ATTORNEYS—ATTORNEY DISCHARGED WITHOUT CAUSE UNDER CONTINGENCY FEE CONTRACT ENTITLED *Only* TO *Quantum Meruit After* SUCCESSFUL SETTLEMENT OR JUDGMENT—*Fracasse v. Brent*, 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972).

On January 1, 1970, George Fracasse, a duly licensed attorney-at-law in California, filed a complaint for declaratory relief against his client, alleging that he was discharged without cause. He prayed that his contingency contract be declared valid and that his one-third interest in any monies ultimately recovered be preserved. The California Supreme Court, in *Fracasse v. Brent*,[1] denied relief, and in the process overruled an extensive line of precedent by holding that an attorney discharged without fault on his part was entitled to recover in *quantum meruit only*.[2] Further, the court found that since the contractual contingency had not yet occurred, no cause of action accrued, even in *quantum meruit*, until the client successfully recovered a judgment or obtained a settlement.[3] Prior to *Fracasse*, attorneys discharged without cause could elect to recover their entire fee under the contingency agreement at the client's final judgment or settlement,[4] or they could choose instead to sue at the time of discharge for the reasonable value of their services.[5]

In *Baldwin v. Bennett*,[6] the keystone of California law on the issue, it was held that a wrongfully discharged attorney was generally entitled to damages amounting to the value of services performed plus the damage sustained by the refusal to allow the performance of the

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

2 *Id.* at 792, 494 P.2d at 14-15, 100 Cal. Rptr. at 390-91.

3 *Id.* at 792, 494 P.2d at 15, 100 Cal. Rptr. at 391.

4 The language used in these cases indicates the broad application of this doctrine: Jones v. Martin, 41 Cal. 2d 23, 256 P.2d 905 (1953) (attorney wrongfully discharged is generally entitled to the same contingent compensation as if he had completed the services contemplated); Denio v. City of Huntington Beach, 22 Cal. 2d 580, 140 P.2d 392 (1943) (attorneys are entitled under the long-established rule in California to recover the compensation specified in their contract after a wrongful discharge); Zurich Gen. Accident & Liab. Ins. Co. v. Kinsler, 12 Cal. 2d 98, 81 P.2d 913 (1938) (attorney may bring action for damages amounting to full contingent fee if discharged without cause); Brown v. Superior Court, 242 Cal. App. 2d 519, 51 Cal. Rptr. 633 (Dist. Ct. App. 1966) (attorney employed on a contingent fee basis who is wrongfully discharged by his client may recover the full contract amount as if he had completed the service); Fivey v. Chambers, 199 Cal. App. 2d 457, 19 Cal. Rptr. 111 (Dist. Ct. App. 1962) (where an attorney is wrongfully discharged he may recover damages equal to the fee specified in the contract).

5 *See* Echlin v. Superior Court, 13 Cal. 2d 368, 375-76, 90 P.2d 63, 67 (1939); Tracy v. MacIntyre, 29 Cal. App. 2d 145, 147-48, 84 P.2d 526, 528 (Dist. Ct. App. 1938).

6 4 Cal. 392 (1854).

remainder of the contract.[7] Nevertheless, that court awarded the entire contractual fee, finding that no accurate method existed for assessing damages, and stating that defendant should not complain since his lack of good faith produced the circumstances.[8] The *Fracasse* court took issue with *Baldwin's* basic premise, seeing no practical reason why recovery on a *quantum meruit* theory could not adequately compensate the attorney,[9] thus terminating a 100-year-old principle of recovery.[10] In disallowing the action for damages, California joined an established minority of jurisdictions.[11] However, the court espoused an incon-

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[7] *Id.* at 393.

[8] *Id.* at 393-94. *See also* Webb v. Trescony, 76 Cal. 621, 622-23, 18 P. 796, 797 (1888).

[9] 6 Cal. 3d at 788, 494 P.2d at 12, 100 Cal. Rptr. at 388.

[10] The dissent in *Fracasse* noted with irritation that a century of California precedent was being overruled. *Id.* at 802, 494 P.2d at 22, 100 Cal. Rptr. at 398.

[11] A leading case, Martin v. Camp, 219 N.Y. 170, 114 N.E. 46 (1916), involved a fixed contingent sum to be awarded attorneys for obtaining a recovery in a condemnation proceeding. The court held that the discharge of these attorneys did not constitute a breach of contract, it being an implied term of the contract that the client may discharge them at any time with or without cause. Once discharged the attorneys were limited to recovery in *quantum meruit*. *Id.* at 173-74, 114 N.E. at 47-48. The court noted only two possible exceptions to this rule: where the attorney has changed his position or incurred expenses, and where an attorney is employed under a general retainer for a fixed period to perform legal services in relation to matters that may arise during the period of the contract. *Id.* at 176, 114 N.E. at 48. *See In re* Driscoll, 131 Misc. 613, 228 N.Y.S. 335 (Sup. Ct. 1928), which interpreted the first exception as authority for adding expenses to the reasonable value normally recovered. Other jurisdictions have used this provision to significantly reduce the far-reaching holding of *Martin*. See in this connection *In re* Winston's Will, 40 N.M. 348, 59 P.2d 904 (1936) (court noted that exceptions limited *Martin v. Camp* to a narrow field); Roxana Petroleum Co. v. Rice, 109 Okla. 161, 235 P. 502 (1924) (attorney had changed his position and incurred expenses). Regarding the latter exception, see Greenberg v. Remick & Co., 230 N.Y. 70, 129 N.E. 211 (1920) (attorney employed for one year for a fixed sum, payable weekly, was wrongfully discharged and eligible to receive damages).

