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On the Trail to Increased Client Protection: Attorney Contingent Fee Contract Termination in Light of Hoover v. Walton Recent Development.

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RECENT DEVELOPMENT

ON THE TRAIL TO INCREASED CLIENT PROTECTION: ATTORNEY CONTINGENT FEE CONTRACT TERMINATION IN LIGHT OF *HOOVER v. WALTON*

TIFFANIE S. CLAUSEWITZ

I. INTRODUCTION

In our increasingly litigious society, the use of contingent fee contracts is on the rise.[1] Under a contingent fee contract,[2] a client may retain an attorney by agreeing to pay the attorney a percentage of any recovery made under the contract. Attorneys who render services on a contingent fee basis take the risk that they will not be compensated unless their clients recover.[3]

When an attorney is discharged without fault from a contingent fee agreement, the attorney has the right to recover under a theory of quantum meruit for the value of services rendered.[4] In Texas, however, an attorney discharged without fault may elect to recover the full contingent fee if the claim is successfully litigated.[5] This

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1. *See* Giana Ortiz, *Medical Malpractice Damage Caps—Constitutional Per Se in Texas, But at What Price? A Look at Alternative Patient Compensation Schemes*, 43 HOUS. L. REV. 1281, 1284 (2006) (addressing whether "the healthcare crisis and rising malpractice rates" can be attributed to increased litigation in Texas); Sofia Androgué & Alan Ratliff, *The Care and Feeding of Experts: Accountants, Lawyers, Investment Bankers, and Other Non-scientific Experts*, 47 S. TEX. L. REV. 881, 889 (2006) ("[Noting] a general rapid increase . . . across all areas of litigation."). As of 1998, lawyers were "representing plaintiffs on a contingent fee basis in most of the roughly one million tort cases that [were] filed each year, [making] the practice . . . more common than ever." Ted Schneyer, *Legal-Process Constraints on the Regulation of Lawyers' Contingent Fee Contracts*, 47 DEPAUL L. REV. 371, 371 (1998).

2. *See* BLACK'S LAW DICTIONARY 338 (8th ed. 2004) (defining contingent fee as "[a] fee charged for a lawyer's services only if the lawsuit is successful or is favorably settled out of court").

3. *See id.* (noting the conditions precedent to an attorney collecting a contingent fee). The primary purpose of contingent fee contracts is "to allow plaintiffs who cannot afford an attorney to obtain legal services by compensating the attorney from the proceeds of any recovery." Hoover Slovacek L.L.P. v. Walton, 206 S.W.3d 557, 561 (Tex. 2006) (per curiam) (citing Arthur Anderson & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997)).

4. *Hoover*, 206 S.W.3d at 561 (citing Mandell & Wright v. Thomas, 441 S.W.2d 841, 847 (Tex. 1969)).

5. *Mandell*, 441 S.W.2d at 847. The court stated that "[i]n Texas, when the client, without good cause, discharges an attorney before he has completed his work, the attorney may recover on the contract for the amount of his compensation." *Id.* (citing Myers v. Crockett, 14 Tex. 257, 258–59 (1855); White v. Burch, 19 S.W.2d 404, 407 (Tex. Civ. App.—Fort Worth 1929, writ ref'd); White v. Burch, 33 S.W.2d 512, 515 (Tex. Civ. App.—

policy appears to favor attorneys over their clients, in that clients are dissuaded from terminating their current attorney in favor of a different attorney because they are then subject to paying two contingent fees.[6] A recent decision, however, signals a possible shift in this policy.

In 2006 the Texas Supreme Court decided *Hoover Slovacek L.L.P. v. Walton*.[7] John Walton hired the firm of Hoover Slovacek L.L.P. to assist in "recover[ing] unpaid royalties from several oil and gas companies operating on his 32,500 acre ranch."[8] The parties operated under a contingent fee contract granting the firm 30% of recovery, and included a termination provision which stated:

> You may terminate the Firm's legal representation at any time .... Upon termination by You, You agree to immediately pay the Firm the then present value of the Contingent Fee described [herein], plus all Costs then owed to the Firm, plus subsequent legal fees [incurred to transfer the representation to another firm and withdraw from litigation].[9]

Walton later discharged the firm, alleging that the assigned attorney was not making headway in settling his claims, and had, in fact, damaged his credibility by making unauthorized, outrageous demands.[10] Hoover attempted to bill Walton for what it claimed was its percentage of the then-current value of the claim, which

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Fort Worth 1930, writ ref'd); Cottle County v. McClintock & Robertson, 150 S.W.2d 134, 139 (Tex. Civ. App.—Amarillo 1941, writ denied)). Moreover, "[b]oth ... [full contract recovery or quantum meruit] are subject to the prohibition against charging or collecting an unconscionable fee." *Hoover*, 206 S.W.3d at 561.

6. *See Considering Referral Fees: A Look Back in Recent History*, 66 TEX. B.J. 977, 979 (2003) (commenting that the *Mandell* rule "provides both referring and handling lawyers with an extremely potent weapon to wield against clients who become dissatisfied with their representation"). The rule "permits those attorneys to threaten their clients credibly with the prospect of having to pay full attorney fees to two different sets of lawyers in the event that they discharge original counsel." *Id.* The author notes that the "result has been the subject of pungent and telling criticism." *Id.*; *see also* Craig N. Adams, Comment, *Clients Beware: Texas Courts Allow Discharged Attorneys to Recover in Full Under Contingent Fee Contracts*, 22 TEX. TECH L. REV. 1159, 1173 (1991) (bemoaning that under Texas law, the client "is forced to choose between proceeding with what is perceived as unsatisfactory representation or retaining other counsel and paying both attorneys").

7. Hoover Slovacek L.L.P. v. Walton, 206 S.W.3d 557 (Tex. 2006) (per curiam).

8. *Id.* at 559.

9. *Id.*

10. *Id.* at 560.

Walton refused to pay.[11] Hoover brought suit against Walton; the trial court held for Hoover, but was reversed by the court of appeals, which ruled that "Hoover's fee agreement was unconscionable as a matter of law."[12] The Texas Supreme Court agreed with this point, reasoning that "[b]ecause [the agreement] imposes an undue burden on the client's ability to change counsel, Hoover's termination fee provision violates public policy and is unconscionable as a matter of law."[13]

Potentially signaling a break from precedent, *Mandell & Wright v. Thomas*[14] established the current standard applied to termination of attorney contingent fee contracts in Texas.[15] In *Mandell*, Thomas hired Mandell & Wright to represent her in matters regarding her husband's death.[16] Subsequently, a second attorney advised her that she had the right to discharge Mandell & Wright in favor of hiring him to litigate the claim.[17] After Thomas released Mandell & Wright and hired the second attorney, Mandell & Wright filed suit seeking one-third of any recovery made by Thomas in settling the death claim.[18] The Texas Supreme Court held that while a client has the right to discharge an attorney hired on a contingent fee basis, if the discharge is without fault, the attorney is entitled to recover the contracted amount of compensation.[19]

While *Mandell* has dictated Texas's policy toward termination of attorney contingent fee contracts for almost forty years, the *Hoover* decision could signal future changes in how terminated attorneys are—or are *not*—compensated. Although the court in *Hoover* distinguished that case's fact pattern from *Mandell* and

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11. *Id.*

12. *Hoover*, 206 S.W.3d at 560.

13. *Id.* at 563.

14. Mandell & Wright v. Thomas, 441 S.W.2d 841 (Tex. 1969).

15. *See Hoover*, 206 S.W.3d at 561–62 (noting that the termination provision in question actually skirted around the *Mandell* remedies thereby avoiding its application).

16. *Mandell*, 441 S.W.2d at 843–44. Following the death of Thomas's husband, Wright approached Thomas as the attorney for her husband's union. *Id.* at 843. Thomas testified that while she did sign the contract, she did not remember reading it. *Id.* at 844.

17. *Id.*

18. *Id.* at 843.

19. *Mandell*, 441 S.W.2d at 847 (declining to limit Mandell & Wright's recovery to "quantum meruit for the value of work performed between the date of employment and date of discharge").

declined to overturn *Mandell*, some of the reasoning in *Hoover* could be interpreted as moving the court closer to invalidating *Mandell*.[20] Specifically, the *Hoover* court made three primary arguments against the termination fee in question: (1) the termination fee provision imposed a penalty for changing counsel, (2) the provision granted the law firm "an impermissible proprietary interest" in the client's claims, and (3) the provision "subverted several policies underlying the use of contingent fees."[21] A discussion of the historical approaches to no-fault termination of attorney contingent fee contracts, followed by an analysis of the Texas Supreme Court's reasoning in *Hoover*, provides insight into the likely future of no-fault contract termination jurisprudence.

II. DIVERGENT APPROACHES TO NO-FAULT TERMINATION OF ATTORNEY CONTINGENT FEE CONTRACTS

Texas law gives clients operating under contingent fee contracts the absolute right to discharge their attorneys.[22] However, when an attorney is discharged without fault, the issue arises as to whether the attorney should be allowed to recover the full contingent fee, or whether the attorney is limited to recovery under the theory of quantum meruit for the reasonable value of services rendered.[23]

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20. Hoover Slovacek L.L.P. v. Walton, 206 S.W.3d 557, 563 (Tex. 2006) (per curiam) (listing the primary reasons for the court's decision).

21. *Id.* at 566 (outlining the reasons for the court's determination that the termination provision was contrary to public policy and unconscionable).

22. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.15, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9) ("A lawyer shall decline to represent a client or, where representation has commenced, shall withdraw . . . from the representation of a client, if . . . the lawyer is discharged, with or without good cause.").

23. *See generally* George L. Blum, Annotation, *Limitation to Quantum Meruit Recovery, Where Attorney Employed Under Contingent-Fee Contract is Discharged Without Fault*, 56 A.L.R. 5TH 1 (1998) (providing a survey of state court approaches to the question of how to compensate an attorney discharged without fault). In his introduction, Blum notes that because clients have an unfettered right to discharge their attorneys at any time, with or without fault, "the issue arises as to whether an attorney employed under a contingent-fee contract, who is discharged without cause, is entitled to recover the contingent fee or is limited to a quantum meruit recovery for the reasonable value of the services rendered." *Id.*

A. *Texas Case Law:* Mandell *and the Traditional Contract Rule*

Texas courts have determined that the no-fault termination of an attorney employed under a contingent fee contract should be treated for all intents and purposes as a traditional breach of contract.[24] In *Mandell*, the Texas Supreme Court acknowledged that the client has a right to terminate the attorney-client relationship without reason, but held that if damages are subsequently recovered, the terminated attorney has a right to recover the full contingent fee.[25] The court stated:

> We reject respondent's contention that Mandell & Wright's recovery should be limited to one of quantum meruit for the value of work performed. Her refusal to cooperate in their prosecution of the claim made it impossible for them to proceed further. In Texas, when the client, without good cause, discharges an attorney before he has completed his work, the attorney may recover on the contract for the amount of his compensation.[26]

This opinion solidified the long-standing tradition in Texas of treating contingent fee contracts no differently than any other contract "for purposes of determining the appropriate remedy in the event of a breach."[27] As far back as 1855, the Texas Supreme Court held that an attorney prevented from completing his obligations under a contingent fee contract is entitled to the complete fee designated in the terms of the contract.[28] In *Myers v.*

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24. *See* Myers v. Crockett, 14 Tex. 257, 258–60 (1855) (holding that when an attorney has entered into a contract to perform services, and the contract is cancelled through no fault of his own, he is "entitled to recover the full amount of the fee contracted to be paid for the services contemplated by the contract"); *accord Hoover*, 206 S.W.3d at 559; *Mandell*, 441 S.W.2d at 847; Cottle County v. McClintock & Robertson, 150 S.W.2d 134, 139 (Tex. Civ. App.—Amarillo 1941, writ denied); White v. Burch, 33 S.W.2d 512, 515 (Tex. Civ. App.—Fort Worth 1930, writ ref'd); White v. Burch, 19 S.W.2d 404, 407–08 (Tex. Civ. App.—Fort Worth 1929, writ ref'd).

