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I. INTRODUCTION

The Florida Supreme Court, in Rosenberg v. Levin, resolved a conflict created by recent decisions in the district courts concerning the appropriate basis of compensation for an attorney discharged without cause from a valid employment contract. This question required the court to grapple with the competing interests of a client's right to discharge his attorney without cause and the attorney's right to be adequately compensated for legal services rendered. After one false start, the Rosenberg court held that an attorney, discharged without cause after partial performance of a valid contract, may recover only the reasonable value of his services rendered prior to discharge, limited by the maximum contract fee. The court further held that an attorney, engaged under a contingency fee contract, may bring a claim for relief in quantum meruit only upon the successful happening of the contingency.

Other jurisdictions have balanced the competing interests in the attorney-client relationship by formulating two distinct approaches: the contract rule and the quantum meruit rule. Under the contract rule, a client's premature termination of the attorney-client relationship is considered a breach of contract for which the attorney is entitled to damages equal to the full contract price.

1. 6 Fla. L.W. 388 (June 11, 1981), vacated, 7 Fla. L.W. 6 (Jan. 7, 1982).
2. The court cited the following cases as support for conflict jurisdiction: Milton Kelner, P.A. v. 610 Lincoln Road, Inc., 328 So. 2d 193 (Fla. 1976); Goodkind v. Wolkowsky, 180 So. 538 (Fla. 1938); Levin v. Rosenberg, 372 So. 2d 956 (Fla. 3d Dist. Ct. App. 1979); Sohn v. Brockington, 371 So. 2d 1089 (Fla. 1st Dist. Ct. App. 1979), cert. denied, 383 So. 2d 1202 (Fla. 1980).
3. The prevailing judicial attitude regarding the client's right to discharge was noted in Salem Realty Co. v. Matera, 410 N.E.2d 716 (Mass. App. Ct. 1980): "If it is bootless to make an opera singer sing, it makes still less sense in a civil case to require a lawyer advocate and a client take advice once they have had a falling out." Id. at 719 (citation omitted). See generally F.B. Mackinnon, Contingent Fees for Legal Services 77-80 (1964); 1 S. Speiser, Attorney's Fees § 4:32 (1973).
5. 7 Fla. L.W. at 6. The court's original decision did not limit the attorneys' quantum meruit recovery to the contract fee. On rehearing, however, the majority of the court supported the limitation and the original decision on the merits was vacated.
6. Id. at 8.
7. Justice Overton attached these labels to the respective rules in Rosenberg. The quantum meruit rule is also known as the modern rule.
The quantum meruit rule, however, does not consider the attorney's discharge to be a breach of contract and limits the attorney's recovery to the reasonable value of his services rendered up until the time of discharge. Some jurisdictions allow the discharged attorney to elect whether to sue for breach of the contract or rescind the agreement and recover in quantum meruit. In Rosenberg the Florida Supreme Court resolved the issue in favor of the quantum meruit rule and joined a significant number of jurisdictions which reject the contract approach. This note will examine the development and current status of a Florida attorney's right to compensation upon discharge without cause and will analyze the limited quantum meruit approach taken by the Rosenberg court.

II. THE CONTRACT RULE

Generally, the agreement between attorney and client concerning fees is governed by ordinary contract principles. Based upon this premise, the Florida Supreme Court's decision in Goodkind v. Wolkowsky followed the majority of jurisdictions which held that an attorney, employed for a specified purpose and definite fee, who has been discharged without cause after substantial performance, could bring an action against his former client for breach of contract. The court also considered the contract fee to be the appro-

contracts). Some jurisdictions modify the application of the contract rule by calculating damages equal to the full contract price less the expenses saved in not performing the balance of the contract. E.g., Bockman v. Rorex, 208 S.W.2d 991 (Ark. 1948) (fixed fee contract); Anderson v. Gailey, 606 P.2d 90 (Idaho 1980) (adopted the modified contract rule in a contingent fee case as an alternative to the quantum meruit rule); LaBach v. Hampton, 585 S.W.2d 434 (Ky. Ct. App. 1979) (awarded damages equal to the full contract fee less the reasonable cost of substitute counsel); Tonn v. Reuter, 95 N.W.2d 261 (Wis. 1959) (applied the modified contract rule to a contingent fee contract).


10. E.g., French v. Cunningham, 49 N.E. 797 (Ind. 1898); In re Downs, 363 S.W.2d 679 (Mo. 1963); Mills v. Metropolitan St. Ry. Co., 221 S.W. 1 (Mo. 1920); Howell v. Kelly, 534 S.W.2d 737 (Tex. Civ. App. 1976).


13. 180 So. 538 (Fla. 1938).

14. Id. at 543. Goodkind actually involved a certified public accountant discharged without cause. Since the accountant was employed to represent a taxpayer before the United States Board of Tax Appeals and the same rules that would govern the employment of an
appropriate measure of damages.¹⁵

The traditional justifications cited by the courts for the contract rule acknowledge the unique nature of the attorney-client relationship; yet these courts impliedly regard the right of an attorney to contract for his services as paramount to the policy which permits the client to sever the relationship at his discretion.¹⁶ At least five justifications are advanced for the contract rule. The primary reason for allowing an attorney to recover the stipulated contract fee is the difficulty in determining the value of partially completed legal work.¹⁷ Second, since the attorney as an independent contractor¹⁸ is capable of contemporaneously performing legal services for numerous clients, evidentiary problems in proving mitigation are raised.¹⁹ Third, the full fee is considered the best measure of damages because it reflects the value the parties themselves placed on the legal services to be performed.²⁰ Fourth, the attorney's duty to avoid conflicts of interest and his obligation to forego employment by the opposing party is an opportunity cost, validly considered in calculating the appropriate rule of damages.²¹ Lastly, the courts seem to apply the "bad man notion"²² which requires that the client be responsible for the entire fee to prevent him from profiting from his own breach.²³

Courts applying the contract rule implicitly assume that the interests of the client are adequately protected by the client's ability to discharge his attorney with cause.²⁴ The general rule is that an

attorney applied to the accountant, the supreme court based its decision upon an attorney-client relationship. Id. at 540.