In accord with *Martin* are: Cole v. Myers, 128 Conn. 223, 21 A.2d 396 (1941) (attorney discharged without fault is not entitled to recover damages); Gordon v. Morrow, 186 Ky. 713, 218 S.W. 258 (1920) (special counsel employed by the Governor of Kentucky were limited to a recovery of the reasonable value of their services after a discharge without cause); Mariana's Succession, 177 So. 464 (La. App. 1937) (attorney not entitled to damages for breach of contract since a contract for legal services may be revoked at any time); Clark v. Quinn, 203 Minn. 452, 281 N.W. 815 (1938) (client is permitted to terminate a non-retainer contract at will, in which event counsel is entitled only to the reasonable value of his services); Dill v. Public Util. Dist., 3 Wash. App. 360, 475 P.2d 309 (1970) (attorney discharged from a contingent contract with or without cause is limited to a recovery in *quantum meruit*).

This issue has not been heavily litigated in New Jersey. An early decision on point was Weibezahl v. Huber, 39 N.J.L.J. 334 (Essex County Cir. Ct. 1916), where the court stated:

> "Every attorney enters into the service of his client subject to the rule that his client may dismiss or supersede him at will; and if he makes a contract for future services to his client, it is necessarily subject to such rule, and made with full

gruous principle when it decreed that no cause of action for *quantum meruit* accrued until after the contingency occurred.[12]

Historically, an attorney's right to be compensated was not always recognized. During the early period of the Roman Empire, an attorney was supported by gratuities which he could not demand as a matter of right,[13] because a proprietary link to the cause of action was deemed to be an undesirable impediment to the administration of justice.[14] This "honorarium" system found acceptance in Europe and England, but in the United States an attorney's right to compensation for his services has always been recognized.[15] In the mid-1800's, the contingency contract, essentially an American institution, found general acceptance as a form of compensation, and has continued to the present as a popular fee arrangement.[16] Such an agreement generally provides compensation for the attorney's services based on a percentage of the final judgment or settlement, contingent upon the successful outcome of the litigation.[17]

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knowledge that he may never perform such service, for the reason that his client may not keep him, and that in that event he will not be paid therefor, but will be entitled to compensation only for the services he has actually rendered."

Id. at 337 (quoting from Johnson v. Ravitch, 113 App. Div. 810, 812, 99 N.Y.S. 1059, 1061 (1906)). The court in *Weibezahl* went on to hold further that

"in such cases the counsel originally engaged will be protected in the matter of compensation to the extent of the reasonable value of the services performed down to the time the substitution [of attorneys] is allowed; and it is immaterial that, under his agreement with the client, his compensation was to be contingent upon the successful outcome of the litigation . . . ."

39 N.J.L.J. at 335 (quoting from 2 E. THORNTON, ATTORNEYS-AT-LAW 796 (1914)). *See generally* Annot., 136 A.L.R. 231 (1942).

12 See note 48 *infra*.

13 *See* E. WOOD, FEE CONTRACTS OF LAWYERS 2-3 (1936); Browder, *Lawyers' Fees Historically Considered*, 50 AM. L. REV. 554, 554-55 (1916).

14 *See* Comment, *Contingent Fee Contracts: Validity, Control and Enforceability*, 47 IOWA L. REV. 942, 942 (1962).

15 *See* H. DRINKER, LEGAL ETHICS 170-71 (1953); E. WOOD, *supra* note 13, at 8. However, early cases in New Jersey held that services were presumed to be gratuitous unless performed pursuant to an express contract. *See* Seeley v. Crane, 15 N.J.L. 35 (Sup. Ct. 1835); Shaver v. Norris, 3 N.J.L. 470 (Sup. Ct. 1811). *See generally* Browder, *supra* note 13, at 559-62.

16 Wilkinson, *The Contingent Fee*, 34 N.J.L.J. 292, 293 (1911); Browder, *supra* note 13, at 562.

England still regards contingent fees as champertous. *See* Denning, *The Price of Freedom: We Must Be Vigilant Within the Law*, 41 A.B.A.J. 1011 (1955), where the Lord Justice observed that contingent contracts were cause for imprisonment in England, and that the English system of partially subsidizing the litigant's costs would, in the United States, probably be deemed an unjustifiable state interference in the legal process. However, he suggested that the continued expansion of legal aid service could satisfy the needs of those not financially able to obtain an attorney except on a contingent fee basis. *Id.* at 1059.

17 *See* Comment, *supra* note 14, at 947.

However, courts view contingent contracts with some suspicion.[18] They have frequently refused to enforce contracts which were deemed unconscionable, relying on their inherent power to discipline individuals long considered to be officers of the court.[19] In some jurisdictions, this power has taken the form of court rules limiting the percentage of a judgment which an attorney may claim under a contingent agreement.[20] The formulation of a schedule of maximum fees can be considered a procedural means to prevent unreasonable compensation,[21] as long as an avenue for objecting to the sufficiency of remuneration is available in exceptional cases.[22] This inherent power, however, does not necessarily lend itself to the judicial construction of an attorney's contract in the absence of unconscionable or sanctionable behavior, as was the case in *Fracasse*.[23]

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[18] *See* Wilkinson, *supra* note 16, at 294-95, where the historical arguments concerning the possible evils of contingent contracts are discussed.

[19] *See* 60 COLUM. L. REV. 242, 245 (1960), and cases cited therein.

In New Jersey the power to discipline attorneys is established by the state constitution. N.J. CONST. art. 6, § 2, ¶ 3, provides: "The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

[20] *See* Gair v. Peck, 6 N.Y.2d 97, 160 N.E.2d 43 (1959), which upheld the enforcement of a schedule of maximum contingent fees in New York.

There is pending litigation in New Jersey over N.J.R. 1:21-7, which limits the percentage recoverable based on a contingent contract. A three-judge federal court, applying principles of comity and abstention, refused to hear the suit until New Jersey courts had reviewed arguments against imposition. American Trial Lawyers Ass'n v. The New Jersey Supreme Court, Civil No. 64-72 (D.N.J., June 26, 1972). Plaintiffs in the suit are the New Jersey Chapter of the American Trial Lawyers Association and the Bar Associations of Hudson, Middlesex and Monmouth counties. The Trial Attorneys of New Jersey are challenging the rule in a companion action. The complaint of the American Trial Lawyers Association alleges

> [that the rule deprives plaintiffs' members of liberty and property without due process of law and denies them equal protection of the laws in that (a) it impairs freedom of contract, (b) is not supported by any fact record developed at a hearing on notice, (c) has no publicly disclosed or actual fact nexus, (d) is unreasonable and arbitrary, (e) impairs obligations of contract since it applies retroactively to retainers entered into and services rendered prior to its effective date, (f) is discriminatory since it excepts subrogees, and fails to differentiate between types of cases and applies only to tort cases. In addition, the complaint charges that the rule is beyond the powers conferred on the Supreme Court by the New Jersey Constitution.