25. *Mandell*, 441 S.W.2d at 847.

26. *Id.*

27. Craig N. Adams, Comment, *Clients Beware: Texas Courts Allow Discharged Attorneys to Recover in Full Under Contingent Fee Contracts*, 22 TEX. TECH L. REV. 1159, 1167 (1991) (citing Myers v. Crockett, 14 Tex. 257, 258–60 (1855); *White*, 19 S.W.2d at 407–08).

28. *See Myers*, 14 Tex. at 257 (holding that an attorney employed to prosecute a suit to try title, who performed services before disagreeing with his client and being replaced by a different attorney, was entitled to recover compensation for services already rendered).

Crockett,[29] the court held "where the attorney had entered upon and was proceeding to perform the services contracted for, and the conduct of the case was thus wrested from him by his client without any fault on his part," it was reasonable to hold that the attorney "was entitled to recover the full amount of the fee contracted to be paid for the services contemplated by the contract."[30] In fact, Texas is the only state which continues to apply what are termed "contract damages" to no-fault discharges of attorneys hired under contingent fee employment contracts.[31]

Treating contingent fee arrangements as traditional contracts is deeply-rooted in the treatment of attorney-client relationships in Texas.[32] Contingent fee contracts are treated the same way as any employment contract.[33] A discharged attorney may recover if the

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29. Myers v. Crockett, 14 Tex. 257 (1855).

30. *Id.* at 258–59. "The rationale for the contract rule is based upon assumptions that (1) the full contract price is the most logical measure of damages as it reflects the value placed on the services at the time of the contract's formation; (2) awarding damages prohibits a client from profiting from his own breach of contract; and, (3) it lessens the difficult task of valuing a lawyer's partially completed work. Olsen & Brown v. City of Englewood, 889 P.2d 673, 675 (Colo. 1995) (citing Rosenberg v. Levin, 409 So. 2d 1016, 1019–20 (Fla. 1982)).

31. Lester Brickman, *Setting the Fee When the Client Discharges a Contingent Fee Attorney*, 41 EMORY L.J. 367, 401 n.24 (1992). Brickman refers to a federal case in which the Fifth Circuit made a "plea to Texas courts that they reconsider the rule in order to avoid what it perceived as inequitable results." *Id.* (citing Johnston v. Cal. Real Estate Inv. Trust, 912 F.2d 788, 789 (5th Cir. 1990)); *see also* Shelley A. Hill, *Fired!!! But What About My 33 1/3% Fee?*, VT. B.J. & L. DIG., Aug. 1993, at 15 ("[Texas] clings to the basic contract damages rule . . . .").

32. *See* Craig N. Adams, Comment, *Clients Beware: Texas Courts Allow Discharged Attorneys to Recover in Full Under Contingent Fee Contracts*, 22 TEX. TECH L. REV. 1159, 1165 (1991) (citing Mandell & Wright v. Thomas, 441 S.W.2d 841, 847 (Tex. 1969); Howell v. Kelly, 534 S.W.2d 737, 739–40 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ); White v. Burch, 19 S.W.2d 404, 407–08 (Tex. Civ. App.—Fort Worth 1929, writ ref'd)) (stating that the policy awarding attorneys discharged without fault the full fee of their contract is "now entrenched in the opinions of the Texas Supreme Court and the courts of appeals").

33. *See White*, 19 S.W.2d at 407 ("The relation of attorney and client in this case did not exist until the contract had been fully executed, and therefore each party was dealing upon an equal basis, one seeking to employ and the other seeking employment."); *see also* Craig N. Adams, Comment, *Clients Beware: Texas Courts Allow Discharged Attorneys to Recover in Full Under Contingent Fee Contracts*, 22 TEX. TECH L. REV. 1159, 1167 (1991) ("Texas courts applying breach of contract remedies have concluded that the attorney-client employment contract is no different than other contracts for purposes of determining the appropriate remedy in the event of a breach."). Courts following the quantum meruit approach highlight this as one reason the attorney-client relationship must be approached differently than a typical employment relationship. *See, e.g.*, Martin

attorney can prove wrongful breach of the contract.[34] Texas law dictates that when an attorney is discharged without fault under a contingent fee agreement, the attorney must prove that a contractual relationship was formed.[35] Once the relationship is established, the attorney is charged with proving he was capable of performing under the terms of the contract, and that this performance was prevented only by the client's wrongful discharge.[36] Once that has been proven, the attorney must show that the contingency on which the contract was based has indeed occurred; if the contingency has not yet transpired, the attorney must show that it would have taken place if the attorney had not been discharged from the contract.[37] Finally, the attorney must prove the amount owed under the contract.[38] If the attorney proves all these elements, the attorney has a prima facie case of wrongful breach of contract.[39]

Given a wrongful breach of contract, the attorney has three remedies. Most elect to either recover for the reasonable value of services rendered up until the time of termination, or to renounce the contract and sue for the contracted amount of compensation as

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v. Camp, 114 N.E. 46, 48 (N.Y. 1917) (noting that if clients are forced to pay breach of contract damages to their attorneys, the contract in question is essentially the same as an ordinary employment contract).

34. *See Mandell*, 441 S.W.2d at 847 (citing Myers v. Crockett, 14 Tex. 257, 258–59 (1855); *White*, 19 S.W.2d at 407; White v. Burch, 33 S.W.2d 512, 515 (Tex. Civ. App.—Fort Worth 1930, writ ref'd); Cottle County v. McClintock & Robertson, 150 S.W.2d 134, 139 (Tex. Civ. App.—Amarillo 1941, writ denied)) (holding that an attorney discharged without fault may recover under the terms of the employment contract); *accord* Law Offices of Windle Turley, P.C. v. French, 140 S.W.3d 407, 413 (Tex. App.—Fort Worth 2004, no pet.); Tillery & Tillery v. Zurich Ins. Co., 54 S.W.3d 356, 360 (Tex. App.—Dallas 2001, pet. denied); Howell v. Kelly, 534 S.W.2d 737, 739 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

35. *See Howell*, 534 S.W.2d at 740 ("It is the burden of the plaintiff to establish the existence of the contract sued on . . . .").

36. *See id.* (outlining the steps that must be taken by an attorney to prove discharge without fault and a valid claim for the full contingency fee).

37. *See id.* ("[The attorney seeking recovery must] establish . . . the happening of a condition on which liability is based, or that the condition would have happened if the promissor had abided by the terms of the contract . . . .").

38. *Id.*

39. *Howell*, 534 S.W.2d at 740 (citing Meade v. Rutledge, 11 Tex. 44, 45 (1853); Hassell v. Nutt, 14 Tex. 260, 262 (1855); Hearne v. Garrett, 49 Tex. 619, 622 (1881); Beaumont v. J.H. Hamblen & Son, 81 S.W.2d 24, 25 (Ark. 1935)). The *Howell* court noted: "[O]nce the plaintiff attorney has proven a contract to provide legal services to the defendant, and that the defendant has discharged him, he has established a prima facie case for the recovery of the resulting damage." *Id.*

set out in the contingent fee arrangement.[40] If the attorney chooses to sue for full compensation, the client has the option of showing that an event either transpired or failed to transpire which, under the terms of the contingent fee agreement, precludes liability.[41] If the client cannot do this, the attorney is generally entitled to compensation under the terms of the agreement.[42] "The effect of this remedy is that an attorney discharged without [fault] is entitled to collect on the entire contingent fee arrangement just as if the contracted-for legal services had actually been completed."[43]

A minority of jurisdictions follow this traditional rule of recovery.[44] While many argue that this policy protects attorneys and allows them to zealously represent their clients without

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40. *See* Mandell & Wright v. Thomas, 441 S.W.2d 841, 847 (Tex. 1969) (allowing the attorney to recover the full contingency fee under the terms of the contract when discharged without fault); Myers v. Crockett, 14 Tex. 257, 258–59 (1855) (stating that while there was no doubt an attorney discharged without fault is entitled to compensation for services rendered, when the attorney performs the services contracted for and is discharged without fault, "there would seem to be much reason in holding that he [is] entitled to recover the full amount of the fee contracted to be paid for the services contemplated by the contract"). The *Howell* court offered a third option—keeping the contract active with the attorney remaining ready and willing to work under the terms of the agreement. *Howell*, 534 S.W.2d at 739–40. However, as noted elsewhere, "[a]lthough this is an option set out by the court in *Howell*, use of the option has not been the subject of extensive litigation." Craig N. Adams, Comment, *Clients Beware: Texas Courts Allow Discharged Attorneys to Recover in Full Under Contingent Fee Contracts*, 22 TEX. TECH L. REV. 1159, 1166 n.53 (1991).

41. *See Howell*, 534 S.W.2d at 740 (reiterating the contract principle that the party seeking to avoid the contract must prove "the happening of a contingency which, by the terms of the contract, would discharge the party from liability, or any default or refusal to perform on the part of the plaintiff that would excuse the performance by the defendant . . .").

42. *See* McGowan v. Parish, 237 U.S. 285, 299 (1915) (awarding the discharged attorneys compensation after it was proven it was the client's fault the final steps to obtain recovery were not taken). Consequently, the Court proclaimed that "no reason [was] shown why complainants should not receive the entire amount stipulated for in the contracts." *Id.*

43. Craig N. Adams, Comment, *Clients Beware: Texas Courts Allow Discharged Attorneys to Recover in Full Under Contingent Fee Contracts*, 22 TEX. TECH L. REV. 1159, 1167 (1991); *see also Mandell*, 441 S.W.2d at 847 (holding that an attorney discharged without full cause is entitled to recovery of the full contingent fee).

