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Quantum Meruit in Ohio: The Search for a Fair Standard in Contingent Fee Contracts

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QUANTUM MERUIT IN OHIO: THE SEARCH FOR A FAIR STANDARD IN CONTINGENT FEE CONTRACTS

I. INTRODUCTION

The allowance of attorney's fees on a contingent basis is unique to the American legal system.[1] The nature of these contracts creates significant problems when the attorney, through no fault of his own, is discharged by the client. The Ohio case of *Fox & Associates v. Purdon*[2] established *quantum meruit* as the appropriate basis of recovery for such an attorney. This Comment discusses the general policies behind contingent fee contracts and Ohio law on attorney-client contracts. It then discusses the remedies available to attorneys in Ohio and other states. The analysis discusses the effect of *Fox & Associates* on Ohio law. It also offers a forum for the use of a two-tier analysis, instead of *quantum meruit*, by providing a critique of the methods used in other states.

II. BACKGROUND

Contingent fee contracts are an important part of the American legal system. Their use can be as varied as necessary to meet the needs of the individual client. This section discusses the history of contingent fee contracts, the policies behind them, and the mechanics of such contracts. This section also provides a brief overview of contingent fee contracts in Ohio. It concludes with a brief summary of remedies available to attorneys in other states when discharged without cause and Ohio's former position regarding remedies for attorneys.

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1. FREDERICK BENJAMIN MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES: A STUDY OF PROFESSIONAL ECONOMICS AND RESPONSIBILITIES 14 (1964). The English legal system with its bifurcated status of barrister and solicitor allows the barrister to act as the advocate of his client, but forbids the barrister to sue his client for the fee owed. The solicitor, on the other hand, can sue for the fee owed. *Id.* at 13-14. In the United States, the distinction between barrister and solicitor has been effectively eliminated. *Id.* at 12-13. A perspective developed in the United States that the legal profession "was essentially a means of earning a living" and should therefore be governed by traditional economic principles. *Id.* at 15. This conceptualization goes far in framing the discussion of contingent fee contracts when contrasted against the following:

> By definition, the [legal] profession holds the public interest to be superior to the self interest of its members; therefore, one of the historic concerns of all professions is to ensure that the economic advantages sought by individual members do not impair the ability of the profession to carry out its functions.

Id. at 9.

2. 541 N.E.2d 448 (Ohio 1989).

A. History of Contingent Fee Contracts

As recently as 1964, only Maine did not recognize contingent fee contracts.[3] Presently, all states recognize contingent fee contracts by statute, case law, or court rule.[4]

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3. MACKINNON, *supra* note 1, at 39.

4. ME. REV. STAT. ANN. tit. 17-A, § 516 (West 1983) (requiring writing to avoid champtery); N.H. REV. STAT. ANN. § 508:4-e (1991) (fees governed by Rule 1.5 of Model Rules of Professional Conduct requiring contingent fee contracts be made in writing); N.M. STAT. ANN. § 16-105 (Michie 1991) (contingent fee contract shall be in writing); OKLA. STAT. ANN. TIT. 5, § 7 (West 1991) (contingent fee contract will be construed as written if clear and explicit); OR. REV. STAT. § 9.400(1)(a) (1988) (contingent fee contracts "shall be written in plain and simple language reasonably believed to be understandable by the plaintiff").

Peebles v. Miley, 439 So. 2d 137 (Ala. 1983) (criteria in determination of reasonableness of fees); Citizens Coalition for Tort Reform, Inc. v. McAlpine, 810 P.2d 162 (Alaska 1991) (reserving power to state supreme court to limit contingent fees); Henry, Walden & Davis v. Goodman, 741 S.W.2d 233 (Ark. 1987) (attorney can recover under *quantum meruit* when discharged from contingent fee agreement); Yates v. Law Offices of Samuel Shore, 280 Cal. Rptr. 316 (Cal. Ct. App. 1991) (attorney limited to statutory amount for contingent fee in malpractice suit); Spensieri v. Farmers Alliance Mut. Ins. Co., 804 P.2d 268 (Colo. Ct. App. 1990) (criteria in determination of reasonableness of fees); Marcus v. DuPerry, 593 A.2d 163 (Conn. App. Ct. 1991) (misconduct obviated contingent fee agreement); Braun v. Fleming-Hall Tobacco Co., 93 A.2d 495 (Del. Sup. Ct. 1952) (allowed recovery on contract akin to contingent fee); Kaushiva v. Hutter, 454 A.2d 1373 (D.C. 1983) (allowed recovery on contingent fee contract after discharge); Goodpaster v. Evans, 570 So. 2d 354 (Fla. Dist. Ct. App. 1990) (contingent fee agreement upheld); Dodd v. Newton, 178 S.E.2d 567 (Ga. Ct. App. 1970) (use of contingent fee schedule admissible for reasonableness of fees); Hoddick, Reinwald, O'Connor & Marrack v. Lotsof, 719 P.2d 1107 (Haw. Ct. App. 1986) (contingent fees allowed under DR 2-106); Anderson v. Gailey, 606 P.2d 90 (Idaho 1980) (awarding compensation after discharge from contingent fee contract); Fletcher v. Fletcher, 591 N.E.2d 91 (Ill. Ct. App. 1992) (fees under Illinois Marriage and Divorce Act must be offset against attorney's contingent fee); Estate of Forrester v. Dawalt, 562 N.E.2d 1315 (Ind. Ct. App. 1990) (awarding compensation after discharge from contingent fee contract); Wunschel Law Firm, P.C. v. Clabaugh, 291 N.W.2d 331 (Iowa 1980) (court can determine reasonableness of contingent fee); In re Carothers' Estate, 591 P.2d 1091 (Kan. Ct. App. 1979) (law firms suit over splitting contingent fees); LaBach v. Hampton, 585 S.W.2d 434 (Ky. Ct. App. 1979) (awarding compensation after discharge from contingent fee contract); Saucier v. Hayes Dairy Prods., Inc., 373 So. 2d 102 (La. 1979) (awarding compensation after discharge from contingent fee contract); Schackow v. Medical-Legal Services, Inc., 416 A.2d 1303 (Md. Ct. Spec. App. 1980) (contingent fee did not violate public policy); Salem Realty Co. v. Matera, 410 N.E.2d 716 (Mass. App. Ct. 1980) (consider contingent fee agreement when compensating after discharge); Morris v. Detroit, 472 N.W.2d 43 (Mich. Ct. App. 1989) (awarding compensaton after discharge from contingent fee contract); Treuti, Saxraug, Berger, Toche, Stephenson, Richards & Aluni, Ltd. v. Nartnik, 439 N.W.2d 418 (Minn. Ct. App. 1989) (awarding compensation after discharge from contingent fee contract); National Sur. Corp. v. Jackson Ready-Mix Concrete, 222 So. 2d 119 (Miss. 1969) (requiring contingent fee to be in writing unless attorney can show full disclosure by clear and convincing evidence); Plaza Shoe Store, Inc. v. Hermel, Inc., 636 S.W.2d 53 (Mo. 1982) (awarding compensation after discharge from contingent fee contract); Burris v. Employment Relations Div., 829 P.2d 639 (Mont. 1992) (state agency may determine reasonableness of contingent fee); Kirby v. Liska, 334 N.W.2d 179 (Neb. 1983) (contingent fee agreement must be clearly demonstrated before approved by court); McCombs v. New Jersey State Police, 576 A.2d 349 (N.J. Super. Ct. Law Div. 1990) (contingent fee subject to limitation); Finkelstein v. Kins, 511 N.Y.S.2d 285 (N.Y. App. Div. 1987) (awarding compensation after discharge from contingent fee contract); Davis v. Taylor, 344 S.E.2d 19 (N.C. Ct. App. 1986) (contingent fee

Contingent fee agreements, in addition to their recognition in every jurisdiction, are applied in many areas of the law. They are commonly used in personal injury, collection, workers' compensation, corporate business, and tax practice cases, as well as in condemnation proceedings and will contests.[5] These agreements, however, are generally prohibited in instances where the client is a criminal defendant or a party in a domestic relations proceeding.[6] There are some jurisdictions, however, that allow contingent fee agreements in specific domestic relations situations.[7]

Contingent fee contracts serve several integrated functions. They provide persons of limited means the opportunity to obtain counsel.[8]

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permitted in property settlement, not child support); City of Bismark v. Thom, 261 N.W.2d 640 (N.D. 1977) (contingent fee contracts permitted generally, but not in eminent domain proceeding); Michael D. Tully, L.P.A. v. Donnelly, 537 N.E.2d 242 (Ohio Ct. App. 1987) (awarding compensation after discharge from contingent fee contract); Klauder v. Gregar, 192 A. 667 (Pa. 1937) (contingent fee proper in civil suit when client not taken advantage of by attorney); Carter v. Dworkin, 561 A.2d 389 (R.I. 1989) (attorney may enter contingent fee contract in civil case pursuant to Rules of Professional Conduct); *In re* Schuldt, 428 N.W.2d 251 (S.D. 1988) (contingent fee is considered in determining reasonableness of fee); Adams v. Mellen, 618 S.W.2d 485 (Tenn. Ct. App. 1981) (awarding compensation under contingent fee contract); Mandell & Wright v. Thomas, 441 S.W.2d 841 (Tex. 1969) (allowing compensation after discharge from contingent fee contract); Phillips v. Smith, 768 P.2d 449 (Utah 1989) (attorney lien invalid because contingent fee agreement did not contemplate discharge); Parker, Lamb & Ankuda, P.C. v. Krupinsky, 503 A.2d 531 (Vt. 1985) (court cited DR 2-106(B) for guidelines of reasonableness, including contingent fees); International Tracers of Am. v. Hard, 570 P.2d 131 (Wash. 1977) (contingent fee considered in determining reasonableness, but not dispositive); Rice v. Mike Ferrell Ford, Inc., 403 S.E.2d 774 (W.Va. 1991) (contingent fee contract consideration in determination of reasonableness of fees); Tonn v. Reuter, 95 N.W.2d 261 (Wis. 1959) (awarding compensation after discharge under contingent fee contract); Jones Land & Livestock Co. v. Federal Land Bank of Omaha, 733 P.2d 258 (Wyo. 1987) (court cited DR 2-106 for guidelines for reasonableness of fees, including contingent fees).

ARIZONA SUP. CT. R. 42 (1985); NEVADA SUP. CT. R. 155 (1992); SOUTH CAROLINA SUP. CT. R. 32 (1990); VIRGINIA SUP. CT. R. pt. 6, § II (1992).

