

**FIXING COMPENSATION PURSUANT TO A
CONTINGENT FEE CONTRACT FOLLOWING
A PREMATURE TERMINATION OF THE
ATTORNEY-CLIENT RELATIONSHIP**

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I. INTRODUCTION

A problem has developed in Louisiana's attorney fee allocation law. In situations where the professional relationship between a client and attorney is prematurely terminated,¹ the Louisiana Supreme Court has limited the liability of some clients while other clients are denied similar protection.² Notably, the availability of this limitation hinges only on which type of fee contract a client confects with her second attorney. This Comment proposes a solution to the problem by protecting the client, no matter what type of fee contract she confects with her second attorney.

In the average negligence-based legal proceeding,³ an injured party hires an attorney to seek legal redress. The attorney files suit and conducts discovery on behalf of the client, and the suit is dismissed, settled, or tried. The client either wins or loses, and after the case has concluded, the client pays the attorney based on the agreement reached between the parties at the outset of the case. Circumstances become somewhat more complicated when the professional relationship between client and attorney is terminated prior to the completion of the case. If this happens, a client generally has two choices: discontinue pursuit of the claim or hire another attorney to continue the case.

Current attorney fee allocation law in Louisiana provides extensive protection to the client whose claim is handled by more than one attorney, as long as all attorneys involved are retained pursuant to a contingent fee contract.⁴ In such a case, the client is responsible for paying only one contingent fee, which the attorneys must split amongst themselves.⁵ However, the client who hires her first attorney pursuant to a contingent fee contract

1. "Premature termination" will be used in this Comment to refer to an attorney-client relationship ending prior to the final disposition of a case.

2. *Saucier v. Hayes Dairy Prods.*, 373 So. 2d 102 (La. 1979) (on rehearing).

3. See *infra* Scenario #1 for an example of the "average negligence-based legal proceeding." These types of suits include suits for personal injury, professional malpractice, wrongful death, etc.

4. *Saucier*, 373 So. 2d at 118 (on rehearing). A contingent fee is "a fee charged for a lawyer's services only if the lawsuit is successful or is favorably settled out of court." BLACK'S LAW DICTIONARY 362 (9th ed. 2009).

5. *Saucier*, 373 So. 2d at 118 (on rehearing); *O'Rourke v. Cairns*, 95-3054 (La. 11/25/96); 683 So. 2d 697, 703.

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and her second attorney pursuant to an hourly fee contract currently has no such protection to limit her liability. This Comment proposes an approach that, if adopted, would provide even-handed protection to both attorneys and clients.

The following presents a method for allocating attorney fees where a contingent fee contract between a client and attorney is prematurely terminated and the client retains a successor attorney on an hourly basis. This method will aid courts ruling on such allocation disputes, ensure the fair treatment of both clients and attorneys, and promote the social utility of the contingent fee contract, which ultimately fosters better attorney–client relations. This Comment particularly focuses on instances where a contingent fee contract is prematurely terminated, either by the client *with cause* or by the attorney *without cause*, and the client subsequently hires a new attorney on an hourly basis.⁶

The following four scenarios demonstrate how a client’s legal fees can vary significantly under Louisiana’s current fee allocation law:

Scenario #1: Mrs. Betty, who was involved in a car accident caused by Driver X, is seriously injured and incurs \$95,000 in medical bills. She also misses three months of work due to her injuries, losing pay of \$15,000. Mrs. Betty meets with Attorney A, who tells her he thinks her claim is worth approximately \$180,000. Mrs. Betty and Attorney A sign a contingent fee contract stating that Attorney A’s fee will be one-third of Mrs. Betty’s recovery. Attorney A files suit, conducts discovery, takes depositions, and three years later, tries the case before a jury. As predicted, the jury awards Mrs. Betty \$180,000: \$95,000 for her medical bills; \$15,000 for lost earnings; and \$75,000 for pain and suffering. Mrs. Betty owes Attorney A one-third of her recovery, or \$60,000, as his fee. She keeps \$120,000.⁷

Scenario #2: Same as Scenario #1, except after working on

6. A contingent fee contract can also be terminated by a client *without cause* or by an attorney *with cause*. For a detailed discussion of “with cause” and “without cause,” see *infra* Section II.C. A client can also enter into a contingent fee contract, instead of an hourly fee contract, with his second attorney. As previously mentioned, clients in this situation are already provided significant protection. See *infra* Section II.D.1.

7. This is the previously mentioned, “average negligence-based legal proceeding.” See *supra* note 3.

Mrs. Betty's case for two years, during which Attorney A worked 240 hours on the case, he withdraws from his representation of Mrs. Betty. After Attorney A's withdrawal, Mrs. Betty hires Attorney B pursuant to a similar one-third contingent fee contract. Attorney B tries Mrs. Betty's case, and the jury awards Mrs. Betty the same \$180,000 as above: \$95,000 for medical bills; \$15,000 for lost earnings; and \$75,000 for pain and suffering and loss of enjoyment of life. Mrs. Betty is required to pay only one contingent fee, equal to \$60,000, which Attorneys A and B must split based on the amount and quality of work each contributed to the case. Mrs. Betty, again, keeps \$120,000 as her recovery.

Scenario 3: Same as Scenario #2, except after Attorney A withdraws, Mrs. Betty cannot find a second attorney to handle her case on a contingent fee basis. After meeting with several attorneys, she realizes that her only option is to hire an attorney on an hourly fee basis. Mrs. Betty hires Attorney B at an hourly rate of \$250. Mrs. Betty's case goes to trial, and the jury awards the same \$180,000 as in Scenarios #1 and #2. However, the fees for which Mrs. Betty is liable are now quite different. She owes Attorney A the reasonable value of the 240 hours he spent on her case, which multiplied by Attorney A's hourly rate of \$250 equals \$60,000. Mrs. Betty also owes Attorney B the full amount of his hourly bill. Attorney B spent 120 hours on Mrs. Betty's case, and his bill, after multiplying 120 hours by a rate of \$250 an hour, equals \$30,000. Under this scenario, Mrs. Betty owes \$90,000 in attorney fees—half of her recovery. She keeps only \$90,000, which is not even enough to pay her outstanding medical bills.

Scenario 4: Same as Scenario #3, except Attorney B works 240 hours before Mrs. Betty's case is finally completed. Attorney B's fee is now \$60,000. Under this scenario, Mrs. Betty owes \$120,000 in attorney fees—well over half of her recovery. After being assured at the outset of her case that she would pay only one-third of her recovery in attorney fees, Mrs. Betty must now pay Attorney A \$60,000 for the reasonable value of his services and Attorney B \$60,000 in hourly fees. She keeps only \$60,000.

