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Frank C. Brown

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ATTORNEY DISCHARGED WITHOUT CAUSE FROM CONTINGENT FEE CONTRACT IS LIMITED TO RECOVERY OF REASONABLE VALUE OF SERVICES

*Plaza Shoe Store v. Hermel, Inc.*¹

When an attorney is discharged without cause under a contingent fee contract, the traditional rule has allowed the attorney to recover the amount due to him under the contract, or recover the reasonable value of his services.² Missouri courts followed the contract rule³ until the Missouri Supreme Court's decision in *Plaza Shoe Store v. Hermel, Inc.*⁴ In *Plaza Shoe*, the supreme court adopted the modern rule, which limits the attorney's recovery to the reasonable value of his services.⁵ The decision reflects the changing attitude of the courts regarding attorney-client law; it should have major effects on what has been considered a contractual relationship.⁶ Because clients will no longer be required to pay their original attorneys regardless of the litigation's outcome, *Plaza Shoe* should encourage the free exercise of the client's absolute right to discharge the attorney.⁷ The decision may, however, affect the desirability and negotiation of contingent fee contracts.

Plaza Shoe Store filed suit against Hermel, Inc. alleging negligent design and construction of a building that Plaza Shoe leased.⁸ Plaza Shoe retained the law firm of Greene, Cassity, Carnahan, Freemont & Greene to pursue the claim under a one-third contingent fee contract.⁹ Although the matter was over three years old and had minimum settlement value, Plaza Shoe received four settlement offers.¹⁰ When the law firm recommended

1. 636 S.W.2d 53 (Mo. 1982) (en banc).

2. See notes 19-20 and accompanying text *infra*.

3. *Id.*

4. 636 S.W.2d 53 (Mo. 1982) (en banc).

5. *Id.* at 60.

6. See 7 AM. JUR. 2D *Attorneys at Law* § 118 (1980).

7. See notes 24-29 and accompanying text *infra*.

8. 636 S.W.2d at 53-54.

9. *Id.* at 54.

10. *Id.* When the Greene firm took over the case, the named plaintiff was not the occupant or the tenant, nor had it sustained any damages. The statute of limi-

that Plaza Shoe accept the last offer of \$50,000 plus a potential rent reduction, Plaza Shoe accused the attorneys of being crooks and of selling out to the defendants.¹¹ The firm concluded it could no longer represent Plaza Shoe, terminated the fee contract, and filed notice of its attorney's lien.¹²

The case was settled and the court placed the proceeds in escrow.¹³ The law firm billed Plaza Shoe for \$16,470 plus costs, and requested that the trial court pay the firm out of the settlement proceeds, either for the contract amount or in quantum meruit.¹⁴ The court granted relief on the contract and valued the firm's services at \$14,417.50.¹⁵ Plaza Shoe ap-

tations on the proper party was about to lapse, and the defendants were aware the proper party was not named. *Id.*

11. *Id.* at 55.

12. Plaza Shoe's accusations created a constructive discharge which entitled the law firm to terminate the employment contract. *See* MO. SUP. CT. R. 4, EC 2-32 (lawyer should withdraw only under compelling circumstances); *id.* DR 2-110(c)(1)(d) (withdrawal permitted when client's conduct renders effective representation impossible); *see generally* 1 S. SPEISER, ATTORNEYS' FEES § 4:12 (1973) (circumstances which justify abandonment). Whether withdrawal is justified is a question of fact. *See* *Young v. Lanznar*, 133 Mo. App. 130, 138, 112 S.W. 17, 20 (1908).

A withdrawing attorney may place a lien on settlement proceeds by serving the opposing party with notice of the contingent fee agreement. *See* MO. REV. STAT. § 484.140 (1978). A collateral issue in *Plaza Shoe* was whether filing a motion in the original proceedings was the proper procedure for enforcing the attorney's lien. Plaza Shoe contended that a discharged attorney could enforce the lien only through an independent proceeding against the client. 636 S.W.2d at 56. This contention was based on a narrow interpretation of *Nelson v. Massman Constr. Co.*, 120 S.W.2d 77, 89 (Mo. Ct. App. 1938), *modified on other grounds sub nom.*, *State ex rel. Massman Constr. Co. v. Shain*, 344 Mo. 1103, 130 S.W.2d 491 (1939), and *Satterfield v. Southern Ry.*, 287 S.W.2d 395 (Mo. Ct. App. 1956). These cases indicated that an attorney could enforce the lien against the judgment, either through an independent action or by motion in the original case, or against the client in an independent proceeding. *Satterfield*, 287 S.W.2d at 397; *Nelson*, 120 S.W.2d at 89. Although MO. REV. STAT. § 484.130 (1978) does not expressly provide a remedy for enforcing the lien, courts have not restricted attorneys to any particular relief. *See Satterfield*, 287 S.W.2d at 397. In *Plaza Shoe*, the supreme court concluded that the trial court had jurisdiction to enforce the lien, for trial courts have broad discretion to determine the appropriate enforcement methods and because there is no significant difference between proceeding directly against the client and proceeding against funds held in escrow by the court. 636 S.W.2d at 56.