5. MACKINNON, *supra* note 1, at 25-28.

6. Ohio DR 2-106 sets forth the metes and bounds for legal fees. It allows contingent fees to be charged to a client but does not expressly prohibit these fees in domestic relations cases. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(c) (Anderson Supp. 1991). Ohio is one of the few states that still utilizes the ABA Model Code of Professional Responsibility. The vast majority of states follow the ABA Model Rules of Professional Conduct. These rules have been adopted to varying degrees in Alabama, Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming. Model Rule 1.5(d) prohibits contingent fee agreements in domestic relations and criminal cases.

7. *See In re* Cooper, 344 S.E.2d 27 (N.C. Ct. App. 1986) (contingent fee arrangement in equitable distribution proceeding is valid so long as it is not contingent upon the obtaining of a divorce); Gross v. Lamb, 437 N.E.2d 309, 311-12 (Ohio Ct. App. 1980) (court considered fact that client wanted experienced out-of-town attorney and could not pay a retainer or hourly fee).

8. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 47 cmt. b (Tent. Draft No. 4, 1991) [hereinafter LAW GOVERNING LAWYERS]. The text of § 47 reads as follows:

They also provide the attorney with an added incentive to work diligently and prosecute legitimate claims.[9] Given that clients generally are not required to pay in full if the case fails, both parties share the risk of failure in these contracts.[10] Contingent fee agreements also encourage litigation in undeveloped areas of the law because the risk of failure is offset by an above average reward.[11]

In addition to these functions, contingent fee contracts also further the interests of the client and protect the client from unscrupulous activities on the part of attorneys. Protection of the client is necessary because the client may have little experience with the legal profession; therefore, the client must rely on the attorney to expedite her claim.[12] This disparity in position is made more apparent when one notes that some attorneys encourage clients to enter contingent fee contracts as a matter of course rather than as a matter of need.[13] Furthermore, this disparity is exacerbated by the many forms of contingent fee contracts used by attorneys, including percentage, hourly, and hourly-percentage.[14] The percentage contingent contract provides that the attorney receives an agreed percentage from the recovery of the case.[15] A contingent hourly contract bills the client for hours spent on the case, payable only upon the occurrence of an agreed to contingency.[16] The contingent hourly-percentage contract stipulates an hourly rate. This rate is multiplied by the time spent on the case creating a "time fee." The

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A lawyer may agree with a client for a fee the size or payment of which is contingent on success in a matter, unless the agreement violates another provision of this Restatement or the size or payment of the fee is:

(1) Contingent on success in prosecuting or defending a criminal proceeding; or

(2) Contingent on securing a divorce or a decree awarding or modifying custody of a child, except where that arrangement is reasonably necessary for the client to secure adequate representation.

9. *Id.*; Stewart Jay, *The Dilemmas of Attorney Contingent Fees*, 2 GEO. J. LEGAL ETHICS 813, 815 (1989).

10. LAW GOVERNING LAWYERS, *supra* note 8. Please note, however, that some contingent fee contracts contain a provision for payment of an hourly rate. *See infra* notes 14 to 18 and accompanying text.

11. Jay, *supra* note 9, at 815. Professor Jay cites securities laws as an example of a previously undeveloped area of the law. *Id.* This last function may have significant ramifications regarding an attorney's good faith effort under Rule 11 of the Federal Rules of Civil Procedure.

12. LAW GOVERNING LAWYERS, *supra* note 8.

13. Jay, *supra* note 9, at 822.

14. Jay, *supra* note 9, at 857-66.

15. Jay, *supra* note 9, at 857. Professor Jay criticizes this form because it may encourage an attorney to put in a less vigorous effort as he will get his fee either way. *Id.* The client loses because the attorney's reduced effort diminishes the potential recovery for the client. *Id.*

16. Jay, *supra* note 9, at 860. Professor Jay criticizes this form because the attorney may curtail his effort if he believes the chances for recovery are inadequate. *Id.* at 861. This form also creates conflict between attorney and client when the client refuses a settlement. This refusal usually increases the likelihood of trial and decreases the possibility of recovery. *Id.* at 861-62.

"time fee" is then added to the percentage by which the gross recovery exceeds the time fee when the contingency occurs.[17]

B. Ohio Law on Attorney-Client Contracts

Section 4705.15(A)(1) of the Ohio Revised Code defines contingent fee agreements.[18] The statute requires that such an agreement be in writing and be signed by the parties if the client's claim "is or may become the basis of a tort action . . . ."[19] In addition to statutory regulation, the Ohio Code of Professional Responsibility identifies two specific purposes for allowing contingent fee contracts.[20] First, in many instances, contingent fee contracts provide the only means for an individual to afford the services of an attorney.[21] Under most contingent fee agreements, the client is not required to pay unless there is a recovery on the claim. Second, "a successful prosecution of the claim produces a *res* out of which the fee can be paid."[22] The attorney is discouraged from making contingent fee contracts with those who can afford regular rates, but he may engage in such a contract if the client insists upon it.[23] The appropriateness of the amount set forth in the contingent fee contract is judged on the assessment of what "a lawyer

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17. Jay, *supra* note 9, at 863. Professor Jay finds this arrangement to be a middle ground whereby the "lawyer has a reason to put in more hours than under a percentage contract, but fewer than if compensated by an hourly contract." *Id.* For a more detailed analysis of this form of contract see Kevin M. Clermont & John D. Currivais, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1987).

18. OHIO REV. CODE ANN. § 4705.15(A)(1) (Anderson Supp. 1991). The section states in full that:

> "Contingent fee agreement" means an agreement for the provision of legal services by an attorney under which the compensation of the attorney is contingent, in whole or in part, upon a judgment being rendered in favor of or a settlement being obtained for the client and is either a fixed amount of an amount to be determined by a specified formula, including, but not limited to, a percentage of any judgment rendered in favor of or settlement obtained for the client.

Id.

19. OHIO REV. CODE ANN. § 4705.15(B) (Anderson Supp. 1991). "Tort action" for purposes of § 4705.15(B) is defined in § 4705.15(A)(2).

20. OHIO CODE OF PROFESSIONAL RESPONSIBILITY EC 2-19 (Anderson Supp. 1991). For disciplinary rules to help enforce these ethical concerns, see *infra* notes 24-25 and accompanying text.

21. OHIO CODE OF PROFESSIONAL RESPONSIBILITY EC 2-19 (Anderson Supp. 1991).

22. *Id.*

23. *Id.*; *see* John Y. Taggart, Comment, *Are Contingent Fees Ethical Where Client is Able to Pay a Retainer*, 20 OHIO ST. L. J. 329 (1959). The author asserts that "contingent fees are ethical where a client is unable to pay for legal services and where a contingency as to the possibility of recovery is involved." *Id.* at 330. The author later notes the possibility that these fees may be outweighed by practical considerations. *Id.* at 340. The author then concludes that by allowing contingent fee agreements with those who can afford retainers, the legal profession and the fiscally secure appropriately bear the financial burden of those who cannot afford legal services on their own. *Id.* at 341.

of ordinary prudence" would believe to be the reasonable value of attorney's fees.[24]

Aside from liens and contingent fee arrangements, an attorney is prohibited from "acquir[ing] a proprietary interest in the [client's] cause of action."[25] The purpose of this rule is to avoid the appearance of champertous contracts.[26] An additional reason is the fear of overreaching on the part of the attorney.[27] Contingent fee contracts in Ohio are rarely held to be champertous. Ohio courts generally find such contracts to be champertous only when the contract contains a specific clause forbidding a client from settling a case without the consent of the attorney.[28] The consent clause impedes the client's right to handle his case as he chooses.

The Ohio Supreme Court in *Scheinesohn v. Lemonek*[29] dealt with a dispute between an attorney and client. Lemonek hired an attorney, Scheinesohn, under a fixed fee contract for three legal matters.[30] The parties disputed the amount of effort expended and the results obtained by Scheinesohn.[31] Lemonek offered Scheinesohn one dollar and fifty cents for services rendered while Scheinesohn demanded the contract price of five hundred dollars.[32] Scheinesohn was fired when he refused Lemonek's offered compensation.[33] Scheinesohn claimed he had been wrongfully discharged and deprived of the opportunity to perform his

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24. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B) (Anderson Supp. 1991).

25. *Id.* at DR 5-103(A) (Anderson 1983).

26. Champtery is defined as:

> [a] bargain between one having an interest in a suit or cause of action . . . and anothe [sic] who is a stranger thereto, whereby such stranger . . . agrees to carry on the prosecution or defense, as the case may be, . . . at his own expense, in consideration of his receiving a part of the thing sued for, in the event of the favorable termination of the litigation.

14 OHIO JUR. 3D, *Champerty and Maintenance* § 1 (1979). A lawyer cannot advance financial aid to a client unless the client is ultimately liable for the finances provided. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(B) (Anderson 1983). *See also* STUART M. SPEISER, ATTORNEY'S FEES § 2.17 (1973 & Supp. 1991).

27. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.4 at 529 (1986); *see also* Arthur L. Kraut, *Contingent Fee: Champerty or Champion?*, 21 CLEV. ST. L. REV. 15, 19 (1972) (author notes that an attorney is entitled to *quantum meruit* even when agreement is held unenforceable as champertous).

28. Key v. Vattier, 1 Ohio 132 (Ohio 1823); *see also* Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Volkert, 50 N.E. 924 (Ohio 1898) (stating that contingent fee contract without attorney consent clause is not champertous). "[T]he law of Ohio will tolerate no lien in or out of the profession, as a general rule, which will prevent litigants from compromising or settling their controversies, or which, in its tendencies, encourages, promotes, or extends litigation." 14 OHIO JUR. 3D, *Champerty and Maintenance* § 5 (1979).

29. 95 N.E. 913 (Ohio 1911).

30. *Id.* The legal matters were a building contract, a collection suit, and the defense of Lemonek in an extortion case.

31. *Id.* at 913-14.

32. *Id.* at 914.

33. *Id.*

portion of the contract.[34] The *Scheinesohn* court analogized the situation to earlier cases[35] and concluded that because the contract price was the only reliable means to show damages, it should be the amount recovered even though the attorney failed to demonstrate that the work was performed.