44. Craig N. Adams, Comment, *Clients Beware: Texas Courts Allow Discharged Attorneys to Recover in Full Under Contingent Fee Contracts*, 22 TEX. TECH L. REV. 1159, 1169 (1991); *see also* Shelley A. Hill, *Fired!!! But What About My 33 1/3% Fee?*, VT. B.J. & L. DIG., Aug. 1993, at 15 (noting that "[Texas] clings to the basic contract damages rule" when determining actions by attorneys discharged without fault).

worrying about undue discharge, a growing majority of jurisdictions are acknowledging the unfairness of this policy toward clients.[45] Consequently, most jurisdictions apply what is considered the modern rule when determining how much a discharged attorney should be able to recover from a former client.[46]

B. *Majority Modern Rule: Limitation to Recovery in Quantum Meruit*

A growing majority of jurisdictions follow the "modern rule," limiting the discharged attorney to recovering fees for the reasonable value of services rendered prior to termination.[47] As in Texas, most jurisdictions allow clients operating under a contingent fee agreement to discharge their attorneys without fault.[48] Unlike Texas, however, these jurisdictions limit the discharged attorney to recovery of a reasonable amount for the value of services rendered if the client subsequently receives a recovery judgment on the claim.[49]

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45. *See* Craig N. Adams, Comment, *Clients Beware: Texas Courts Allow Discharged Attorneys to Recover in Full Under Contingent Fee Contracts*, 22 TEX. TECH L. REV. 1159, 1170 (1991) (noting the trend toward "reject[ing] the traditional approach and permit[ting] the discharged attorney to recover only the reasonable value of services rendered").

46. *See, e.g.*, Fracasse v. Brent, 494 P.2d 9, 14 (Cal. 1972) ("[There is] no injustice in a rule awarding a discharged attorney the reasonable value of the services he has rendered up to the time of discharge."). In doing so, the court upheld the client's right to end the attorney-client relationship without undue limitations, while acknowledging the attorney's right to reasonable compensation for work performed. *Id.*

47. *See* Lester Brickman, *Setting the Fee When the Client Discharges a Contingent Fee Attorney*, 41 EMORY L.J. 367, 373 n.37 (1992) (citing to the vast majority of jurisdictions which apply quantum meruit recovery for attorneys discharged without fault).

48. *See, e.g.*, State Farm Mut. Ins. Co. v. St. Joseph's Hosp., 489 P.2d 837, 841 (Ariz. 1971) ("[W]e . . . reaffirm the power of the client at any time to discharge his attorney and to settle or compromise his own claim."); *Fracasse*, 494 P.2d at 13 (holding that clients are not limited in their right to terminate their attorneys at any time, regardless of cause); Cole v. Myers, 21 A.2d 396, 399 (Conn. 1941) ("It is well settled that a client has the right to discharge his attorney and to substitute another at any time with or without cause and in spite of any contract . . . ."); Martin v. Camp, 114 N.E. 46, 47–48 (N.Y. 1916) (quoting *In re* Dunn, 98 N.E. 914, 916 (N.Y. 1912)) (affirming that clients may discharge their attorneys at any time, with or without fault)); Midvale Motors, Inc. v. Saunders, 442 P.2d 938, 940 (Utah 1968) ("While a party may discharge his attorney with or without cause, the attorney should not withdraw from a case except for good cause.").

49. *See, e.g.*, *Fracasse*, 494 P.2d at 13–14 (advocating for recovery in quantum meruit for attorneys discharged with or without fault).

Under the modern approach to termination of contingent fee contracts, "the right to discharge an attorney without [fault] is an implied term in the contingent fee agreement."[50] Therefore, when a client discharges the attorney, there is no breach of contract, and no subsequent right to recovery of the full amount of compensation contracted for in the agreement.[51] Under this line of reasoning, the right to end the attorney-client relationship is absolute.[52] This follows the reasoning of the traditional rule applied in Texas; however, while under the traditional rule a contingent fee arrangement is viewed as a typical employment contract, jurisdictions following the modern rule recognize the special nature of the attorney-client relationship.[53]

Courts adopting this approach reason that the nature of the attorney-client relationship is different than that of a typical

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50. Craig N. Adams, Comment, *Clients Beware: Texas Courts Allow Discharged Attorneys to Recover in Full Under Contingent Fee Contracts*, 22 TEX. TECH L. REV. 1159, 1170–71 (1991); *see also Martin*, 114 N.E. at 48 (indicating there is an implied contract right to terminate the attorney without cause at any time). In *Martin*, the court stated that "[i]f the client has the right to terminate the relationship of attorney and client at any time without cause, it follows as a corollary that the client cannot be compelled to pay damages for exercising a right which is an implied condition of the contract." *Martin*, 114 N.E. at 48. The court further noted that if clients could be forced to pay breach of contract damages to their attorneys, the contract in question is essentially the same as an ordinary employment contract. *Id.* Therefore, in cases where an attorney employed under a contingent fee agreement is discharged without fault, the attorney is allowed to recover in quantum meruit. *Id.* However, the attorney is not permitted to recover damages for the alleged breach. *Id.* "The discharge of the attorney by his client does not constitute a breach of the contract, because it is a term of such contract, implied from the peculiar relationship which the contract calls into existence, that the client may terminate the contract at any time with or without cause." *Id.*

51. *Martin*, 114 N.E. at 48.

52. *Id.* (citing *In re* Dunn, 98 N.E. 914, 916 (N.Y. 1912) ("That the client may at any time for any reason or without any reason discharge his attorney is a firmly established rule which springs from the personal and confidential nature of the relation which such a contract of employment calls into existence.")).

53. *Compare* Myers v. Crockett, 14 Tex. 257, 258–59 (reasoning that when an attorney has entered into a contractual relationship and proceeds to perform the services contracted for, and is then discharged without fault from the contract, there is justification in holding that the attorney is "entitled to recover the full amount of the fee contracted to be paid for the services contemplated by the contract"), *with Martin*, 114 N.E. at 48 (responding to decisions such as *Myers* in stating that "[t]hese decisions in other jurisdictions are not consistent with the principles which define the nature of the contract under which an attorney is employed, as those principles have been declared by the decisions of this court").

employment contract.[54] The confidential nature of the relationship, combined with the need for complete trust and confidence in one's attorney, "injects into the contract certain special and unique features."[55] Because of this required level of trust, the client should have the right to terminate a relationship in which trust has been lost, and should be able to do so without the threat of having to pay the full fee if recovery is later made.[56] Consequently, jurisdictions following the modern rule limit the attorney's recovery to the reasonable value of services rendered under the theory of quantum meruit.[57]

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54. *See, e.g.*, Martin v. Camp, 114 N.E. 46, 47 (N.Y. 1916) ("The contract under which an attorney is employed by a client has peculiar and distinctive features which differentiate it from ordinary contracts of employment."). The *Martin* court noted that application of English common law did not clarify the nature of the attorney-client employment contract. *Id.*; *see also* Pye v. Diebold, 283 N.W. 487, 488 (Minn. 1939) (distinguishing the attorney employment contract from others, stating that because "the client has the right to terminate the relation of attorney and client at any time without cause, then the contract differs from an ordinary contract of employment [as] one of the parties thereto may put an end to the same, whether agreeable to the other party or not").

55. *Martin*, 114 N.E. at 47. Courts following the modern rule generally hold that the attorney-client contract includes an implied right to discharge the attorney at will, without fear of being held to the contract terms. *See, e.g.*, Fracasse v. Brent, 494 P.2d 9, 13 (Cal. 1972) ("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."). The court further noted that "[i]t would be anomalous and unjust to hold the client liable in damages for exercising that basic implied right." *Id.*

56. *See, e.g.*, *Martin*, 114 N.E. at 47 ("Notwithstanding the fact that the employment of an attorney by a client is governed by the contract which the parties make, the peculiar relation of trust and confidence that such a relationship implies injects into the contract certain special and unique features."). Several courts have commented on the importance of trust to the attorney-client relationship. *See, e.g.*, King & King, Chartered v. Harbert Intern., Inc., 436 F. Supp. 2d 3, 12 (D.D.C. 2006) (citing Robinson v. Nussbaum, 11 F. Supp. 2d 1, 5 (D.D.C. 1997) ("[T]rust and confidence are essential elements of any attorney-client relationship, . . . a client should not be forced to continue to employ an attorney with whom he no longer retains this rapport.")); Abbott v. Marker, 722 N.W.2d 162, 167 (Wis. Ct. App. 2006) ("'Policy considerations play a fundamental role in protecting the very important relationship between attorney and client. The attorney-client privilege provides sanctuary to protect a relationship based upon trust and confidence.'" (quoting State v. Meeks, 666 N.W.2d 859, 873 (Wis. 2003))).

57. Courts following the modern rule contend that application of quantum meruit recovery protects clients while compensating attorneys for work performed prior to discharge. *See, e.g.*, Lubell v. Martinez, 901 So. 2d 951, 952–53 (Fla. Dist. Ct. App. 2005) (distinguishing between recovery for the discharged attorney and the substituted attorney). The *Lubell* court stated that attorneys discharged under a contingent fee agreement are entitled to recover the reasonable value of their services rendered, while the substituted attorney is entitled to the full contingent fee. *Id.* The court further noted

A split exists among these jurisdictions as to "whether a limit should be placed on an attorney's quantum meruit recovery."[58] Some courts restrict the amount of recovery so that it does not surpass the percentage of recovery originally set in the contract.[59] These courts reason that "limiting the attorney's recovery to the contract percentage legitimizes the client's right to discharge an attorney without fear of serious financial consequences."[60] The other jurisdictions following the modern rule disregard the

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that "[t]his rule ensures the client the right to discharge an attorney at any time with or without cause, while at the same time making a client responsible for his or her actions." *Id.*; *see also* Dudding v. Norton Frickey & Assoc., 11 P.3d 441, 445 (Colo. 2000) (relating that historically, courts applying quantum meruit recovery theories to contracts involving legal services acknowledge "that when a client discharges his or her attorney . . . the client remains obligated to pay the reasonable value of the services rendered, barring conduct by the attorney that would forfeit his right to receive a fee"); Phil Watson, P.C. v. Peterson, 650 N.W.2d 562, 567 (Iowa 2002) ("'Although a firm normally will prefer to carry a contingent-fee case to completion and receive the contractually based compensation rather than a quantum meruit recovery, the increasing acceptance of [quantum meruit recovery] accommodates the interests of both the firm and its former client.'" (quoting Robert W. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEX. L. REV. 1, 27 (1998))); Malonis v. Harrington, 816 N.E.2d 115, 121 (Mass. 2004) (noting that failing to compensate the discharged attorney can result in the unjust enrichment of the client); King v. Fox, 851 N.E.2d 1184, 1191–92 (N.Y. 2006) (holding that when an attorney is discharged without fault under a contingent fee contract, there is no breach of contract and the attorney can only recover in quantum meruit); Reid, Johnson, Downes, Andrachik & Webster v. Lansberry, 629 N.E.2d 431, 436 (Ohio 1994) (joining other courts in holding that "when an attorney representing a client pursuant to a contingent-fee agreement is discharged, the attorney's cause of action for a fee recovery on the basis of *quantum meruit* arises upon the successful occurrence of the contingency"). *But see* Salmon v. Atkinson, 137 S.W.3d 383, 388 (Ark. 2003) (Imber, J., concurring) (arguing that in some situations, application of quantum meruit recovery may also be unfair, as when "an attorney in a contingent-fee action is always entitled to a *quantum meruit* fee upon discharge, a poor client without funds to pay such a fee may be forced by the attorney to continue with a lawsuit that the client would prefer not to pursue").