13. The settlement was for \$58,000. 636 S.W.2d at 54. The party paying a settlement subject to an attorney's lien may give the proceeds to the court for distribution. *See* *Lawson v. Missouri & Kan. Tel. Co.*, 178 Mo. App. 124, 136, 164 S.W. 138, 143 (1914).

14. This figure was apparently based on a \$50,000 settlement. The firm unsuccessfully attempted to increase the amount to \$16,666. 636 S.W.2d at 55.

15. There is authority that a court cannot give alternate relief in quantum meruit if the attorney does not request it. *See* *Craig v. Jo B. Gardner, Inc.*, 586 S.W.2d

pealed the order, and the case was transferred from the Missouri Court of Appeals for the Southern District to the Missouri Supreme Court.¹⁶ The supreme court held that attorneys employed under contingent fee contracts who are discharged without cause before settlement or judgment are entitled only to the reasonable value of the legal services rendered.¹⁷ The court also held that recovery is allowed only when the contingency occurs, and that the amount recovered may not exceed the contract fee.¹⁸

Missouri previously had applied the contract rule, which allows an attorney discharged without cause to recover on the contingent fee contract or in quantum meruit.¹⁹ Because this rule treats the attorney-client agree-

316, 325 (Mo. 1979) (en banc). Choice of the wrong lien enforcement remedy may prevent recovery. *See Schechter v. Fitzsimmons Indus.*, 627 S.W.2d 89, 91 (Mo. Ct. App. 1981) (order that husband pay wife's attorney's fees was not direct award of fees to attorney, so garnishment was improper remedy).

16. 636 S.W.2d at 55.

17. *Id.* at 60.

18. *Id.*

19. *Id.* at 55-56. *See Craig v. Jo B. Gardner, Inc.*, 586 S.W.2d 316, 325 (Mo. 1979) (en banc); *In re Downs*, 363 S.W.2d 679, 686 (Mo. 1963); *In re Thomasson's Estate*, 346 Mo. 911, 916, 144 S.W.2d 79, 83 (1940); *Mills v. Metropolitan St. Ry.*, 282 Mo. 118, 122, 221 S.W. 1, 4 (1920); *Barthels v. Garrels*, 206 Mo. App. 199, 201, 227 S.W. 910, 914 (1920). Enforcement of an attorney's lien is an equitable action. *Craig v. Jo B. Gardner, Inc.*, 586 S.W.2d 316, 325 (Mo. 1979) (en banc); *Fein v. Schwartz*, 404 S.W.2d 210, 228 (Mo. Ct. App. 1966).

Most jurisdictions allow the attorney wrongfully discharged to recover the contract price. *See Kaushiva v. Hutter*, 454 A.2d 1373, 1374 (D.C. 1983); *Carter v. Dunham*, 104 Kan. 59, 63, 177 P. 533, 535 (1919); *Walters v. Hastings*, 84 N.M. 101, 107, 500 P.2d 186, 192 (1972); *Roberts v. Montgomery*, 115 Ohio St. 502, 507, 154 N.E. 740, 741 (1926); *White v. American Law Book Co.*, 106 Okla. 166, 167, 233 P. 426, 427 (1924); *Dolph v. Speckart*, 94 Or. 555, 565, 186 P. 32, 35 (1920); *Kent v. Fishplate*, 247 Pa. 361, 364-65, 93 A. 509, 510 (1915); *Mandrell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex. 1969). The modern rule, adopted by several jurisdictions, limits recovery to the reasonable value of services. *See Friedman v. Harris*, 158 F.2d 187, 188 (D.C. Cir. 1946); *Owens v. Bolt*, 218 Ala. 344, 350, 118 So. 590, 594 (1928); *State Farm Mut. Ins. Co. v. Saint Joseph's Hosp.*, 107 Ariz. 498, 502, 489 P.2d 837, 841 (1971); *Fracasse v. Brent*, 6 Cal. 3d 784, 791, 494 P.2d 9, 13, 100 Cal. Rptr. 385, 391 (1972); *Cole v. Myers*, 128 Conn. 223, 229, 21 A.2d 396, 399 (1941); *Rosenberg v. Levin*, 409 So. 2d 1016, 1022 (Fla. 1982); *Dorsey v. Edge*, 75 Ga. App. 388, 392, 43 S.E.2d 425, 428 (1947); *French v. Cunningham*, 149 Ind. 632, 635, 49 N.E. 797, 799 (1898); *Breathitt Coal, Iron & Lumber Co. v. Gregory*, 25 Ky. 1507, 1509, 78 S.W. 148, 149 (1904); *Salem Realty Co. v. Matera*, 10 Mass. App. Ct. 571, —, 410 N.E.2d 716, 719 (1980); *Ambrose v. Detroit Edison Co.*, 65 Mich. App. 484, 488, 237 N.W.2d 520, 522 (1975); *Pye v. Diebold*, 204 Minn. 319, 322, 283 N.W.2d 487, 488 (1939); *Baker v. Zikas*, 176 Neb. 290, 293, 125 N.W.2d 715, 717 (1964); *In re Estate of Poli*, 134 N.J. Super. 222, 225, 338 A.2d 888, 891 (1975); *Martin v. Camp*, 219 N.Y. 170, 176, 114 N.E. 46, 48 (1916); *Covington v. Rhodes*, 38 N.C. App. 61, 64, 247 S.E.2d 305, 308 (1978), *cert. denied*, 296 N.C. 410, 251 S.E.2d 468 (1979); *Heinzmann v. Fine, Fine, Legum & Fine*, 217 Va. 958, 963,

ment like any other employment contract,²⁰ the supreme court reexamined it in light of the attorney-client relationship. The court felt that reevaluation of the rule was justified by the current increase in litigation, the growth in use of contingent fee contracts, and the need to maintain public confidence in courts and attorneys.²¹ The court characterized the attorney-client relationship as delicate, highly personal, and built on special trust and confidence.²² Clients totally rely on their attorneys, so they must have complete confidence in their ability and integrity, and the relationship requires absolute fairness and candor.²³