15. Id. at 543.
19. Id. at 779. But cf. Anderson v. Gailey, 606 P.2d 90 (Idaho 1980) (attorney wrongfully discharged is entitled to recover the contract price, but has a duty to mitigate whether employed under a fixed or contingent fee contract).
20. 7 Fla. L.W. at 7.
21. See, e.g., Scheinesohn v. Lemonek, 95 N.E. 913, 916 (Ohio 1911); see also Note, supra note 18, at 782.
22. See generally Childres & Garamella, The Law of Restitution and the Reliance Interest in Contract, 64 NW. U.L. REV. 433, 435 (1969). The "bad man notion" of the law of contracts is the idea that the party who voluntarily fails to perform is a wrongdoer.
23. E.g., Dolph v. Speckart, 186 P. 32, 35 (Ore. 1920): "[A client] who has wrongfully broken a contract should not be permitted to reap advantage from his own wrong ...." See Note, supra note 17, at 1004.
24. But see Note, supra note 18, at 783-84.
attorney discharged for good and sufficient cause is denied any compensation, regardless of whether he was retained under a fixed or contingent fee contract.\textsuperscript{25} This assumption, however, is insensitive to the fact that conduct which is offensive to a client and imical to a close attorney-client relationship may be insufficient to constitute legal cause for discharge.\textsuperscript{26}

Contract rule jurisdictions have consistently recognized the client's "right" to dissolve the attorney-client relationship at any time with or without cause.\textsuperscript{27} This prerogative is based on the special need for trust and confidence in the relationship between attorney and client.\textsuperscript{28} Although the client's power to discharge an attorney has been "[c]lothed in the vestments of an absolute right,"\textsuperscript{29} the contract rule renders this power impotent because of the client's potential liability for the entire contract fee. The Florida Supreme Court in Goodkind noted that:

\begin{quote}
[T]his power . . . to terminate the attorney's authority must be distinguished from the right to do so . . . [I]f the client has employed the attorney for a definite time, he has negativised his right by the contract. While the client may still terminate the authority of the attorney to represent him, he has breached his contract in doing so, and must respond for the breach.\textsuperscript{30}
\end{quote}

In practice, the contract rule has often placed an onerous burden on the client's power of discretionary discharge.\textsuperscript{31} Not only is the client liable for breach of contract damages to the original attorney, but in order to proceed with the action, the employment of substitute counsel will be necessary. The client, fearful of liability for the full amount of two contracts, is inhibited from terminating

\textsuperscript{25} F. B. Mackinnon, Contingent Fees for Legal Services, 77-80 (1964).
\textsuperscript{26} E.g., Zurich Gen. Accident & Liability Ins. Co. v. Kinsler, 81 P.2d 913 (Cal. 1938) (cause must not only be good, but legally sufficient for discharge); Warner v. Basten, 255 N.E.2d 72 (Ill. App. Ct. 1969) (attorney's discharge was without cause even though client learned that attorney had represented opposing party in the past).
\textsuperscript{27} E.g., Goodkind v. Wolkowsky, 180 So. 538 (Fla. 1938); see Speiser, supra note 3, at §§ 4:24, 4:29.
\textsuperscript{28} 180 So. at 541.
\textsuperscript{29} Note, Attorney Dischared Without Cause Under Contingency Fee Contract Entitled Only to Quantum Meruit After Successful Settlement or Judgment—Fracasse v. Brent, 4 Seton Hall L. Rev. 228, 232 (1972).
\textsuperscript{30} 180 So. at 542 (citing Annot. 1917F. L.R.A. at 407). See also Fracasse v. Brent, 100 Cal. Rptr. 385, 389 (1972) (citing 1 Witkin, California Procedure § 39 at 46 (2d ed. 1954).
\textsuperscript{31} This burden is most severe in personal injury cases. See, e.g., Jones v. Brown, 190 P.2d 956 (Cal. Dist. Ct. App. 1948) (Client paid 73½% of recovery in fees to attorneys); Goldberg v. Perlmutter, 31 N.E.2d 333 (Ill. App. Ct. 1941) (attorney who engaged in only initial consultation with client awarded full contingency fee).
the employment of an attorney in whom he has lost trust. Judicial recognition of the “chilling effect” that this objective theory of recovery has upon the client’s right to discharge and the concomitant damage it causes to the intimacy required in the attorney-client relationship has been a catalyst for change.