58. Craig N. Adams, Comment, *Clients Beware: Texas Courts Allow Discharged Attorneys to Recover in Full Under Contingent Fee Contracts*, 22 TEX. TECH L. REV. 1159, 1172 (1991).

59. *See, e.g.*, Rosenberg v. Levin, 409 So. 2d 1016, 1021–22 (Fla. 1982) (disagreeing with an unlimited quantum meruit rule). The *Rosenberg* court found this unacceptable, as it permitted discharged attorneys to recover more than the contracted-for amount when the reasonable value of services rendered exceeded the client's actual recovery. *Id.* at 1021. To remedy this situation, the court ordered: "In computing the reasonable value of the discharged attorney's services, the trial court can consider the totality of the circumstances .... Factors such as time, the recovery sought, the skill demanded, the results obtained, and the attorney-client contract itself will necessarily be relevant considerations." *Id.* at 1022.

60. Craig N. Adams, Comment, *Clients Beware: Texas Courts Allow Discharged Attorneys to Recover in Full Under Contingent Fee Contracts*, 22 TEX. TECH L. REV. 1159, 1172 (1991) (citing Rosenberg v. Levin, 409 So. 2d 1016, 1022 (Fla. 1982)).

contract value, ruling that because the contract has been cancelled, it cannot be used as a basis for determining recovery; consequently, the attorney's compensation is not limited to the percentage set in the original contract.[61]

An issue for courts following either of the quantum meruit approaches is whether to premise the discharged attorney's recovery on the "actual occurrence of the contractual contingency."[62] While some courts allow discharged attorneys to immediately bring their cause of action for compensation, others delay the suit until the original cause of action has been decided.[63] By deferring the discharged attorney's cause of action for recovery of fees until the client's original cause of action is settled, the client is not forced to compensate the attorney prior to obtaining an

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61. *See, e.g.*, *In re* Montgomery's Estate, 6 N.E.2d 40, 41 (N.Y. 1936) (holding that once a contract has been cancelled, it cannot be used to determine the amount of compensation to be paid to the attorney). The *Montgomery* court stated that "[u]nder that theory, the contract price does not constitute a limitation on the amount of an attorney's recovery" because the contract is null and void. *Id.* However, "its effect may be to enhance the amount the client may be compelled to pay and in a certain sense penalize[] the client for exercising a privilege given by law to discharge an attorney at will regardless of cause." *Id.*

62. Craig N. Adams, Comment, *Clients Beware: Texas Courts Allow Discharged Attorneys to Recover in Full Under Contingent Fee Contracts*, 22 TEX. TECH L. REV. 1159, 1172 (1991) (observing that some courts premise recovery upon the contingency); *see also* Fracasse v. Brent, 494 P.2d 9, 14 (Cal. 1972) (addressing this dilemma faced by courts that are attempting to determine the reasonable value of services rendered by the discharged attorney).

63. *See, e.g.*, *Fracasse*, 494 P.2d at 14 (holding that the attorney's action for compensation for the reasonable value of services rendered does not accrue until the contingency upon which the contract was based has been fulfilled). The *Fracasse* court reasoned that the result obtained in the cause of action is significant to calculating the value of services rendered, and it would be "improper to burden the client with an absolute obligation to pay his former attorney regardless of the outcome of the litigation." *Id.* Consequently, "the attorney's action for reasonable compensation accrues only when . . . the client has had a recovery by settlement or judgment." *Id.*; *see also Rosenberg*, 409 So. 2d at 1022 (mandating that the discharged attorney's cause of action only commences if the contingency successfully occurs). The *Rosenberg* court rationalized that this rule is more equitable. *Id.* The discharged attorney recovers only if the client is successful—thus preserving the understanding between the parties under the contingent fee contract. *Id.* The court acknowledged that not all jurisdictions follow this standard, but defended its view stating, "Deferral . . . supports our goal to preserve the client's freedom to discharge, and any resulting harm to the attorney is minimal because the attorney would not have benefited earlier until the contingency's occurrence." *Id.* The court qualified its statement by conceding that "[t]here should, of course, be a presumption of regularity and competence in the performance of the services by a successor attorney." *Id.*

outcome in the pending cause, which might discourage the client from changing counsel.[64] In addition, the success or failure of the client's suit can assist the trier of fact in determining the reasonable value of services rendered by the discharged attorney.[65]

Another issue considered by courts is whether the attorney has substantially performed under the terms of the contract.[66] Most courts following the modern rule hold that when an attorney has substantially completed the contracted-for performance, the quantum meruit standard is unfair.[67] In this situation, the attorney is allowed to recover the full contingent fee under the original terms of the contract.[68] "Only where an attorney renders less than substantial performance will quantum meruit be the appropriate measure of damages."[69]

III. THE MOVEMENT IN TEXAS TOWARD INCREASED CLIENT PROTECTION

As a traditionally conservative state, Texas law typically favors businesses, and in this case, attorneys, when construing contract terms and applying them to contractual relationships.[70] However,

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64. *See Fracasse*, 494 P.2d at 14 (explaining that the discharged attorney's action for reasonable compensation does not accrue until the contingency stated upon which the original agreement was based has occurred). The court gave two reasons for limiting recovery in this way. *Id.* First, to determine the reasonableness of the attorney's fee, the courts will look at "'the amount involved and the result obtained.'" *Id.* (citation omitted). Second, the court believed "it would be improper to burden the client with an absolute obligation to pay his former attorney regardless of the outcome of the litigation." *Id.*

65. *See id.* (noting that whether or not the suit is ultimately successful assists the court in determining the value of the work done by the attorney prior to discharge).

66. Kaushiva v. Hutter, 454 A.2d 1373, 1374 (D.C. 1983) (basing the decision whether to award the full contingent fee or use a theory of quantum meruit on the substantial performance of the attorney).

67. *See, e.g., id.* ("[A]n attorney who enters into a contingency fee agreement with his client, substantially performs, and is then prevented by his client from completing performance is entitled to the full amount specified in the fee agreement.").

68. *See id.* (noting that several jurisdictions allow for full recovery under a contingent fee contract when the discharged attorney substantially performs).

69. *Id.*

70. *See, e.g.*, Myers v. Crockett, 14 Tex. 257, 258–59 (1855) (treating the contingent fee contract the same as any other contract). The court noted that a plaintiff attorney is "entitled to recover compensation for the services performed." *Id.* at 258. In addition, when an attorney has entered a contract to provide services, there is no reason the attorney should not be "entitled to recover the full amount of the fee contracted to be paid for the services contemplated by the contract" if the contractual relationship is ended without fault. *Id.* at 259; *see also* White v. Burch, 33 S.W.2d 512, 515 (Tex. Civ. App.—

because of the special and unique relationship between attorneys and their clients, there is a trend toward increasing client protections in these relationships.[71]

A. *Ethical Considerations Regarding Client Protection in the Attorney-Client Relationship*

"An attorney, as an officer of the court and a member of the legal profession, has a fundamental obligation to represent the client fully and to protect the client's confidences."[72] It is this very aspect of the attorney-client relationship that makes it unique from other contractual relationships and which raises problems when a client decides to discharge one attorney in favor of hiring another.[73] In addition, lawyers serve as fiduciaries for their clients; retention of an attorney to employ professional judgment on behalf of the client requires the client to enjoy a requisite level of trust and confidence in the attorney and the attorney's abilities.[74] The court in *Hoover* stated, "When interpreting and

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Fort Worth 1930, writ ref'd) (noting that a discharged attorney is entitled to the full contract amount when discharged without fault); Crye v. O'Neal & Allday, 135 S.W. 253, 254 (Tex. Civ. App.—Texarkana 1911, no writ) (affirming adherence to the traditional rule allowing attorneys to be discharged with or without fault, but holding that an attorney discharged without fault should be compensated under the terms of the contract).

71. *See* Mallios v. Baker, 11 S.W.3d 157, 168 (Tex. 2000) ("'We acknowledge the distinction between market assignments involving purely economic transactions . . . [and] claim assignments that necessarily involve and invoke the unique lawyer-client relationship and duty of confidentiality; privity, and the duty of the lawyer that runs only to the client . . . .'" (quoting Cerberus Partners, L.P. v. Gadsby & Hannah, 728 A.2d 1057, 1060 (R.I. 1999))); Vinson & Elkins v. Moran, 946 S.W.2d 381, 393 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.) (emphasizing the unique relationship between clients and attorneys); City of Garland v. Booth, 895 S.W.2d 766, 770 (Tex. App.—Dallas 1995, writ denied) (asserting that allowing malpractice lawsuits to be assigned would "imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client"); Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313, 316 (Tex. App.—San Antonio 1994, writ ref'd) (expounding on the uniqueness of the attorney-client relationship).

72. Craig N. Adams, Comment, *Clients Beware: Texas Courts Allow Discharged Attorneys to Recover in Full Under Contingent Fee Contracts*, 22 TEX. TECH L. REV. 1159, 1177 (1991).

73. *See id.* ("By holding the client liable under the contract, courts are punishing the exercise of the client's implied right to discharge his attorney."). Adams points out the ironic result of the *Mandell* rule's application, stating that "[w]hile these courts claim to recognize that the extremely confidential nature of the attorney-client relationship demands that clients be able to discharge their attorneys, they effectively negate the right by penalizing clients for exercising it." *Id.*

74. Lester Brickman, *Contingent Fees Without Contingencies:* Hamlet *Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 46 (1989).

enforcing attorney-client fee agreements, it is 'not enough to simply say that a contract is a contract. There are ethical considerations overlaying the contractual relationship.'"[75] Because of this, special consideration should be given when the attorney-client relationship is broken.[76]

B. *Differing Views on the Application of* Mandell *in Texas*

Advocates of the *Mandell* decision and application of the traditional rule in Texas argue that it affords important protections to attorneys willing to work for clients on a contingent fee basis.[77]

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75. Hoover Slovacek L.L.P. v. Walton, 206 S.W.3d 557, 560 (Tex. 2006) (per curiam) (quoting Lopez v. Muñoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 868 (Tex. 2000) (Gonzales, J., concurring and dissenting)).

76. *See id.* ("The attorney's special responsibility to maintain the highest standards of conduct and fair dealing establishes a professional benchmark that informs much of our analysis in this case.").

77. *A Roundtable Discussion on Professionalism*, 36 HOUS. LAW. 10, 17 (Nov./Dec. 1998). When discussing the advantages and disadvantages of the *Mandell* rule, a Texas attorney participating in a roundtable on professionalism commented on the protections afforded to attorneys by the rule's application:

> There are obviously problems, from time to time, with the application of [the *Mandell*] rule, and I certainly acknowledge that and understand it. But if you've got a situation where you have invested hours of your time and thousands of dollars on behalf of the client, and that client comes in and does not like the advice you're giving or does not like what you are telling him or her, and the client can just walk out the door and fire you, that's the height of injustice.... As long as lawyers are willing to represent people on contingent fees, and to spend money and time and effort, they need some degree of protection. There are lawyers who, if they hear that [another attorney] got a particular case, wouldn't have one compunction about interfering with that relationship, indirectly or directly, if they knew they were not facing the prospect of Mandell & Wright. Without that rule, I don't see how you could afford to spend the time and money.