The court in *Plaza Shoe* reasoned that because of the unique aspects of the relationship, the client has the absolute right to discharge his attorney,²⁴ a right that is much greater than in other employment relationships.²⁵ The modern rule is based on this special trust and confidence and the client's right to discharge his attorney.²⁶ The absolute right to discharge makes

234 S.E.2d 282, 284 (1977); *Ramey v. Graves*, 112 Wash. 88, 91, 191 P. 801, 802 (1920); *Clayton v. Martin*, 108 W. Va. 571, 575, 151 S.E. 855, 856 (1930); *see also* Annot., 92 A.L.R.3d 690 (1979).

20. 636 S.W.2d at 56. The remedies for breach of contract are damages, specific performance, and restitution. *See* 5 A. CORBIN, CORBIN ON CONTRACTS § 1102 (1964).

21. 636 S.W.2d at 56-57. Between 1970 and 1980, the number of federal civil cases increased 93.3%, from 87,321 to 168,789. THE LAWYER'S ALMANAC 1981-82, at 534.

22. 636 S.W.2d at 57. *See also* *Craig v. Jo B. Gardner, Inc.*, 586 S.W.2d at 320 (client became dissatisfied when attorneys ignored his concerns over an important petition error); *Gardine v. Cottey*, 360 Mo. 681, 695, 230 S.W.2d 731, 739 (1950) (en banc) (attorney induced client's wife to forego valuable property settlement rights in return for an uncontested divorce, then represented wife in divorce proceeding).

23. 636 S.W.2d at 57 (citing *Rosenberg v. Levin*, 409 So. 2d 1016, 1021 (Fla. 1982)). *See also* *Laughlin v. Boatmen's Nat'l Bank*, 163 S.W.2d 761, 765 (Mo. 1942); *In re Thomasson's Estate*, 346 Mo. 911, 918, 144 S.W.2d 79, 83 (1940); *Bybee v. S'Renco*, 316 Mo. 517, 522, 291 S.W. 459, 461 (1926).

24. 636 S.W.2d at 58. Although prior Missouri decisions recognized the right to discharge, it was not characterized as absolute. *See* *Allen v. Fewel*, 337 Mo. 955, 961, 87 S.W.2d 142, 145 (1935); *McLaughlin v. McLaughlin*, 427 S.W.2d 767, 768 (Mo. Ct. App. 1968). The authority was subject to the attorney's right to payment. *Craig v. Jo B. Gardner, Inc.*, 586 S.W.2d 316, 320 (Mo. 1979) (en banc); *In re Downs*, 363 S.W.2d 679, 686 (Mo. 1963) (en banc).

25. 636 S.W.2d at 57 (citing *Rosenberg*, 409 So. 2d at 1021).

26. *Id.* (citing *Martin v. Camp*, 219 N.Y. 170, 114 N.E. 46 (1916)). *See* *Fracasse v. Brent*, 6 Cal. 3d at 791, 494 P.2d at 13, 100 Cal. Rptr. at 389. This premise underlies many recent decisions adopting the modern rule. *See* Note, *Attorney-Client-Contingent Fee Contracts—An Attorney Discharged Without Cause Under a Contingent Fee Contract is Limited to Quantum Meruit Recovery, and Recovery is Dependent Upon the Client's Ultimate Recovery in the Underlying Action*, 41 CIN. L. REV. 1002, 1003 (1972); Note, *Attorney-Client—Attorney's Right to Compensation When Discharged Without Cause From a*

recovery of the contract fee suspect; to allow a client to discharge the attorney and then hold the client liable in damages is unjust.²⁷ The court was persuaded that the modern rule was in the best interests of clients and the legal profession because it balances the client's power to discharge against the attorney's right to fair compensation.²⁸ The modern rule is especially desirable in contingent fee contracts because allowing recovery on the contract may chill the client's discretion to discharge his attorney; economics could force the client to continue with an attorney in whom he has lost confidence.²⁹

After deciding that the discharged attorney's recovery is limited to the reasonable value of services, the court addressed the issue of when the attorney's cause of action accrued. The court looked at two approaches.³⁰ The New York view reasons that the cause of action accrues upon termination, because the case has been removed from the discharged attorney, whose compensation will rest on the ability of his successor.³¹ California courts hold that the cause of action accrues when the contingency occurs,³² because a reasonable fee can be calculated only when the ultimate recovery is determined.³³ Although the attorney may have an established hourly charge, the benefit the client receives from the legal services is not measurable until judgment or settlement.³⁴ California courts find that it is improper to burden the client with an obligation to pay a discharged attorney

Contingent Fee Contract—Covington v. Rhodes, 15 WAKE FOREST L. REV. 677, 689-90 (1979).