III. THE QUANTUM MERUIT RULE

In response to the contract rule’s defects in theory and application, a substantial number of jurisdictions hold that an attorney, retained under a contingent fee contract, who is discharged without cause after partial performance, is denied recovery on the contract. The attorney’s remedy is limited to compensation equal to the reasonable value of his services rendered. This modern trend is premised upon policy considerations which distinguish the attorney-client contract from other employment agreements and justify a departure from conventional contract principles. The genesis of the quantum meruit rule can be traced to the New York Court of Appeals decision in Martin v. Camp. In Martin, an assignee to a law firm’s interest in a contingency fee contract was limited to recovery measured by the reasonable value of the firm’s services rather than damages for breach of contract. The court considered the client’s right to terminate the relationship to be an implied condition of the contract. Therefore, it followed as a corollary that the client “[could not] be made liable in damages for doing that

32. 7 Fla. L.W. at 7.
33. In Salopek v. Schoemann, 124 P.2d 21 (Cal. 1942), Justice Gibson noted the Hobson’s choice that confronts the dissatisfied client, and he issued a call for change from the contract rule: The right to discharge is of little value if the client must risk paying the full contract price for services not rendered upon a determination by a court that the discharge was without legal cause. The client may frequently be forced to choose between continuing the employment of an attorney in whom he has lost faith, or risking the payment of double contingent fees equal to the greater portion of any amount eventually recovered . . . Unless a rule is adopted allowing an attorney as full compensation the reasonable value of services rendered to the time of discharge, clients will often feel required to continue in their service attorneys in whose integrity, judgment or capacity they have lost confidence. Id. at 25 (Gibson, J., concurring).
35. In most instances the reasonable value of an attorney’s service will be less than damages for breach; however, this will not be the case in a losing contract situation. See infra note 119 and accompanying text.
36. Note, supra note 18 at 780, 786-89.
37. 114 N.E. 46 (N.Y. 1916).
which under the contract he has a right to do." 38

Since the discharge of counsel without cause does not constitute a breach of contract under Martin, the attorney's measure of recovery falls within the realm of restitution. 39 The contract is rescinded upon discharge and the attorney is entitled to compensation based on quantum meruit. 40 In this context, a quantum meruit determination is based upon the reasonable value of legal services rendered and not the benefit to the client. 41 Quantum meruit recovery is founded upon an implied assumpsit or promise by the client to pay the attorney as much as he reasonably deserves. 42

The quantum meruit rule enhances the client's power to discharge by using the fiction of an implied condition in the contract. This term is a "constructive device used by the courts to effectuate public policy without tarnishing the principles of freedom of contract." 43 Policy considerations require that singular treatment be accorded the attorney-client relationship. Unlike other employment relationships, in the attorney-client relationship, a client must rely almost exclusively upon an attorney's good faith, loyalty and zeal to protect his legal rights. 44 This reliance necessitates complete confidence in the integrity and ability of the attorney to represent the client's best interests and is the foundation upon which the right to discharge is based. 45

Since the "real value of a client's power to discharge is dependent on what it costs him," 46 the quantum meruit rule's objective is to minimize this cost and facilitate the termination of unsatisfactory attorney-client relationships. 47 The cases adopting the

38. Id. at 47-48.
39. RESTATEMENT (SECOND) OF AGENCY § 452 (1958); see generally Childres & Garamella, supra note 22, at 437.
40. 114 N.E. at 48.
41. Heinzman v. Fine, Fine, Legum & Fine, 234 S.E.2d at 286 n.4. In the context of professional service contracts, confusion has resulted because the contract reliance interest (restoration of the status quo) has developed under the guise of restitution (recovery of benefits conferred), namely quantum meruit. Childres & Garamella, supra note 22 at 451-54.
42. Sohn v. Brockington, 371 So. 2d 1089, 1094 (Fla. 1st Dist. Ct. App. 1979) (citation omitted). See generally Hazen v. Cobb, 117 So. 853, 857-59 (Fla. 1928) (explanation of the historical development of general and special assumpsit).
43. Note, supra note 29, at 233-34.
45. 7 Fla. L.W at 8.
46. 6 Fla. L.W. at 388.
47. The distinction between the right to discharge and the power to discharge still exists under the quantum meruit rule because the client remains accountable to the attorney for the reasonable value of legal services, but presumably the client's exposure to liability is less
quantum meruit rule assume that an unfettered right to dissolve such relationships will promote public confidence in the legal profession and increase the efficiency of the adjudicatory process.

IV. FLORIDA CASE LAW

Florida has long recognized the delicate and confidential nature of the attorney-client relationship and its important role in the efficient administration of justice. The Florida Supreme Court has repeatedly affirmed the power of the client to discharge his attorney with or without cause. Yet in Goodkind v. Wolkowsky the supreme court expressly declined the invitation to recognize the client's power to discharge as an implied condition of the contract and held the exercise of the power constituted a breach of the agreement. In State ex rel. Branch v. Duval the Third District Court of Appeal acknowledged the line of authority in Florida which recognized the client's right to discharge and even embraced the New York position that this right was an implied term of the attorney-client contract. Yet the Branch court failed to adopt the corollary implication that the client could not be liable for breach in exercising an implied contractual right. For thirty-eight years, Florida courts applied the contract rule to fixed fee and contingency fee contracts, allowing attorneys to recover breach of contract damages when discharged without cause.

It was not until the Florida Supreme Court's 1976 decision in Milton Kelner, P.A. v. 610 Lincoln Road, Inc., that the continued viability of the contract rule was threatened in Florida. Kelner was

than under the contract rule.

48. Baruch v. Giblin, 164 So. 831 (Fla. 1935). "The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it . . . undermines the confidence of the public in the bench and bar." Id. at 833.