95 N.J.L.J. 56 (1972).

[21] *See* Gair v. Peck, 6 N.Y.2d 97, 109-12, 160 N.E.2d 43, 50-52 (1959) (broad court powers to enact procedural rules to discipline attorneys and prevent unreasonable compensation discussed).

[22] *See, e.g.*, N.J.R. 1:21-7, which provides in part:

> (f) If at the conclusion of a matter an attorney considers the fee permitted . . . to be inadequate, an application on written notice to the client may be made to the Assignment Judge for the hearing and determining of a reasonable fee in light of all the circumstances.

[23] Fracasse's complaint alleged that he was discharged without cause. 6 Cal. 3d at

The *Fracasse* decision may be viewed as court regulation and discipline of attorneys through the modification of existing substantive case law.[24] In this restructuring of the attorney-client contractual relationship, apparently the court was concerned with protecting clients from possible double-payment of counsel fees. This result frequently occurred because the discharged attorney could readily recover his *full* contingent fee at the time final judgment or settlement was reached, and the client's new attorney could simultaneously require payment of his full fee.[25] However, the *Fracasse* court might have considered an alternative to recovery in *quantum meruit* in the form of damages less than the entire fee. Other jurisdictions award a discharged attorney the full fee minus the value of the services remaining to be performed.[26]

Basic to *Fracasse* is the absolute right to discharge an attorney. This power, which enjoys universal recognition, is derived from the "special confidence and trust" implicit in the attorney-client relationship.[27] Clothed in the vestments of an absolute right, it necessarily conflicts with basic contract rights.[28] One of the few limitations on the right to discharge occurs in situations where the attorney's power

786-87, 494 P.2d at 10, 100 Cal. Rptr. at 386. This contention is not disputed in the opinion.

24 In the formulation of court rules, however, the courts have recognized their inability to promulgate substantive rules and have limited their reach to rules of procedure. *See* Winberry v. Salisbury, 5 N.J. 240, 248, 74 A.2d 406, 410, *cert. denied*, 340 U.S. 877 (1950); Gair v. Peck, 6 N.Y.2d 97, 104, 106 N.E.2d 43, 47 (1959).

25 6 Cal. 3d at 789, 494 P.2d at 12, 100 Cal. Rptr. at 388. The court observed:

> "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. . . ."

Id. (quoting from Salopek v. Schoemann, 20 Cal. 2d 150, 157, 124 P.2d 21, 25 (1942) (concurring opinion)).

26 *See* Henry v. Vance, 111 Ky. 72, 63 S.W. 273 (1901), where the court held that an attorney, discharged from his contingent contract without cause, may recover as the reasonable value of his services "the contract price, abated by such sum as is reasonably represented by the unperformed part of the labor." *Id.* at 82, 63 S.W. at 276. The same solution was reached in Bockman v. Rorex, 212 Ark. 948, 208 S.W.2d 991 (1948); Tonn v. Reuter, 6 Wis. 2d 498, 95 N.W.2d 261 (1959).

27 *See* Salopek v. Schoemann, 20 Cal. 2d 150, 157, 124 P.2d 21, 24. *See also* Gage v. Atwater, 136 Cal. 170, 172, 68 P. 581, 582 (1902); Weibezahl v. Huber, 39 N.J.L.J. 334, 336 (Essex County Cir. Ct. 1916); Martin v. Camp, 219 N.Y. 170, 174, 114 N.E. 46, 48 (1916).

28 The dissent in *Fracasse* criticized the majority's total abrogation of basic contract law governing the attorney-client relationship. 6 Cal. 3d at 796-97, 494 P.2d at 17-18, 100 Cal. Rptr. at 393-94. The conflict between the absolute right of a client to discharge his attorney and the common-law right to damages for the breach of a valid, enforceable contract is discussed in Comment, *supra* note 14, at 958-61.

is coupled with an interest.[29] Recognizing this conflict, the *Fracasse* court attempted to strike an equitable balance between the absolute right to discharge and the traditional right to contract. The difficulty in striking this balance is documented by the sharp division among jurisdictions regarding whether a discharge without cause can be considered a breach of contract.[30] In *Gage v. Atwater*,[31] the power to discharge an attorney was described as a "right."[32] The court in *Fracasse* stated that it would be anomalous to recognize the right established in *Gage* and then penalize its operation by exacting damages.[33] Accordingly, the discharge of Mr. Fracasse was held not to be a breach of contract because the right to dismiss was a basic term of the contract, implied by law.[34] The implication of terms is a constructive device used by

29 *See, e.g.*, United Gas Pub. Serv. Co. v. Christian, 186 La. 689, 173 So. 174 (1937) (client specifically assigned a percentage interest in the judgment to the attorney); Gulf, C. & S.F. Ry. v. Miller, 21 Tex. Civ. App. 609, 53 S.W. 709 (1899) (client assigned one-half interest in his cause of action to attorney). Generally a mere contingent contract does not create an interest which prevents dismissal. *See* Isrin v. Superior Court, 63 Cal. 2d 153, 403 P.2d 728, 45 Cal. Rptr. 320 (1965). *But see* St. John The Baptist Greek Catholic Church v. Gengor, 124 N.J. Eq. 449, 2 A.2d 337 (Ch. 1938), where an order for substitution of solicitor would not be entered until the liens of the discharged attorneys were satisfied.