27. 636 S.W.2d at 58.

28. If the client is liable to the discharged attorney for the contract price and must also pay substitute counsel, recovery may be substantially depleted by attorneys' fees. See Note, *Limiting the Wrongfully Discharged Attorney's Recovery to Quantum Meruit*—Fracasse v. Brent, 24 HASTINGS L.J. 771, 783 (1973); see, e.g., Jones v. Brown, 84 Cal. App. 2d 390, 190 P.2d 956 (1948) (over 73% of recovery paid to attorneys). Plaza Shoe eventually paid \$34,290.35 in attorneys' fees and expenses out of a \$58,000 recovery (59%), despite the limits of the modern rule. 636 S.W.2d at 60.

29. 636 S.W.2d at 58. See also Salopek v. Schoemann, 20 Cal. 2d 150, 124 P.2d 21 (1942) (Gibson, C.J., concurring) (client forced to choose between double contingent fees or a single attorney in whom he has no confidence).

30. 636 S.W.2d at 59.

31. Tillman v. Komar, 259 N.Y. 133, 135-36, 181 N.E. 75, 76 (1932); Martin v. Camp, 219 N.Y. at 177, 114 N.E. at 49. See also Fracasse v. Brent, 6 Cal. 3d at 804, 494 P.2d at 23, 100 Cal. Rptr. at 398 (Sullivan, J., dissenting).

32. *Fracasse*, 6 Cal. 3d at 791-92, 494 P.2d at 13-14, 100 Cal. Rptr. at 389-90.

33. *Id.* at 792, 494 P.2d at 14, 100 Cal. Rptr. at 390. This logic is not persuasive because the court could determine the right to a fee on discharge and postpone its calculation until the client recovers. See WAKE FOREST L. REV., *supra* note 26, at 685.

34. A significant factor in determining whether an attorney's fee is reasonable is the "amount involved and the result obtained." MO. SUP. CT. R. 4, DR 2-106(B)(4).

regardless of the outcome of the litigation;³⁵ any other result would inhibit the exercise of the client's absolute right to discharge.³⁶ Although it is inconsistent with contract law,³⁷ the Missouri Supreme Court adopted the California view because of the policies it serves³⁸ and the unique nature of the attorney-client relationship.³⁹

The court also determined that the contract price should limit any quantum meruit recovery.⁴⁰ According to the New York view, discharge cancels the contract,⁴¹ and the attorney may recover in quantum meruit an amount which may exceed the contract price.⁴² This is consistent with traditional contract law.⁴³ The Missouri Supreme Court, however, stressed that in attorney-client relations, policy outweighed traditional contract theory; allowing "unlimited recovery under quantum meruit loses sight of the rationale of the modern rule favoring a client's freedom to discharge his attorney without unreasonable burden."⁴⁴ If the contract price limits recovery, the client is not forced to pay a penalty for exercising the right to discharge.⁴⁵

35. *Fracasse*, 6 Cal. 3d at 792, 494 P.2d at 14, 100 Cal. Rptr. at 390. This is particularly true for poor clients.

36. *Id.* at 790-91, 494 P.2d at 13, 100 Cal. Rptr. at 389. See also *Rosenberg v. Levin*, 409 So. 2d, 1016, 1021 (Fla. 1982); *601 Lincoln Rd., Inc. v. Kelner*, 289 So. 2d 12, 15 (Fla. Ct. App. 1974).

37. "[O]ne who disaffirms a contract may not selectively enforce its provisions." 636 S.W.2d at 59. See also *Tillman v. Komar*, 259 N.Y. at 135, 181 N.E. at 75 (attorney recovered in excess of contingent fee contract amount). But see *J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS* 511-26 (2d ed. 1977) (defaulting party may not recover on the contract unless performance is substantial, divisible, or independent of the promise); 5 A. CORBIN, *supra* note 20, § 1123 (defaulting party may recover the value of his performance less the aggrieved party's damages).

38. The California rule preserves the client's absolute right to discharge, reduces the cost of exercising that right, and promotes public confidence in the legal system. 636 S.W.2d at 59-60.

39. *Id.*

40. *Id.* at 59.

41. *Tillman v. Komar*, 259 N.Y. at 135, 181 N.E. at 75.

42. 636 S.W.2d at 59. Quantum meruit recovery could exceed the contract price if the original contingent fee was low and the case was lengthy or difficult.

43. In contract law, the majority rule does not restrict damages to the contract amount, although the contract price is evidence of the value of performance. 5 A. CORBIN, *supra* note 20, § 1113.

44. 636 S.W.2d at 59.