Section II of this Comment unravels the legal principles and jurisprudence necessary for a full understanding of the proposal. It begins by discussing the purpose and social utility of the

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contingent fee contract. Next, the two primary methods in which the professional relationship between attorney and client can be prematurely terminated are addressed. Section II then surveys case law to determine when the professional relationship between attorney and client is terminated with or without cause and discusses the varying ramifications of that determination. Section II also highlights the historical development of Louisiana's fee allocation law and concludes by looking to the ways in which other states address fee allocation in instances of premature termination of a contingent fee contract.

Section III of this Comment proposes a method for allocating attorney fees where a contingent fee contract between a client and attorney is prematurely terminated, either by the client with cause or by the attorney without cause, and the client retains a successor attorney on an hourly basis. This Comment asserts that a client in such a situation should never be required to pay more in legal fees than she contractually agreed to pay under the original contingent contract, unless the client expressly agrees to do so in writing. Rather, the second attorney's hourly fee should be subtracted from the fee amount contemplated in the original contingent contract, and the former attorney should receive the remainder as his fee. Section III then defends this proposal and addresses various counter-arguments before ending with a brief conclusion.

II. FEE ALLOCATION LAW: CONTINGENT FEES, PREMATURE TERMINATION, CAUSE & CASE LAW

In determining the proper method for fixing compensation pursuant to a contingent fee contract following a premature termination of the attorney-client relationship, a court should consider the following: (1) the purpose and social utility of the contingent fee; (2) whether the relationship was terminated by the client or attorney; (3) whether the relationship was terminated with or without cause; and (4) jurisprudence governing attorney fee allocation disputes. Each is considered respectively in the following subsections.

A. CONTINGENT FEES: PURPOSE AND SOCIAL UTILITY

As between attorney and client, two major types of fee arrangements may be confected: hourly and contingent.⁸ An

8. 21 FRANK L. MARAIST ET AL., LOUISIANA CIVIL LAW TREATISE: LOUISIANA

hourly fee is a method of charging for legal services where a client pays her attorney a set dollar amount per hour for work performed on the case. In contrast, a contingent fee is “a fee charged for a lawyer’s services only if the lawsuit is successful or is favorably settled out of court.”⁹ Compensation pursuant to a contingent fee contract is set at a certain percentage of the client’s recovery at the outset of the litigation.¹⁰ Contingent fee contracts are most widely used in negligence-based personal injury claims.¹¹ Attorneys hired under these contracts are not entitled to recover a fee unless they obtain monetary damages on behalf of their client.¹² Absent recovery, an attorney retained pursuant to a contingent fee contract has no right to claim a fee.¹³

The contingent fee serves a valuable social function by giving those who cannot afford the risk of loss access to legal services.¹⁴ A contingent fee contract allows a client, who could not otherwise pay for legal services, to assert her legal rights by agreeing to pay an attorney out of her recovery in the event of success.¹⁵ Under a contingent fee, an attorney agrees to provide all legal services necessary for the completion of a client’s claim and takes on the risk of loss by agreeing to forego compensation for his services in the event of non-recovery.¹⁶ The risk of non-recovery that an attorney assumes under a contingent fee agreement is balanced by the potential benefit of receiving a much larger fee in the event of success.¹⁷

As early as 1884, the Louisiana Supreme Court recognized that absent the contingent fee, many citizens would be denied the opportunity to enforce their legal rights.¹⁸ Since then, the

LAWYERING § 16.3 (2007).

9. BLACK’S, *supra* note 4, at 362.

10. 7 AM. JUR. 2D *Attorneys at Law* § 258 (2010).

11. 21 MARAIST ET AL., *supra* note 8, § 16.3.

12. 23 SAMUEL WILLISTON & RICHARD A LORD, A TREATISE ON THE LAW OF CONTRACTS § 62:4 (4th ed. 2002).

13. 7 AM. JUR. 2D, *supra* note 10, § 258.

14. O’Rourke v. Cairns, 95-3054 (La. 11/25/96); 683 So. 2d 697, 700.

15. 23 WILLISTON, *supra* note 12, § 62:4.

16. *Id.*; 7A C.J.S. *Attorney & Client* § 268 (2010); Saucier v. Hayes Dairy Prods., 373 So. 2d 102, 105 (La. 1979) (on rehearing).

17. 23 WILLISTON, *supra* note 12, at §62.9.

18. Buck & Beauchamp v. Blair & Buck, 36 La. Ann. 16 (La. 1884) (stating that the court had “no hesitation in recognizing the binding effect and validity of [contingent fee] contracts, without which many unfortunate litigants would be deprived of the only means of enforcing their rights”).

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Louisiana Supreme Court has repeatedly affirmed the validity and social utility of the contingent fee.¹⁹ Particularly relevant to this Comment's discussion is the Louisiana Supreme Court's landmark attorney fee allocation decision, *Saucier v. Hayes Dairy Products, Inc.* *Saucier* recognized the social importance of the contingent fee and chose "to vindicate the contingency fee contract rather than render it nugatory," meaning the court awarded fees based on the contract instead of the theory of *quantum meruit*.²⁰ In determining the proper frame of reference for allocating attorney fees to an attorney retained pursuant to a contingent fee, a court should begin by considering the contingent fee contract's nature, purpose, and social utility. A court should also consider whether the professional relationship was prematurely terminated by the client or by the attorney because each party is given different rights to terminate that relationship.

**B. TERMINATION BY CLIENT OR ATTORNEY: DISCHARGE OR
WITHDRAWAL**

The professional relationship between a client and attorney can be prematurely terminated in one of two ways: the client can discharge his attorney; or the attorney can withdraw from his representation of the client. A client has the absolute right to discharge his attorney with or without cause.²¹ Attorneys do not share the same right to withdraw from representation, and their ability to terminate representation is subject to restrictions.²²

Louisiana Rule of Professional Conduct 1.16 provides both mandatory and discretionary circumstances under which attorneys shall or may terminate the representation of a client.²³

19. Succession of Landry, 41 So. 226, 227 (1906); *Saucier*, 373 So. 2d at 118 (on rehearing); *O'Rourke*, 683 So. 2d at 700 ("Aside from its validity *vel non*, the social utility of a reasonable contingency fee arrangement promotes access to needed legal services for those without means to afford the risk of financial loss.").

20. *Saucier*, 373 So. 2d at 118 (on rehearing). For an in-depth discussion of this case, see *infra* Section II.D.1. *Quantum meruit* is Latin for "as much as he has deserved." BLACK'S, *supra* note 4, at 1361. The term is defined as "the reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship." *Id.*

21. 21 MARAIST ET AL., *supra* note 8, § 5.9; *Saucier*, 373 So. 2d at 114 (on rehearing); *Due v. Due*, 342 So. 2d 161, 165 (La. 1977); *Louque v. Dejan*, 56 So. 427, 428 (La. 1911).