In *Scheinesohn,* the Ohio Supreme Court adopted the standard established in *French v. Cunningham,*[36] an Indiana case, which allowed an attorney who had been wrongfully discharged by a client to "recover on a [sic] *quantum meruit* for the reasonable value of the services, or . . . [to] sue on the contract and recover damages for its breach."[37] In applying the *French* standard, the *Scheinesohn* court stated that the option to sue on the contract should exist to allow the attorney to "recover whatever damage he can prove he suffered including the loss of a valuable contract."[38] The court considered the wrongful discharge to be a breach of the contract between attorney and client.[39]

After resolving the issue of right to recovery, the *Scheinesohn* court turned its attention to the proper amount of recovery. The court held that the correct award was the contract price.[40] Its reasoning was two-fold. First, because there had been neither services performed nor benefits provided, *quantum meruit* did not apply.[41] The contract, in the court's view, was the closest approximation to the "value of the attorney's anticipated services . . . ."[42] Second, the sensitive nature of the contract concerned the court due to the fact that it would be unfair for an attorney to be discharged because he could not be hired subsequently by the opposing party.[43] Thus, the attorney was entitled to the full contract amount.

The Ohio Supreme Court applied the *Scheinesohn* rule fifteen years later to the contingent fee contract in *Roberts v. Montgomery.*[44] Roberts was an attorney with the firm of Howell, Roberts & Duncan. He was hired under a contingent fee contract to prosecute a personal

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34. *Id.*

35. Baldwin v. Bennett, 4 Cal. 392 (1894); French v. Cunningham, 49 N.E. 797 (Ind. 1898); Kersey v. Garton, 77 Mo. 645 (1883). These cases involved both contingent and fixed fee contracts.

36. French v. Cunningham, 49 N.E. 797 (Ind. 1898).

37. *Scheinesohn,* 95 N.E. at 915 (emphasis added) (quoting *French,* 49 N.E. at 799).

38. *Id.*

39. *Id.* at 916.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* The court determined it would have been unfair to fashion a remedy without considering this possibility. *Id.*

44. 154 N.E. 740 (Ohio 1926).

injury claim for Montgomery.[45] Montgomery discharged Roberts, prompting the suit. At the time of discharge, Roberts had interviewed witnesses and had taken affidavits and depositions.[46] Roberts sent these documents to Montgomery to sign and return to him.[47] In the interim, Montgomery hired a second attorney who copied Roberts' work exactly and obtained a settlement for Montgomery.[48]

The court stated that the only issue remaining was the measure of damages.[49] It noted that the attorney received a recovery in *Scheinesohn,* although there was no evidence of even partial performance.[50] The court followed *Scheinesohn* because it believed it would be inequitable to allow full recovery for no work performed in that case and then limit recovery where the attorney actually performed.[51]

While both *Scheinesohn* and *Roberts* dealt with express contracts, *Bolton v. Marshall*[52] addressed the measure of recovery where there was no written contract. Thomas Bolton was a partner in the firm of Maurer, Bolton & Mierke. Mrs. George Marshall hired Bolton to handle the affairs of her deceased husband.[53] Bolton presumed that he would continue to represent the estate throughout the probate process.[54] He was fired, however, without cause three weeks later.[55] Although no express contract establishing fees existed, Bolton asserted "that they [the law partners] were at all times ready and able to perform the services required; and that they [were] entitled to be 'reimbursed' in the sum of $25,000."[56]

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45. *Id.* at 740-41. The trial court awarded plaintiff the entire one-third contingent fee. *Id.* at 740. The Court of Appeals limited recovery to the reasonable value of services rendered prior to discharge. *Id.* at 741.

46. *Id.* at 741.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* The court added that statistics were available for estimating the likelihood of success at trial. *Id.* The court listed factors for consideration in similar cases:

> When the contract covers settlement, as well as trial through the courts to final determination and recovery, and the compensation is wholly contingent upon success, and is limited to an agreed percentage of recovery, as in this case, there is no room for doubt about the obligations of the parties each to the other.

Id. at 741.

51. *Id.*

52. 91 N.E.2d 508 (Ohio 1950).

53. *Id.* at 509.

54. *Id.* The court's assertion that it was also Mrs. Marshall's intention to retain Mr. Bolton further supports this fact. *Id.*

55. *Id.*

56. *Id.* at 509-10. The plaintiffs, however, in their complaint, alleged that they had performed services to the estate with a reasonable value of $880. *Id.* at 509. In her answer, the defendant admitted owing $880 while generally denying all other claims. *Id.*

The *Bolton* Court made special note that there was no written agreement providing for services or compensation.[57] The court framed the issue as whether the plaintiff could recover "in an action at law the amount which they might have earned had the relationship . . . continued until the estate had been fully administered."[58] While the *Scheinesohn* and *Roberts* opinions provided for recovery under *quantum meruit* or the contract itself, the court distinguished these cases because Bolton and Marshall did not execute a written contract.[59] The court found that the lack of a written agreement was dispositive and, therefore, limited recovery to "the reasonable value of the services actually performed in pursuance of the employment."[60]

In each of these cases, *Scheinesohn*, *Roberts*, and *Bolton*, the courts did not ignore the at-will nature of the attorney-client relationship in contingent fee contracts; the courts simply placed a greater emphasis on protecting the pecuniary interest of the attorney.[61] The difficulty in adequately balancing the interests of both attorney and client has led to a variety of remedies.

C. *Attorneys' Remedies in Ohio and Other States*

Concern regarding the client's lack of sophistication in legal matters has led to a restriction on traditional freedom of contract rules.[62] The client's absolute right to discharge the attorney with or without cause, which under normal circumstances might be deemed a breach, protects the client in many jurisdictions.[63]

Prior to *Fox & Associates v. Purdon*,[64] the Ohio courts followed the old majority rule which allowed the plaintiff attorney to elect to recover either under *quantum meruit* or on the contract.[65] This rule is still followed in a few jurisdictions.[66] The majority of states, however,

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57. *Id.* at 510.

58. *Id.*

59. *Id.* at 511.

60. *Id.* The court also stated that while a client had the absolute right to discharge an attorney with or without cause, the client is still liable for compensation to the attorney. *Id.*

61. *Id.* at 511; Roberts v. Montgomery, 154 N.E. 740, 741 (Ohio 1926); Scheinesohn v. Lemonek, 95 N.E. 913, 916 (Ohio 1911).

62. LAW GOVERNING LAWYERS, *supra* note 8, at 203-04. Freedom of contract is the latitude afforded by the government to individual parties to enter a contractual relationship. This latitude can be restricted by public policy concerns. HOWARD O. HUNTER, MODERN LAW OF CONTRACTS, § 24.01 (1987).

63. Fracasse v. Brent, 494 P.2d 9, 13 (Cal. 1972); Rhoades v. Norfolk & W. Ry. Co., 399 N.E.2d 969, 974 (Ill. 1979); Plaza Shoe Store, Inc. v. Hermel, Inc., 636 S.W.2d 53, 58 (Mo. 1982); Fox & Assocs. v. Purdon, 541 N.E.2d 448, 450 (Ohio 1989).

64. 541 N.E.2d 448 (Ohio 1989). *See infra* notes 88-107 and accompanying text.

65. *See* Roberts v. Montgomery, 154 N.E. 740 (Ohio 1926); *Scheinesohn*, 95 N.E. at 913.

66. French v. Cunningham, 49 N.E. 797, 799 (Ind. 1898) (when attorney is prevented from performing due to client's action, attorney can recover under *quantum meruit* not to exceed con-

currently apply *quantum meruit* when the attorney is discharged without cause.[67] The calculation of *quantum meruit* differs among jurisdictions.

Some states only allow an attorney to recover under the "traditional" *quantum meruit* approach - prompt payment upon the client's breach or recovery without regard to the contracted fee.[68] This approach is based on the assumption that once the client denies the attorney's right to the contracted fee, the client also forfeits his right to defer payment until the recovery is obtained.[69] Accordingly, the discharge releases the attorney from the contracted fee. Further, the *quantum meruit* recovery can exceed the contracted amount.[70]

An emerging trend in many jurisdictions is to expressly restrict the *quantum meruit* recovery to the contract price; the contract price acts as a ceiling to the amount recoverable by the attorney.[71] Courts using this "modified" *quantum meruit* approach assert that it strikes the best balance between the client's right to discharge and the attorney's ex-

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tract price or in the alternative for contractual damages under breach); Mandell & Wright v. Thomas, 441 S.W.2d 841, 847 (Tex. 1969) (attorney should not be limited to *quantum meruit*; rather the attorney should be allowed to sue on the contract). *But see* Estate of Forrester v. Dawalt, 562 N.E.2d 1315, 1317-18 (Ind. Ct. App. 1990) (abandoned damages for breach allowed in *French*).

67. *See infra* notes 68-77 and accompanying text.

68. Hoddick, Reinwald, O'Connor & Marrack v. Lotsof, 719 P.2d 1107, 1112 (Haw. Ct. App. 1986) (DR 2-106 allows *quantum meruit* to exceed client's recovery); *In re* Callahan, 578 N.E.2d 985, 988 (Ill. 1991) (once client terminates contract all provisions cease to exist; therefore, only limit is reasonable value for services rendered); Whalen v. Shear, 546 N.E.2d 1, 2-3 (Ill. App. Ct. 1989) (attorney may receive entire contract price if it is the reasonable value and primarily the work of discharged attorney; the contract price may be a limit); Trenti, Saxhaug, Berger, Roche, Stephenson, Richards & Aluni, Ltd. v. Nartnik, 439 N.W.2d 418, 421 (Minn. Ct. App. 1989) (attorney is like workman or supplier and is entitled to prompt payment); Finkelstein v. Kins, 511 N.Y.S.2d 285, 286-87 (N.Y. App. Div. 1987) (client can discharge attorney but client remains liable for reasonable value of services even if in excess of contracted fee).

The Seventh Circuit Court of Appeals recently discussed contingent fee contracts in Illinois. Maksym v. Loesch, 937 F.2d 1237 (7th Cir. 1991). *Loesch* involved a contingent fee contract where there was an hourly rate charged plus a percentage of recovery. *Id.* at 1238. The court bifurcated the provisions of the contract. Under the court's view, the attorney, when discharged, will be able to collect the straight hourly fee. The standard set forth in Norfolk & W. Ry. Co. v. Rhoades, 399 N.E.2d 969 (Ill. 1979), however, will apply to the contingency portion of the contract. *Maksym*, 937 F.2d at 1246.

69. *Nartnik*, 439 N.W.2d at 421.

70. *Finkelstein*, 511 N.Y.S.2d at 287 (quoting Matter of Goldin, 480 N.Y.S.2d 392, 393 (N.Y. App. Div. 1984)).