Id. But see Robert W. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEX. L. REV. 1, 16 (1988) (arguing that allowing clients the ability to discharge their attorneys at-will promotes competition among attorneys). Hillman notes:

> Lawyers and clients most frequently litigate this issue when the contract involves a contingent fee and the client discharges the attorney prior to the occurrence of the contingency. From the discharged lawyer's perspective, removal without cause under these circumstances may seem harsh and unfair. Fairness to lawyers, however, is a policy consideration subordinated to the right of clients to choose and change their legal representatives. The only issue is that of determining reasonable compensation for the fired lawyer.

Id. at 17 (footnotes omitted).

As noted previously, an attorney who agrees to represent a client on a contingent fee basis incurs the risk that no recovery will be obtained and any time and financial resources invested in the case will be lost.[78] Thus, if a client who retained an attorney on a contingent fee basis loses trust in the attorney's decisions, or prefers to hire a different one, the client has the right to terminate his attorney.[79]

The client's ability to terminate a contingent fee arrangement at any time, without fault by the attorney, is why proponents of the *Mandell* rule argue that it affords necessary protection to attorneys who have invested their resources in a contingent fee relationship.[80] While the rule does not guarantee the attorney will be compensated, it does assure payment if the client later receives a recovery based on the suit in the original contingent fee contract.[81] Proponents of the rule assert that this ensures the attorney is compensated for a successful recovery based (at least in part) on the work performed.[82] In addition, this rule discourages

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78. *See Hoover*, 206 S.W.3d at 561 (citing Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997)) (explaining that contingent fees offer greater potential fees than hourly billing in exchange for a risk of no recovery; this means the attorney does not recoup the time and financial resources invested in the case and client). In an article addressing the risk aspect of contingent fee contracts, author Lester Brickman highlights "the fundamental indispensability of risk in contingent fees." Lester Brickman, *Contingent Fees Without Contingencies:* Hamlet *Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 127 (1989). Through an analysis of case law and ethical obligations, Brickman argues that "it has been demonstrated that a contingent fee retainer agreement is invalid unless there is a realistic possibility that there will be no recovery." *Id.* "Nonetheless, lawyers routinely charge contingent fees in cases in which there is no realistic risk of nonrecovery." *Id.* Consequently, the overuse of contingent fee agreements entered into on the courthouse steps burdens a client's "right of access to the courts." *Id.*

79. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.15, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9) (mandating that a lawyer must withdraw from representing a client if discharged, with or without good cause).

80. *See A Roundtable Discussion on Professionalism*, 36 HOUS. LAW. 10, 17 (Nov./Dec. 1998) (commenting on the protections afforded to attorneys by the *Mandell* rule). The attorney discussing this issue acknowledged problems with the application of the *Mandell* rule. *Id.* However, he argued it would be the "height of injustice" to allow attorneys who have invested vast amounts of time and financial resources to be discharged for no reason, with no hope of compensation. *Id.*

81. *Hoover*, 206 S.W.3d at 563–65 (citing Mandell & Wright v. Thomas, 441 S.W.2d 841, 847 (Tex. 1969)).

82. *See, e.g.*, *id.* (recognizing "the valid competing interests of an attorney who, like

other attorneys from interfering with previously established attorney-client relationships, because they know that if a client releases an already engaged attorney in order to substitute the new attorney's services, the recovering client will have to pay both attorneys a full fee.[83]

Although the *Mandell* rule affords substantial protection for attorneys, it can result in distinct disadvantages for clients who engage an attorney through a contingent fee contract. In an ideal situation, potential clients have a thorough grasp of their situation, and the implications of hiring a specific attorney. However, sometimes potential clients, often after they have just endured an accident or tragedy resulting in the potential suit, are approached by less-than-forthright attorneys offering their services during the clients' times of need.[84] These clients may be lured into signing an agreement without understanding the full weight of what they are doing or whom they are hiring.[85] Once clients gain a better understanding of their legal situation and the implications of their attorney-client relationship, they are hindered by their contingent fee agreement and the rule imposed by *Mandell*.[86] The court in *Howell v. Kelly*[87] outlined the clients' three less-than-ideal choices:

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any other professional, expects timely compensation for work performed and results obtained," and stating that under *Mandell*, "attorneys are entitled to protection from clients who would abuse the contingent fee arrangement and avoid duties owed under contract"); *A Roundtable Discussion on Professionalism*, 36 HOUS. LAW. 10, 17 (Nov./Dec. 1998) (commenting on the protections afforded to attorneys by the *Mandell* rule).

83. *See A Roundtable Discussion on Professionalism*, 36 HOUS. LAW. 10, 17 (Nov./Dec. 1998) (addressing the possibility that clients do not always enter into a contingent fee arrangement with a full understanding of the consequences).

84. *See id.* (acknowledging the fact that some clients are "tricked" into hiring attorneys, and then subsequently dissuaded from discharging them because of the *Mandell* remedies).

85. *See id.* ("[I]f you get tricked into something by somebody who says they've had a lot of experience . . . but they haven't done anything particularly wrong in the way they've handled the case, the *Mandell* . . . rule seems to say you can't get rid of them.").

86. *See* Mandell & Wright v. Thomas, 441 S.W.2d 841, 847 (Tex. 1969) (declining to limit a no-fault discharged attorney to recovery in quantum meruit, stating that "[i]n Texas, when the client, without good cause, discharges an attorney before he has completed his work, the attorney may recover on the contract for the amount of his compensation").

87. Howell v. Kelly, 534 S.W.2d 737 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

> Since an attorney under a contingent fee contract is permitted to recover on the contract in Texas, the usual rules of contract law are applicable. A party who has been damaged by a breach of contract has an election to pursue any of three remedies. He may treat the contract as rescinded and may recover upon a quantum meruit so far as he has performed; or he may keep the contract alive, for the benefit of both parties, being at all times ready and able to perform; or, third, he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have received if he had not been prevented from performing. [88]

If the client chooses to discharge their current attorney in favor of a new one, the client is faced with the prospect of paying two contingency fees, potentially resulting in the majority of the recovery going to the attorneys.[89] Consequently, the client will more than likely remain with the original attorney, even if the client has lost confidence in the attorney's abilities and desires new counsel.[90]

As a result of these and other concerns, client protection is a paramount issue for consideration. Recent changes in Texas referral fee regulation provide an example of an increased awareness of the need to address client protection as it relates to the attorney-client relationship.

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88. *Id.* (citing RESTATEMENT OF CONTRACTS §§ 326–27, 347 (1932); RESTATEMENT (SECOND) OF AGENCY §§ 453, 455 (1958)).

89. *See* Craig N. Adams, Comment, *Clients Beware: Texas Courts Allow Discharged Attorneys to Recover in Full Under Contingent Fee Contracts*, 22 TEX. TECH L. REV. 1159, 1159 (citing Johnston v. Cal. Real Estate Inv. Trust, 912 F.2d 788, 788 (5th Cir. 1990)) (describing a case in which enforcement of *Mandell* resulted in two-thirds of the client's settlement being paid to his original and substituted attorneys).

90. *See A Roundtable Discussion on Professionalism*, 36 HOUS. LAW. 10, 17 (Nov./Dec. 1998) (noting that the *Mandell* rule sometimes results in deceived clients being stuck with their original attorneys). If the client discharges the attorney but cannot prove a wrong has occurred, only that there is a lack of trust, the client is still bound by the *Mandell* rule to compensate the discharged attorney out of any subsequent recovery. *See* Johnston v. Cal. Real Estate Inv. Trust, 912 F.2d 788, 789 (5th Cir. 1990) (holding that where the attorney was discharged without fault, the attorney must be compensated according to the terms of the contingent fee contract). *But see* Fracasse v. Brent, 494 P.2d 9, 15 (Cal. 1972) ("It should be sufficient that the client has, for whatever reason, lost faith in the attorney, to establish 'cause' for discharging him.").

C. *Drawing an Analogy: Texas Referral Fee Reform*

Texas recently increased one aspect of client protection by amending the statute that governs attorney referral fees.[91] Prior to this amendment, Texas was one of a minority of jurisdictions which allowed an attorney to collect a referral fee for simply referring a client to another attorney.[92] The referring attorney carried no liability and assumed no responsibility for the subsequent actions of the attorney who ultimately worked on the case.[93] Consequently, an attorney could refer a client to another attorney and contract to receive a percentage of any potential recovery without carrying any risk should the client later institute a malpractice action.[94] This practice contradicted the American Bar Association (ABA) Model Rules of Professional Conduct, mandating that "the division of fees between two lawyers can only occur if the lawyers assume joint responsibility for the case."[95] Under the ABA Model Rule, an attorney receiving a referral fee must either base the fee on actual services performed or accept joint responsibility for the representation.[96]

Debate regarding referral fees was prevalent during the years preceding the 2004 amendment:

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91. *See* Rachel L. Bosworth, *Is the Model Rule Outdated? Texas Carries Referral Fee Responsibility into the Limited Liability Era*, 84 TEX. L. REV. 509, 534–35 (2005) (noting that the new rule was passed by the state bar on December 20, 2004 and put into effect on March 1, 2005). Prior to the rule change, Texas was one of only a few states that allowed a pure forwarding fee to a lawyer. *See Considering Referral Fees: A Look Back in Recent History*, 66 TEX. B.J. 977, 977 (2003) (defining a pure forwarding fee as "a fee paid to a lawyer whose sole contribution to the prosecution or defense of a matter was to refer it to the lawyer or law firm that actually handled it"). These fees were thought to "facilitate delivery of legal services of the best available quality to a client because they remove[d] the temptation of a marginally qualified lawyer to retain a matter in order to receive a fee rather than to refer it to a more qualified lawyer better able to handle it." *Id.*

92. Samuel V. Houston III, Comment, *In the Interest of the Client: Why Reform of Texas's Rules Regarding Referral Fees is Necessary*, 33 ST. MARY'S L.J. 875, 879–80 (2002).

93. *Id.* at 880.

94. *Id.* at 877 ("In Texas [before the rule was reformed], a referring attorney [could] not be held liable for a referred attorney's malpractice, unless the referring attorney [had] agreed to maintain responsibility for the case.").

95. *Id.* at 882 (citing MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2001)).

96. Rachel L. Bosworth, *Is the Model Rule Outdated? Texas Carries Referral Fee Responsibility into the Limited Liability Era*, 84 TEX. L. REV. 509, 510 (2005) (citing MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2004)).