30 *Compare* Martin v. Camp, 219 N.Y. 170, 114 N.E. 46 (1916) (discharge of attorney without cause is not a breach of contract), *with* Higgins v. Beaty, 242 N.C. 479, 88 S.E.2d 80 (1955) (discharged attorney allowed to sue for breach). *See also* Tenney v. Berger, 93 N.Y. 524, 45 Am. Rep. 263 (1883), where an attorney was permitted to withdraw from a case and still recover the reasonable value of his services. The court found that the client had hired a second attorney without his consent and there was friction between the attorneys which prevented them from working together amicably, and went on to note the anomalies of the attorney-client relationship:

> If an attorney, without just cause, abandons his client before the proceeding for which he was retained has been conducted to its termination, he forfeits all right to payment for any services which he has rendered. The contract being entire he must perform it entirely, in order to earn his compensation, and he is in the same position as any person who is engaged in rendering an entire service, who must show full performance before he can recover the stipulated compensation. While the attorney is thus bound to entire performance, and the contract as to him is treated as an entire contract, it is a singular feature of the law that it should not be treated as an entire contract upon the other side; for it is held that a client may discharge his attorney, arbitrarily, without any cause, at any time, and be liable to pay him only for the services which he has rendered up to the time of his discharge.

Id. at 529, 45 Am. Rep. at 266.

31 136 Cal. 170, 68 P. 581 (1902).

32 *Id.* at 172, 68 P. at 582.

33 6 Cal. 3d at 791, 494 P.2d at 13, 100 Cal. Rptr. at 389.

34 The court held:

> We have concluded that a client should have both the power and the right at any time to discharge his attorney with or without cause. Such a discharge does not constitute a breach of contract for the reason that it is a basic term of the contract, implied by law into it by reason of the special relationship between the contracting parties, that the client may terminate that contract at will. It

the courts to effectuate public policy without tarnishing the principles of freedom of contract.[35]

The upsurgence of consumer awareness may also have had some effect on the thinking of the court in *Fracasse*. New legislation has spurred courts into looking behind the boilerplate of commercial contracts.[36] However, these new powers are usually employed where there is some evidence of overreaching through the use of oppressive contracts or a denial of expectations through some procedural abuse.[37] There was no indication of such abuses in *Fracasse*.[38]

However, if the thrust of the *Fracasse* decision is viewed as protection of the client rather than punishment of the attorney for some palpable wrong, then the court's reshaping of the law concerning discharged attorneys can be better understood.[39] *Fracasse* has essentially required the discharged attorney to accept the consequences attaching to discharge "for cause" although he may have been wrongfully discharged.[40] A California attorney dismissed for cause is only allowed

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would be anomalous and unjust to hold the client liable in damages for exercising that basic implied right.

Id. at 790-91, 494 P.2d at 13, 100 Cal. Rptr. at 389.

35 Professor Corbin stated:

> In the more recent cases the courts are beginning to see and to admit that the finding of an "implied term" or an "implied condition" is frequently a pure construction by the court itself for the purpose of attaining a "just" result under circumstances that the parties did not foresee and as to which they had no ideas and made no provision.

3A A. CORBIN, CONTRACTS § 632 (1960) (footnote omitted).

36 UCC § 2-302 provides:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

See generally Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969). Consumer protection also extends to credit. *See* The Consumer Credit Protection Act, 15 U.S.C. §§ 1601 *et seq.* (1970). *See also* Littlefield, *Consumerism: A Review and Preview*, DENVER L.J. 12 (Special Issue 1971); LoPucki, *The Uniform Consumer Credit Code: Consumer's Code—Or Lender's Code?*, 22 U. FLA. L. REV. 335 (1970).

37 *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (naive consumer confronted with high pressure tactics not bound by contract if unconscionable); *In re* Elkins-Dell Mfg. Co., 253 F. Supp. 864 (E.D. Pa. 1966) (one-sided, oppressive contract bearing no relation to business risks not enforceable); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (attempted disclaimer of implied warranty of merchantability invalid as against public welfare). *See generally* Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

38 See note 23 *supra*.

39 *See* 6 Cal. 3d at 792, 494 P.2d at 14, 100 Cal. Rptr. at 390, where the *Fracasse* court discussed the protection of the client versus the imposition on the attorney.

40 *See* Moore v. Fellner, 50 Cal. 2d 330, 325 P.2d 857 (1958) (attorney discharged from

reasonable compensation for services performed prior to dismissal, and in the case of a contingency contract, recovery must await the occurrence of that contingency—the successful settlement or recovery by the client.[41] Formerly, loss of confidence would constitute cause only if based on substantial and reasonable grounds.[42] In *Fracasse* the definition of "cause" is extended to include where, for any reason whatsoever, there is the smallest loss of confidence by the client in the attorney's skill.[43] This redefinition enables the *Fracasse* court to apply prior California law regarding discharge for cause.[44]

While the significance of limiting a discharged attorney's recovery to *quantum meruit* is substantial, perhaps the more interesting element of the *Fracasse* decision is its holding which denies the recovery of the

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contingent contract for cause is limited to recovery in *quantum meruit* and cause of action does not arise until successful settlement or judgment).

41 *Id.*

42 In Moser v. Western Harness Racing Ass'n, 89 Cal. App. 2d 1, 200 P.2d 7 (Dist. Ct. App. 1948), the court held that

> irrespective of any question of negligence the client is justified in discharging his attorney if the latter has given reasonable cause for loss of confidence in his ability or integrity. . . . [T]he dissatisfaction which will justify termination of an attorney's employment, as for cause, must be based upon reasonable grounds and not the mere whim of the client or a critical and unreasonable attitude, with which attorneys frequently have to contend. Conduct of the attorney which does not furnish substantial grounds for distrust or lack of confidence will not absolve the client from liability for a wrongful termination of the employment.

Id. at 7-8, 200 P.2d at 11. A determination regarding whether "cause" for discharge exists was necessarily complex, but deemed essential. *See* Zurich Gen. Accident & Liab. Ins. Co. v. Kinsler, 12 Cal. 2d 98, 81 P.2d 913 (1938), where the court stated:

> With respect to a determination of whether the discharge of an attorney has been "without cause", it is obvious that no precise act or fixed line of conduct on the part of the attorney may be accurately defined or specified as furnishing a sufficient reason for an application of the rule against him. Manifestly, "cause" which in legal contemplation would justify the cancellation of a contingent contract for compensation on account of legal services thereafter to be rendered, necessarily would have to depend upon the particular circumstances that were present in each case.