71. Rosenberg v. Levin, 409 So. 2d 1016, 1021 (Fla. 1982) (limits *quantum meruit* recovery to maximum contract fee in all premature discharge cases); Trend Coin Co. v. Fuller, Feingold & Mallah, P.A., 538 So. 2d 919, 921 (Fla. Dist. Ct. App. 1989) (limits recovery to maximum contract fee even when discharged at almost same time contingency occurs); Morris v. Detroit, 472 N.W.2d 43, 48 (Mich. Ct. App. 1989) (attorney entitled to 99.44% of contracted fee when discharged shortly before resolution); Plaza Shoe Store, Inc. v. Hermel, Inc., 636 S.W.2d 53, 60 (Mo. 1982) (recovery limited not to exceed the contracted fee).

pectation of compensation.[72] The ceiling accomplishes this balancing of interests by (1) preventing economic penalty to the client who exercises his right to discharge the attorney,[73] and (2) encouraging the attorney to act ethically with respect to his right to compensation.[74]

Given these two approaches to *quantum meruit,* recovery is made all the more confusing in those jurisdictions which establish the form of recovery but do not expressly state whether there is a limit on this recovery.[75] Some of these jurisdictions note that substantial performance may be an issue in the *quantum meruit* analysis, but these courts decline to resolve the matter.[76] Other courts apparently allow unlimited recovery, but they express concern regarding potential chilling effects on the right to discharge.[77] Thus, these concerns seem to result in a *de facto* application of the modified *quantum meruit* approach.

Another alternative still found in some states is the "fair allowance" approach which determines recovery based on the contract price less a fair allowance for services not performed.[78] The "fair allowance" is comprised of the expenses not incurred by the discharged attorney.[79] This approach is slightly different from the modified *quantum meruit*

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72. *Rosenberg*, 409 So. 2d at 1021; *Morris*, 472 N.W.2d at 48; *Plaza Shoe*, 636 S.W.2d at 60. For criticism of the singular use of this approach, see *infra* notes 196-211 and accompanying text.

73. *See supra* notes 12-14 and accompanying text.

74. *See supra* notes 12-14 and accompanying text.

75. Gaines, Gaines & Gaines, P.C. v. Hare, Wynn, Newel & Newton, 554 So. 2d 445, 447-48 (Ala. Civ. App. 1989) (*quantum meruit* if no substantial performance, but there is no express statement as to limit); Henry, Walden & Davis v. Goodman, 741 S.W.2d 233, 236 (Ark. 1987) (held that attorney can only recover under *quantum meruit*, not contract, but does not state if there is limit on *quantum meruit*); Fracasse v. Brent, 494 P.2d 9, 14 (Cal. 1972) (attorney only entitled to *quantum meruit*, but does not state if there is a limit on *quantum meruit*); Schneider v. Kaiser Found. Hosps., 264 Cal. Rptr. 227, 230 (Cal. Ct. App. 1989) (attorney may be entitled to entire contract fee if discharged shortly before suit, still doesn't establish limit); Lessing v. Gibbons, 45 P.2d 258, 262 (Cal. Dist. Ct. App. 1935) (restitution for attorney services unlimited by contract price); Hopkins v. Steele, 297 S.E.2d 528, 528-29 (Ga. Ct. App. 1982) (attorney entitled to reasonable fees for services rendered, no limit stated); Madison v. Goodyear Tire and Rubber Co., 663 P.2d 663, 666-67 (Kan. Ct. App. 1983) (*quantum meruit* appropriate when discharged before contingency occurred); Smith v. Binder, 477 N.E.2d 606, 608 (Mass. App. Ct. 1985) (can only recover under *quantum meruit* if have not substantially performed; recovery on contract after substantial performance left open); Salem Realty Co. v. Matera, 410 N.E.2d 716, 719 (Mass. App. Ct. 1980) (*quantum meruit* is standard but may consider former agreement and consider contribution of service to ultimate result); Hamlin v. Case & Case Inc., 61 P.2d 1287, 1289 (Wash. 1936) (*quantum meruit* is recovery, but no mention of limit though there is concern about client right to discharge).

76. *Hare, Wynn, Newel & Newton*, 554 So. 2d at 447-48; *Binder*, 477 N.E.2d at 608.

77. *Lessing*, 45 P.2d at 262; *Fracasse*, 494 P.2d at 14; *Hamlin*, 61 P.2d at 1289.

78. Anderson v. Gailey, 606 P.2d 90, 96 (Idaho 1980); LaBach v. Hampton, 585 S.W.2d 434, 436 (Ky. Ct. App. 1979); *see also* Tonn v. Reuter, 95 N.W.2d 261, 265-66 (Wis. 1959) (court deducts fair allowance for service and expenses from recovery ultimately realized by client).

79. *Anderson*, 606 P.2d at 96.

discussed above. Its foremost concern is the client's right to discharge, but it arrives at its award by deducting savings to the client first, rather than calculating reasonable value and then comparing it to the contract amount.[80]

A final alternative provides that the discharged attorney and the subsequent attorney divide what is termed the highest ethical contingency percentage.[81] This approach takes the fee agreed to by the client and then equitably divides it between the attorneys according to factors set forth in the Code of Professional Responsibility.[82] The major motivating factor behind this approach is that the client is subject to only one fee.[83]

Given the conflicting interests between attorney and client in contingent fee contracts and the wide variety of these agreements, courts nationwide have struggled to develop an appropriate balance between attorney and client.[84] Ohio courts adopted a view that weighed heavily in favor of the attorney.[85] This view, however, has recently changed.

III. ANALYSIS

Ohio law recently shifted its emphasis from protecting an attorney's interest to protecting the client's interest.[86] This analysis discusses the change in Ohio law as a result of the Ohio Supreme Court's decision in *Fox & Associates v. Purdon.* It then advances a two-tier standard as an alternative to the *quantum meruit* standard set forth in *Fox & Associates.* This two-tier standard will be contrasted with the standards used in New York, Florida, and California. It will then be applied to a hypothetical to illustrate its operation.

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80. *Tonn*, 95 N.W.2d at 265-66.

81. Saucier v. Hayes Dairy Prods., Inc., 373 So. 2d 102, 118 (La. 1979).

82. *Id.*

83. *Id.* at 119. *Quantum meruit* was not applied in this case. *Id.* at 118. For further discussion of this highest ethical fee standard and its appropriateness in a civil law jurisdiction, see Sterling Scott Willis, Note, *The Concept of an "Earned Fee" in the Regulation of Attorney's Fees by the Louisiana Supreme Court*, 42 LA. L. REV. 1181 (1982); H. David Vaughn, II, Comment, *The Application of Quantum Meruit to Attorney Fee Litigation*, 49 LA. L. REV. 215 (1988). For a brief discussion of why the highest ethical fee standard is inappropriate in a common law jurisdiction, see Joan E. Engelbart, Note, *Attorney's Fees-* Hoddick, Reinwald, O'Connor & Marrack v. Lotsof*: Rejection of the Doctrine of "Division of Highest Ethical Contingency Percentage"*, 9 U. HAW. L. REV. 793 (1987).

84. Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982); Salem Realty Co. v. Matera, 410 N.E.2d 716 (Mass. App. Ct. 1980); Mandell & Wright v. Thomas, 441 S.W.2d 841 (Tex. 1969); Hoddick, Reinwald, O'Connor & Marrack v. Lotsof, 719 P.2d 1107 (Haw. 1986).

85. Bolton v. Marshall, 91 N.E.2d 508 (Ohio 1950); Roberts v. Montgomery, 154 N.E. 740 (Ohio 1926); Scheinesohn v. Lemonek, 95 N.E. 913 (Ohio 1911).

86. Fox & Assocs. v. Purdon, 541 N.E.2d 448 (Ohio 1989).

A. Change in Ohio Law on Contingent Fee Contracts

In *Roberts v. Montgomery*, the Ohio Supreme Court provided an attorney the ability to recover on the contract if he was discharged without cause.[87] This position, however, was recently discarded in *Fox & Associates v. Purdon*.[88] In *Fox & Associates*, Purdon hired an attorney from Fox & Associates to represent her in a suit to collect damages for injuries she received in an automobile accident.[89] The attorney from Fox & Associates entered into a thirty-three and one-third percent contingent fee contract with Purdon.[90] Approximately three weeks before the case went to trial, the attorney for Fox & Associates notified Purdon that he would be leaving the firm.[91] Purdon wished to retain her attorney due to the proximity of the trial.[92] She made repeated efforts to notify the firm that she was terminating their services.[93]

Fox & Associates subsequently filed suit. A *de novo* trial was conducted after an arbitration panel found in favor of the firm.[94] The trial court found that the firm was entitled to the agreed contract fee because Purdon breached the contingent fee agreement.[95] Purdon appealed to the Court of Appeals seeking a ruling that *quantum meruit* was an attorney's only appropriate relief regardless of whether the discharge was with or without cause.[96]

The Second District Court of Appeals declined Purdon's suggestion to adopt a *quantum meruit* standard in Ohio regardless of whether the client dismissed the attorney with or without cause.[97] The court

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87. *Roberts*, 154 N.E. at 741.

88. 541 N.E.2d 448 (Ohio 1989).

89. *Id.*

90. *Id.*

91. *Id.* This was approximately twenty months after first entering the contingent fee contract. *Id.* The contract was entered into on or about May 30, 1984, and the attorney notified the client of his leaving the firm on February 5, 1986. Fox & Assocs. v. Purdon, No. 87-CA-26, 1988 Ohio App. LEXIS 1253 (2d App. Dist. Mar. 28, 1988). Purdon's discharge letter was delivered on February 12, 1986. Later that same day Purdon accepted a settlement of $11,500. *Fox & Assocs.*, 541 N.E.2d at 448.

92. *Fox & Assocs.*, 541 N.E.2d at 448.

93. *Id.* While the letter was delivered on February 12, 1986, Purdon attempted to notify the firm of its discharge on February 5 and again on February 10, 1986. *Id.*

94. *Id.* at 448-49.

95. *Id.* at 449. The trial court granted a directed verdict in favor of Fox & Associates on the issue of just cause to discharge. Fox & Assocs. v. Purdon, No. 87-CA-26, 1988 Ohio App. LEXIS 1253, at *4 (2d App. Dist. Mar. 28, 1988).

96. *Fox & Assocs.*, 541 N.E.2d at 449.

97. Fox & Assocs. v. Purdon, No. 87-CA-26, 1988 Ohio App. LEXIS 1253, at *9 (2d App. Dist. Mar. 28, 1988). The Court of Appeals ruled that there was enough evidence to submit to the jury on the issue of whether Purdon had just cause to discharge the firm. *Id.* at *7.

cited *Roberts*, *Scheinesohn*, and *Bolton* in support of its position.[98] Purdon appealed on this issue.