22. 21 MARAIST ET AL., *supra* note 8, § 5.9.

23. LA. RULES OF PROF. CONDUCT R. 1.16 (2011); LA. REV. STAT. ANN. § 37:222 (2011).

Rule 1.16(a) lists three instances in which an attorney must withdraw.²⁴ In contrast, Rule 1.16(b) lists seven instances in which an attorney may withdraw.²⁵ Section (1) of Rule 1.16(b) permits an attorney to withdraw if the withdrawal “can be accomplished without material adverse effect on the interests of the client.”²⁶ Accordingly, an attorney may withdraw for any reason, as long as the withdrawal does not cause material adverse effects to the interests of the client.²⁷ The remaining subparts of Rule 1.16(b) list instances where an attorney may withdraw for good cause, even if the withdrawal will cause materially adverse effects to the interests of the client.²⁸ Because a client has the absolute right to discharge his attorney while an attorney’s right is subject to restrictions, courts should consider which party terminated the professional relationship. However, a more important consideration, which is addressed in the following subsection, is whether the terminating party had “cause” for doing so.

24. Rule 1.16(a) provides that an attorney *shall* withdraw from his representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or
- (3) the lawyer is discharged.

LA. RULES OF PROF. CONDUCT R. 1.16 (2011).

25. Rule 1.16(b) provides that an attorney *may* withdraw from his representation of a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer’s services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

Id.

26. 21 MARAIST ET AL., *supra* note 8, § 5.9.

27. *Id.*

28. *Id.*

**C. PREMATURE TERMINATION OF THE PROFESSIONAL
RELATIONSHIP: WITH OR WITHOUT CAUSE**

Whether a client or attorney terminates the professional relationship “with cause” or “without cause” entails varying legal consequences relating to awarding attorney fees. The general rule is that a client who discharges his attorney either with or without cause is liable for attorney fees.²⁹ However, a client who discharges his attorney “with cause” can receive a reduction in the amount due to the attorney based on the seriousness of the cause for discharge.³⁰ Notwithstanding the general rule, lower courts are given great discretion in awarding attorney fees, and a reduction is not required in all instances of “with cause” discharge.³¹

Although an attorney is entitled to a fee whether *discharged* by his client with or without cause, the same does not hold true in all instances where an attorney *withdraws* from the professional relationship. An attorney who withdraws from his representation of a client “with cause” is entitled to compensation.³² However, an attorney who withdraws from representation “without cause” may be barred from recovering a fee.³³ To further complicate things, one Louisiana court of appeal recently held that a withdrawal may be “not wrongful” but “materially adverse” to a client’s interest.³⁴ In such a case, an attorney is entitled to a fee subject to certain reductions.³⁵ By side-stepping the issue of withdrawal with or without cause all together, this case has introduced unnecessary difficulty into Louisiana fee allocation jurisprudence. Keep these varying legal consequences in mind when reading the following two subsections, which will explore the differing factual scenarios under which Louisiana courts have

29. *Saucier*, 373 So. 2d at 117-18. See also *Howe v. Scottsdale Ins. Co.*, 218 F.3d 744 (5th Cir. 2000); *Sims v. Selvage*, 499 So. 2d 325, 329 (La. App. 1 Cir. 1986); *Boutte v. ABC Ins. Co.* 00-0649 (La. App. 4 Cir. 2/6/02); 811 So. 2d 30, 34.

30. *O'Rourke v. Cairns*, 95-3054 (La. 11/25/96); 683 So. 2d 697, 704; *Osborne v. Vulcan Foundry*, 96-1849 (La. App. 4 Cir. 9/3/97); 699 So. 2d 492, 497; *Buras v. Dynasty*, 98-2362 (La. App. 4 Cir. 3/31/99); 731 So. 2d 1010, 1012.

31. *Tran v. Williams*, 10-1030 (La. App. 3 Cir. 2011); 56 So. 3d 1224.

32. *Cameco Indus. v. La. Cane Mfg.*, No. 92-3158, 1995 WL 529847, at *1 (E.D. La. Sept. 6, 1995).

33. *Kyle v. Glickman*, No. 99-3111, 2001 WL 35996143, at *4 (E.D. La. June 29, 2001).

34. *Verges v. Dimension Dev.*, 08-1336 (La. App. 4 Cir. 02/10/10); 32 So. 3d 310.

314. For an in-depth discussion of this case, see *infra* Section II.D.1.

35. *Verges*, 32 So. 3d at 315.

found discharge or withdrawal both with and without cause.

1. DISCHARGE BY CLIENT WITH OR WITHOUT CAUSE

Discharge by a client “with cause” is generally characterized by attorney misfeasance or nonfeasance.³⁶ Louisiana courts have found that a client discharged his attorney with cause in the following cases.

In *O'Rourke v. Cairns*, the Louisiana Supreme Court found an attorney was discharged with cause because of his lack of communication, strategic uncertainty, and unprofessional social demeanor.³⁷ The litigation revealed that the attorney rarely communicated with his client even regarding “key aspects of the litigation.”³⁸ Furthermore, the attorney confessed to his client that he was unsure how to proceed with the case and “didn't know what he was doing.”³⁹ The Supreme Court concluded that these reasons, along with the attorney's “unprofessional social demeanor,” gave his client cause for discharge.⁴⁰

Other courts have found less egregious behavior to support a finding of discharge with cause. The Louisiana Fourth Circuit Court of Appeal has found cause for discharge where an attorney failed to communicate with his client.⁴¹ In *Buras v. Dynasty*, the attorney answered discovery requests without consulting his client, failed to personally meet with his client, and failed to return multiple phone calls from his client.⁴² The fourth circuit concluded that this was ample evidence on which the trial court could base a finding of discharge with cause.⁴³

The fourth circuit has also found cause for discharge where an attorney refused to discontinue representing a client's

36. *O'Rourke v. Cairns*, 95-3054 (La. 11/25/96); 683 So. 2d 697, 704; *Osborne v. Vulcan Foundry*, 96-1849 (La. App. 4 Cir. 9/3/97); 699 So. 2d 492, 497; *Buras v. Dynasty*, 98-2362 (La. App. 4 Cir. 3/31/99); 731 So. 2d 1010, 1012.

37. *O'Rourke*, 683 So. 2d at 703.

38. *Id.* (“Key aspects” included the lifting of a bankruptcy stay).

