meruit but allow recovery of damages on the breach of contract,[3] while others allow re-

[1] Fracasse v. Brent, 494 P.2d 9, 10 (Cal. 1972).

[2] Kirk v. Culley, 261 P. 994 (Cal. 1927); *In re* Montgomery, 6 N.E.2d 40 (N.Y. 1936); *see* Oliver v. Campbell, 273 P.2d 15 (Cal. 1954); *cf.* Young v. Tian, 150 S.W.2d 317 (Tex. Civ. App.—Galveston 1941, writ dism'd) (noncontingent contract where both attorney and client assented to abandonment; recovery by the attorney was on quantum meruit).

[3] Kikuchi v. Ritchie, 202 F. 857 (9th Cir. 1913); Philbrook v. Novy, 77 N.E. 520 (Mass.

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covery for the full contract price,[4] based on the theory that the contract is the only measure of damages. Where the attorney is not retained under a contract of employment setting out his fees and is discharged without cause, he is allowed to recover the reasonable value of his services.[5] However, in situations where the attorney is discharged for cause on a noncontingent fee contract, there is no recovery on quantum meruit or on the contract,[6] although there are cases to the contrary.[7] The result would appear to be the same in cases involving contingent fee contracts.[8]

In situations involving the discharge without cause of an attorney on a contingent fee contract, the laws vary. Where the client's action constitutes a breach of contract and where the client has obtained a settlement or judgment, some jurisdictions have measured and ascertained the recovery as the full contract price.[9] Other jurisdictions have allowed a remedy under quantum meruit[10] or damages for the breach of contract.[11] However, where the client has breached the contract and the contingency has not occurred, either to the benefit or detriment of the client, courts have barred recovery both on the contract price[12] and on the reasonable value of the attorney's services.[13] Moreover, damages for breach of contract have also been denied.[14]

The California courts early recognized the right of the client to discharge his attorney[15] and subsequently gave such right statutory authority.[16] In *Gage v. Atwater*,[17] an action brought by an attorney challenging his removal, the court held:

1906); Grant v. Langley, 68 N.Y.S. 820 (Sup. Ct. 1901). *Contra, In re* Montgomery, 6 N.E.2d 40 (N.Y. 1936).

4 Goodkind v. Wolkowsky, 9 So. 2d 553 (Fla. 1942); Myers v. Crockett, 14 Tex. 257 (1855).

5 Elconin v. Yalin, 282 P. 791 (Cal. 1929) (dictum); Gamwell v. Killion, 282 S.W. 873 (Tex. Civ. App.—Amarillo 1926, no writ).

6 Fletcher v. Kellog, 6 F.2d 476 (D.C. Cir.), *cert. denied*, 269 U.S. 555, 46 S. Ct. 18, 70 L. Ed. 409 (1925); Warner v. Basten, 255 N.E.2d 72 (Ill. Ct. App. 1970); Holmes v. Evans, 29 N.E. 233 (N.Y. 1891).

7 Phelps v. Elgin, Joliet & E. Ry., 217 N.E.2d 519 (Ill. Ct. App. 1966); *cf.* Price v. Western Loan & Sav. Co., 100 P. 677 (Utah 1909).

8 Moore v. Fellner, 325 P.2d 857 (Cal. 1958); Salopek v. Schoemann, 124 P.2d 21 (Cal. 1942).

9 Mandell & Wright v. Thomas, 441 S.W.2d 841 (Tex. Sup. 1969); Randolph, Bowen & Co. v. Randolph, 34 Tex. 181 (1870) (noncontingent fee contract).

10 Martin v. Camp, 114 N.E. 46 (N.Y. 1916); Thompson v. Smith, 248 S.W. 1070 (Tex. Comm'n App. 1923, jdgmt adopted).

11 White v. Burch, 19 S.W.2d 404 (Tex. Civ. App.—Fort Worth 1929, writ ref'd). *Contra,* Cole v. Myers, 21 A.2d 396 (Conn. 1941); Martin v. Camp, 114 N.E. 46 (N.Y. 1916).