49. Note, supra note 18, at 785, 788-89.

50. 86 So. at 572.

51. 164 So. at 833.

52. State ex rel. Branch v. Duval, 249 So. 2d 468 (Fla. 3d Dist. Ct. App. 1971); Brasch v. Brash, 109 So. 2d 584 (Fla. 3d Dist. Ct. App. 1959); Osius v. Hastings, 97 So. 2d 623 (Fla. 3d Dist. Ct. App. 1957); Harvey v. Rowe, 192 So. 878 (Fla. 1940); Carey v. Town of Gulfport, 191 So. 45 (Fla. 1939); Goodkind v. Wolkowsky, 180 So. 538 (Fla. 1938); United States Sav. Bank v. Pittman, 86 So. 567 (Fla. 1920) (per curiam).

53. 180 So. 538.

54. Id. at 542-43.

55. 249 So. 2d 468.

56. Id. at 469.

57. Id. See supra note 38 and accompanying text.

58. 6 Fla. L.W. at 389.

59. 328 So. 2d 193 (Fla. 1976).
engaged, pursuant to a contingency contract, by a robbery victim to negotiate a settlement agreement with the client's insurer. Subsequently, the insurer agreed to pay the face amount of the policy and Kelner began to negotiate a distribution of the policy proceeds in satisfaction of several consignors' claims. The client rejected the consignors' settlement offer and terminated the attorney's employment without cause. The trial court approved the contract and the jury returned a verdict in favor of the attorney equal to the full contract fee. On appeal, the third district court determined that the issue was whether an attorney discharged without cause from a contingency fee contract should be permitted to recover under the terms of the contract or be limited to quantum meruit recovery. The court adopted the quantum meruit approach as the better rule because of the peculiarity of attorney-client relationships. Recognizing the import of its break with precedent supporting the contract rule, the third district certified the question to the supreme court as a matter of great public interest.

Regrettably, the supreme court was unable to resolve the issue certified by the lower court. Since the maximum recovery under the insurance policy had been obtained and the attorney was compensated separately by the client in the consignors' actions, the court determined that the happening of the contingency preceded the attorney's discharge. Therefore, the issue of the appropriate basis of an attorney's compensation in the event of a premature discharge was not before the court. However, the supreme court approved the district court's interpretation that the contract rule of Goodkind was limited to fixed fee contracts and not persuasive authority in the contingent fee context. In foretelling dicta, the court signaled its willingness to reconsider the contract rule.

60. Id. at 193-95.
62. Id.
63. Id. at 15 n.2.
64. 328 So. 2d at 195-96. The supreme court found Fracasse v. Brent, 100 Cal. Rptr. 385 (1972), to be distinguishable because the attorney in Fracasse was discharged prior to the occurrence of the contingency. Id.
65. 180 So. 538 (Fla. 1938).
66. Kelner, 328 So. 2d at 196.
67. Id. The court stated:
Quantum meruit may well be the proper standard when the discharge under a contingent fee contract occurs prior to the obtaining of the full settlement contracted for under the attorney-client agreement, with the cause of action accruing only upon the happening of the contingency to the benefit of the former client. Id.
In the recent case of Sohn v. Brockington, the First District Court of Appeal addressed the unresolved issue in Kelner: the appropriate standard for recovery for an attorney discharged from a contingency contract after part performance, yet before the occurrence of the contingency. Seizing upon the supreme court's dicta in Kelner, the Sohn court held that an attorney's exclusive remedy for a client's premature termination of a contingent fee contract was in quantum meruit. The first district court also suggested that the attorney's cause of action for quantum meruit recovery accrues upon discharge and is not limited by the fee stipulated in the attorney-client contract. Although the Sohn court's rejection of the contract rule was limited to contingent fee contracts, the policy justifications which support the enhancement of the client's power to discharge in the contingent fee context apply with equal force to situations where the attorney is retained for a specified amount. These policies, coupled with the erosion of the contract rule in the lower courts, persuaded the supreme court that the time had come to reconsider its holding in Goodkind.

V. Rosenberg v. Levin

George Levin engaged attorneys Terrence E. Rosenberg and Gerald Pomerantz to represent him in a multimillion dollar mortgage foreclosure action. The attorneys were to be paid according to the terms of a letter agreement which provided for a $10,000 retainer plus fifty percent of any recovery in excess of $600,000. Pomerantz and Rosenberg were discharged without cause prior to settlement or judicial resolution of the case. Subsequently, Levin employed substitute counsel and settled the matter for a net recovery of $500,000. The discharged attorneys filed an amended complaint seeking payment of the $10,000 retainer, costs incurred, and

68. 371 So. 2d 1089 (Fla. 1st Dist. Ct. App. 1979), cert. denied, 383 So. 2d 1202 (Fla. 1980). Attorney Sohn was employed by his client under the terms of a contingent fee contract. The contract provided for a fee of 40% of any recovery received by the client. After Sohn had successfully represented the client on her workman's compensation and personal injury protections claims, but before he had filed a complaint in the tort action, he was discharged without cause by the client. Id. at 1091.

69. Id. at 1091. The Sohn court went further than most modern trend jurisdictions and held that quantum meruit should be the exclusive remedy whether the attorney's discharge was with or without cause. Id.

70. Id. at 1094.

71. Id.

72. 7 Fla. L.W. 6 (Jan. 7, 1982).