39. *Id.*; *O'Rourke v. Cairns* 95-381 (La. App. 5 Cir. 11/28/95); 666 So. 2d 345, 349.

40. *O'Rourke*, 683 So. 2d at 703. The lower court's opinion reveals that the attorney's “unprofessional social demeanor” was his appearance at his client's home while visibly intoxicated. *O'Rourke*, 666 So. 2d at 349.

41. *Buras*, 731 So. 2d at 1012.

42. *Id.* at 1013.

43. *Id.*

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estranged wife.⁴⁴ In that case, a husband who was injured at work brought a personal injury claim, and his wife brought a related loss of consortium claim.⁴⁵ After filing suit, the wife told the husband she was in love with another man.⁴⁶ The husband voiced dissatisfaction with his attorney's continued representation of his wife during their "vicious divorce," but the attorney refused to discontinue representation ensuring the husband he could "handle it."⁴⁷ Although the fourth circuit found that the attorney did not breach the Rules of Professional Conduct, the court determined that such a finding was unnecessary to conclude that the attorney had been discharged with cause.⁴⁸ The court concluded that good cause for discharge existed based on the unnecessary stress placed on the client by the attorney's refusal to discontinue representation of his estranged wife and the questions of trustworthiness raised by the attorney's refusal to withdraw.⁴⁹

The Louisiana Third Circuit Court of Appeal found that an attorney's performance of only minimal work on a client's case during a prolonged period of time constituted cause for discharge.⁵⁰ In that case, a client was injured in an automobile accident, and she retained the services of an attorney.⁵¹ The only action taken on the client's behalf by the attorney in nearly two years of representation was to file a petition one day prior to the running of prescription.⁵² The third circuit concluded that when no work had been performed for a year and a half after the petition was filed, the client had cause for discharging her attorney.⁵³

Similarly, the United States District Court for the Eastern District of Louisiana, applying Louisiana law, has found cause for discharge where an attorney met with a client on only a few

44. *Osborne v. Vulcan Foundry*, 96-1849 (La. App. 4 Cir. 9/3/97); 699 So. 2d 492,496-97.

45. *Id.* at 497.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Guilbeau v. Fireman's Fund Ins. Co.*, 293 So. 2d 216, 218 (La. App. 3 Cir. 1974).

51. *Id.* at 217.

52. *Id.*

53. *Id.* at 218.

occasions; on those occasions the majority of the conversation centered around the attorney's personal life; the attorney was unfamiliar with the client's case; and the attorney suggested that the client interview potential witnesses herself.⁵⁴ Most recently, the Louisiana third circuit found that insufficient communication alone can constitute discharge for cause.⁵⁵ Traditionally, egregious behavior was necessary for a finding of discharge with cause; however, the trend recently has been to find cause for discharge under less severe fact patterns. Generally speaking, cause for discharge will be found where an attorney gives a client reason to doubt the attorney's ability to handle her case or frustrates a client's access to information through a lack of communication.

In contrast to discharge "with cause," an attorney is typically found to be discharged "without cause" when the attorney has adequately represented a client, but the client nevertheless exercises her right to discharge her attorney.⁵⁶ Louisiana courts have found an attorney discharged by a client without cause in the following cases.

The Louisiana fourth circuit has found discharge without cause where a client complained of his dissatisfaction with a physician recommended by his attorney and the attorney's failure to timely advise him of a limited amount of liability insurance coverage for his claim.⁵⁷ The court conducted a fact-intensive analysis to determine that the attorney was discharged without cause. Following the complaint, the attorney referred his client to a different physician.⁵⁸ Also, he never recommended that the client settle for the liability insurance coverage limits, but instead informed his client that the defendant was solvent and able to pay above his insurance coverage.⁵⁹ Finally, the court considered the substantial amount of work performed by the attorney on the case and the client's wife's favorable testimony regarding the

54. *Langley v. Norton*, No. 99-2653, 2003 WL 21991643, at *6 (E.D. La. Aug. 19, 2003).

55. *Tran v. Williams*, 10-1030, p. 6 (La. App. 3 Cir. 2011); 56 So. 3d 1224, 1229.

56. *Saucier v. Hayes Dairy Prods.*, 353 So. 2d 732, 733-34, *rev'd on other grounds*, 373 So. 2d 102 (La. 1979); *Boutte v. ABC Ins. Co.*, 00-0649 (La. App. 4 Cir. 2/6/02); 811 So. 2d 30, 34; *Sims v. Selvage*, 499 So. 2d 325, 328 (La. App. 1 Cir. 1986); *Howe v. Scottsdale Ins. Co.*, 218 F.3d 744 (5th Cir. 2000).

57. *Saucier*, 353 So. 2d at 733.

58. *Id.*

59. *Id.* at 734.

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attorney–client relationship prior to discharge.⁶⁰

Similarly, the Louisiana First Circuit Court of Appeal held that an attorney's failure to advance medical expenses and court costs to his client does not constitute cause for discharge.⁶¹ In that case, a former client argued he discharged his attorney for cause because he refused to pay medical bills and court costs.⁶² After expressing its disappointment that attorneys be allowed at all to advance such costs, the court determined that the failure or refusal to advance those costs does not give a client cause for discharge.⁶³ The United States Court of Appeals for the Fifth Circuit, applying Louisiana law, held that a client discharged his attorney without cause.⁶⁴ Reasons for the court's decision included the client's failure to fulfill his duties and communicate his dissatisfaction to his attorney.⁶⁵ Furthermore, the attorney kept the client fully informed of the litigation.⁶⁶

The common thread through all of the cases regarding discharge without cause is that an attorney who has not given a client sufficient reason for frustration with his representation will be found to have been discharged without cause. Subjective dissatisfaction is not enough for a finding of discharge with cause.

2. WITHDRAWAL BY ATTORNEY WITH OR WITHOUT CAUSE

Rules of Professional Conduct 1.16(a) and 1.16(b) provide circumstances in which an attorney's withdrawal is with cause; however, this list is not exhaustive.⁶⁷ Louisiana courts have also found good cause for withdrawal where a client failed to pay his legal fees,⁶⁸ where an attorney had an unspecified concern regarding his client's criminal background,⁶⁹ where a client sent

60. *Saucier v. Hayes Dairy Prods.*, 353 So. 2d 732, 734 *rev'd on other grounds*, 373 So. 2d 102 (La. 1979).

61. *Sims v. Selvage*, 499 So. 2d 325, 328 (La. App. 1 Cir. 1986).

62. *Id.*

63. *Id.*

64. *Howe v. Scottsdale Ins. Co.*, 218 F.3d 744, *1 (5th Cir. 2000).