12 Bartlett v. Odd-Fellows' Sav. Bank, 21 P. 743, 744 (Cal. 1889); *accord,* Friedman v. Mindlin, 155 N.Y.S. 295 (N.Y. City Ct. 1915). *Contra,* Tillman v. Komar, 181 N.E. 75, 76 (N.Y. 1932).

13 Webb v. Trescony, 18 P. 796 (Cal. 1888) (noncontingent fee contract). *Contra,* Tracy v. MacIntyre, 84 P.2d 526 (Cal. Dist. Ct. App. 1938); Tillman v. Komar, 181 N.E. 75 (N.Y. 1932).

14 Fivey v. Chambers, 19 Cal. Rptr. 111 (Dist. Ct. App. 1962); *see* McConnell v. Corona City Water Co., 85 P. 929 (Cal. 1906).

15 People v. Norton, 16 Cal. 436 (1860).

16 CAL. CODE CIV. PROC. ANN. § 284 (Deering 1959):

> [T]he rule must be considered as settled in this state—the client has the absolute right to change his attorney at any stage in the action. . . . [The] client is justified in seeking to dissolve that relation whenever he ceases to have absolute confidence in either the integrity or the judgment or the capacity of the attorney.[18]

This right was qualified, however, where the attorney employed had an interest in the litigation,[19] in which case the client had the right or power to discharge the attorney but not the right to discharge liability under the contract.

The early case of *Baldwin v. Bennett*[20] established California law as to damages under a noncontingent fee contract when the attorney was discharged without cause. Holding that quantum meruit would be proper,[21] the court recognized an exception.

> Where from the nature of the contract, (as in this case) no possible mode is left of ascertaining the damage, we will have presented the anomalous case of a wrong without a remedy, unless we adopt the only measure of damages which remains, and that is, the price agreed to be paid.[22]

The court thus set out damages recoverable on breached noncontingent contracts.[23] The basis for damages recoverable under such contracts is adequately set out in the later case of *McConnell v. Corona City Water Co.*[24] The holding in *Baldwin* was never to be seriously challenged in

> 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 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 payment of the fee or compensation to be paid by the party*. (Emphasis added.)

The 1937 decision of Cassel v. Gregori, 70 P.2d 721 (Cal. 1937) held that this latter provision which had been added in 1935 was void as an infringement of the constitutional right to trial by jury and a discriminatory classification of cases. The provision was later removed by the legislature. CAL. CODE CIV. PROC. ANN. § 284 (Deering Supp. 1971), *amending* CAL. CODE CIV. PROC. ANN. § 284 (Deering 1959).

[17] 68 P. 581 (Cal. 1902); *see* Salopek v. Schoemann, 124 P.2d 21 (Cal. 1942); Echlin v. Superior Court, 90 P.2d 63 (Cal. 1939).

[18] 68 P. 581, 582 (Cal. 1902).

[19] Kirk v. Culley, 261 P. 994 (Cal. 1927); Todd v. Superior Court, 184 P. 684 (Cal. 1919); Fivey v. Chambers, 19 Cal. Rptr. 111 (Dist. Ct. App. 1962); *cf.* Gage v. Atwater, 68 P. 581 (Cal. 1902).

[20] 4 Cal. 392 (1854).

[21] *Id.* at 393.

[22] *Id.* at 393.

[23] Oliver v. Campbell, 273 P.2d 15 (Cal. 1954); Webb v. Trescony, 18 P. 796 (Cal. 1888); Countryman v. California Trona Co., 170 P. 1069 (Cal. Dist. Ct. App. 1918).

[24] 85 P. 929, 930 (Cal. 1906):

> One who has been injured by a breach of contract has an election to pursue any of three remedies. He may treat the contract as rescinded and may recover upon a quantum meruit so far as he has performed; or he may keep the contract alive, for

subsequent decisions and, although evoking minor dissent, was to remain the law of California.