The Ohio Supreme Court found that previous Ohio law was unsound and overruled the decisions reached in *Scheinesohn* and *Roberts*.[99] In addition, the court partially overruled *Bolton* by eliminating the restriction of *quantum meruit* to only those cases in which there was not a written or express contract.[100] The court held that when a client discharges an attorney, with or without cause, the appropriate measure of recovery is *quantum meruit* for the reasonable value of services provided.[101]

The court took notice of "the contemporary and regulated status of today's attorney-client relationship relative to fees."[102] It stated that the principal concern in these cases is the "trust and confidence" between the parties.[103] The court concluded that *quantum meruit* is the most appropriate means to accommodate both attorney and client.[104]

While the *Fox & Associates* court established the *quantum meruit* standard, it did not clarify or expand upon the standard. The court, in dictum, noted that an attorney may recover the full contract price if the attorney had substantially performed or was discharged "on the courthouse steps."[105] This ruling, however, creates uncertainty in determining the appropriate award when the attorney is discharged. In support of its holding, the court cited cases from different categories of *quantum meruit* recovery.[106] Questions remain as to whether (1) substantial performance is used in lieu of the *quantum meruit* approach, or (2) substantial performance is merely a factor in the *quantum meruit* analysis.[107]

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98. *Id.* at *7-8.

99. *Fox & Assocs.*, 541 N.E. 22 at 450. *Scheinesohn* allowed for full recovery under the contract price when the attorney had not performed under a fixed fee contract. Scheinesohn v. Lemonek, 95 N.E. 913 (Ohio 1911). *Roberts* allowed for recovery under a contingent fee contract where there had been partial performance. Roberts v. Montgomery, 154 N.E. 740 (Ohio 1926).

100. *Fox & Assocs.*, 541 N.E.2d at 450.

101. *Id.*

102. *Id.* at 449. The court then noted the fee guidelines set forth under Ohio Code of Professional Responsibility DR 2-106(A) through (C). *Id.* at 450.

103. *Id.* at 450.

104. *Id.*

105. *Id.*

106. *Id.*; *see supra* text accompanying notes 68-77.

107. An additional issue not before the court in this case was when exactly the attorney's cause of action under *quantum meruit* accrues. Some courts permit an attorney to recover promptly, as would a worker or supplier. Trenti, Saxhaug, Berger, Roche, Stephenson, Richards & Aluni, Ltd. v. Nartnik, 439 N.W.2d 418 (Minn. Ct. App. 1989). The *Nartnik* court stated that the client breached the contract. *Id.* at 421. The court reasoned that because the terms of the contract were unenforceable, the attorney should be compensated immediately. *Id.* The primary

B. *Description of Two-Tier Standard*

As an alternative to the *Fox & Associates* approach, Ohio courts should adopt a two-tier analysis which adequately addresses the concerns raised in the prior cases.[108] The first tier provides for recovery on the contract for substantial performance. The second tier awards the lesser of the contract price or a *quantum meruit* amount in cases of partial performance.[109] Under this partial performance tier, the subsequent attorney receives the remainder of the contract amount after the discharged attorney receives compensation.

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concern of the court was that the client may unnecessarily "string out" payment until another firm settled the case. *Id.* at 421.

The view that an attorney may recover before the conclusion of the client's case has been adopted in other jurisdictions. Booker v. Midpac Lumber Co., 649 P.2d 376, 379 (Haw. 1982). The fact that the attorney is discharged prior to the occurrence of the contingency is considered "as putting an end to the contract." *Id.* at 379. New York has recognized that the attorney's cause of action accrues immediately. *In re* Tillman, 181 N.E. 75, 76 (N.Y. 1932). There, the court asserted that since the attorney could "enforce his claim by action, he need not . . . be compelled to await the outcome of the litigation from which he has been displaced." *Id.* at 76.

Recent cases require that the discharged attorney wait until the occurrence of the contingency before filing the *quantum meruit* claim. Fracasse v. Brent, 494 P.2d 9, 14 (Cal. 1972); Rosenberg v. Levin, 409 So. 2d 1016, 1022 (Fla. 1982). One court has noted that, while this view "may not comport with traditional contract law," public policy dictates that the nature of the attorney-client relationship be protected in this way. Plaza Shoe Store, Inc. v. Hermel, Inc., 636 S.W.2d 53, 59 (Mo. 1982).

In Ohio, the current law states that a wrongfully discharged attorney may recover compensation only when the client is actually compensated. Michael D. Tully Co. v. Donnelly, 537 N.E.2d 242, 245 (Ohio Ct. App. 1987). The court further stated that it was against public policy to allow an attorney to recover when the client may not. *Id.* at 246.

This is consistent with the Ohio Code of Professional Responsibility. Ethical consideration 2-19 allows contingent fee contracts under the premise that there was a *res* from which the fee can be recovered. OHIO CODE OF PROFESSIONAL RESPONSIBILITY EC 2-19 (Anderson Supp. 1991). An attorney should not recover when the client has not because it is improper to take a fee out of the client's assets. MACKINNON, *supra* note 1, at 63.

108. *Fracasse*, 494 P.2d 9 (Cal. 1972); *Rosenberg*, 409 So. 2d 1016 (Fla. 1982); Anderson v. Gailey, 606 P.2d 90 (Idaho 1980); *Nartnik*, 439 N.W.2d 418 (Minn. Ct. App. 1989). *See infra* notes 110-222 and accompanying text.

109. LAW GOVERNING LAWYERS, *supra* note 8, § 52(2). The text of § 52 reads as follows:

> When the client-lawyer relationship ends before the lawyer has completed the services due for a matter:
>
> (1) A lawyer who has been discharged without forfeiting the lawyers fee under § 49 and after substantially performing the services due, or any severable part of them, may recover the compensation provided by any otherwise enforceable agreement, less the value of the services that the lawyer did not provide because of the discharge; and
>
> (2) When a lawyer's compensation is not forfeited under § 49 and the lawyer is not entitled to recover under Subsection (1), the lawyer may recover the lesser of the fair value of the lawyer's services as determined under § 51 and the compensation provided by any otherwise enforceable agreement between lawyer and client for services performed.

Id.

1. First Tier: Substantial Performance

The right to recover under the theory of substantial performance is determined by whether or not the party withholding payment had received substantially all of the services contemplated in the contract.[110] In order to apply this doctrine, there must be a showing as to the scope of the contract. In a contingent fee contract, an attorney, and subsequently the court, must consider the amount of effort necessary to render a final judgment. Thus, the contemplated amount of effort determines the scope of the contract.[111]

At least two jurisdictions have adopted this substantial performance standard.[112] Substantial performance is found under a contingent fee contract in these jurisdictions when the attorney has "performed valuable services contributing to the results finally obtained by the client."[113] The attorney must also demonstrate his ability to be ready, willing, and able to continue his client's case.[114]

This doctrine protects the attorney from the client's wrongful discharge.[115] An example of such motive is when the client has "no significant reason for discharging the lawyer other [t]han [sic] avoiding the contractual fee."[116] While it is universally recognized that a client has an absolute right to discharge an attorney,[117] this first tier requires a degree of good faith on the part of the client. One court noted that an attorney assumes the risk that his client may abandon the litigation or settle without consultation under a contingent fee contract.[118] That court, however, asserted that the attorney does not assume the risk of wrongful discharge by the client in the hope of limiting monetary liability to *quantum meruit*.[119] The *Walters* court further asserted that such opportunistic conduct would essentially reduce the agreement to a unilateral contract.[120]

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110. 17A C.J.S. *Contracts* § 508 (1963).

111. STUART M. SPEISER, ATTORNEY'S FEES § 2:26 at 116 (1973).

112. Kaushiva v. Hutter, 454 A.2d 1373 (D.C. 1983), *cert. denied*, 464 U.S. 820 (1984) (attorney may recover contract amount if he substantially performs); Walters v. Hastings, 500 P.2d 186 (N.M. 1972) (attorney should recover on contract; client should not escape liability of bargain yet retain benefit of that same bargain).

113. *In re* Waller, 524 A.2d 748, 750 (D.C. 1987).

114. *Kaushiva*, 454 A.2d at 1375.

115. LAW GOVERNING LAWYERS, *supra* note 8, § 52 cmt. b.

116. LAW GOVERNING LAWYERS, *supra* note 8, § 52 cmt. b.

117. WOLFRAM, *supra* note 27, § 9.4 at 545.

118. Walters v. Hastings, 500 P.2d 186, 192 (N.M. 1972) (quoting Friedman v. Mindlin, 155 N.Y.S. 295, 298 (City Ct. of N.Y. 1915)).

119. *Id.* at 193.

120. *Id.* A unilateral contract creates a legal obligation whereby only one party has made a promise. 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 13 (3d ed. 1957). By

Courts that have adopted the substantial performance standard examine the amount of work performed by the attorney prior to discharge.[121] In *Kaushiva v. Hutter*, the attorney (Hutter) had been hired to represent the client (Kaushiva) in an arbitration hearing.[122] Hutter took the case under a fifteen percent contingent fee contract.[123] An additional fifteen percent was agreed to be sent to a Mr. Lilly, an attorney Kaushiva previously discharged.[124] Hutter represented Kaushiva at the hearing.[125] After the arbitrators requested additional briefs, Hutter told his client that he believed there would be a favorable verdict and that he would file the brief after allowing Kaushiva to look it over.[126] Kaushiva, however, demanded to see the brief sooner than anticipated and, when Hutter told Kaushiva this was impossible, Kaushiva discharged him.[127] The *Kaushiva* court found that Kaushiva had effectively frustrated Hutter's performance and, therefore, Hutter was entitled to the contracted amount.[128]

In another case applying the substantial performance standard, *Walters v. Hastings*,[129] an attorney (Brown) was hired by a Mr. Herman Walters to recover damages for his son for injuries resulting from an automobile accident. The plaintiffs settled an initial claim against Walters' brother-in-law, a passenger in the other automobile.[130] After this settlement, Brown had established several claims for recovery, the theoretical basis of these claims, and the possible amount to be recovered.[131] Walters, however, pursued other avenues of recovery and subsequently agreed to a settlement without the advice or consent of Brown.[132] Brown then asserted a charging lien against Walters and his insurer.[133] Brown maintained that his contract covered the settlement Walters received.[134] The *Walters* court found that the contract covered the second settlement and that Brown was entitled to recovery.[135] The

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allowing the client to avoid compensating the attorney, only the attorney has made a promise to uphold the legal obligation.