65. *Id.* The client neglected to fulfill his duties by failing to provide the attorney with income records, consult an accountant and psychologist at the attorney's recommendation, and continue treatment for injuries. *Id.*

66. *Id.*

67. *See supra* note 25, specifically Rule 1.16(b)(7).

68. *Cameco Indus. v. La. Cane Mfg.*, No. 92-3158, 1995 WL 529847, at *1 (E.D. La. Sept. 6, 1995).

69. *WSF, Inc. v. Carter*, 35,581 (La. App. 2d Cir. 12/28/01); 803 So. 2d 445, 448.

antagonistic letters to the opposing counsel and judge regarding his attorney,⁷⁰ and where a client complained of her attorney by writing an unsubstantiated letter to the Committee on Ethics and Grievances.⁷¹ In the last case, the court found that the attorney had cause for his withdrawal because of the client's behavior, which "tend[ed] to degrade or humiliate the attorney . . . [and] destroy[ed] the reciprocal confidence required between attorney and client."⁷²

In contrast, the federal eastern district of Louisiana, applying Louisiana law, has refused to find cause for withdrawal where an attorney withdrew because he thought the case would be "arduous and expensive" and "not . . . cost-effective."⁷³ Based on the fact that the circumstances of the case had not changed between the attorney's enrollment and withdrawal, the court held that the attorney's withdrawal was without cause and that the attorney forfeited his right to claim a fee.⁷⁴

To summarize, Rule of Professional Conduct 1.16(b) contains a list of reasons for permissive withdrawal, and absent a showing of one of the reasons contained therein, an attorney has the burden of proving good cause for withdrawal. However, what constitutes cause for withdrawal outside of Rule 1.16(b) is not perfectly clear. Now that the general principles governing how and when the attorney-client relationship can be prematurely terminated have been discussed, the next section highlights the historical development of Louisiana's fee allocation law.

D. LOUISIANA JURISPRUDENCE: HISTORICAL DEVELOPMENT AND CURRENT STATE

This subsection first addresses the historical development of fee allocation law in Louisiana. After outlining the historical development, it briefly summarizes the current state of fee allocation law in Louisiana. Generally speaking, Louisiana jurisprudence historically favored an attorney's right to compensation over the interests of a client; however, the balance of those interests has shifted toward protecting clients from

70. *Landry v. Faulkner*, 417 So. 2d 1376, 1379 (La. App. 4 Cir. 1982).

71. *Fishman v. Conway*, 57 So. 2d 605, 606 (La. Ct. App. 1952).

72. *Id.* at 607.

73. *Kyle v. Glickman*, No. 99-3111, 2001 WL 35996143, at *3 (E.D. La. June 29, 2001).

74. *Id.* at *5.

exposure to liability for unfair fees.

1. THE HISTORICAL DEVELOPMENT OF LOUISIANA FEE ALLOCATION LAW

Historically, an attorney discharged without cause prior to the completion of his contingent contract was able to collect his entire fee.⁷⁵ In *D'Avricourt v. Seeger*, the Louisiana Supreme Court held clients liable to their attorneys for the entire amount of the parties' legal-services contract even though the attorneys did not render all services required by the contingent fee contract.⁷⁶ The clients were held liable because they personally sold succession property when the legal-services contract required that the attorney sell all property of the succession.⁷⁷ The court held that the offending clients were liable in full under the contract because their actions—selling the succession property personally—rendered the complete performance of the contingent contract by the attorney impossible.⁷⁸

Similarly, the Louisiana Supreme Court, in *United Gas Public Service Co. v. Christian*, held a client liable in full for a contingent fee contract when he discharged his attorney and hired subsequent counsel.⁷⁹ The court based its conclusion on the fact that the client prevented his former attorney from completing the full performance of the contingent contract.⁸⁰ The case involved a client, Ned Christian, who retained the services of Foster, Hall, Barret & Smith to determine his and his children's respective ownership of natural gas royalty rights under an oil and gas lease.⁸¹ Christian and his children signed a contingent fee contract that assigned Foster, Hall, Barret & Smith one-half of any amounts recovered as their fee.⁸² Without any notice to Foster, Hall, Barret & Smith, Christian hired other counsel to represent him and his children in the matter.⁸³ The court found that Christian, by employing subsequent counsel, prevented

75. *D'Avricourt v. Seeger*, 125 So. 735, 737 (La. 1929); *United Gas Pub. Serv. Co. v. Christian*, 173 So. 174, 176 (La. 1937).

76. *D'Avricourt*, 125 So. at 737.

77. *Id.*

78. *Id.*

79. *United Gas Pub. Serv. Co.*, 173 So. at 176.

80. *Id.*

81. *Id.* at 174.

82. *Id.* at 175.

83. *Id.*

Foster, Hall, Barret & Smith from performing the contract as agreed; therefore, Christian was found liable for the full amount of the contract.⁸⁴ This case, like many others, historically allowed attorneys discharged without cause to recover their entire fee; however, attorneys discharged with cause were limited to recovering the reasonable value of the services rendered.⁸⁵

In *Smith v. Westside Transit Lines*, a client hired an attorney to represent him in a personal injury action.⁸⁶ Following a breakdown in communications between the client and the attorney and a continuance that pushed the trial date back almost a year, the client discharged his attorney.⁸⁷ The client hired a second attorney who was successful in settling the client's claim.⁸⁸ The client paid forty percent of his recovery to his second attorney, and the client's first attorney filed suit seeking to recover his full one-third contingent fee.⁸⁹ The Louisiana fourth circuit determined that such a result would be "unconscionable."⁹⁰ Instead, the court determined that the attorney had been discharged with cause; therefore, his recovery was limited to *quantum meruit*,⁹¹ meaning as much as he deserves.⁹² The trial court was ordered to hold an evidentiary hearing to fix compensation based on the number of hours worked, the quality of work performed, and the effects such work had on the ultimate determination of the case.⁹³ In its conclusion, the court regretted to admit that "the ultimate outcome of [the] case could work to the distinct disadvantage of [the client] who may find himself liable for total attorneys' fees which are disproportionate to the amount of his settlement," but the court determined that it had no other alternative and implored the bar to provide "machinery"

84. *United Gas Pub. Serv. Co. v. Christian*, 173 So. 174, 176 (La. 1937). The supreme court neither addressed nor based its decision on Christian's lack of notice of dismissal to his prior attorneys. *United Gas Pub. Serv. Co.*, 173 So. at 176.

85. *O'Rourke v. Cairns*, 95-3054 (La. 11/25/96); 683 So. 2d 697, 701; *Smith v. Westside Transit Lines*, 313 So. 2d 371, 378 (La. App. 4 Cir. 1975); *Carlson v. Nopal Lines*, 460 F.2d 1209, 1211 (5th Cir. 1972).