45. *Id.* at 59-60 (citing *Chamblis, Bahner & Crawford v. Luther*, 531 S.W.2d 108, 113 (Tenn. Ct. App. 1975)). In *Plaza Shoe*, the court reasoned that since the discharged attorney may recover only after the contingency occurs, the trial court is the proper forum for enforcement of the lien. The method of enforcement and the valuing of services fall within the trial court's discretion. 636 S.W.2d at 60. The court stated that trial judges may determine reasonable value in accordance with DR 2-106(B), which provides:

The contract rule permits the discharged attorney to recover the agreed percentage of the ultimate recovery.⁴⁶ Although this rule seems harsh, several factors support it. Valuation of attorney's services is difficult, particularly if the work is incomplete.⁴⁷ It is hard to value fractions of work on a case⁴⁸ because the attorney's learning and judgment give the product its worth.⁴⁹ The most important part of this work may be the initial advice.⁵⁰ If agreed upon, a contract price may provide a measure of dam-

Factors to be considered as guides in determining the reasonableness of a fee include the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.

MO. SUP. CT. R. 4, DR 2-106(B).

46. Prior to *Plaza Shoe*, Missouri courts applied the contract rule. *See In re Downs*, 363 S.W.2d 679, 686 (Mo. 1963) (lawyer discharged without fault from contingent fee contract may sue for contract fee when claim is liquidated by judgment or settlement); *Gillham v. Metropolitan St. Ry.*, 282 Mo. 118, 123, 221 S.W. 1, 5 (1920) (attorney discharged from contingent fee contract may sue on contract or for reasonable value of services).

47. *See Kikuchi v. Ritchie*, 202 F. 857, 859 (9th Cir. 1913); *Henry v. Vance*, 111 Ky. 72, 82, 53 S.W. 273, 276 (1901); *CIN. L. REV.*, *supra* note 26, at 1004.

48. *See Note, supra* note 28, at 781 (citing *Brodie v. Watkins*, 33 Ark. 545, 548 (1878)).

49. *Terminal Ry. Ass'n v. Schmidt*, 353 Mo. 79, 92, 182 S.W.2d 79, 84 (1944); *Wonneman v. Wonneman*, 305 S.W.2d 71, 81 (Mo. App. 1957). *See generally* 1 S. SPEISER, *supra* note 12, § 8.8.

50. *See Bradley v. Neal*, 234 Ark. 728, 731, 354 S.W.2d 269, 270-71 (1962) (citing *Brodie v. Watkins*, 33 Ark. 545, 548 (1878)). Although the difficulty in allocating the value of legal services is cited in support of the contract rule, it may favor quantum meruit recovery. *See Note, supra* note 28, at 781. Quantum meruit recovery should account for all relevant factors, including the time and labor required, the novelty and difficulty of the case, the ability and experience of counsel, and the result. *See, e.g., German Evangelical St. Marcus Congregation v. Archambault*, 404 S.W.2d 705, 711 (Mo. 1966); *Terminal Ry. Ass'n v. Schmidt*, 353 Mo. 79, 92, 182 S.W.2d 79, 84 (1944). Moreover, quantum meruit is determined by judges, who are

ages.⁵¹ Charging the full fee prevents the client from benefitting from his own breach.⁵² Moreover, under the contract rule, a discharged attorney generally has no duty to mitigate damages by seeking substitute employment,⁵³ as discharged employees generally do.⁵⁴ The contract rule protects the attorney's economic interest,⁵⁵ motivates attorneys to provide necessary legal services, and improves access to legal services.⁵⁶ This protection, however, comes at the client's expense, and policy should not favor attorneys over clients. Although there is support for the contract rule, the Missouri Supreme Court found in *Plaza Shoe* that the modern rule better advances the policy of allowing a client to discharge his attorney at any time, and promotes greater confidence in the legal profession.⁵⁷

In Missouri, agency law governs the attorney-client relationship.⁵⁸ The "nature of the lawyer's profession necessitates the utmost good faith toward his client and the highest loyalty and devotion to his client's interests."⁵⁹ However, the absolute right of the client to discharge his attorney afforded by *Plaza Shoe* is inconsistent with agency law, under which a principal has no right to revoke the agency merely because he has lost confidence in the agent.⁶⁰ The principal's right to discharge is subject to payment of damages.⁶¹ *Plaza Shoe*, in contrast, places a greater value on protecting the client/principal's need for confidence in his attorney/agent. Several features of the attorney-client relationship justify favoring princi-

considered experts on attorneys' fees. *Sebree v. Rosen*, 393 S.W.2d 590, 599 (Mo. 1965).

51. *See, e.g.*, *McCall v. Atchley*, 256 Mo. 39, 46, 164 S.W. 593, 595 (1914) (attorney has action at law upon discharge for one-fourth of property value as specified in contingent fee contract).

52. *See, e.g.*, *Dolph v. Speckart*, 94 Or. 550, 566, 186 P. 32, 35-36 (1920). Because discharge prevents full performance by the attorney, it is impossible to measure damages under the general contract damages rule.

53. *See* Annot., 44 A.L.R.3d 629 (1972) (occupations required to mitigate damages). *But see* 11 AM. JUR. PROOF OF FACTS 2D 679, 690 (1976) (attorney employed by a law firm may be required to mitigate damages).

54. 5 A. CORBIN, *supra* note 20, § 1095. *See, e.g.*, *Wessler v. City of St. Louis*, 242 S.W.2d 289, 290-91 (Mo. Ct. App. 1951).

55. Traditionally, a contract is enforceable to the extent of its value. Thus, when a client breaches a contingent fee contract, the full price should be recovered, although it may exceed the actual loss. 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1315 (3d ed. W. Jaeger 1968).