Recovery of the full contract price would be allowed on a contingent fee contract where the attorney had been discharged without cause.[25] The court in *Zurich General Accident & Liability Insurance Co. v. Kinsler*[26] upheld this and awarded the attorney the full contract price. However, the circumstances in *Zurich* showed the inequity of this procedure and prompted the court in *Salopek v. Schoemann*[27] to reconsider this remedy[28] and allow only quantum meruit recovery by an attorney discharged without cause.[29]

A difficulty encountered by the injured party in recovering for breach of contract lay in bringing the action at the proper time. The courts had already determined that there could be no action for recovery until the contingency had occurred.[30] Moreover, although declaratory relief had been available since 1921,[31] no case involving attorney fees had ever utilized the procedure to determine damages before the occurrence of the contingency.

The court in *Fracasse v. Brent*[32] declined to follow all precedent in the measurement of damages. Feeling that "policy dictated a review of the law," the court attacked the premise behind *Baldwin* in awarding damages for the contract price as being "faulty," there being "no convincing

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> the benefit of both parties, being at all times ready and able to perform; or, third, he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing.

See RESTATEMENT OF CONTRACTS § 326 (1938).

25 Bartlett v. Odd-Fellows' Sav. Bank, 21 P. 743 (Cal. 1889).

26 81 P.2d 913 (Cal. 1938).

27 124 P.2d 21 (Cal. 1942) (an action brought by an assignee to recover for services performed by assignor attorney under a contingent fee contract in which discharge was with cause).

28 *Id.* at 24 (Gibson, C.J., and Traynor, J., concurring):

> The compensation of an attorney employed under a contingent fee contract and discharged without cause should be measured by the reasonable value of the services performed, not by the fee fixed in the contract. The cases in this state allowing recovery of the full contract fee under such circumstances should be overruled.

The case of Denio v. City of Huntington Beach, 140 P.2d 392 (Cal. 1943) found Gibson, C.J., and Traynor, J., again urging the same proposition in a dissent of a case involving the submission of damages in an employment contract as being the compensation fixed by the contract; the dissent saw no reason for not submitting an issue calling for a quantum meruit recovery on a contingent fee contract.

29 The court in Zurich Gen. Acc. & Liab. Ins. Co. v. Kinsler, 75 P.2d 115 (Cal. Dist. Ct. App.), *rev'd*, 81 P.2d 913 (Cal. 1938) had awarded the appellant in the case the reasonable value of his services, ascertained at $75, refusing to allow recovery on the contract for one-third of the $2000 judgment; the lower court, however, had found the attorney discharged with cause. No doubt the disparity of the figures weighed in the dissent in *Denio*.

30 Bartlett v. Odd-Fellows' Sav. Bank, 21 P. 743 (Cal. 1889); Brown v. Connolly, 83 Cal. Rptr. 158 (Dist. Ct. App. 1969); *see* Moore v. Fellner, 325 P.2d 857 (Cal. 1958); Jones v. Martin, 256 P.2d 905 (Cal. 1953). *Contra*, Tracy v. MacIntyre, 84 P.2d 526 (Cal. Dist. Ct. App. 1938). The lower court found it "unreasonable to rest an attorney's compensation upon the outcome of a trial which may never occur." *Id.* at 528.

31 CAL. CODE CIV. PROC. ANN. §§ 1060, 1062a (Deering 1959).

32 494 P.2d 9 (Cal. 1972).

Martinez: A Discharged Attorney Is Limited to Quantum Meruit Recovery for t

reason why recovery on a quantum meruit theory would not fairly and adequately compensate the attorney for his services."[33] The court, noting that *Baldwin* had been controlling in all subsequent contractual fee cases, overuled it and its progeny, stating that recovery on all breached attorneys' fees contracts thereafter was to be on quantum meruit.

Recognizing the power of a client to discharge his attorney, but with liability attaching if the attorney had an interest and was discharged without cause, *Fracasse* acknowledged that the possible penalty in discharging an attorney without cause had limited the exercise of this right.

> The right to discharge is of little value if the client must risk paying the full contract price for services not rendered upon a determination by a court that the discharge was without legal cause.[34]

Thereupon, instead of furnishing the client with a test to determine what was sufficient cause to discharge an attorney without liability, the court, held as sufficient the client's loss of faith in the attorney.[35] Using the reasoning in *Martin v. Camp*[36] the court extended this finding to hold that such discharge by a client, with or without cause, would not constitute a breach of the employment contract and that the client could terminate the contract at will.