86. *Smith*, 313 So. 2d at 372.

87. *Id.* at 372-73.

88. *Id.*

89. *Id.* at 377.

90. *Id.*

91. See BLACK'S, *supra* note 4, at 1361.

92. *Smith*, 313 So. 2d at 378.

93. *Id.*

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to handle similar matters in the future.⁹⁴

Shortly after the fourth circuit's decision in *Smith*, the Louisiana Supreme Court overruled the *D'Avricourt-United Gas* line of precedent in the landmark fee allocation case of *Saucier v. Hayes Dairy*, implementing a new method of fee allocation in this state geared toward the protection of clients.⁹⁵ However, it would be another seventeen years until the *Smith* decision would be similarly overruled by the Louisiana Supreme Court.⁹⁶

In *Saucier*, a client was injured in an automobile accident.⁹⁷ The client initially hired an attorney to represent him on a thirty-three and one-third percent contingent fee basis; the client subsequently dismissed the attorney without cause.⁹⁸ Thereafter, the client hired a second attorney, also on a thirty-three and one-third percent contingent fee basis, who obtained a \$75,000 settlement on his behalf.⁹⁹ On initial hearing, the supreme court held each attorney was entitled to claim their entire contingent fee—\$25,000.¹⁰⁰ However, on rehearing, the supreme court reversed its original decision and held that a client who executes two separate contingent fee agreements with two different attorneys is only liable to pay one fee.¹⁰¹ The fee is equal to the highest contingent percentage to which the client contractually agreed.¹⁰² Once the contingent percentage is determined, the fee should be allocated between or among the involved attorneys using the *Saucier* factors.¹⁰³ The eight *Saucier* factors are as follows:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to

94. *Smith v. Westside Transit Lines*, 313 So. 2d 371, 378 (La. App. 4 Cir. 1975)

95. *Saucier v. Hayes Dairy Prods.*, 373 So. 2d 102, 118 (La. 1979) (on rehearing).

96. *O'Rourke v. Cairns*, 95-3054 (La. 11/25/96); 683 So. 2d 697, 704.

97. *Saucier*, 373 So. 2d at 103.

98. *Id.* at 104.

99. *Id.*

100. *Id.* at 106. In his dissent of the majority's opinion on initial hearing, Justice Dennis noted that the client's \$75,000 recovery would be inequitably split as follows: Client—\$25,000; Attorney 1—\$25,000; Attorney 2—\$25,000. *Id.* at 108 (Dennis, J., dissenting).

101. *Saucier*, 373 So. 2d at 118 (on rehearing).

102. *Id.* (on rehearing). The court reached this decision after considering the nature of the contingent fee contract, its social importance, and potential for abuse. *Id.* (on rehearing).

103. *Id.* (on rehearing).

- perform the legal services 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;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - (8) whether the fee is fixed or contingent.¹⁰⁴

The Louisiana Supreme Court enunciated the rule in *Saucier* to uphold the “letter and spirit” of legal ethics in the state while providing an equitable solution that would prejudice neither attorney nor client.¹⁰⁵ The court determined that the contingent fee contract, not *quantum meruit*, was the correct frame of reference for determining compensation for an attorney discharged without cause prior to the completion of the contract.¹⁰⁶ The court noted that its solution would promote better attorney–client relations.¹⁰⁷ It encouraged an initially retained attorney to resolve professional disagreements with clients, which in turn increases the public respect of the legal profession.¹⁰⁸ And successor attorneys, realizing that only one contingency fee can be split, will be more inclined to persuade a client to maintain his professional relationship with his initial attorney absent reasonable cause for complaint.¹⁰⁹ Most importantly, the court sought to assure the fair treatment of clients, who should never be required to pay more than one contingency fee, while preserving the client’s right to change attorneys without being exposed to “financial peril” for choosing

104. *Saucier v. Hayes Dairy Prods.*, 373 So. 2d 102, 116 (La. 1979) (on rehearing).

105. *Id.* at 118 (on rehearing).

106. *Saucier*, 373 So. 2d at 118 (on rehearing).

107. *Id.* at 118 (on rehearing).

108. *Id.* (on rehearing).

109. *Id.* (on rehearing).

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to exercise that right.¹¹⁰ In *Saucier*, the Louisiana Supreme Court weighed these considerations and formulated a rule that equally protects clients and attorneys.¹¹¹

Seventeen years later, the Louisiana Supreme Court revisited its holding from *Saucier* in *O'Rourke v. Cairns*.¹¹² Before *O'Rourke*, a client who discharged his attorney without cause could only be held responsible for one contingent fee under *Saucier*, while a client who discharged his attorney with cause could be held liable for an amount greater than one contingent fee.¹¹³ In *O'Rourke*, the court cured this inconsistency by extending its holding from *Saucier* to cover instances where an attorney is discharged for cause.¹¹⁴ *O'Rourke* involved a medical malpractice claim in which the client hired initial counsel pursuant to a contingent fee contract.¹¹⁵ The attorney fee was set at thirty-three and one-third percent of the client's recovery if the case settled before filing suit and forty percent if filing a lawsuit was required.¹¹⁶ The client later discharged his counsel with cause.¹¹⁷ Following the discharge, the client retained the services of a second attorney also pursuant to a contingent fee contract, who successfully prosecuted the case to settlement.¹¹⁸

In *O'Rourke*, the Louisiana Supreme Court began its analysis by reaffirming the validity and social utility of the contingent fee contract.¹¹⁹ The court then shifted its attention to the change implemented in Louisiana fee allocation law by *Saucier*.¹²⁰ Prior to *Saucier*, a client who discharged his attorney without cause was required to pay two contingent fees, but after, a client in the same situation was required to pay only one fee, a

110. *Saucier v. Hayes Dairy Prods.*, 373 So. 2d 102, 119 (La. 1979) (on rehearing).

111. *Id.* (on rehearing).

112. *O'Rourke v. Cairns*, 95-3054 (La. 11/25/96); 683 So. 2d 697.

113. *Id.* at 703. The fourth circuit had previously held that when a former attorney is discharged with cause he is entitled to recover in *quantum meruit*, or the reasonable value of his services, and his successor can recover the entire amount of his contingency fee. See *Smith v. Westside Transit Lines*, 313 So. 2d 371, 372 (La. App. 4 Cir. 1975). This exposed a client to liability for more than one contingent fee in discharge for cause situations.

114. *O'Rourke*, 683 So. 2d at 703-04.

115. *Id.* at 698-99.

116. *Id.*

117. *Id.* at 702-03.