56. *See* Note, *Breach of Contingent Fee Contract*, 1960 WIS. L. REV. 156, 158.

57. 636 S.W.2d at 60.

58. *Qualls v. Field Enter. Corp.*, 302 F. Supp. 152, 153 (E.D. Mo. 1969); *Southwestern Bell Tel. Co. v. Roussin*, 534 S.W.2d 273, 276 (Mo. Ct. App. 1976); *State ex rel. A.M.T. v. Weinstein*, 411 S.W.2d 267, 272 (Mo. Ct. App. 1967); *Schwarze v. May Dep't Stores*, 360 S.W.2d 336, 338 (Mo. Ct. App. 1962).

59. *In re Thomasson's Estate*, 346 Mo. 911, 918, 144 S.W.2d 79, 83 (1940).

60. *See* 9 S. WILLISTON, *supra* note 55, § 1012B.

61. *See* W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 48, at 87-88 (1964).

pals over agents: the client's inability to evaluate the quality of legal services,⁶² the client's inability to foresee whether he will retain confidence in the attorney selected,⁶³ and the impairment of effective legal representation which may result if clients are compelled to continue relationships with attorneys in whom they have lost confidence.⁶⁴

Plaza Shoe may have a great impact on the availability of contingent fee contracts, which have made some legal services available to those who otherwise could not afford representation.⁶⁵ Even clients who can afford to pay attorneys by the hour may prefer contingent fee contracts because expenses are minimized if the claim is lost.⁶⁶ Although firmly established in the United States,⁶⁷ contingent fee contracts are controversial.⁶⁸ It has been suggested that they are a gamble on litigation and are inconsistent with the detachment required in the legal profession.⁶⁹ The emphasis on winning may reduce the lawyer's self-restraint in negotiation and advocacy.⁷⁰ Large financial rewards may encourage solicitation, impairing the professional disinterest necessary to effectively advising clients.⁷¹ In addition, the contingent fee can be excessive, unrelated in time, talent, or effort to the value of the services.⁷²

62. See generally Mazor, *Power and Responsibility in the Attorney-Client Relationship*, 20 STAN. L. REV. 1120, 1121 (1968); Note, *supra* note 56, at 158-59.

63. See, e.g., Phelps v. Elgin, J. & E. Ry., 70 Ill. App. 89, 94, 217 N.E.2d 519, 522 (1966). In *Phelps*, a client signed a contingent fee contract without reading the fine print. After having the terms read to her, she attempted to discharge the attorneys, but they refused to accept the registered letter of discharge.

64. See Note, *supra* note 28, at 787.

65. See generally Lipscomb v. Adams, 193 Mo. 530, 542-43, 91 S.W. 1046, 1048 (1906); MO. SUP. CT. R. 4, EC 2-20, EC 5-7; Youngwood, *The Contingent Fee—A Reasonable Alternative?*, 28 MOD. L. REV. 330, 333-34 (1965) (contingent fee contracts serve persons who might otherwise go unrepresented).

66. Note, *Contingent Fee: Champerty or Champion?*, 21 CLEV. ST. L. REV. 15, 28 (1972). Relatively sophisticated consumers of large quantities of legal services, armed with the knowledge that they will be liable upon discharge only for the reasonable value of services, may acquire the leverage to demand lower-percentage contingent fee contracts.

67. Youngwood, *supra* note 65, at 333. Civil contingent fees are used everywhere but Maine and Massachusetts. Outside of this country, the contingent fee is considered champertous and prohibited. *Id.* at 331. The Missouri Bar Advisory Committee has formally declared that contingent fees are unethical in some domestic relations cases, *Missouri Bar Administration*, 33 J. MO. B. 465 (1977), and in all criminal cases. MO. SUP. CT. R. 4, DR 2-106(C).

68. See 1 S. SPEISER, *supra* note 12, § 2:3; Note, *supra* note 66, at 15-16; see generally M. BLOOM, *THE TROUBLE WITH LAWYERS* 192-220 (1968); F. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* 4-6 (1964).

69. F. MACKINNON, *supra* note 68, at 4; Note, *supra* note 66, at 16.

70. F. MACKINNON, *supra* note 68, at 4.

71. *Id.*

72. *Suggested Changes in the Contingent Fee System*, 19 FED'N INS. COUNS. Q. 76, 82

Under the modern rule, an attorney discharged without cause may recover only the reasonable value of services rendered prior to discharge. This has been criticized as imperiling the attorney's economic interest.⁷³ A primary justification for the modern rule is allowing a client the freedom to change representation,⁷⁴ thus promoting public confidence in the legal profession.⁷⁵ Confidence may be undermined by a rule which forces clients to retain attorneys in whom they have lost confidence.⁷⁶ Attorneys are responsible for administration of justice as officers of the court.⁷⁷ Willingness to consult an attorney depends in part on general confidence in the legal profession,⁷⁸ and the modern rule attempts to improve the administration of justice by promoting public confidence.⁷⁹ This is accomplished by judicially implying terms in contingent fee contracts that give clients the absolute right to discharge, with or without cause.⁸⁰

Plaza Shoe should cause Missouri attorneys to reassess contingent fee contracts, which may no longer be economically appealing. At least two

(Winter 1968-69). Some have advocated judicial review of contingent fees in personal injury cases. While most clients accept the "no recovery-no fee" rule, they often find fees unreasonably high. Committee on Personal Injury Claims, State Bar of California, *The Case for Contingent Fees*, 6 LAW OFF. ECON. & MGMT., 189, 190 (1965). Two reasons are advanced to support the high percentage fee: first, it covers costs in cases where the attorney performs but obtains no recovery; second, clients get a bargain by not paying when they lose. Contingent fees are not unreasonable when balanced against the costs in cases lost or complex cases, where the fee does not fully compensate the attorney. F. MACKINNON, *supra* note 68, at 182.