73. Id. Levin actually received $675,000, but he relinquished $175,000 to other parties in the settlement agreement. The trial court's final order indicated that Levin was only to receive $500,000, 6 Fla. L.W. at 391 n.2.
quantum meruit recovery in lieu of the contingency fee. The trial court held Levin responsible for the amount of the legal services rendered under the quantum meruit theory and awarded Pomerantz and Rosenberg $55,000. The Third District Court of Appeal affirmed the trial court’s reliance upon quantum meruit, but held that it was error for the trial court to ignore the written terms of the contract and in no event could the attorney’s recovery exceed the $10,000 retainer. The supreme court granted certiorari to formulate the appropriate standard of recovery for an attorney employed under a valid fee agreement when discharged without cause by a dissatisfied client.

In the supreme court’s original decision on the merits, Justice England noted the difference between attorney-client contracts and other employment agreements. He opined that the lawyer-client relationship is the “cornerstone of our legal system” and that the public’s perception of the administration of justice is dependent upon the collective trust and confidence which clients place in their attorneys. On rehearing, Justice Overton agreed and recognized “an overriding need to allow clients freedom to substitute attorneys without economic penalty as a means of accomplishing the broad objective of fostering public confidence in the legal profession.” This philosophy, tempered by a recognition of an attorney’s right to adequate compensation, convinced the court that the quantum meruit rule should be applied in all premature discharge cases.

The court’s analysis applied to premature discharge under fixed and contingency fee contracts, as well as “mixed fee” contracts which provide for both fixed and contingent fees. The quantum meruit rule adopted by the New York courts in Martin v. Camp, 114 N.E. 46, was limited to contingent fee contract, until In re Montgomery’s Estate, 6 N.E.2d 40 (N.Y. 1936), extended its application to fixed fee agreements. California has not yet applied the quantum meruit rule of Fracasse v. Brent, 100 Cal. Rptr. 385, beyond the contingent fee situation. See also Note, supra note 29 at 242 (Suggesting that the Fracasse holding is couched in broad enough terms to encompass fixed fee contracts).

74. Brief of Respondents on the Merits at 9, Rosenberg v. Levin, 7 Fla. L.W. 6 (Jan. 7, 1982).
75. 7 Fla. L.W. at 6.
76. 372 So. 2d at 958.
77. 7 Fla. L.W. at 6.
78. 6 Fla. L.W. 388 (June 11, 1982), vacated, 7 Fla. L.W. 6 (Jan. 8, 1982). Justice England left the Florida Supreme Court in September 1981.
79. Id.
80. Id.
81. 7 Fla. L.W. at 8.
82. Id. The court’s analysis applied to premature discharge under fixed and contingency fee contracts, as well as “mixed fee” contracts which provide for both fixed and contingent fees. Id. at 8. The quantum meruit rule adopted by the New York courts in Martin v. Camp, 114 N.E. 46, was limited to contingent fee contract, until In re Montgomery’s Estate, 6 N.E.2d 40 (N.Y. 1936), extended its application to fixed fee agreements. California has not yet applied the quantum meruit rule of Fracasse v. Brent, 100 Cal. Rptr. 385, beyond the contingent fee situation. See also Note, supra note 29 at 242 (Suggesting that the Fracasse holding is couched in broad enough terms to encompass fixed fee contracts).
83. 7 Fla. L.W. at 9.
contract rule.\textsuperscript{84}

The adoption of the quantum meruit rule required the court to address two narrower issues: (1) Whether under a contingency contract an attorney's cause of action accrues upon discharge or upon the successful happening of the contingency and (2) whether the maximum fee agreed upon and stipulated in the contract is a limitation on an attorney's quantum meruit recovery. This latter issue was the basis for a dissenting opinion authored by Justice Overton which prompted the court to grant a petition for rehearing and vacate its original decision on the merits.\textsuperscript{86}

\textit{A. The Deferred Cause of Action}

Jurisdictions which have rejected the contract rule and adopted the quantum meruit approach have disagreed over the issue of when the discharged attorney's cause of action for recovery in quantum meruit accrues.\textsuperscript{86} Determination of this issue is important because it establishes the attorney's first opportunity to seek compensation and fixes the moment at which the statute of limitations begins to run.\textsuperscript{87} The New York courts, for example, permit the attorney to choose between bringing an action in quantum meruit immediately upon discharge or deferring the action until the underlying litigation is resolved.\textsuperscript{88} California, however, precludes the attorney from bringing an action for the reasonable value of his services before the contingency stated in the contract occurs.\textsuperscript{89}

The argument in favor of an immediate cause of action is premised on the notion that the client's termination of the contingency agreement rescinds the terms of the contract. "[T]herefore no contingency stated in the rescinded contract should govern the

\textsuperscript{84} See supra notes 53-57 and accompanying text. The court was careful to note that its decision did not disturb \textit{Kelner} which permitted full recovery under completed contracts, whether contingent, fixed fee, or mixed. 7 Fla. L.W. at 9.

\textsuperscript{85} 6 Fla. L.W. 388, 391-92 (Overton, J., dissenting), vacated, 7 Fla. L.W. 6 (Justice Overton wrote the majority opinion).


\textsuperscript{87} Note, \textit{Attorney-Client Relationship: Remedies of Attorneys Discharged Without Cause in Contingent Fee Contract Situations}, 37 ALB. L. REV. 364, 380 (1973); see Wright v. Johanson, 233 P. 16 (Wash. 1925) (held cause of action accrued upon discharge, therefore, the action was barred by the statute of limitations).