121. Kaushiva v. Hutter, 454 A.2d 1373, 1375 (D.C. 1983), *cert. denied*, 464 U.S. 820 (1984); *Walters*, 500 P.2d at 187-88.

122. *Kaushiva*, 454 A.2d at 1374.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. 500 P.2d 186 (N.M. 1972).

130. *Id.* Walters' brother-in-law was sued under the family purpose doctrine. *Id.* at 188.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 193.

court stated that the discharge was "without justification" and that such discharge was not contemplated by the attorney as a risk in contracting.[136]

In essence, these cases assert that substantial performance should be applied when discharge is without justification[137] or frustrates the performance of the attorney.[138] If a court does not find substantial performance on the part of the discharged attorney, the second tier of the contingent fee analysis should be applied.

2. Second Tier: Lesser of Quantum Meruit or Contract

Under this two-tier analysis which the Ohio courts should adopt, the second tier evaluates partial performance under contingent fee contracts. The attorney, when discharged, should be entitled to the lesser of fair value of services rendered or the contract fee.[139] This tier is similar to the "modified" *quantum meruit* approach.[140]

This second tier protects the interests of both the client and the attorney. The client should not be penalized for exercising his right of discharge by requiring that he pay the full contract price.[141] To give full effect to that right, the cost to the client should be as low as possible. Under this tier, the attorney will receive proper compensation. If the reasonable value of services exceeds the contract fee, the attorney receives the contracted fee. There is no windfall. If the reasonable value of services does not exceed the contract fee, the attorney only receives that reasonable value. In either case, the attorney obtains "a fair fee" and the client is liable for the minimum amount possible.[142] This rule has been substantially followed in some jurisdictions.[143]

This partial performance analysis will dispel the concerns expressed by some courts regarding the client's liability for multiple fees.[144] Under this standard the work product of the attorney belongs to

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136. *Id.*

137. *Id.*

138. Kaushiva v. Hutter, 454 A.2d 1373, 1374 (D.C. 1983).

139. LAW GOVERNING LAWYERS, *supra* note 8, § 52(2).

140. Rosenberg v. Levin, 409 So. 2d 1016, 1021 (Fla. 1982); Morris v. Detroit, 472 N.W.2d 43, 48 (Mich. Ct. App. 1991); Plaza Shoe Store, Inc. v. Hermel, Inc., 636 S.W.2d 53, 60 (Mo. 1982).

141. LAW GOVERNING LAWYERS, *supra* note 8, § 52 cmt. c.

142. LAW GOVERNING LAWYERS, *supra* note 8, § 52 cmt. c.

143. Kaushiva v. Hutter, 454 A.2d 1373 (D.C. 1983). The attorney was deemed to have substantially performed when discharged after an appellate hearing. *Id.* at 1375. *Cf.* Anderson v. Gailey, 606 P.2d 90 (Idaho 1980) (recovery based on contract price less allowance for services not rendered); *see supra* notes 78-80 and accompanying text.

144. Fracasse v. Brent, 494 P.2d 9, 13 (Cal. 1972); Rosenberg v. Levin, 409 So. 2d 1016, 1021 (Fla. 1982); Plaza Shoe Store, Inc. v. Hermel, Inc., 636 S.W.2d 53, 60 (Mo. 1982).

the client.[145] Thus, when the client approaches a new attorney, that attorney is relieved of repetitious actions because the client will give the new attorney the work completed by the discharged attorney. Proponents of this view argue that the client should be able to find an attorney that will not charge for services he has not performed.[146]

This partial performance tier insures that the attorney receives the amount earned in performance of the contract without subjecting the client to dual liability for one work product. The second tier utilizes a modified *quantum meruit* standard that is grounded in the implied-in-fact doctrine.[147] The following sections explain why this doctrine is advocated.

C. *General Agency Principles*

A difficulty with *quantum meruit* recovery is its theoretical nature. While pure agency principles are limited in their application to these cases, these principles do provide some guidance.[148] Given that *quantum meruit* recovery in attorney-client contracts is not based on breach of contract, agency law imposes liability on the principal for the amount stipulated in the contract plus "the value, not exceeding the agreed ratable compensation, of services for which the compensation is not apportioned."[149] The agent cannot recover, however, for services rendered that were not part of the agreed exchange.[150]

While agency law provides some assistance, these principles are designed to govern agency relationships where the agent is less powerful than the principal. The attorney-client relation, however, generally does not follow this premise. Courts have emphasized the principal-client's ability to terminate his attorney at will to compensate for heightened reliance on the agent-attorney.[151] This policy places the attorney

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145. *Plaza Shoe Store, Inc.*, 636 S.W.2d at 57.

146. LAW GOVERNING LAWYERS, *supra* note 8, § 52 cmt. c.

147. *See infra* notes 174-76 and accompanying text.

148. LAW GOVERNING LAWYERS, *supra* note 8, at 203-04. One of the reasons for restriction of the freedom of contract between attorney and client is that the "principal entrusts important matters to a lawyer as agent, an agent whom the client cannot control closely and who may be motivated to profit at the principal's expense." LAW GOVERNING LAWYERS, *supra* note 8, at 203-04.

149. RESTATEMENT (SECOND) OF AGENCY § 452 (1958). Comment (a) specifically states that this section applies where the employment is terminable at will. *Id.* § 452 cmt. a. Section 449, comment (b) states that an attorney may have a cause of action against a client if that client settles by himself or hires another attorney. *Id.* § 449 cmt. b. This comment, however, seems to be directed at the situation in which the client hires another attorney while the first attorney is still employed by the client.

150. *Id.* § 453. This section precludes recovery for services not part of the exchange "even if the principal benefits from services." *Id.*

151. Fracasse v. Brent, 494 P.2d 9 (Cal. 1972); Rhoades v. Norfolk & W. Ry. Co., 399 N.E.2d 969 (Ill. 1979); Plaza Shoe Store, Inc. v. Hermel, Inc., 636 S.W.2d 53 (Mo. 1982); E.

in a detrimental position and may prove inequitable to the attorney if abused by the client.

D. Traditional Contract Damages

"The legal status accorded the attorney's claim to his fee will depend upon the attitudes which surround the legal profession itself."[152] This statement is indicative of the strain between traditional contract principles and the attorney-client relationship. This tension is grounded in the perceived and sometimes actual inequity in bargaining position between attorney and client.[153] Although the attorney-client relationship is essentially contractual, it is considered as a unique arrangement of its own. If traditional contract principles governed the relationship, the client's discharge of the attorney would be a breach of contract and the attorney could recover under the principles of expectancy, reliance, or restitution damages.[154]

Under expectancy principles, the attorney would recover the full contract amount because the purpose of this remedy is to place the non-breaching party in the same position as if the contract had been fully performed.[155] The possibility of expectancy damages deters a breach of contract because this measure of damages will essentially allow the wrongfully discharged attorney to recover the full contract price.[156]

Reliance and restitution principles are similar in their calculation of damages. The purpose of reliance recovery is to place the non-breaching party in as good a position as before the contract was made.[157] Restitution damages seek to prevent unjust enrichment.[158] The major distinction between the two is that the reliance interest re-

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Randall Morrow, Note, *Attorney's Right to Compensation when Discharged Without Cause From a Contingent Fee Contract* - Covington v. Rhoades, 15 WAKE FOREST L. REV. 677, 683 (1979).

152. L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 2*, 46 YALE L. J. 373, 398 (1937) (hereinafter Fuller (2)).

153. *See supra* notes 12-17 and accompanying text.

154. L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L. J. 52, 53-54 (1936).

155. *Id.* at 54 (defendant would be ordered to pay the money value of the performance contracted for).

156. *Id.* at 61.

157. *Id.* at 54 (defendant would be ordered to pay that amount the court finds the plaintiff expended in preparation of performance).

158. *Id.* (defendant would be ordered to return to the plaintiff the value of the services actually conferred to the defendant).

lates to preparation whereas the restitution interest is directed to compensate for services performed.[159]

E. Why Implied-in-Law Doctrine is Inadequate

An implied-in-law foundation for *quantum meruit* recovery creates an analytical obstacle when applying *quantum meruit* to attorney-client contracts. Many courts have held that the right to recovery under *quantum meruit* is implied-in-law.[160] Shifting the theoretical basis of *quantum meruit* to the implied-in-fact doctrine provides a better reasoned foundation. This shift also circumvents the inconsistencies and semantic difficulties created by the implied-in-law doctrine.

States which consider the client's action to be a breach of the contract allow the attorney the alternative of collecting under *quantum meruit* or traditional contract remedies.[161] While recognizing the necessity of giving the attorney-client contract special consideration, these courts emphasize the attorney's reliance interest.[162] These cases do not draw the distinction between reliance and restitution; the attorney may recover whether or not the client directly benefits from the services.[163]

Some courts have acknowledged the sensitivity of the attorney-client relationship by asserting the discharge of the attorney is not a breach, but rather the exercise of a term of the contract implied-in-law.[164] In *Fracasse v. Brent*, the California Supreme Court asserted that the right to discharge is implied in law because of "the special relationship between the contracting parties."[165] In that case, an attorney, George Fracasse, was hired under a contingent fee contract to pursue a personal injury claim for Brent.[166] Brent discharged Fracasse shortly thereafter and Fracasse filed suit claiming an entitlement to one-third of any recovery ultimately attained.[167] The court concluded

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159. Fuller and Perdue take note of Martin v. Camp, 114 N.E. 46 (N.Y. 1916), and assert that the client's liability not only included restitution recovery but also "apparently extends to the reliance interest of the attorney . . . ." Fuller (2), *supra* note 152, at 398.

160. Fracasse v. Brent, 494 P.2d 9 (Cal. 1972); Plaza Shoe Store, Inc. v. Hermel, Inc., 636 S.W.2d 53 (Mo. 1982); Martin v. Camp, 114 N.E. 46 (N.Y. 1916).

161. French v. Cunningham, 49 N.E. 797 (Ind. 1898); Mandell & Wright v. Thomas, 441 S.W.2d 841 (Tex. 1969); *see also* Johnston v. California Real Estate Investment Trust, 912 F.2d 788 (5th Cir. 1990) (following holding of *Thomas* despite what the court believed to be an inequitable result arising from attorney's ability to choose between alternate theories of recovery).

162. Fuller (2), *supra* note 152, at 398; *see also French*, 49 N.E. at 799; *Camp*, 114 N.E. at 48; *Thomas*, 441 S.W.2d at 847.