73. WAKE FOREST L. REV., *supra* note 26, at 686-87. *But see* Covington v. Rhodes, 38 N.C. App. 61, 66, 247 S.E.2d 305, 308 (1978) (modern rule will not deter future use of contingent fees), *cert. denied*, 296 N.C. 410, 251 S.E.2d 468 (1979).

74. 636 S.W.2d at 58. This freedom is greater than that in the normal agency relationship. Note, *supra* note 28, at 786-87.

75. 636 S.W.2d at 57. *See* Fracasse v. Brent, 6 Cal. 3d at 789, 494 P.2d at 12, 100 Cal. Rptr. at 388; Martin v. Camp, 219 N.Y. at 176, 114 N.E. at 48.

76. 636 S.W.2d at 58. *See also* Fracasse, 6 Cal. 3d at 789, 494 P.2d at 12, 100 Cal. Rptr. at 388. Increased public confidence would encourage people to seek legal advice. Note, *supra* note 28, at 789.

77. Note, *supra* note 28 at 788-89. *See also* Spevack v. Klein, 385 U.S. 511, 520 (1966) (Fortas, J., concurring) (although an officer of the court, attorney cannot be disbarred for asserting privilege against self-incrimination).

78. Note, *supra* note 28, at 788.

79. This assumes that more people will seek legal advice if they know they are free to discharge attorneys in whom they lose confidence.

80. The *Plaza Shoe* court recognized the logic of this approach. 636 S.W.2d at 58. This right frees the client from liability for breach of contract and damages because of discharge. Fracasse, 6 Cal. 3d at 790-91, 494 P.2d at 13, 100 Cal. Rptr. at 389. Thus, the attorney recovers in restitution, off the contract. *See* RESTATEMENT (SECOND) OF AGENCY § 452 (1958) (upon termination without authority, principal is liable for value of the agent's services).

situations are fraught with risk and unfairness for the attorney. First, an attorney discharged immediately before judgment or settlement may be denied the contract bargain, despite nearly full performance. Second, an attorney may be discharged after working diligently and receive no compensation if the successor attorney loses the case.⁸¹ Therefore, attorneys may insist on higher percentage contingent fees to compensate for the risk of discharge without recovery.⁸² Moreover, if the attorney feels he may be discharged, he may not vigorously pursue the client's claim.⁸³ If the modern rule discourages attorneys from taking contingent fee cases, poor clients may go unrepresented.⁸⁴

Plaza Shoe could also lead to higher retaining fees, since a discharged attorney may be entitled to a retaining fee, even if it exceeds the reasonable value of the services rendered.⁸⁵ This would further limit the availability of legal services. Limiting recovery to quantum meruit may also encourage third-party interference with attorney-client relationships. Although generally there is no cause of action against one who induces a party to exercise an absolute right,⁸⁶ contractual interference actions against third parties have been sustained⁸⁷ under the contract⁸⁸ and modern rules.⁸⁹

81. See *Fracasse*, 6 Cal. 3d at 804, 494 P.2d at 14, 100 Cal. Rptr. at 399 (Sullivan, J., dissenting) (attorney does not bargain for the risk that another will take the case).

82. WAKE FOREST L. REV., *supra* note 26, at 687.

83. Note, *supra* note 28, at 793.

84. WAKE FOREST L. REV., *supra* note 26, at 687. Higher contingent fees will mean fewer clients will be able to pay, increasing the burden on attorneys to provide free legal services. Cf. MO. SUP. CT. R. 4, EC 2-25 ("The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer.").

85. A retaining fee is a preliminary payment to secure an attorney's future services. A contract to pay a retainer is valid and enforceable even though the services are never rendered. 7A C.J.S. *Attorney and Client* § 282 (1980). *But cf.* Rimos v. Rimos, 81 N.Y.S.2d 347 (Sup. Ct. 1948) (retainer must be returned when attorney is discharged for cause).

86. See generally Annot., 26 A.L.R.2d 1223, 1227 (1952). For example, an attorney has no cause of action against a person who induces the client to settle. The Missouri attorney's lien statute does not give the attorney the power to prevent settlement. *Taylor v. St. Louis Transit Co.*, 198 Mo. 715, 726, 97 S.W. 155, 157 (1906). Absent fraud or collusion, the client has the absolute right to settle or adjust the claim. *Gerritzen v. Louisville & Nashville Ry.*, 115 S.W.2d 44, 45 (Mo. Ct. App. 1938).

87. The action is for intentional interference with contract performance. See RESTATEMENT (SECOND) OF TORTS § 766 (1979). Under the *Plaza Shoe* rationale, the contract is terminable at will by the client and technically there is no breach. This should be taken into account in determining the discharged attorney's damages. *Id.* § 774A.