Id. at 101, 81 P.2d at 915.

43 6 Cal. 3d at 790, 494 P.2d at 13, 100 Cal. Rptr. at 389.

44 The dissenting opinion noted the apparent unfairness of this approach:

> Finally, I point out that by holding that "It should be sufficient that the client has, for whatever reason, lost faith in the attorney, to establish 'cause' for discharging him" . . . the majority actually propose a *subjective* test for determining breach in respect to an attorney-client contract. However, for all practical purposes, their rule frees the client even from an obligation of good faith and permits him to escape at will from the terms of his contract. This new rule violates the most basic principle of contract law—that a party's actions will be judged according to objective standards of reasonableness. Ironically and incongruously, the result of the majority's holding is that although an *objective* test is applied to determine whether a contract has been formed . . . , a *subjective* test is now to be applied to determine whether it has any legal effect.

6 Cal. 3d at 802, 494 P.2d at 21-22, 100 Cal. Rptr. at 397-98.

reasonable value of services by the discharged attorney until, and only if, the client successfully recovers in the underlying cause of action.[45] As a general principle of agency law, after a discharge, the right of a party to compensation for previous services still depends upon the provisions of the rescinded contract.[46] However, when the rescinded contract contemplates a future contingency, it is anomalous to both rescind the contract and also cause it to operate in the future to determine the rights of the parties.[47]

Other jurisdictions have held that a cause of action for *quantum meruit* accrues immediately after a wrongful discharge.[48] Thus, the

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[45] *Id.* at 791-92, 494 P.2d at 14, 100 Cal. Rptr. at 390.

[46] *See* discussion in 5A A. CORBIN, CONTRACTS § 1229 (1964), wherein the author stated:

> In contracts of agency or other employment, it is often provided that one or both of the parties shall have the power to terminate the agency or employment at any time (or on specified conditions) by giving notice. When the required notice is given, neither party is under a duty of further performance; the contract may be said to be "discharged." Yet the rights of the parties with respect to performances rendered or breaches committed before the notice became operative still depend upon the provisions of the "discharged" contract.

Regarding a discharged attorney's right to compensation, *see generally* 5 A. CORBIN, CONTRACTS § 1095 (1964); 10 S. WILLISTON, CONTRACTS § 1285A (3d ed. 1967), and cases cited therein.

[47] The dissent in *Fracasse* noted the inconsistency:

> [The] plaintiff-attorney, although discharged without cause, may not use the terms of the contract to measure his damages. Contradictorily, the majority also say that plaintiff's recovery for even the reasonable value of his services is subject to the contractual term that compensation is contingent upon the success of defendant's personal injury suit.

6 Cal. 3d at 804, 494 P.2d at 23, 100 Cal. Rptr. at 399.

[48] *See* Cox v. Trousdale, 138 Kan. 633, 27 P.2d 298 (1933) (citing Martin v. Camp, 219 N.Y. 170, 114 N.E. 46 (1916), as authority for the accrual of a cause of action in *quantum meruit* at the time of discharge); Inman v. Gonzales, 89 So. 2d 914 (La. Ct. App. 1956) (cause of action in *quantum meruit* would be proper at time of discharge); Tillman v. Komar, 259 N.Y. 133, 181 N.E. 75 (1932) (it was contrary to the rights of a substituted attorney that he be required to await the outcome of the litigation before he would receive compensation for his services performed under a percentage contract); Sundheim v. Beaver County Bldg. & Loan Ass'n, 140 Pa. Super. 529, 14 A.2d 349 (1940) (attorney may have a cause of action for the reasonable value of services although present contract action is barred by the non-occurrence of a condition precedent—recovery by the client in the underlying action); Wright v. Johanson, 132 Wash. 682, 233 P. 16, *aff'd on rehearing*, 135 Wash. 696, 236 P. 807 (1925) (cause of action for *quantum meruit* accrued at discharge of attorney). *See also* Thompson v. Smith, 248 S.W. 1070, 1073 (Tex. Comm'n App. 1923), where although the issue was not decided, the language of the court indicated quite strongly the irrelevance of the breached contract in a determination of future rights. California, prior to the holding in *Fracasse*, was in accord with the above body of authority. *See* Tracy v. MacIntyre, 29 Cal. App. 2d 145, 84 P.2d 526 (Dist. Ct. App. 1938).

It should be carefully noted that in the above decisions the action was in *quantum meruit*. In jurisdictions where suit is allowed for the recovery of damages or the entire fee, the attorney may elect to sue on a contract theory. In this case he may be required to await the contingency. *See* Bartlett v. Odd-Fellows' Sav. Bank, 79 Cal. 218, 21 P. 743, 12 Am. Rep. 139 (1889); Inman v. Gonzales, 89 So. 2d 914 (La. Ct. App. 1956).

New York Court of Appeals concluded in *Tillman v. Komar*[49] that a discharged attorney could sue upon dismissal in *quantum meruit*.[50] In explaining the rationale, the court pointed out the vulnerable position in which the discharged attorney might be placed:

> This [attorney] did not contract for his contingent compensation on the hypothesis of success or failure by some other member of the bar. A successor may be able to obtain far heavier judgments than the efforts of the original attorney could secure, or, on the other hand, inferior equipment of a different lawyer might render futile an attempt to prove damage to the client.[51]

The *Fracasse* court, however, was not ultimately concerned with potential unfairness to the discharged attorney. It concluded that the imposition of a judgment for the attorney against a possibly indigent ex-client was the primary consideration:

> The client may and often is very likely to be a person of limited means for whom the contingent fee arrangement offers the only realistic hope of establishing a legal claim. Having determined that he no longer has the trust and confidence in his attorney necessary to sustain that unique relationship, he should not be held to have incurred an absolute obligation to compensate his former attorney. Rather, since the attorney agreed initially to take his chances on recovering any fee whatever, we believe that the fact that the success of the litigation is no longer under his control is insufficient to justify imposing a new and more onerous burden on the client.[52]

The court also reasoned that it would be impossible to reach a determination of the reasonable compensation due an attorney "until the matter has finally been resolved."[53] It is interesting to note that to support this contention the court in *Fracasse* relied on *Brown v. Connelly*,[54] where an attorney sought recovery of his entire fee under a contingent fee contract.[55] Recovery was denied because there could be no cause of action against the client "for compensation *based upon a contingency fee contract* until the happening of the stated contingency."[56] However, the *Fracasse* court did not point out that this

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49 259 N.Y. 133, 181 N.E. 75 (1932).