> Because the previous Texas Rule was less restrictive than fee-sharing rules adopted in other states, the Texas Supreme Court put pressure on the State Bar to come up with a rule that would further limit referral fees in Texas. In October 2003, the Texas Supreme Court adopted Proposed Rule 8a of the Texas Rules of Civil Procedure, subject to public comment. After receiving comments on problems with both the rule's content and process, the court committed the question to the State Bar, delaying implementation of Proposed Rule 8a, and appointed a Referral Fee Task Force to conduct research and propose a new rule. The Task Force submitted its report and formulated a new version of Rule 1.04(f) that was presented to the state bar for approval during a fall 2004 referendum.[97]

In 2004, Texas amended its rule, but did not fully adopt the Model Rule proposed by the ABA.[98] The new Texas rule contains a joint responsibility clause comparable to the Model Rule's provision; however, attorneys in Texas can only be held responsible to the extent of their wrongdoing.[99] Nevertheless and

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97. *Id.* at 534–35 (citations omitted). "Texas has long been reluctant to restrict pure referral fee relationships." *Id.* at 534. Before the rule change, Texas was one of only a few jurisdictions that allowed a referring "attorney to collect a fee for merely providing a referral to another attorney." Samuel V. Houston III, Comment, *In the Interest of the Client: Why Reform of Texas's Rules Regarding Referral Fees is Necessary*, 33 ST. MARY'S L.J. 875, 879 (2002); *accord Considering Referral Fees: A Look Back in Recent History*, 66 TEX. B.J. 977, 979 (2003) (discussing how Texas previously allowed pure forwarding fees to "a lawyer whose sole contribution to the . . . matter was to refer to the lawyer or law firm that actually handled it"). "Texas adopted the ABA's Canon 34 as Texas's Canon 31 but amended it to provide that '[n]o division of fees for legal services is proper, except with other lawyers, based upon a division of service or responsibility, *or with a forwarding attorney*.'" Rachel L. Bosworth, *Is the Model Rule Outdated? Texas Carries Referral Fee Responsibility into the Limited Liability Era*, 84 TEX. L. REV. 509, 534 (2005) (quoting STATE BAR OF TEX., RULES AND CANONS OF ETHICS, Canon 31 (1957, superseded 1971)). In adding the phrase "or with a forwarding attorney," the Texas rule directly contradicted the ABA's "prohibition of a pure forwarding fee." *Id.* Subsequent revisions to the rule yielded the same result. *See id.* ("[W]hen the ABA adopted DR 2-107(A), requiring that a division of fees be based on both services performed *and* responsibility assumed, Texas adopted an almost identical rule; except its rule added the phrase 'or is made with a forwarding lawyer,' again preserving the pure referral fee.").

98. *See* Rachel L. Bosworth, *Is the Model Rule Outdated? Texas Carries Referral Fee Responsibility into the Limited Liability Era*, 84 TEX. L. REV. 509, 509 (2005) (commenting that while Texas recently amended its rule "to further regulate attorney referral fees in Texas," it stopped short of completely adopting the ABA Model Rule).

99. *See id.* (providing a hypothetical scenario to demonstrate the effects of Texas's new rule). Bosworth argues that "Texas's stance against conferring vicarious liability on referring attorneys reveals a defect in the Model Rule's interpretation and necessitates

most importantly, the new rule protects clients since referring attorneys can be held responsible for negligent referrals.[100] The new regulation induces referring attorneys to safeguard the client's interests by finding an attorney well-situated to represent the client, as the referring attorney could be held partly responsible for the referred attorney's malpractice.[101]

Just as Texas increased client protection through amendment of its referral fee rules, so could it increase client protection by amending the rules governing attorneys discharged from contingent fee agreements. While the *Hoover* court did not have the opportunity to overturn *Mandell*, it did recognize the need to protect clients in a contingent fee arrangement.[102]

IV. RETHINKING THE TEXAS RULE: APPLYING THE PRINCIPLES DISCUSSED IN *HOOVER* TO EXPLAIN WHY THE TEXAS SUPREME COURT SHOULD OVERTURN *MANDELL*

In *Hoover v. Walton*, the Texas Supreme Court was ultimately faced with a breach of contract claim in which Hoover claimed Walton breached their contingent fee contract when he refused to pay for the discharged attorney's services under the terms of the

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juxtaposing the policies supporting vicarious liability against those supporting referral fee restrictions." *Id.*

100. *See id.* at 538 (noting the referring attorney's "responsibility to make reasonable efforts to assure adequate representation"). The author stated:

> To ensure the retention of adequate representation, he must conduct a reasonable investigation into the client's legal matter and then refer the matter to, or associate with, a lawyer whom the referring or associating lawyer reasonably believes is competent to handle the case. The adequate representation requirement defines the appropriate standard of care that lawyers should use to refer claims and that plaintiffs may use to prove negligent referral. Note that negligent referral holds the referring attorney liable only for his own wrongdoing, not for the wrongdoing of the handling attorney.

Id. (footnotes omitted) (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04 cmt. 13 (2005)).

101. *See* Rachel L. Bosworth, *Is the Model Rule Outdated? Texas Carries Referral Fee Responsibility into the Limited Liability Era*, 84 TEX. L. REV. 509, 538 (2005) (noting that the referring attorney will be held liable for making a negligent referral; he is not held liable "for the wrongdoing of the handling attorney").

102. *See* Hoover Slovacek L.L.P. v. Walton, 206 S.W.3d 557, 563 (Tex. 2006) (per curiam) (observing that attorneys are in the best position to bear the risk associated with contingent fee agreements). As previously discussed, the *Hoover* court could not directly address *Mandell* because the termination provision in question managed to avoid the provisions of the rule by contracting around it. *Id.* at 562.

termination fee provision.[103] The jury found for Hoover, failing to find that Walton discharged the firm for good cause or that the fee imposed was unconscionable.[104] However, the court of appeals reversed the ruling and held that "Hoover's fee agreement was unconscionable as a matter of law."[105] The Texas Supreme Court agreed with this point.[106] While the court distinguished this situation from *Mandell* and declined to overturn that opinion, some of the *Hoover* reasoning could be interpreted as moving the court closer to invalidating *Mandell*.[107]

In *Hoover* the court stated: "Because [the termination fee provision] imposes an undue burden on the client's ability to change counsel, Hoover's termination fee provision violates public policy and is unconscionable as a matter of law."[108] The same could be said for allowing discharged attorneys to recover a full contingent fee upon successful litigation of their former client's claim. Although the *Hoover* court did not overturn *Mandell*, its reasoning—that the termination fee was contrary to public policy and unenforceable—can be applied as an argument for discontinuing the traditional rule in Texas.[109] The court stated:

> Hoover's termination fee provision penalized Walton for changing counsel, granted Hoover an impermissible proprietary interest in Walton's claims, shifted the risks of the representation almost entirely to Walton's detriment, and subverted several policies underlying the use of contingent fees. We hold that this provision is unconscionable as a matter of law, and therefore, unenforceable.[110]

The *Hoover* court made three primary arguments against the termination fee provision in question: (1) the provision imposed a

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103. *Id.* at 560.

104. *Id.*

105. *Id.* (citing Walton v. Hoover, Bax & Slovacek, L.L.P., 149 S.W.3d 834, 847 (Tex. App.—El Paso 2004) (pet. granted)).

106. *See Hoover*, 206 S.W.3d at 563 (opining that the termination fee provision imposed "an undue burden on the client's ability to change counsel" and was therefore unconscionable as against public policy).

107. *See id.* (distinguishing *Mandell* merely because Hoover's termination fee provision exceeded *Mandell* by "requiring immediate payment of the firm's contingent interest").

108. *Id.*

109. *See id.* at 566 (holding that the provision "subverted several policies underlying the use of contingent fees" and was, therefore, unenforceable due to unconscionability).

110. *Id.*

penalty for changing counsel; (2) it granted the law firm "an impermissible proprietary interest" in the client's claims; and (3) the provision "subverted several policies underlying the use of contingent fees."[111] These same arguments are applicable against awarding a full contingent fee to an attorney discharged without fault from a contingent fee contract.

A. *Imposition of a Penalty for Changing Counsel*

The *Hoover* court noted that enforcing the termination fee provision would have resulted in a penalty for discharging the lawyer, subsequently "impos[ing] an undue burden on the client's ability to change counsel."[112] In a similar way, it can be argued that forcing a client to pay a discharged attorney the full contingent fee if the claim is successfully litigated also imposes a penalty.[113] This deters clients from changing counsel for reasons that might not merit a "for cause" discharge, but are nonetheless in the client's best interest. As discussed above, an attorney may approach a client subsequent to the incident giving rise to their claim, and hire without a full grasp of the implications of using that particular attorney.[114] Alternatively, a client may hire an attorney with a complete understanding of the situation at hand, but then develop conflicts in viewpoint or discover underlying philosophical disagreements, resulting in the client losing trust in the attorney and desiring a new attorney with a more compatible understanding of the situation.[115]

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111. Hoover Slovacek L.L.P. v. Walton, 206 S.W.3d 557, 566 (Tex. 2006).

112. *Id.* at 563.

113. *See* Craig N. Adams, Comment, *Clients Beware: Texas Courts Allow Discharged Attorneys to Recover in Full Under Contingent Fee Contracts*, 22 TEX. TECH L. REV. 1159, 1174 (1991) (opining that by binding clients to the terms of the contingent fee contracts, courts are in effect punishing clients by impeding their rights to discharge their attorneys at will).

114. *See A Roundtable Discussion on Professionalism*, 36 HOUS. LAW. 10, 16 (Nov./Dec. 1998) (indicating that clients can be "tricked" into hiring an attorney).

115. *See Hoover*, 206 S.W.3d at 563 (noting that trust "is vital to the attorney-client relationship"). The court stated:

> In Texas, we hold attorneys to the highest standards of ethical conduct in their dealings with their clients. The duty is highest when the attorney contracts with his or her client or otherwise takes a position adverse to his or her client's interests. As Justice Cardozo observed, "[a fiduciary] is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most

Public policy strongly favors clients employing the attorney of their choice while retaining the right to discharge the attorney at any time.[116] In Texas, however, the client is impeded by the fact that if the client changes attorneys and then recovers on the claim, the client will have to pay two contingent fees.[117] This could result in the majority of the recovery going to the attorneys—in some situations, making the claim pointless to litigate.[118] One argument presented in the *Hoover* dissent was that "[n]o rational plaintiff changes lawyers midway through a case in order to

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sensitive, is then the standard of behavior." Accordingly, a lawyer must conduct his or her business with inveterate honesty and loyalty, always keeping the client's best interest in mind.

The attorney's special responsibility to maintain the highest standards of conduct and fair dealing establishes a professional benchmark that informs much of our analysis in this case.

Id. at 561 (quoting Lopez v. Muñoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 866–67 (Tex. 2000) (Gonzales, J., concurring and dissenting)).

116. *Id.* at 562 (citing Martin v. Camp, 114 N.E. 46, 48 (N.Y. 1917) (explaining that the nature of the attorney-client relationship supports a policy that allows clients to hire and fire attorneys at will).