118. *Id.* at 699.

119. *Id.* at 700.

120. *O'Rourke*, 683 So. 2d at 701.

portion of which went to each attorney.¹²¹ The Louisiana Supreme Court determined that the shift prevented two undesirable results: clients' right to counsel being limited by concerns of paying multiple fees; discharged attorneys receiving the full benefit of contingent contracts when performing less than the full performance contemplated by the contract.¹²² The court then turned its attention to the method of allocation used when an attorney was discharged for cause. In discharge-for-cause cases, clients were required to pay their first attorney the reasonable value of his services and pay their second attorney the full value of his contingent fee.¹²³ The court determined this result was "absurd."¹²⁴

After finding that the client's first attorney was discharged for cause due to a lack of communication, strategic and substantive uncertainty in handling the case, and an "unprofessional social demeanor," the Louisiana Supreme Court extended the rule from *Saucier* to confine a client's liability for attorney fees to one contingent fee regardless of whether he discharged his attorney with or without cause.¹²⁵ The court held that in discharge for cause situations, the lower courts should determine the highest contingent fee to which a client contractually agreed and allocate the fee between counsel based on the *Saucier* factors.¹²⁶ Following an analysis of the *Saucier* factors, *O'Rourke* requires a consideration of the nature and gravity of the cause for the attorney's dismissal and a corresponding percentage reduction of his fee determined under the *Saucier* allocation.¹²⁷ In *O'Rourke*, the court applied its newly formulated rule by allocating forty percent of the fee to the client's first attorney based on his contributions to the case; however, because he was found to be discharged for cause, his award was reduced by twenty-five percent based on the nature and gravity of the causes for his dismissal.¹²⁸

One of the most recent cases in Louisiana to deal with

121. *O'Rourke v. Cairns*, 95-3054 (La. 11/25/96); 683 So. 2d 697.

122. *Id.*

123. *Id.*

124. *O'Rourke*, 683 So. 2d at 703.

125. *Id.*

126. *Id.* at 704.

127. *Id.*

128. *Id.* The attorney's award of forty percent was \$82,400, which was reduced by twenty-five percent to \$61,800. *Id.*

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attorney fee allocation issues is *Verges v. Dimension Development*. In *Verges*, the Louisiana Fourth Circuit Court of Appeal decided how it would allocate attorney fees among attorneys in situations where a firm is retained pursuant to a contingent fee contract, subsequently withdraws from the case, and a successor firm is retained on an hourly basis.¹²⁹ In that case, Mrs. Verges' husband hired the firm of Orrill, Cordell & Beary pursuant to a contingent fee contract to represent Mrs. Verges in a lawsuit for damages to her immovable property caused by the construction of an adjacent hotel.¹³⁰ Orrill, Cordell & Beary subsequently withdrew, and Mrs. Verges retained the services of Hulse & Wanek on an hourly basis.¹³¹

The fourth circuit began its analysis by concluding that the standard enunciated in *Saucier v. Hayes Dairy* does not apply.¹³² The fourth circuit found that *Saucier* was factually distinguishable because *Saucier* addressed a case where the client's former and successor attorneys were both retained on a contingent basis, while in this case, the client retained the first attorneys on a contingent basis and the second attorneys on an hourly basis.¹³³

Next, the court found that the first attorneys' withdrawal had adversely affected the client's interests.¹³⁴ After the client's first attorneys withdrew because they no longer felt the case was financially viable, she was forced to quickly obtain new counsel in the middle of her case and was charged for legal services on an hourly basis.¹³⁵ The court rationalized that these effects were to the client's detriment and that they would not have occurred but for the client's first attorneys' withdrawal.¹³⁶ The fourth circuit determined that the client should not be responsible for any additional expense resulting from the withdrawal of the first

129. *Verges v. Dimension Dev.*, 08-1336 (La. App. 4 Cir. 02/10/10); 32 So. 3d 310, 312-16. This fact situation has not yet been addressed by the Louisiana Supreme Court.

130. *Id.* at 312. Mr. Verges was able to hire legal counsel to represent his wife through a power of attorney. *Id.*

131. *Id.*

132. *Id.*

133. *Verges*, 32 So. 3d at 312.

134. *Id.* at 313.

135. *Id.*

136. *Id.* at 314.

attorneys.¹³⁷ Specifically, she incurred additional legal fees as a direct consequence of the first attorneys' withdrawal.¹³⁸ The court reasoned that the client's second attorneys charged her to familiarize themselves with her case, which was a duplicative expense she would not have incurred but for her first attorneys' withdrawal from the case.¹³⁹ The client's second attorneys also charged an hourly rate, which was \$25.00 greater than what her first attorneys charged.¹⁴⁰ The court found the first attorneys responsible for these adverse effects because their withdrawal caused the additional legal expenses.¹⁴¹ The fourth circuit held that the trial court's award of attorney fees was excessive because it did not account for these additional expenses.¹⁴²

The fourth circuit decided that in cases where a former attorney's withdrawal adversely affects his client, the attorney should be responsible for those adverse effects unless the client makes litigation unreasonably difficult.¹⁴³ The court's decision was based on the following analysis. First, it interpreted Rule of Professional Conduct 1.16 to say that an attorney may withdraw from the representation of a client if an unreasonable financial burden will be placed on the attorney by the representation, or the client renders the representation unreasonably difficult.¹⁴⁴ Although the fourth circuit found no unreasonableness on the part of the client, the court determined that the client's former attorneys presented evidence sufficient to prove that continuing their representation would have resulted in an unreasonable financial burden.¹⁴⁵ Therefore, the fourth circuit found that the first attorneys' withdrawal was "not wrongful."¹⁴⁶ Next, the court

137. *Verges v. Dimension Dev.*, 08-1336 (La. App. 4 Cir. 02/10/10); 32 So. 3d 310, 315.

138. *Id.* at 313.

139. *Verges*, 32 So. 3d at 314.

140. *Id.*

141. *Id.* at 313.

142. *Id.*

143. *Id.* The fourth circuit suggested that unreasonable settlement demands could be such a situation where a client would create the unreasonable difficulty necessary to free an attorney from the responsibility of paying for the adverse effects caused by its withdrawal. *Id.*

144. *Verges*, 32 So. 3d at 314.

145. *Id.* The fourth circuit did not refer to any evidence on which it based this finding.

146. *Id.* The fourth circuit did not discuss what would have been the outcome had the withdrawal been deemed wrongful instead of materially adverse to the interests of the client.