\textsuperscript{88} E.g., Paolillo v. American Export Isbrandtsen Lines, Inc., 305 F. Supp. 250 (S.D.N.Y. 1969) (attorney may choose to take a percentage amount of recovery with the percentage to be determined at an ancillary proceeding at the conclusion of the case); Adams v. Fort Plain Bank, 36 N.Y. 255 (1867) (immediate cause of action recognized).

\textsuperscript{89} 100 Cal. Rptr. 385.
right of the attorney to bring his action immediately following discharge."\textsuperscript{90} Because the contract "wholly stands or totally falls,"\textsuperscript{91} the client is not permitted to disaffirm the contract, while selectively enforcing its favorable provisions.\textsuperscript{92} It is also argued that the original attorney presumably entered into a contingency contract apprised of the risk that the client would not recover, but he did not contemplate his discharge or the possibility of being succeeded by another attorney.\textsuperscript{93} Therefore, his contingent compensation should not be measured by the "success or failure [of] some other member of the bar."\textsuperscript{94}

In \textit{Fracasse} California’s deferred cause of action was based upon the perceived need to know the result obtained and the amount involved in order to determine the reasonableness of the discharged attorney’s fee.\textsuperscript{95} More importantly, the \textit{Fracasse} court believed that an immediate cause of action would place a coercive burden on the contingency fee client, who is likely to be of limited means, to pay his former attorney before final determination of the litigation.\textsuperscript{96}

In \textit{Rosenberg}, the supreme court found the rule and rationale of the California position convincing. The court considered the deferred cause of action approach to be consistent with its objective of promoting the client’s ability to terminate the attorney-client relationship.\textsuperscript{97} The harm to the discharged attorney from a deferred cause of action was regarded as negligible because the attorney would not have benefited prior to the contingency even under the terms of the discharged contract.\textsuperscript{98} The court attempted to minimize the alteration of contractual risk caused by the client’s choice of substitute counsel by utilizing a presumption of competency in the performance of the successor attorney.\textsuperscript{99}

Prior to the supreme court’s decision in \textit{Rosenberg}, two district courts in Florida which had considered the accrual question regarding contingency agreements came to opposite conclusions.\textsuperscript{100}

\textsuperscript{90} Sohn v. Brockington, 371 So. 2d at 1094.
\textsuperscript{91} 181 N.E. at 75.
\textsuperscript{92} Note, \textit{supra} note 18, at 791-92.
\textsuperscript{93} \textit{Id.} at 791.
\textsuperscript{94} \textit{Id.} at 791.
\textsuperscript{95} \textit{Id.} at 76.
\textsuperscript{96} 100 Cal. Rptr. at 390.
\textsuperscript{97} \textit{Id.} at 791.
\textsuperscript{98} \textit{Id.} at 76.
\textsuperscript{99} \textit{Id.} at 791.
\textsuperscript{100} Sohn v. Brockington, 371 So. 2d at 1094 (favored an immediate cause of action); 610 Lincoln Road, Inc. v. Milton Kelner, P.A., 289 So. 2d at 15 (deferred cause of action).
Like the supreme court, the third district considered the deferred cause of action to be the better rule. The first district, on the other hand, considered the California rule inflexible and instead opted for the New York rule.

In New York, a discharged attorney has an immediate right to quantum meruit recovery without regard for the fate of the contingency. However, if the court considers the outcome of the litigation to be essential to determining the succeeded attorney's compensation, it may grant a declaratory judgment, but defer payment until the client obtains a favorable recovery. The discharged lawyer also may elect to await the resolution of the matter and seek quantum meruit recovery in an ancillary proceeding at the conclusion of the case.

The Rosenberg opinion failed to consider the alternatives offered by the New York procedure. The court considered the cause of action issue to be an all or nothing proposition and assumed that an immediate cause of action would place an improper burden on the contingency fee client. Yet the New York rule is responsive to the court's concern for determining the result obtained and amount involved in order to correctly assess the amount of compensation in appropriate cases. The lower courts should be entrusted to determine the proper moment for recovery and adequately protect the interests of the discharged attorney and the client. The supreme court instead adopted a rule based upon a hypothetical contingency fee client of limited means. However, "[t]he use of contingent fee contracts remains more an aspect of the litigation involved than of the financial condition of a client."

The underlying litigation which gave rise to the claim for attorney's fees in Rosenberg was a mortgage foreclosure action involving

101. Id. at 15.
102. 371 So. 2d at 1094.
106. 7 Fla. L.W. at 6.
107. Id.
millions of dollars\textsuperscript{109} and the court's assumption of a contingency fee client of limited means was inappropriate on the facts before the court.