117. *See, e.g.*, Johnston v. Cal. Real Estate Inv. Trust, 912 F.2d 788, 788 (5th Cir. 1990) (demonstrating the financial effect of the *Mandell* rule on a client who discharges his attorney without fault and subsequently settles the cause of action with the assistance of a substituted attorney). The Fifth Circuit Court of Appeals, which maintains jurisdiction in Texas, argued against the unfairness of the verdict it was forced to impose. *Id.* In this case, the injured child received less than $20,000 of the $75,000 verdict. *Id.* The court stated, "Perhaps in the future the Texas courts may see fit to reconsider the appropriate measure of damages in such suits as this for breach of contingent fee agreements. Unless and until they do, results such as this must follow." *Id.* at 789. The court has continued to argue against the rule imposed by *Mandell*. *See, e.g.*, Augustson v. Linea Aerea Nacional-Chile S.A., 76 F.3d 658, 662–63 n.6 (5th Cir. 1996) ("The majority jurisdictions reason that allowing recovery on the contract impinges on the client's absolute right to select the lawyer of his choice by forcing the client to pay double fees, one to his discharged attorney and one to his new lawyer.").

118. *See* Craig N. Adams, Comment, *Clients Beware: Texas Courts Allow Discharged Attorneys to Recover in Full Under Contingent Fee Contracts*, 22 TEX. TECH L. REV. 1159, 1159 (1991) (citing Johnston v. Cal. Real Estate Inv. Trust, 912 F.2d 788, 788 (5th Cir. 1990)) (describing the aforementioned case, in which the client was forced to pay two-thirds of his recovery to his original and substitute attorneys). In *Johnston*, the client hired an attorney under a contingent fee contract to seek recovery based on the injury of his minor son. *Johnston*, 912 F.2d at 788. The Johnstons discharged the attorney, hired a new firm, and subsequently recovered $75,000. *Id.* The discharged attorney intervened, arguing that his "contract was terminated without good cause" and seeking his original contracted fee, which was one-third of the settlement. *Id.* In ruling for the discharged attorney, the court noted, "Given the position taken by Mr. Swisher [the discharged attorney], the Texas Supreme Court's holding in *Mandell & Wright v. Thomas*, and our duty to apply Texas substantive law, this inequitable result is unavoidable." *Id.* at 789.

recover less . . . [s]o when [the client retained a different attorney] . . . he must have reasoned that if he had to discharge the firm it would be to maximize recovery."[119] However, clients that are uncomfortable with their attorneys or have an inherent clash of personalities may be willing to take the risk of a lesser recovery in order to work with someone more amenable to their desires. Consequently, requiring clients to pay two contingent fees hampers clients' rights to change attorneys.[120]

B. *Impermissible Proprietary Interest in the Client's Claims*

The *Hoover* court stated that the termination provision in question provided the firm with an impermissible proprietary interest in the client's claims.[121] "The Disciplinary Rules provide that a contingent fee is permitted only where, quite sensibly, the fee is 'contingent on the outcome of the matter for which the service is rendered.'"[122] Application of the traditional rule does not violate this rule because the services that were rendered prior to termination were related to the matter being litigated; however, other circumstances could lead to a potential unethical proprietary interest in the claim. For example, in the case of attorneys seeking contingent fee contracts solely to obtain the contingency who then make no efforts to fully try the case or retain the contract, their interest in the case becomes entirely proprietary.[123] It could be argued that once the contract is terminated and the attorney no longer has control over the steps taken to move the case forward,

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119. *Hoover*, 206 S.W.3d at 566 (Hecht, J., dissenting).

120. *See* Fracasse v. Brent, 494 P.2d 9, 12–13 (Cal. 1972) ("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."); *see also* Heinzman v. Fine, Fine, Legum & Fine, 234 S.E.2d 282, 284–86 (Va. 1977) (adopting the reasoning of *Fracasse* in holding "that *quantum meruit* is the most functional and equitable measure of recovery").

121. *Hoover*, 206 S.W.3d at 566.

122. *Id.* at 563 (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(d)). The court noted that "even if Hoover's termination fee provision is viewed as transforming a traditional contingent fee into a fixed fee, it nonetheless impermissibly grants the lawyer a proprietary interest in the client's claim by entitling him to a percentage of the claim's value without regard to the ultimate results obtained." *Id.* at 564.

123. *See* Salmon v. Atkinson, 137 S.W.3d 383, 388 (Ark. 2003) (Imber, J., concurring) ("[While] Rule 1.8(j) allows an attorney to have a proprietary interest in a contingent outcome . . . the fee should [not] become the sole 'raison d'etre' for the lawsuit.").

there should be no right to a proprietary interest in the client's claim.[124]

C. *Subversion of Policies Underlying the Use of Contingent Fees*

Finally, the court in *Hoover* noted that "Hoover's termination fee provision is also antagonistic to many policies supporting the use of contingent fees in civil cases."[125] In the same way, enforcing *Mandell* contravenes the principles sustaining the use of contingent fee contracts between attorneys and clients.

One primary purpose of contingent fee contracts is to allow clients who cannot afford to hire attorneys to retain one for legal services by agreeing to pay them a portion of any potential recovery.[126] In this risk-sharing arrangement, the attorney bears

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124. *See id.* ("[A] lawsuit that is pursued for the sole reason of securing a contingency fee for the attorney certainly violates both the letter and the spirit of Rule 1.8(j).").

125. Hoover Slovacek L.L.P. v. Walton, 206 S.W.3d 557, 564 (Tex. 2006) (per curiam). "Most troubling is [the] creation of an incentive for the lawyer to be discharged soon after he or she can establish the present value of the client's claim with sufficient certainty." *Id.* The court explained that while contingent fee agreements promote "efficiency and diligent efforts to obtain the best results possible," a termination fee provision such as the one in Hoover's contract with Walton "encourages the lawyer to escape the contingency as soon as practicable, and take on other cases, thereby avoiding the demands and consequences of trials and appeals. Moreover, the provision encourages litigation of a subset of claims that would not be pursued under traditional contingent fee agreements." *Id. But see id.* at 567 (Hecht, J., dissenting) (dismissing, based on the fiduciary duty all attorneys owe to their clients, the majority argument that attorneys in this type of arrangement have an incentive to misbehave).

126. *Hoover*, 206 S.W.3d at 561 (citing Arthur Anderson & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997)). As noted by the court in *Fracasse v. Brent*,

> [I]t would be improper to burden the client with an absolute obligation to pay his former attorney regardless of the outcome of the litigation. 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.

Fracasse v. Brent, 494 P.2d 9, 14 (Cal. 1972); *accord* Allard v. First Interstate Bank of Wash., N.A., 768 P.2d 998, 1005 (Wash. 1989) ("The most important justification for the contingent fee is that it opens up the legal system to those who could not otherwise afford it."); Lester Brickman, *Contingent Fees Without Contingencies:* Hamlet *Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 43 (1989) ("The most commonly cited historic justification for the contingent fee is its function as a financing device that enables a client to assert and prosecute an otherwise unaffordable claim."); Randolph I. Gordon & Brook Assefa, *A Tale of Two Initiatives: Where Propaganda Meets Fact in the Debate Over America's Healthcare*, 4 SEATTLE J. SOC. JUST. 693, 735–36 (2006) (citing Allard v. First

the risk that no recovery will be made and the attorney will not be compensated, while the client, if recovery is made, risks paying the attorney a higher amount than likely would have been paid on a per-hour basis.[127] If a client is in the position of having to hire an attorney on a contingent fee basis, the client is more likely to be susceptible to attorney solicitation, and deterred by the prospect of paying two attorney fees because of a lack of financial resources and a real need for the funds sought through the claim.[128] Consequently, if the client knows that the traditional rule applies in Texas, the client might be dissuaded from pursuing better representation.

Another purpose of a contingent fee contract is to "encourage[] efficiency and diligent efforts to obtain the best results possible."[129] However, unless the attorney does something extreme enough to warrant a for-cause discharge, the client will have to pay the attorney the contingent fee if there is a recovery.[130] As long as attorneys operating under a contingent

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Interstate Bank of Wash., N.A., 768 P.2d 998, 1005 (Wash. 1989)) ("Contingent fees are [a] long established means of facilitating access to those otherwise unable to afford [legal] representation.").

127. *See* Arthur Anderson & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997) (noting that contingent fee "contracts, because they offer the potential of a greater fee than might be earned under an hourly billing method, compensate the attorney for the risk that the attorney will receive no fee whatsoever if the case is lost"). The court further stated that "[t]he lawyer in effect lends the value of his services, which is secured by a share in the client's potential recovery." *Id.* (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21.9 (4th ed. 1992)).

128. *See Salmon*, 137 S.W.3d at 388 (Imber, J., concurring) ("[A] poor client without funds to pay such a fee may be forced by the attorney to continue with a lawsuit that the client would prefer not to pursue.").

129. *Hoover*, 206 S.W.3d at 564. The court also noted that "[a] closely related benefit is the contingent fee's tendency to reduce frivolous litigation by discouraging attorneys from presenting claims that have negative value or otherwise lack merit." *Id.* at 561 (citing Ted Schneyer, *Legal-Process Constraints on the Regulation of Lawyers' Contingent Fee Contracts*, 47 DEPAUL L. REV. 371, 389–90 (1998)). While contingent fees purportedly discourage frivolous litigation, they also "motivate lawyers to work more diligently, since their compensation depends upon their clients' recovery." Lester Brickman, *Contingent Fees Without Contingencies:* Hamlet *Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 43–44 (1989). Brickman notes that another justification offered for contingent fees is that they "encourage litigation, thereby furthering the national policy in favor of increasing access to courts." *Id.*

130. *See* Law Offices of Windle Turley, P.C. v. French, 140 S.W.3d 407, 413 ("'[W]hen the client, without good cause, discharges an attorney before he has completed his work, the attorney may recover on the contract for the amount of his compensation.'" (quoting Mandell & Wright v. Thomas, 441 S.W.2d 841, 847 (Tex. 1969))); *see also id.* ("Whether a client had good cause for discharging an attorney with whom he contracted

fee contract know they are protected by the *Mandell* rule, there is the unfortunate possibility that the attorneys may not feel compelled to do their best work, especially if they know the case is likely to recover on its merits.[131] Removing *Mandell* protection would encourage attorneys to do their best work at all times while undertaking the risk inherent in contingent fee contracts.

Finally, the Supreme Court of Texas approved of the Indiana Supreme Court's statement that "'[l]awyers almost always possess the more sophisticated understanding of fee arrangements. It is therefore appropriate to place the balance of the burden of fair dealing and the allotment of risk in the hands of the lawyer in regard to fee arrangements with clients.'"[132] This same analysis should apply to a no-fault discharge of an attorney in a contingent fee contract. The attorney should bear the risk that something might happen or personalities may clash in a way which diminishes the effectiveness of the relationship, leading to a lack of trust between the attorney and client.[133] Trust is crucial to the attorney-client relationship and effective representation; once the client loses trust and confidence in the attorney, the client should

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to provide legal services is a fact issue for the jury to decide."). Even if an attorney is discharged for cause, however, he is still entitled to the reasonable value of services rendered. *See, e.g.*, Rocha v. Ahmad, 676 S.W.2d 149, 156 (Tex. App.—San Antonio 1984, no writ) (holding that the appellant, though discharged for cause, was entitled to recovery of the reasonable value of services rendered).