50 *Id.* at 136, 181 N.E. at 76.

51 *Id.* at 135-36, 181 N.E. at 76.

52 6 Cal. 3d at 792, 494 P.2d at 14, 100 Cal. Rptr. at 390.

53 *Id.*

54 2 Cal. App. 3d 867, 83 Cal. Rptr. 158 (Dist. Ct. App. 1969).

55 *Id.* at 869, 83 Cal. Rptr. at 159.

56 *Id.* at 871, 83 Cal. Rptr. at 160. It is interesting to note that the majority in *Fracasse* used almost these exact words. However, they removed the emphasis on "based on a contingent fee contract" as it existed in *Brown* and substituted their own emphasis on the word "compensation." *See* 6 Cal. 3d at 787, 494 P.2d at 11, 100 Cal. Rptr. at 387. Thus the *Fracasse* court derived an implication unintended by the court in *Brown*.

rule was applied in *Brown* only because the attorney sought the *full contingent fee* and not recovery in *quantum meruit*.[57] Thus *Brown* is weak authority for the proposition that *quantum meruit* recovery must await the occurrence of the contingency.[58]

Prior to *Fracasse* an attorney always retained something of value before and after a discharge without cause. Before discharge, he held the valuable privilege of litigating a controversy for a contingent compensation.[59] After a discharge, he retained the valuable right to an immediate cause of action in *quantum meruit*.[60] The *Fracasse* decision has extinguished a right to an immediate cause of action and converted this valuable interest in the litigation into a gamble on an unknown attorney. Further, the discharged attorney, after risking his time and effort toward a possible recovery, delivers this investment into strange hands in return not for definite compensation, but for a *contingent compensation* over which he has no control.[61] In applying this new

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57 The *Brown* court stated:

> "It is well settled that where the attorney is wrongfully discharged before he has completely performed his contract, he may recover from the client damages for such breach, the measure of damages being the fee specified in the contract, or recover on a *quantum meruit* for the reasonable value of his services." . . . It must be noted, however, . . . at least where an attorney relies solely on his contingency fee agreement, his cause of action does not accrue until the happening of the specified contingency.

2 Cal. App. 3d at 870, 83 Cal. Rptr. at 160 (quoting in part from Fivey v. Chambers, 199 Cal. App. 2d 457, 463, 19 Cal. Rptr. 111, 115 (Dist. Ct. App. 1962)).

58 Applicable precedent was disposed of by the *Fracasse* court in a footnote disapproving Tracy v. MacIntyre, 29 Cal. App. 2d 145, 84 P.2d 526 (Dist. Ct. App. 1938) (cause of action in *quantum meruit* accrued immediately upon wrongful discharge of the attorney). *See* 6 Cal. 3d at 792 n.4, 494 P.2d at 14, 100 Cal. Rptr. at 390.

59 The outcome of litigating a controversy and losing, being the full contractual benefit bargained for, must be considered compensation under the circumstances. *See* 1 A. CORBIN, CONTRACTS § 148 (1963) (footnotes omitted), wherein he stated:

> A promise is not made insufficient as a consideration for a return promise by the fact that it is conditional, even though the condition is one that is purely fortuitous and may never happen at all. A promise that is subject to such a fortuitous condition is called an "aleatory" promise. It is a chance-taking promise, but is not necessarily an illegal wager even under various statutes directed against gambling. . . .
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> If a seeming promise is made conditional upon an event that can not occur at all, as the promisor knows, no real promise has been made. . . . If, on the other hand, the promise is conditional upon an event that may possibly occur, it is not illusory; and it is not made an insufficient consideration by the fact that the probability that the event will occur is very slight.

60 *See* Tracy v. MacIntyre, 29 Cal. App. 2d 145, 84 P.2d 526 (Dist. Ct. App. 1938). For other jurisdictions, see note 48 *supra*.

61 The dissent in *Fracasse* observed:

> By thus selectively retaining parts of the contract, even though it has been disaffirmed, the majority violate the rule that the contract must be preserved or eliminated in its entirety. Their explanation that plaintiff agreed "to take his

doctrine of recovery, care must be given to protect the investment interest of the discharged attorney.[62] Contingent contracts are not formed as simple, salaried propositions, but are in essence an application of risk capital seeking higher returns.[63] A determination of the value of a discharged attorney's services, which did not consider the contingent nature of his enterprise, would tend to be unreasonable.[64]

From a practical standpoint, when an attorney must look to a recovery *in futuro*, procedural safeguards become crucial.[65] The discharged attorney is unable to monitor the progress of the litigation and may not be informed of a final judgment or settlement.[66] Yet in *Fracasse* the court held that not only had a cause of action for *quantum meruit* recovery not yet accrued, but further, that the attorney was not

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chances on recovering any fee whatever" . . . disregards the substantial change in risk that results when plaintiff is prevented from managing the litigation.

6 Cal. 3d at 804, 494 P.2d at 23, 100 Cal. Rptr. at 399.

62 See comments by Phillip G. Auerbach, President of the Trial Attorneys of New Jersey, writing in regard to N.J.R. 1:21-7, which limits the percentage of recovery in contingent fee contracts. 94 N.J.L.J. 818 (1971). Mr. Auerbach estimated that an attorney will invest anywhere from $500.00 to $10,000.00 in a file.