163. Fuller (2), *supra* note 152, at 398 n.165; *French*, 49 N.E. at 799; *Camp*, 114 N.E. at 48; *Thomas*, 441 S.W.2d at 847.

164. *Fracasse*, 494 P.2d at 13; *Plaza Shoe Store, Inc.*, 636 S.W.2d at 58; *Camp*, 114 N.E. at 47.

165. *Fracasse*, 494 P.2d at 13.

166. *Id.* at 10.

167. *Id.*

that it would be inappropriate to penalize the client for exercising her implied right to discharge.[168] Given the fact that *Fracasse* utilized the implied-in-law contract doctrine it is helpful to review the doctrine's basic principles.

A contract implied-in-law occurs when the court believes that equity requires that a term be implied to avoid unfairness or to advance a presumed intention.[169] A court allows a plaintiff to recover under *quantum meruit* if the court finds "(1) [that] the defendant received a benefit, (2) [that it was] at . . . plaintiff's expense, and (3) . . . that it would [be unfair] for the defendant to retain the benefit without paying for it."[170] Courts should not continue to apply this formula in attorney-client contract cases because there is no unjust enrichment.[171] The work product of the attorney is the property of the client.[172] It is a term of the contract and, under the attorney-client relationship, the client's retention of the work product is just.

A more appropriate option is an implied-in-fact doctrine where the conduct of the parties is considered to make the contract terminable at will. *Quantum meruit* recovery will be allowed under the implied-in-fact doctrine if the plaintiff can show: (1) that the defendant requested plaintiff to perform work; (2) that the plaintiff expected compensation for services; and (3) that the defendant knew or should have known the plaintiff expected compensation.[173] There is a manifest intent between the parties under this theory.[174] Applying this test to a contingent fee contract, the client requested the attorney's services and the attorney expected compensation. If the intent and conduct of the parties established a contract terminable at will, the client is responsible for any compensation owed.[175] Determination of the rights and duties owed would be governed by agency principles.[176] Adherence to the implied-

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168. *Id.*

169. 66 AM. JUR. 2D *Restitution and Implied Contracts* § 2 (1973).

170. Candace S. Kovacic, *A Proposal to Simplify Quantum Meruit Litigation*, 35 AM. U. L. REV. 547, 554 (1986). The author, however, notes the unique nature of attorney-client contracts and states they are of little precedential value to her article. *Id.* at 552 n.10.

171. Plaza Shoe Store, Inc. v. Hermel, Inc., 636 S.W.2d 53, 57 (Mo. 1982).

172. *Id.*

173. Kovacic, *supra* note 170, at 554.

174. 66 AM. JUR. 2D *Restitution and Implied Contracts* § 2 (1973).

175. *See supra* note 149 and accompanying text.

176. LAW GOVERNING LAWYERS, *supra* note 8, at 203-04. *See supra* notes 148-51 and accompanying text. The Restatement (Second) of Agency § 452 states:

> Unless otherwise agreed, if the principal has contracted to pay the agent for his services and the relation terminates without breach of contract by either party, the principal is subject to liability to pay to the agent for services previously performed and which are part of the agreed exchange:
>
> (a) the agreed compensation for services for which compensation is apportioned in the contract; and

in-fact doctrine would avoid the difficulties created by applying implied-in-law *quantum meruit* recovery to contingent fee agreements and place a court's rationale on a solid foundation.

D. Amount of Recovery Allowed in Other States and How a Two-Tier Standard Would Apply

A two-tier system based on a distinction between partial and substantial performance provides the most equitable solution to the attorney-client discharge dilemma.[177] Both parties fear being taken advantage of by the other. This two-tier structure protects the attorney in the event he is discharged after enormous effort on his part.[178] The client remains free to exercise the contractual right to discharge the attorney and hire a second attorney without paying additional compensation.[179]

The merits of this two-tier structure can be demonstrated through an evaluation and analysis of the three applications of *quantum meruit* discussed above.[180] The approach applied in New York provides that quantum meruit recovery may exceed the contract price.[181] Florida's approach allows for *quantum meruit* recovery limited to the fee established in the contract.[182] The position taken in California holds the client liable to the discharged attorney for the contract fee and subject to the fee of the subsequent attorney.[183]

1. New York Approach

New York courts have adopted the position that *quantum meruit* recovery may exceed the contract price.[184] This form of recovery is based on the argument that once the client invokes his right to dis-

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(b) the value, not exceeding the agreed ratable compensation, of services for which the compensation is not apportioned.

RESTATEMENT (SECOND) OF AGENCY § 452 (1958). Comment (a) states that this section applies "where the principal or agent exercises a privilege of terminating the relation . . . because the employment was at will." *Id.*

177. LAW GOVERNING LAWYERS, *supra* note 8, § 52; *But see* Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982); Plaza Shoe Store, Inc. v. Hermel, Inc., 636 S.W.2d 53 (Mo. 1982).

178. LAW GOVERNING LAWYERS, *supra* note 8, § 52 cmt. b.

179. LAW GOVERNING LAWYERS, *supra* note 8, § 52 cmt. c. This position assumes that the client is able to negotiate a contract with a second attorney at a reduced cost since the subsequent attorney would not have to do preliminary work. *Id.*

180. *See supra* notes 68-77 and accompanying text.

181. Finkelstein v. Kins, 511 N.Y.S.2d 285 (N.Y. App. Div. 1987). *See infra* notes 184-87 and accompanying text.

182. Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982); *see also* Plaza Shoe Store, Inc. v. Hermel, Inc., 636 S.W.2d 53 (Mo. 1982). *See infra* notes 196-211 and accompanying text.

183. Fracasse v. Brent, 494 P.2d 9 (Cal. 1972); *See infra* notes 212-15 and accompanying text.

184. Lai Ling Cheng v. Modansky Leasing Co., Inc., 525 N.Y.S.2d 328 (N.Y. App. Div. 1988); *Finkelstein*, 511 N.Y.S.2d at 285.

charge, the contract is expunged.[185] The contract, however, can be considered with other items as evidence of reasonable compensation.[186] While New York courts are sensitive to the uniqueness of attorney-client contracts and client freedoms,[187] this method of recovery is unfair to the client for two reasons.

First, although the rule satisfies the financial expectations of attorneys, the rule acts to significantly restrict a client's right to discharge. Not only can the discharged attorney recover an amount in excess of the contract price, the attorney can file his cause of action immediately upon discharge.[188] This approach places undue emphasis on the attorney's interest in compensation.[189]

Second, the client is prejudiced by having to pay a higher price for the value of services performed even though the amount of services may not constitute substantial performance under the contract. The contract price is the client's form of insurance.[190] The agreed percentage manifests the attorney's risk under a contingent fee contract.[191] It reflects the fact that more work than usual might be required.[192] Just as the attorney would not be permitted to ask for added compensation upon fulfillment of the contract,[193] *quantum meruit* should not exceed the contract price in the case of partial performance. Clearly, this approach has the practical effect, like the contract rule,[194] of discouraging a client from exercising his right to discharge his attorney.[195]

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185. *In re* Tillman, 181 N.E. 75 (N.Y. 1932). The court stated "such an agreement cannot be partially abrogated. Either it wholly stands or totally falls." *Id.* at 75.

186. *Id.* The *Tillman* court also reasoned that "the value of one attorney's services is not measured by the result attained by another." *Id.* A later court listed the size of recovery as an element of consideration in determining the reasonable fee. *Lai Ling Cheng*, 525 N.Y.S.2d at 330.

187. Matter of Krooks, 178 N.E. 548, 549 (N.Y. 1931) ("[t]he peculiar relationship of trust and confidence which ought to exist between attorney and client injects into the contract special and unique features."); Martin v. Camp, 114 N.E. 46 (N.Y. 1916); *Finkelstein*, 511 N.Y.S.2d at 285.

188. *Tillman*, 181 N.E. at 76.

189. *Martin*, 114 N.E. at 47. The court stated "the principle never has been adopted in this state that the professions of physicians and counsellors are merely honorary, and that they are not of right entitled to demand and receive a fair compensation for their services." *Id.*

190. Jay, *supra* note 9, at 815.

191. Jay, *supra* note 9, at 815.

192. Jay, *supra* note 9, at 842. ("[t]he percentage might change a few points to account for the difficulty of the case . . . .").

193. RESTATEMENT (SECOND) OF AGENCY § 444 (1958).

194. *See* French v. Cunningham, 49 N.E. 797 (Ind. 1898); Mandell & Wright v. Thomas, 441 S.W.2d 841 (Tex. 1969).

195. Morrow, *supra* note 151, at 683.

2. Florida Approach

In *Rosenberg v. Levin*, the Florida Supreme Court adopted the modified *quantum meruit* approach and restricted the maximum *quantum meruit* recovery to the contract price.[196] In that case, the attorney was to receive $10,000 unless the client recovered over $600,000 on his claim.[197] The attorney then would receive fifty percent of that recovery.[198] The client discharged the attorney and then settled the claim for $500,000.[199] The attorney sought compensation in excess of the $10,000 clause.[200] The court noted with approval the decision of a Tennessee appeals court which based its rejection of allowing recovery in excess of the contract fee on the grounds that unscrupulous attorneys may encourage their clients to discharge them and collect a windfall.[201] The court adopted this rule because the client "must rely entirely on the good faith efforts of the attorney in representing his interests."[202]

This policy was subsequently extended to include those instances when discharge was nearly contemporaneous with the client's recovery.[203] In *Trend Coin Co. v. Fuller, Feingold & Mallah*, the Florida Court of Appeals noted the strict adherence to the *Rosenberg* rule in Florida.[204] The *Trend Coin* court also employed the criteria established by *Rosenberg* to determine the reasonable value of attorney's fees.[205] These criteria are "the totality of the circumstances surrounding the professional relationship between the attorney and client . . . [including] . . . time, the recovery sought, the skill demanded, the results obtained, and the attorney-client contract."[206]

The Florida approach is subject to attack on two grounds. First, under the totality of the circumstances approach, the results obtained is dispositive— not just a factor. It appears that the attorney's effort must achieve the desired result. It is not enough that the attorney has done all that is necessary except performing the formality of making the set-

196. Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982).