The court, in response to an amicus brief, could see no difficulty in ascertaining quantum meruit recoveries where it had done so previously when an attorney had been discharged with cause;[37] nor could it see difficulty in allowing clients to rescind and abandon their employment contracts at will.

> To the extent that such discharge is followed by the retention of another attorney, the client will in any event be required, out of any recovery, to pay the former attorney for the reasonable value of his services. Such payment, in addition to the fee charged by the second attorney, should certainly operate as a self-limiting factor on the number of attorneys so discharged.[38]

The appellant having sought declaratory relief on the contract before occurrence of the contingency, the court turned to the question of timeliness in bringing the action. Noting that earlier decisions had held that a claim based upon unlawful discharge of an attorney retained

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[33] *Id.* at 12.
[34] *Id.* at 12.
[35] *Id.* at 13.
[36] 114 N.E. 46, 48 (N.Y. 1916). The court stated: "The discharge of the attorney by his client does not constitute a breach of contract, because it is a term of such contract, implied from the peculiar relationship which the contract calls into existence, that the client may terminate the contract at any time with or without cause."
[37] Salopek v. Schoemann, 124 P.2d 21 (Cal. 1942); see TEX. CODE PROF. RESP., art. III, § 8, DR2-106 (1971).
[38] Fracasse v. Brent, 494 P.2d 9, 13 (Cal. 1972).

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under a contingent fee contract did not accrue until the occurrence of the contingency, the court now declined to modify this rule in accordance with the new remedy set forth by the court. Holding that an attorney's action for quantum meruit would accrue only with the occurrence of the contingency as stated in the contract, the court felt that, as in *Brown v. Connolly*,[39] determination should wait on the result. Moreover, the impropriety of burdening the client with an absolute obligation to pay the former attorney regardless of the outcome of the litigation would discourage poorer clients from employing the more financially realistic contingent fee arrangement.[40] The court refused to approve *Tracy v. MacIntyre*[41] which had allowed an attorney discharged without cause on a contingent fee contract to sue immediately for recovery on quantum meruit without awaiting occurrence of the contingency. Declaratory relief was denied the appellant, the court finding no present controversy or circumstances justifying such; the court thus declined to follow *Martin* to its conclusion that the cause of action accrues at the time of discharge where the contract is terminated, and not until the occurrence of the contingency in the contingent fee contract.[42] Notwithstanding this, the court found that since an attorney agrees initially to take his chances on recovering any fee whatever in a contingent fee arrangement, quantum meruit recovery should be denied an attorney where there is no recovery.[43]

A strong and vigorous dissent was filed in *Fracasse*, urging retention of *Baldwin* as authority for the proper remedy for breach of the employment contract by the client.[44] In a well reasoned opinion, the dissent also recommended that declaratory relief be made available to the injured party in contingent fee contracts prior to the occurrence of the contingency, where the remedy was now to be on quantum meruit.[45]

In examining *Fracasse* it would be well to note that although the action was brought on a contingent fee contract, the implication of the holding extends to noncontingent fee contracts. Moreover, although the court has established quantum meruit as the proper measure of damages, the court is contradictory where it forbids quantum meruit to be mea-

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39 83 Cal. Rptr. 158, 160 (Dist. Ct. App. 1969): The court had felt that to allow recovery on the contract before occurrence of the contingency would lead to unfair consequences to the client since "[e]xperience has shown that more often than not the size of a party's claim bears little relation to its value."

40 Fracasse v. Brent, 494 P.2d 9, 14 (Cal. 1972). But there is a rather critical observation by Sullivan, C.J.: "If the majority assert, contingent fee contracts frequently involve clients of limited means, *prompt establishment of an interest in a portion of the proceeds may therefore be essential to recovery.*" (Emphasis added.) *Id.* at 17 (dissenting opinion).

41 84 P.2d 526 (Cal. Dist. Ct. App. 1938).

42 Martin v. Camp, 114 N.E. 46, 49 (N.Y. 1916).

43 Fracasse v. Brent, 494 P.2d 9, 14 (Cal. 1972).

44 *Id.* at 18.

45 *Id.* at 22.