63 *See* Schwartz & Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125, 1150 (1970), where the authors examined why the returns on contingent contracts are higher than a corresponding hourly wage. They also noted that risk taking rests most heavily on lawyers with few cases and on small firms. The importance of this is that the *Fracasse* case shifts an additional uncertainty or risk upon the attorney. The total effect will create an additional disadvantage for attorneys who are building a practice.

64 In estimating the reasonable value of the services rendered by an attorney, courts generally consider the contingent nature of the contract. *See* Simler v. Conner, 352 F.2d 138 (10th Cir. 1965), *cert. denied*, 383 U.S. 928 (1966); Monsanto Chem. Co. v. Grandbush, 162 F. Supp. 796 (W.D. Ark. 1958); *In re* Lanza's Estate, 229 Cal. App. 2d 720, 40 Cal. Rptr. 528 (Dist. Ct. App. 1964); *In re* Cusimano, 174 Misc. 1068, 22 N.Y.S.2d 677 (Sur. Ct. 1940).

65 The dissent in *Fracasse* observed that it was essential for the attorney to establish his claim in judgment form as early as possible. 6 Cal. 3d at 795, 494 P.2d at 16-17, 100 Cal. Rptr. at 392-93. The dissent further noted:

> The discharged attorney obviously desires to secure a conditional determination of his right to recover his fee before the trial or settlement of the personal injury action so that he can reach any proceeds before his former client disposes of them. If, as the majority assert, contingent fee contracts frequently involve clients of limited means, prompt establishment of an interest in a portion of the proceeds may therefore be essential to recovery. The attorney who eventually brings the personal injury action to judgment or settlement may have the first opportunity to resort to the proceeds. The attorney who is discharged without cause should certainly receive comparable protection.

Id. (footnote omitted).

66 There will be instances where the client will be willing to take the fruits of recovery without paying for the services that obtained it. *See* Berman, *The Attorney's Lien in New York—A New Look*, 6 N.Y.L.F. 300 (1960). If attorneys need protection while they are handling the case (*Id.* at 303-04), the need will increase when they are not.

entitled to a declaratory judgment.[67] The California Declaratory Relief Act enables the courts to make a binding determination regarding rights in property or under contract whenever an actual controversy exists.[68] The statute has been liberally construed for the purpose of eliminating "uncertainties and controversies which might result in future litigation."[69] The judicial power that the statute provides has been used to interpret the terms of an attorney's contract,[70] to declare the rights of remaindermen under certain future contingencies[71] and to determine possible liability of parties to a breached contract before an adjudication on the merits.[72] However, the court in *Fracasse* held that since the cause of action did not accrue until the happening of the contingency, there was "no present controversy such as would justify the court in exercising its discretion to entertain an action for declaratory relief."[73]

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67 6 Cal. 3d at 792-93, 494 P.2d at 15, 100 Cal. Rptr. at 391.

68 The California Declaratory Relief Act provides in pertinent part:

> Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action in the superior court or file a cross-complaint in a pending action in the superior or municipal court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract.

CAL. CIV. PRO. CODE § 1060 (West Supp. 1972).

69 Mefford v. City of Tulare, 102 Cal. App. 2d 919, 922, 228 P.2d 847, 849 (Dist. Ct. App. 1951). The court stated:

> The purpose of declaratory relief is to liquidate uncertainties and controversies which might result in future litigation and whether a determination is proper in an action for declaratory relief is a matter within the trial court's discretion.

Id. California courts have held that the statute is to be liberally construed in order to effectuate its purpose. *See In re* San Joaquin Light & Power Corp., 52 Cal. App. 2d 814, 127 P.2d 29 (Dist. Ct. App. 1942); Tolle v. Struve, 124 Cal. App. 263, 12 P.2d 61 (Dist. Ct. App. 1932).

70 *See* Blakeslee v. Wilson, 190 Cal. 479, 213 P. 495 (1923) (declaratory judgment sought to determine whether an attorney was entitled to a percentage of future judgment or to fixed sum). In New Jersey, the Declaratory Relief statute, N.J. STAT. ANN. §§ 2A:16-50 *et seq.* (1952), has been applied to attorney's contracts. *See* Murphy v. Westfield Trust Co., 129 N.J. Eq. 389, 20 A.2d 359 (Ch. 1941), *aff'd*, 130 N.J. Eq. 600, 23 A.2d 564 (Ct. Err. & App. 1942) (right of attorneys to declaratory judgment declaring their rights and status under a retainer agreement recognized).

71 *See* Caldwell v. Rosenberg, 47 Cal. App. 2d 143, 117 P.2d 366 (Dist. Ct. App. 1941) (contingent remainders of life beneficiary's children constituted a present legal equitable right which parties could protect by declaratory judgment).

72 *See* Sattinger v. Newbauer, 123 Cal. App. 2d 365, 266 P.2d 586 (Dist. Ct. App. 1954) (right to declaratory judgment interpreting partnership contract upheld although issue could be mooted by future judgment on merits regarding alleged breach of contract).

73 6 Cal. 3d at 792-93, 494 P.2d at 15, 100 Cal. Rptr. at 391.

Fracasse was seeking a determination of his right to recover his fee conditioned upon eventual settlement or judgment in favor of his former client.[74] He had an interest in the proceeds of the action which he was attempting to protect, and the declaratory judgment would be evidence of his interest similar to a lien.[75] To create a lien at common law the lienor was normally required to have possession of the subject property.[76] An exception to this is the attorney's charging lien which encumbers a judgment attained through his efforts.[77] In California the charging lien is granted by contractual consent and is not implied by the mere formation of a contingent contract.[78] Also, there is no general statutory grant of a lien on the client's cause of action as exists in other states.[79] As a consequence, any execution not founded on an equitable lien would be effected by statutory attachment proceedings after final recovery by the client.[80] While an existing declaratory judg-

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74 *Id.* at 786-87, 494 P.2d at 10, 100 Cal. Rptr. at 386.

75 *Id.* at 795, 494 P.2d at 16-17, 100 Cal. Rptr. at 392-93.