Arguably, procedural safeguards designed to protect the discharged attorney's recovery become more important under the deferred cause of action approach. The courts traditionally have protected the discharged attorney's interest in an action by impressing upon the client's ultimate recovery an equitable charging lien.\textsuperscript{110} The supreme court has recognized the charging lien to be an acceptable method of securing the payment of attorney's fees.\textsuperscript{111} Yet the Rosenberg court did not consider the impact its adoption of the California rule would have upon the use of charging liens in contingency fee cases. Whether the preclusion of any immediate legal action to recover the reasonable value of the discharged attorney's services also precludes efforts to impose an equitable lien on the client's future recovery is unanswered by the court's decision. However, charging liens do not offend the objectives favored by the Rosenberg court. The client is protected from incurring out-of-pocket legal fees because the lien attaches only to a settlement or judgment favorable to the client.\textsuperscript{112} Therefore, the client's power to terminate the attorney-client relationship is not diminished because the fees are not due until the happening of the contingency. If the contingency fails to occur, the attorney's lien is ineffective.\textsuperscript{113}

\section*{B. The Limited Quantum Meruit Rule}

On rehearing, the Florida Supreme Court vacated its original decision on the merits and adopted the "limited quantum meruit rule" which restricts the recovery of a prematurely discharged attorney to the maximum fee provided for in the attorney-client contract.\textsuperscript{114} The court considered this limitation logical in light of its decision to establish quantum meruit as the exclusive remedy in attorney discharge cases.\textsuperscript{115} The limited quantum meruit rule represents a significant departure from the customary legal mind set

\textsuperscript{109} Petitioner's Brief on the Merits at 2, Rosenberg v. Levin, 7 Fla. L.W. 6 (Jan. 6, 1982).

\textsuperscript{110} Fishback, Attorney's Liens for Fees, 51 Fla. B.J. 679 (Dec. 1977).


\textsuperscript{112} Billingham v. Thiele, 107 So. 2d 238, 243 (Fla. 2d Dist. Ct. App. 1958).

\textsuperscript{113} 97 F.2d 293.

\textsuperscript{114} 7 Fla. L.W. at 6.

\textsuperscript{115} Id. at 8.
which is attuned to consider a restitutionary action, even in a contractual setting, to be mutually exclusive from a contract action for damages.\textsuperscript{116}

In the majority of jurisdictions which follow the quantum meruit rule or permit an action in quantum meruit to be brought as an alternative to a contract action, the contract fee is not considered a limitation on quantum meruit recovery.\textsuperscript{117} The same rationale which supports an immediate cause of action can be used to support an unlimited quantum meruit rule; the contract is rescinded upon discharge and its terms no longer bind the attorney or the client. Usually, the issue presented by a quantum meruit award in excess of the contract does not arise because the reasonable value of services performed under the prematurely terminated agreement is less than the contract fee.\textsuperscript{118} But in instances where unexpectedly difficult services are rendered or the attorney miscalculates the requirements of full performance, the client's exercise of the power to discharge may in effect permit the attorney to escape his obligations under a losing contract and in some instances may result in a windfall to the discharged lawyer.\textsuperscript{119}

It is universally held that where the defendant's only remaining obligation under a contract is to pay money and the plaintiff has substantially or fully performed, restitution in quantum meruit is precluded and the plaintiff is limited to recovery of the contract fee, absent consequential damages.\textsuperscript{120} The supreme court followed this principle in Milton Kelner, P.A.\textsuperscript{121} The court concluded Kelner was entitled the full contingent fee because the contingency


\textsuperscript{117} E.g., Salem Realty Co. v. Matera, 410 N.E.2d 716 (Mass. App. Ct. 1980) aff'd 426 N.E.2d 1160 (Mass. 1981): "[The client] cannot have it both ways. [He] cannot abrogate the agreement on the high side and insist on its terms on the low side." Id. at 719. See also In re Montgomery's Estate, 6 N.E.2d 40 (N.Y. 1936) (rescinded contract cannot limit the attorney's amount of recovery); see generally Annot. 109 A.L.R. 674 (1937) (contract price as limit of attorney's recovery on quantum meruit in event of his discharge without fault on his part).

\textsuperscript{118} Chambliss, Bahner & Crawford v. Luther, 531 S.W.2d 108, 110 (Tenn. Ct. App. 1975).

\textsuperscript{119} See, e.g., 6 N.E.2d 40 (attorney's recovery in quantum meruit was double that permitted by the contract when discharged after performing five-sixths of the work); cf. Knapp v. Gaston Teyssier, 96 Pa. Super. 193 (1929) (architect recovered $1,690 in quantum meruit after part performance when payment in full would have been $490).

\textsuperscript{120} 531 S.W.2d at 110. See generally, 5 CORBIN, supra note 4, at § 1110 (2 ed. 1964) (Restitution not available if performance has created a contract debt in money).

\textsuperscript{121} 328 So. 2d 193.
had been achieved.\textsuperscript{122} Paradoxically, an attorney discharged without cause after partial performance in jurisdictions following the unlimited quantum meruit approach can conceivably recover a larger award than the attorney, similarly situated, who fully performs.\textsuperscript{123}

The \textit{Rosenberg} court's original decision quashed the district court's limitation on the attorney's quantum meruit award to the contract price.\textsuperscript{124} Justice England reasoned that the attorney-client contract was relevant to the determination of the reasonable compensation owed the discharged lawyer, but its terms were not dispositive.\textsuperscript{125} The court acknowledged the "chilling effect" that recovery in excess of the contract price could exert on the client's power to discharge.\textsuperscript{126} Nonetheless, the court reasoned that the deleterious consequences of the unlimited quantum meruit rule could be avoided by the trial court in ascertaining the reasonable compensation owed the attorney.\textsuperscript{127} The court stated that quantum meruit recovery in excess of the contract price would avoid "client overreaching where the diligent attorney has outperformed the initial estimate of his worth. . . ."\textsuperscript{128} Other courts have similarly suggested that unlimited quantum meruit recovery would prevent the wholesale discharge of attorneys by clients shopping for the least expensive legal fees.\textsuperscript{129}