131. *See* Lester Brickman, *Contingent Fees Without Contingencies:* Hamlet *Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 44 (1989) ("Contingent fees also motivate lawyers to work more diligently, since their compensation depends upon their clients' recovery."). This motivation is potentially lessened when an unmotivated attorney is aware that if they are discharged and another attorney assists the former client in recovery, the discharged attorney will still be able to recover the contracted fee. *Id. But see Hoover*, 206 S.W.3d at 569 (Hecht, J., dissenting) (dismissing the majority argument that attorneys in this type of arrangement have an incentive to misbehave). In his dissenting opinion, Justice Hecht stated, "The Court appears to assume . . . lawyers do not owe clients a fiduciary duty, the intentional breach of which is a tort remedied by actual and exemplary damages. A lawyer as wicked as the [c]ourt's imagination may be more deterred by the threat of punitive damages than . . . a voided contract." *Id.*

132. Levine v. Bayne, Snell & Krause, Ltd., 40 S.W.3d 92, 95 (Tex. 2001) (quoting *In re* Myers, 663 N.E.2d 771, 774–75 (Ind. 1996)) (placing the burden of proof on the attorney to prove the attorney's interpretation of an ambiguous fee agreement provision).

133. *See* Hoover Slovacek L.L.P. v. Walton, 206 S.W.3d 557, 563 (Tex. 2006) (per curiam) (proclaiming the importance of trust to the attorney-client relationship); *cf. Levine*, 40 S.W.3d at 95 (noting that the trust relationship between attorneys and their clients justifies placing the burden of risk involved in contingent fee agreements on the attorneys).

have the ability to legally terminate the relationship.[134]

While the right to end an attorney-client relationship is available in Texas, application of the traditional rule can prevent termination of the attorney contingent fee contract.[135] As long as the state allows a full contingent fee recovery for attorneys discharged without fault, clients will never be completely free to change attorneys during the course of their claim.[136] While the attorney has two options—either to recover in quantum meruit, or elect to enforce the contract for recovery of the full contingent fee—clients are "forced to choose between proceeding with what is perceived as unsatisfactory representation or retaining other counsel and paying both attorneys."[137] Adoption of the majority rule would allow appropriate compensation to attorneys for work

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134. *See* Fracasse v. Brent, 494 P.2d 9, 13 (Cal. 1972) (opining that once a client has lost faith in their attorney, there is sufficient cause for discharge); *see also* Comment, *A Mere Quantum Meruit for Attorneys' Fees*, 30 YALE L.J. 514, 517 (1921) (noting that the attorney-client relationship should end when the client loses confidence in the attorney). The many rules and regulations enforced by the courts to protect the trust aspect of the attorney-client relationship illustrate its importance in our legal system. *See, e.g.*, Robertson v. State, 187 S.W.3d 475, 482–83 (Tex. Crim. App. 2006) (remarking on the effect of an ineffective assistance of counsel review, noting that "'[i]ntrusive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel . . . , and undermine the trust between attorney and client'") (quoting Strickland v. Washington, 466 U.S. 668, 690 (1984)); Hoover v. Larkin, 196 S.W.3d 227, 233 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (citing Miller v. Kennedy & Minshew, Prof'l Corp., 142 S.W.3d 325, 338 (Tex. App.—Fort Worth 2003, pet. denied)) ("Fee forfeiture is an equitable remedy whose primary purpose is not to compensate the injured client, but to protect the relationship of trust between attorney and client by discouraging attorney disloyalty.").

135. *See, e.g.*, Craig N. Adams, Comment, *Clients Beware: Texas Courts Allow Discharged Attorneys to Recover in Full Under Contingent Fee Contracts*, 22 TEX. TECH L. REV. 1159, 1174 (1991) (stressing that application of the traditional rule effectively penalizes clients who want to change attorneys).

136. *Id.* While clients always have the right to discharge one attorney in favor of another, that right is impeded when doing so leads to steep financial consequences. *See, e.g.*, Tonn v. Reuter, 95 N.W.2d 261, 264 (Wis. 1959) (asserting that while there is agreement between jurisdictions that a client has an inherent right to discharge their attorney, "there is sharp disagreement as to whether a client by so doing may subject himself to the payment of damages on the ground of breach of contract").

137. Craig N. Adams, Comment, *Clients Beware: Texas Courts Allow Discharged Attorneys to Recover in Full Under Contingent Fee Contracts*, 22 TEX. TECH L. REV. 1159, 1173 (1991) (citing Johnston v. Cal. Real Estate Inv. Trust, 912 F.2d 788, 788–89 (5th Cir. 1990); Warner v. Basten, 255 N.E.2d 72, 75 (Ill. App. Ct. 1969)). In each of the two cited cases, the clients were forced to pay contingent fees to both their original attorneys and their substituted attorneys, resulting in the inequitable result of the majority of their recoveries going to attorneys' fees and court costs. *Id.*

completed, while allowing clients their rights to change attorneys without fear of inordinate financial repercussions.

Acceptance of the majority rule approach can increase client protection while still compensating attorneys for the reasonable value of services performed if the client subsequently recovers on the claim.[138] The risk associated with the contingent fee relationship is allocated to the attorney, while still assuring compensation upon successful litigation.[139] In addition, most courts following the modern rule have held that in instances where the attorney has performed so substantially that recovery in quantum meruit is inappropriate, the attorney should be able to recover under the terms of the contract upon successful litigation of the claim.[140] Consequently, application of the modern rule

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138. *See, e.g.*, *Fracasse*, 494 P.2d at 14 (stating that an attorney's claim to compensation for the reasonable value of services rendered does not accrue until the contingency upon which the contract was based has been fulfilled). Delaying payment until the contingency has been fulfilled "insures that the client will not be forced to compensate the first attorney prior to the successful outcome of his case." Craig N. Adams, Comment, *Clients Beware: Texas Courts Allow Discharged Attorneys to Recover in Full Under Contingent Fee Contracts*, 22 TEX. TECH L. REV. 1159, 1172 (1991) (citing Fracasse v. Brent, 494 P.2d 9, 13–14 (Cal. 1972)). The *Fracasse* court reasoned that this approach would not encourage clients to discharge attorneys simply to save the attorneys' fees. *Fracasse*, 494 P.2d at 13. If such a discharge is "followed by the retention of another attorney," the client will be obligated to pay the discharged attorney for their services out of any subsequent recovery. *Id.* "Such payment, in addition to the fee charged by the second attorney, should certainly operate as a self-limiting factor on the number of attorneys so discharged." *Id.* at 13–14.

139. *See* Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 563 (Tex. 2006) (per curiam) (quoting Levine v. Bayne, Snell & Krause, Ltd., 40 S.W.3d 92, 95 (Tex. 2001)) ("'[L]awyers almost always possess the more sophisticated understanding of fee arrangements. It is therefore appropriate to place the balance of the burden of fair dealing and the allotment of risk in the hands of the lawyer in regard to fee arrangements with clients.'").

140. Craig N. Adams, Comment, *Clients Beware: Texas Courts Allow Discharged Attorneys to Recover in Full Under Contingent Fee Contracts*, 22 TEX. TECH L. REV. 1159, 1173 (1991); *see, e.g.*, McGowan v. Parish, 237 U.S. 285, 299 (1915) (holding that even after many years of inactivity and the death of the client, the original lawyer had "a complete right to the payment of the money" and enforcement of the contingent fee contract based on his significant contribution to the client's recovery); *In re* Waller, 524 A.2d 748, 751 (D.C. 1987) ("[C]ourts vary widely on the issue of the compensation due an attorney after discharge without cause, recovery of the full contingency fee is most likely in cases in which the attorney has, before discharge, fully performed, substantially performed, or contributed substantially to the results finally obtained by the client."); Kaushiva v. Hutter, 454 A.2d 1373, 1373–74 (D.C. 1983) (holding that an attorney is entitled to recover in full under the original contract following substantial performance, provided the client subsequently recovers).

strikes a balance between client protection and attorney compensation.

V. CONCLUSION

In summary, the *Hoover* decision might herald an impending shift in Texas jurisprudence towards the majority of jurisdictions which limit a discharged attorney to recovery in quantum meruit. While Texas has long adhered to traditional contract principles—allowing an attorney discharged without fault to recover in full under the contingent fee contract[141]—application of the majority rule protects clients who exercise their right to end an attorney-client relationship in favor of different representation.[142]

Trust and confidence are essential aspects of the attorney-client relationship; allowing clients the freedom to terminate attorney-client relationships as desired and needed encourages trust and confidence between the parties, ultimately leading to a stronger working relationship.[143] Applying the traditional rule can undermine the primary justification for the use of contingent fees, in that it impedes clients who might not be able to afford an attorney on a per-hour basis from seeking the best counsel possible, should they be caught in an ineffective attorney-client relationship.[144]

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141. *See* Myers v. Crockett, 14 Tex. 257, 258–59 (1855) (holding that when an attorney performing services contracted for is discharged without fault, the attorney is entitled to the full fee contracted for in the agreement).

142. *See, e.g.*, Craig N. Adams, Comment, *Clients Beware: Texas Courts Allow Discharged Attorneys to Recover in Full Under Contingent Fee Contracts*, 22 TEX. TECH L. REV. 1159, 1174 (1991) (bemoaning that enforcing the traditional rule effectively punishes clients who desire to change attorneys).

143. *See, e.g.*, *Fracasse*, 494 P.2d at 12–13 ("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."). Consequently, because of the special nature of the attorney-client relationship and the fact that attorneys are usually the more informed party in this situation, attorneys should be charged with the burden of risk that the relationship may end before the matter in question has been successfully litigated. *Cf.* Levine v. Bayne, Snell & Krause, Ltd., 40 S.W.3d 92, 95 (Tex. 2001) (quoting *In re* Myers, 663 N.E.2d 771, 774–75 (Ind. 1996)) (stressing that because of the trust relationship between attorneys and their clients, the burden of risk involved in proving the terms of contingent fee agreements should be placed on the attorneys).

144. *See, e.g.*, Salmon v. Atkinson, 137 S.W.3d 383, 388 (Ark. 2003) (Imber, J., concurring) ("[A] poor client without funds to pay such a fee may be forced by the attorney to continue with a lawsuit that the client would prefer not to pursue.").

Just as Texas recently increased client protection by amending referral fee rules to ensure attorneys are making reasonable recommendations, Texas can elect to protect clients' ability to employ and discharge attorneys at will.[145] Overturning *Mandell* and adopting the modern rule of recovery in quantum meruit strikes a better balance between protecting clients and assuring compensation for attorneys who have accepted the risks in a contingent fee contract.

145. *See* Rachel L. Bosworth, Note, *Is the Model Rule Outdated? Texas Carries Referral Fee Responsibility into the Limited Liability Era*, 84 TEX. L. REV. 509, 534–35 (2005) (discussing the new referral fee rule passed by the state bar in 2004, providing added protections for clients of referred attorneys).