88. *State Farm Ins. Co. v. Gregory*, 184 F.2d 447, 452 (4th Cir. 1950) (insurance company induced client to settle for less than policy value by representing that

Plaza Shoe does not foreclose the possibility of attorneys recovering damages for wrongful discharge. Recovery on the contract should be allowed when the attorney performs non-legal work,⁹⁰ because the policies that support the modern rule are not compelling outside the attorney-client relationship.⁹¹ *Fracasse v. Brent*,⁹² relied on in *Plaza Shoe*, suggests that clients are liable for breach of contract for bad faith discharges.⁹³ Bad faith is evident in discharges by clients who have not lost confidence in their attorney's loyalty or ability.⁹⁴ Moreover, once the attorney has fully performed, recovery should not be limited to quantum meruit,⁹⁵ because the attorney's right to the contract price is vested, and the client's attempted termination should be ineffective.⁹⁶ Since an attorney has no implied authority to compromise or settle claims, it may be difficult to determine whether an attorney has fully performed.⁹⁷

Missouri attorneys should consider *Plaza Shoe* before drafting contingent fee contracts. Because the supreme court did not prescribe a method for calculating the reasonable value of services,⁹⁸ contracts should be drafted carefully to avoid problems. A contract should inform the client of the absolute right to discharge, advise the client of his duty to compensate the attorney for services rendered, and provide a method for calculating a reasonable fee.⁹⁹ The attorney should anticipate the possibility of discharge

settlement was more favorable than proceeding and dividing recovery with attorney); *State Farm Mut. Ins. Co. v. St. Joseph's Hosp.*, 107 Ariz. 498, 489 P.2d 837 (1971) (insurance company persuaded client to discharge attorney, helped her prepare dismissal letter, then secured settlement for an amount previously rejected).

89. *Lurie v. New Amsterdam Casualty Co.*, 270 N.Y. 379, 382, 1 N.E.2d 472, 473 (1936) (insurance agents threatened that unless client repudiated his retainer with attorney, client would not recover).

90. *See, e.g., Mandel v. Liebman*, 303 N.Y. 88, 97, 100 N.E.2d 149, 154 (1951) (attorney employed as personal representative and manager).

91. The use of legal skills does not conclusively create an attorney-client relationship. *Id.*

92. 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972).

93. *Id.* at 790, 494 P.2d at 13, 100 Cal. Rptr. at 387 ("It should be sufficient that the client has, for whatever reason, lost faith in the attorney, to establish 'cause' for discharging him.").

94. Note, *supra* note 28, at 790-91. *See, e.g., Neepner v. Heinbach*, 249 S.W. 440, 441 (Mo. Ct. App. 1923) (client engaged substitute counsel without notice to original attorney and thus prevented performance).

95. To "the extent that such discharge occurs 'on the courthouse steps' where the client executes a settlement obtained after much work by the attorney," reasonable value of the attorney's services may equal the contingent fee. *Fracasse*, 6 Cal. 3d at 791, 494 P.2d at 14, 100 Cal. Rptr. at 386.

96. Note, *supra* note 28, at 791.

97. *Leffler v. Bi-State Dev. Agency*, 612 S.W.2d 835, 836 (Mo. Ct. App. 1981).

98. 636 S.W.2d at 60.

99. WAKE FOREST L. REV., *supra* note 26, at 688. The last provision should encourage healthy discussion of fees. *Accord* MO. SUP. CT. R. 4, EC 2-19 (clear

immediately before settlement.¹⁰⁰ Reasonable fee provisions, admissible in New York for determining reasonable value,¹⁰¹ could prevent litigation over fees owed by former clients to their discharged attorneys.¹⁰²

Plaza Shoe brings Missouri into the growing minority of states which hold that an attorney discharged before judgment or settlement is limited to recovering the reasonable value of services rendered. This limitation, while inconsistent with contract and agency law, allows clients to discharge their attorneys at any time. The modern rule does not unfairly penalize the client for discharging an attorney in whom he has lost confidence. *Plaza Shoe* should bolster public confidence in the legal profession.

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agreement with client as to the basis of the fee promotes understanding and good relations; reasons for fee should be fully explained).

100. Under the modern rule, such a discharge could limit the attorney's fee. Thus, the attorney would lose the contingent fee benefit of spreading costs of cases lost over a large number of clients, possibly reducing willingness to accept contingent fee contracts. An attorney discharged immediately before settlement may, however, be entitled to the full contingent fee. *See Fracasse*, 6 Cal. 3d at 791, 494 P.2d at 13-14, 100 Cal. Rptr. at 389-90; *Covington v. Rhodes*, 38 N.C. App. at 66, 247 S.E.2d at 309.

101. *See Tillman v. Komar*, 259 N.Y. at 135, 181 N.E. at 75-76; *see also Potts v. Mitchell*, 410 F. Supp. 1278, 1282 (W.D.N.C. 1976); *Gordon v. Stewart*, 74 Nev. 115, 119, 324 P.2d 234, 236 (1958).

102. Suits against clients to recover fees are discouraged. *See MO. SUP. CT. R. 4, EC 2-23*; Note, *supra* note 28, at 787.