197. Levin v. Rosenberg, 372 So. 2d 956, 957 (Fla. Dist. Ct. App. 1979).

198. *Id.*

199. *Id.*

200. *Id.*

201. *Rosenberg*, 409 So. 2d at 1021. The court cited Chambliss, Bahner & Crawford v. Luther, 531 S.W.2d 108, 113 (Tenn. Ct. App. 1975). However, a Tennessee court of appeals, in Brownlow v. Payne, 2 Tenn. App. 154 (1925), used the contract rule. The two cases were harmonized in Adams v. Mellen, 618 S.W.2d 485, 488 (Tenn. Ct. App. 1981).

202. *Rosenberg*, 409 So. 2d at 1021.

203. Trend Coin Co. v. Fuller, Feingold & Mallah, 538 So. 2d 919, 921 (Fla. Dist. Ct. App. 1989).

204. *Id.*

205. *Id.* at 922.

206. *Id.* (citing *Rosenberg*, 409 So. 2d at 1022).

tlement of the case official.[207] An attorney who has substantially performed is entitled to only modified *quantum meruit* relief. The emphasis on results obtained provides a disincentive for an attorney to work diligently regardless of the form of contingent fee agreement.[208]

Second, recovery under the Florida approach does not take into account the possiblity of abuse by the client. While the second tier of the proposed two-tier analysis is similar to modified *quantum meruit*,[209] it offers a remedy for this scenario. This type of client abuse is the exact problem found in *Rosenberg*. Equity is disserved by allowing only *quantum meruit* recovery even when the contingency (client recovery) is about to occur. While some may argue that the attorney may contract for a minimum recovery to prevent waste of effort,[210] it is only a minimal attempt to gain compensation. The attorney is still deprived of compensation to which he is entitled. Moreover, any increase in the flat fee clause runs the risk of inhibiting the client in the exercise of his right to discharge his attorney. By allowing the client to wield this power, this approach may discourage the creation of contingent fee contracts. There is no rational reason for protecting such an abuse of a right.[211] The two-tier approach is a viable alternative to the Florida approach.

3. California Approach

The California courts have developed a system that is the closest to the position advocated in the two-tier approach.[212] This approach, however, has two distinct problems. The California Supreme Court established *quantum meruit* as the appropriate standard of recovery in *Fracasse v. Brent*.[213] A California Court of Appeals subsequently interpreted *Fracasse* to allow the use of a pro rata formula that divides the recovery between the attorneys based on the proportion of *time* each attorney spent on the case.[214] This system protects the client from double fees and compensates the attorneys for their work.[215]

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207. *Id.* at 921 (citing Barton v. McGovern, 504 So. 2d 457 (Fla. Dist. Ct. App. 1987)).

208. Jay, *supra* note 9, at 857-62.

209. *See supra* text accompanying note 140.

210. *See* Kirshenbaum v. Hartshorn, 539 So. 2d 497 (Fla. Dist. Ct. App. 1989).

211. LAW GOVERNING LAWYERS, *supra* note 8, § 52 cmt. b.

212. Fracasse v. Brent, 494 P.2d 9 (Cal. 1972); Schneider v. Kaiser Found. Hosps., 264 Cal. Rptr. 227 (Cal. Ct. App. 1989); Spires v. American Bus Lines, 204 Cal. Rptr. 531 (Cal. Ct. App. 1984).

213. *Fracasse*, 494 P.2d at 14.

214. *Spires*, 204 Cal. Rptr. at 533; *see also* Saucier v. Hayes Dairy Prods., Inc., 373 So. 2d 102 (La. 1979) (the discharged and subsequent attorney used factors in Code of Professional Responsibility to divide highest ethical contingency fee).

215. *Spires*, 204 Cal. Rptr. at 533.

While this method provides adequate protection to the client, it is still detrimental to the attorneys. This method is based on the presumption that time equals services. It ignores those factors considered by courts and other authorities such as the experience of the attorneys and the difficulties in the case.[216] The method should focus on the amount of work accomplished in the preparation of the case and the scope of the contract,[217] rather than the amount of time expended.

The other problem with the California rule is its terminology. Another California court has recently stated that an attorney discharged just before the conclusion of the case may use the remedy of *quantum meruit* to recover the full contract price.[218] Under this application, the attorney can collect the full contract price if he can show that the contract price is the appropriate *quantum meruit* recovery.[219] This approach is identical to the "totality of the circumstances" test used in Florida.[220] The California rule, therefore, is subject to the same criticisms as the Florida rule.[221] Client abuse and attorney disinterest remain real threats within the California approach.

In allowing recovery for the entire amount, the court essentially allows recovery under substantial performance.[222] It is confusing to both attorneys and clients to include substantial performance in a *quantum meruit* definition. The separation of these terms and doctrines would clarify the positions and obligations of both parties to contingent fee contracts.

4. Application of Two-Tier Standard

The two-tier standard can be clarified by application to a specific fact pattern. X was injured in an automobile accident. She was a pedestrian struck by a car driven by Y. X hired attorney Z to represent her. X and Z agreed to a written contingent fee agreement where Z will get thirty percent of the net recovery upon the successful prosecution of the case. X then sued on the ground that Y negligently operated his vehicle and Y raised the defense of contributory negligence. Z ob-

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216. *See, e.g.*, Rosenberg v. Levin, 409 So. 2d 1016, 1022 (Fla. 1982); Tillman v. Komar, 181 N.E. 75, 76 (N.Y. 1932); OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (Anderson Supp. 1991). In actuality, the California Court of Appeals in *Spires* appears to ignore those very factors set forth in Los Angeles v. Los Angeles-Inyo Farms Co., 25 P.2d 224, 227-28 (Cal. Ct. App. 1933), such as the nature and difficulty of litigation, the amount involved, the skill required, the attention given, and the success or failure of effort.

217. *See supra* note 111 and accompanying text.

218. Schneider v. Kaiser Found. Hosps., 215 Cal. Rptr. 227, 230 (Cal. Ct. App. 1989).

219. *Id.*

220. *Rosenberg*, 409 So. 2d at 1022.

221. *See supra* notes 207-11 and accompanying text.

222. *See* Kaushiva v. Hutter, 454 A.2d 1373 (D.C. 1983).

tained depositions from both X and Y and witnesses to the accident. He conducted an inspection of the accident scene complete with photographs. He issued and answered interrogatories. Upon completion of discovery, Z filed a motion for summary judgment. For unknown motives, X then discharged Z. The motion for summary judgment was denied. X hired a new attorney, A, to handle the case at trial. A verdict of $100,000 was received from which there was no appeal.

Under this scenario, a court using this two-tier analysis would determine if Z had made a *prima facie* case for substantial performance. Such a case would be made if Z could show that there was a valid contract and that he had performed a substantial amount of the services necessary to accomplish the goal of the contract.[223] Because of the limited facts presented here, it will be assumed that the written contract in this case is valid. The court would then be left with the task of ascertaining whether performance was substantial. The discharged attorney, Z, would have to show that his services had substantially contributed to the results finally obtained by X.[224] Z must also show he was ready, willing, and able to carry out the remainder of the contract.[225]

Z could show that he had substantially contributed to the verdict received if the second attorney, A, did not perform any additional discovery. The denial of the motion for summary judgment should have little effect on the determination of substantial performance. The motion deals only with genuine issues of material fact, not with the likelihood of success of the case. Had Z not been fired, the only action necessary for him to perform would be to present the case at trial. The discovery created by Z ultimately prevailed at trial. The subsequent attorney, A, was required to do no additional work to accomplish the same result.

Z, on the limited facts provided, could be presumed to be ready, willing, and able to perform when he was fired. This fact is reinforced by the contract itself. He planned to handle the case until it had been successfully litigated. Therefore, under the two-tier standard, the court would probably find Z had substantially performed and X would have to pay thirty thousand dollars to Z. The subsequent attorney, A, would receive nothing under this method unless he had separately contracted with X.[226]

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223. Greenberg v. Sher, 567 A.2d 882, 884 (D.C. 1989).

224. *In re* Waller, 524 A.2d 748, 750 (D.C. 1987).

225. *Kaushiva*, 454 A.2d at 1375.

226. LAW GOVERNING LAWYERS, *supra* note 8, § 52 cmt. c. It is presumed the subsequent attorney, A, could contract for compensation, but he is not entitled to compensation simply by being hired when he did not have to do additional work. *Id.*

A different result would probably be reached if the case was appealed by the defendant Y. Under this circumstance, attorney A would have to prepare the case upholding the trial court judgment. All of the preparations necessary for the appeal would be the sole work of A. This fact could, arguably, remove the case from the scope of substantial performance.

Assuming that the appeal was successful and X prevailed, the issue would be what amount is due to both attorneys. Under the partial performance tier of the two part analysis, the court would award Z the lesser of the *quantum meruit* amount based on the implied-in-fact doctrine or the full contract fee.

The court would first determine the reasonable value of services provided by Z. Among other factors, the court can look to the novelty or difficulty of the issues, the skill of opposing counsel, the time spent in preparation, the amount at stake, and the result obtained for the client.[227] In this case, the result was obtained by attorney Z. Attorney A was hired to preserve the verdict on appeal. Once the court determines Z's contribution to the recovery, the court would compare it to the contract price. The court would award the lesser of the *quantum meruit* amount or the contract price. The subsequent attorney, A, would be entitled to the remainder of the contingent fee percentage. The subsequent attorney could receive additional compensation only if he had separately contracted for more.

The two-tier approach is responsive to a wide variety of fact patterns without forcing the court to strain the application of *quantum meruit*. Moreover, this approach promotes fairness in the attorney-client relationship. Substantial performance insures that the initial attorney will receive what he is entitled to when discharged. It also protects the client from payment of double attorney's fees unless the client separately contracts with a subsequent attorney. The partial performance standard protects the client from payment of excessive fees by imposing a limit on the amount owed. That limit, at its most extreme, is simply the amount originally contracted for by the parties. There is no burden on either the client's obligations or the attorney's expectations under the contract.

IV. CONCLUSION

Contingent fee contracts have long been treated as a unique area of contract and agency law. If there is to be any credence to the claim that the client's right to discharge is to be protected and used effectively, the remedies used after termination should be designed to deal

227. STUART M. SPEISER, ATTORNEY'S FEES §§ 8:4-8:11 (1973).

with as many scenarios as possible, without reducing the attorney's incentive or the client's expectations.

The newly adopted *quantum meruit* standard in contingent fee contracts found in *Fox & Associates v. Purdon* leaves open the issue of defining the extent of *quantum meruit* relief. Rather than adopting either the traditional or modified *quantum meruit* rules, the Ohio courts should adopt a two-tier remedy structure based upon partial performance and substantial performance. This method will provide the best means to protect the integrity of the attorney-client relationship.

Kenneth A. Ewing