On rehearing, Justice Overton emphasized the economic penalty the unlimited quantum meruit rule would levy upon a client exercising his right to discharge.\textsuperscript{130} The court's earlier concern with the possibility of client overreaching was replaced by a fear that the rule would encourage less than ethical attorneys "to induce clients to lose confidence in them in cases where the reasonable value of their services has exceeded the original fee and thereby, upon being discharged, reap a greater benefit than that for which they had

122. \textit{Id.} at 196; accord \textit{Oliver} v. \textit{Campbell}, 273 P.2d 15 (Cal. 1954) (attorney denied $5000 recovery in quantum meruit and limited to contract price of $750 where attorney had virtually completed performance).
124. 6 Fla. L.W. at 90.
125. \textit{Id.} A number of cases suggest that although the contract does not govern or limit quantum meruit recovery it should be taken into account in ascertaining an attorney's reasonable compensation. \textit{See, e.g.}, \textit{Newman} v. \textit{Melton Truck Lines}, Inc. 443 F.2d 896 (5th Cir. 1971) (applying Mississippi law); \textit{Potts} v. \textit{Mitchell}, 410 F. Supp. 1278 (W.D.N.C. 1976).
126. 6 Fla. L.W. at 390.
127. \textit{Id}.
128. \textit{Id}.
129. \textit{Fracasse} v. \textit{Brent}, 100 Cal. Rptr. at 389-90; \textit{Sohn} v. \textit{Brockington}, 371 So. 2d at 1093.
130. 7 Fla. L.W. at 8.
bargained."

The supreme court's adoption of the limited quantum meruit rule was based exclusively upon the public policy objective of making the power to discharge synonymous with the right to discharge. This leaves the court's decision vulnerable to the attack that it "jettisoned respected contract principles to decree . . . that a solemn, valid agreement between attorney and client may be dissolved into thin air at the mere whim of the client." Some writers, however, have suggested that a departure from traditional contract theory is warranted, and that a discharged attorney should recover only to the extent of his reliance upon the contract. This reliance interest can be articulated in two ways: in contract, for the reasonable value of services rendered; or in quantum meruit, a restitution action, also for the reasonable value of services rendered. Although the interest protected by the quantum meruit and contract actions are the same, "in an action for reliance damages on a losing contract, the contract price sets an upper limit on recovery, while in a restitution action, the injured party's recovery may sometimes exceed that price."

Unfortunately, the Rosenberg court's adoption of the principle that the right to discharge is implied in the contract fosters the notion that the attorney's restitutionary recovery is not limited by the terms of the contract. In this context, however, restitution for breach is a contractual remedy and it is appropriate that the attorney's recovery for the reasonable value of services rendered prior to discharge be limited to the contract price in a suit for quantum meruit, just as it would in an action for contract damages. The 1979 tentative draft of the Restatement (Second) of Contracts adopted this position and limited restitutionary recovery for part performance to the amount which would have been due upon completion of the contract.

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131. Id. (quoting Chambliss, Bahner & Crawford v. Luther, 531 S.W.2d at 108, 113. See 5 CORBIN, supra note 4, at § 1102 (citing with approval the limited quantum meruit rule adopted in Chambliss).

132. 7 Fla. L.W. at 8. "Without such a limitation, a client's right to discharge an attorney may be illusory and the client may in effect be penalized for exercising a right." Id.

133. 100 Cal. Rptr. at 393 (Sullivan, J., dissenting).

134. See, e.g., 5 CORBIN, supra note 131, at § 1102; Perillo, supra note 116, at 45; Childres & Garamella, supra note 22, at 451-54.

135. Childres & Garamella, supra note 22, at 437.

136. Perillo, supra note 116, at 42.


138. Childres & Garamella, supra note 22, at 452.

The limited quantum meruit rule recognizes that the protection of one's reliance interest in a contract should not depend upon whether the action is brought on the contract or in quantum meruit and honors the parties' original allocation of risks. It avoids the absurd result of an attorney being profitably compensated for discharge from a losing contract and the "chilling effect" the contract rule and the unlimited quantum meruit rule have upon the client's power to terminate an unsatisfactory attorney-client relationship.  

VI. Conclusion

The Florida Supreme Court's adoption of the limited quantum meruit rule is a far-reaching attempt to unfetter the client's power to discharge an unsatisfactory attorney. The uniform application of the rule in all premature discharge cases coupled with the deferred cause of action approach taken with respect to contingency fee contracts, extends the rights of the client in Florida beyond those recognized in any other jurisdiction. Limiting the discharged attorney's recovery to the contract fee avoids the paradox of restitution for part performance greater than the sum which would have been due upon completion of the contract, respects the parties' original bargain and promotes the client's ability to retain counsel in whom he has confidence. Florida's limited quantum meruit approach strikes the optimal balance between the client's right to discharge his attorney and the attorney's right to reasonable compensation for work performed. The discharged attorney's recovery, however, should not depend on the performance of his successor. The court should have permitted an immediate cause of action in contingency fee cases. In the limited number of cases where the discharged attorney's contribution to the outcome is essential to determine his recovery, his right to recover could be protected by a declaratory judgment or charging lien and recovery deferred until the conclusion of the controversy. The Rosenberg decision will hopefully prompt other jurisdictions to examine the inadequacies of the contract and unlimited quantum meruit rules.

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