It may not, however, be possible for the declaratory judgment to operate as a lien. In Rosenberg v. Lawrence, 10 Cal. 2d 590, 75 P.2d 1082 (1938), a controversy arose over the compensation due attorneys for litigation they had carried to a stipulation of entry of judgment for the plaintiff. The trial court declared that the attorneys would be entitled to 50% of the recovery. The California Supreme Court sustained this holding as far as it defined the compensation due the attorneys but struck out parts of the judgment which declared that a portion of the client's recovery belonged to the attorneys. The court held that new substantive rights could not be created by declaratory judgment, under the guise of doing equity, when there otherwise was no right to a lien. *Id.* at 594-95, 75 P.2d at 1084-85.

76 *See* Brauer v. Hotel Associates, Inc., 40 N.J. 415, 419-20, 192 A.2d 831, 833-34 (1963), where the various common law liens available to the attorney were discussed.

77 *Id.* at 420, 192 A.2d at 834. *See generally* Annot., 143 A.L.R. 204 (1943).

The charging lien is equitable in nature because there is no possession of the subject property. See the comparison of the common law (possessory) lien and the principle of equitable assignment (charging lien) in *In re* McCormick's Estate, 14 N.J. Misc. 73, 75-76, 182 A. 485, 486-87 (Bergen County Orphans' Ct. 1936). *See generally* Berman, *supra* note 66, at 303-04; 7 C.J.S. *Attorney and Client* § 211 (1937).

78 *See* Echlin v. Superior Court, 13 Cal. 2d 368, 90 P.2d 63 (1939); Rosenberg v. Lawrence, 10 Cal. 2d 590, 75 P.2d 1082 (1938).

79 *See, e.g.*, American Auto. Ins. Co. v. Niebuhr, 124 N.J. Eq. 372, 2 A.2d 46 (Ch. 1938), where the attorney's statutory charging lien on a judgment recovered by a substituted attorney was preserved. The basis for the creation of a lien prior to the existence of a judgment is N.J. STAT. ANN. § 2A:13-5 (1952), which gives the attorney a lien on the cause of action.

80 CAL. CIV. PRO. CODE § 537 (West Supp. 1972) provides in part:

> The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, . . . as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment, as in this chapter provided, in the following cases:
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> 1. In an action upon a contract, express or implied, for the direct payment of money . . . .

ment might expedite these proceedings, it would not enhance the position of the attorney as a creditor.[81]

The economic impact of *Fracasse* on California attorneys may not be fully realized. Currently in California, a wrongfully discharged attorney can recover his full fee after the breach of a non-contingent contract.[82] However, recovery may soon be limited to *quantum meruit*, since the *Fracasse* court couched its decision in terms broad enough to apply to non-contingent agreements.[83] This result would be in accord with the experience of New York following *Martin v. Camp*,[84] where a wrongfully discharged attorney was entitled to recovery only in *quantum meruit* under a contingent contract.[85] This limitation on recovery was subsequently applied to non-contingent arrangements.[86] However, an attorney's right to immediate recovery in *quantum meruit* after wrongful discharge under a non-contingent contract should remain unaffected by the *Fracasse* holding, as the basis for postponing recovery (burden to client with limited means) does not exist for the client who is financially able to retain counsel on a non-contingent basis. New York would allow immediate recovery in *quantum meruit* under either contractual arrangement.[87]

Since the contingent fee arrangement is an established medium for supplying justice to the indigent, careful consideration must be

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81 See note 75 *supra*, where the use of a declaratory judgment as a lien was questioned. This shortcoming raises doubts whether a declaratory judgment can prevent a client from disbursing his judgment, absent any attachment proceedings.

82 *See* Oliver v. Campbell, 43 Cal. 2d 298, 273 P.2d 15 (1954) (general rule applied although attorney sought recovery in *quantum meruit*); Webb v. Trescony, 76 Cal. 621, 18 P. 796 (1888) (attorney discharged without cause granted full contract fee).

83 They held specifically:

> [A]n attorney discharged with or without cause is entitled to recover the reasonable value of his services rendered to the time of discharge. . . . We further hold that the cause of action to recover compensation for services rendered under a contingent fee contract does not accrue until the occurrence of the stated contingency.

6 Cal. 3d at 792, 494 P.2d at 14-15, 100 Cal. Rptr. at 390-91.

84 219 N.Y. 170, 114 N.E. 46 (1916). See discussion note 11 *supra*.

85 219 N.Y. at 174, 114 N.E. at 48.

86 *See In re* Montgomery's Estate, 272 N.Y. 323, 6 N.E.2d 40 (1936). For other jurisdictions *see generally* Annot., 54 A.L.R.2d 604, 619 (1957).

87 *See* Tillman v. Komar, 259 N.Y. 133, 181 N.E. 75 (1932) (attorney discharged from contingent contract allowed immediate recovery in *quantum meruit*). For non-contingent contracts there is no contractual basis for delaying the time of recovery. *See In re* Montgomery's Estate, 272 N.Y. 323, 6 N.E.2d 40 (1936), where the court emphasized the irrelevance of the fallen contract by holding that the contract price does not limit the recovery in *quantum meruit* since the contract either " 'wholly stands or totally fails.' " *Id.* at 327, 6 N.E.2d at 41 (quoting from Tillman v. Komar, 259 N.Y. 133, 135, 181 N.E. 75, 75 (1932)).

given to it before modifying its operation.[88] The balance of economic exchange and risk-taking must be considered from both the client's and the attorney's viewpoint. The client in many instances cannot afford to assume an absolute obligation and may, therefore, feel compelled to remain with an attorney in whom he has lost faith. The client also gains bargaining power by having the termination sword with which to prod a recalcitrant attorney. The attorney, on the other hand, as a businessman, must calculate the risk of discharge into his fees. Otherwise, he must shy away from contingent arrangements or accept smaller returns. Thus, the *Fracasse* decision has shifted the balance in California to favor the client and in doing so has reduced the efficacy of the contingent contract.

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[88] For an analysis of the economic decisions made by parties to a contingent fee contract and the influence of each party's desire to maximize returns, see Schwartz & Mitchell, *supra* note 63, at 1125-26.