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noted that Rule of Professional Conduct 1.16(b)(1) allows an attorney to withdraw if that withdrawal can be accomplished without material adverse effects to the interests of his client.¹⁴⁷ Even though the first attorneys' withdrawal was not wrongful, the fourth circuit found that the attorneys' withdrawal resulted in materially adverse effects to the client's interests; therefore, the court held the first attorneys responsible for the cost of those adverse effects.¹⁴⁸

The fourth circuit noted that a trial court is given great discretion to determine an award of attorney fees, and the exercise of such discretion should not be reversed on appeal absent a showing of clear abuse.¹⁴⁹ However, the fourth circuit found an abuse of discretion in the trial court's failure to reduce the award of attorney fees by the amounts indicative of the materially adverse effects to client's interests and amended the judgment accordingly.¹⁵⁰ The trial court's judgment was affirmed in all other respects.¹⁵¹

Disagreeing with the amount of fees to which the client's first attorneys were entitled, Judge Murray dissented, arguing that despite factual differences the majority erred in ignoring the principles of *Saucier*.¹⁵² The dissent stated that the supreme court in *Saucier* sought to protect a client's right to discharge her attorney without the fear of incurring multiple fees while protecting an attorney's right to reasonable compensation for his

147. *Verges v. Dimension Dev.*, 08-1336 (La. App. 4 Cir. 02/10/10); 32 So. 3d 310, 314.

148. *Id.* at 314-15.

149. *Id.* at 314. Except for a calculation error resulting in a \$3,600.00 discrepancy, the fourth circuit found that the trial court had not erred in accepting the client's former attorneys' calculation of the hourly value of services rendered in determining its award of attorney's fees. *Verges*, 32 So. 3d at 315.

150. *Id.* The court found those materially adverse effects to be represented by the following amounts: (1) fees in the amount of \$15,288.40 charged by the client's second attorneys to review the work performed by the client's first attorneys; and (2) additional fees in the amount of \$5,396.25 charged by the client's second attorneys due to their higher hourly rate. *Id.* Accordingly, the fourth circuit amended the trial court's judgment by reducing its award from \$112,850.00 to \$88,565.35. *Id.* The fourth circuit calculated its judgment by subtracting the fees charged by the second attorneys for review of the first attorneys' work (\$15,288.40), the additional fees charged because of the client's second attorneys' higher hourly rate (\$5,396.25), and correcting the transposition error in the first attorneys' calculation of fees owed (\$3,600.00). *Id.*

151. *Id.* at 316.

152. *Verges*, 32 So. 3d at 316-17 (Murray, J., dissenting).

work.¹⁵³ The dissent determined that in *Saucier*, the Louisiana Supreme Court sought to treat all parties fairly and that the concept of fairness should apply in all fee disputes regardless of the types of fee agreements involved.¹⁵⁴ The dissent concluded that the trial court's award of attorney fees was not fair to all parties because the client was being required to pay over \$10,000 more than she would have if her first attorneys would not have withdrawn.¹⁵⁵ Furthermore, the dissent found inequity in the client's exposure to hourly fees regardless of her success.¹⁵⁶ The dissent stated that the client's liability for attorney fees was limited upon entering a contingent fee contract with her former attorneys at thirty percent of her recovery, and if the client did not recover, she would not have been responsible for the payment of any attorney fees.¹⁵⁷ The dissent noted that because of the client's first attorneys' withdrawal the client was "put in the position" where she had to obtain new counsel on an hourly basis, which exposed the client to further liability for attorney fees regardless of recovery.¹⁵⁸

In conclusion, the dissent proposed that the client's liability for attorney fees be capped at thirty percent of her recovery, and the hourly fees charged by her second attorneys should be subtracted from that amount, awarding the client's first attorneys the remaining balance.¹⁵⁹ The dissent found that based on the relevant factors, such a distribution would be equitable and fair to all parties.¹⁶⁰

2. THE CURRENT STATE OF LOUISIANA FEE ALLOCATION LAW

As the law currently stands, a client who discharges an attorney retained pursuant to a contingent fee contract either with or without cause and hires a second attorney pursuant to a contingent fee contract will be required to pay only one contingent fee, the highest to which the client contractually agreed, as mandated by the Louisiana Supreme Court in *Saucier*

153. *Verges v. Dimension Dev.*, 08-1336 (La. App. 4 Cir. 02/10/10); 32 So. 3d 310, 317 (Murray, J., dissenting).

154. *Id.* (Murray, J., dissenting).

155. *Id.* (Murray, J., dissenting).

156. *Id.* at 318 (Murray, J., dissenting).

157. *Id.* (Murray, J., dissenting).

158. *Verges*, 32 So. 3d at 318 (Murray, J., dissenting).

159. *Id.* (Murray, J., dissenting).

160. *Id.* (Murray, J., dissenting).

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and *O'Rourke*.¹⁶¹ However, a client who discharges an attorney retained pursuant to a contingent fee contract and hires a second attorney pursuant to an hourly fee contract is not protected in the same manner and may be liable for attorney fees greater than one contingent fee.

Depending on in which circuit the case is located, the fee will be determined in one of three ways. In the Louisiana Fourth Circuit Court of Appeal, a client's liability will be determined under the amorphous *Verges* allocation. Under that method, a client is required to pay her first attorney the reasonable value of his services minus an amount determined to represent "material adverse effects" to her interests.¹⁶² The client is also liable to her second attorney for his full hourly fee.¹⁶³ In the first, second, and third circuits, a client is required to pay her first attorney the reasonable value of his services and her second attorney his full hourly fee.¹⁶⁴ In the fifth circuit, there is no jurisprudence on point, so the outcome of a fee allocation dispute in that circuit is uncertain. The difference in protections given to clients who retain more than one attorney pursuant to contingent fee contracts and clients who retain one attorney pursuant to a contingent fee and one pursuant to an hourly fee is what prompted this Comment's proposal, which is discussed in detail in Section III. To obtain a broader perspective of how other states are treating the same problem, the next subsection outlines the approaches taken by several other states.

E. JURISPRUDENCE OF THE OTHER STATES: HOW OTHERS ADDRESS THE PROBLEM

Different states take different approaches when allocating attorney fees following a premature termination of a contingent fee contract; however, like Louisiana, the method of allocation is determined by which party terminated the relationship and whether the relationship was terminated with or without cause. The following is an outline of the approaches taken by the four most populated states in the United States: California, Texas,

161. *Saucier v. Hayes Dairy Prods.*, 373 So. 2d 102, 118 (La. 1979) (on rehearing); *O'Rourke v. Cairns*, 95-3054 (La. 11/25/96); 683 So. 2d 697, 704.

162. *Verges*, 32 So. 3d at 315.

163. *Id.*

164. *Krebs v. Bailey's Equip. Rentals*, 328 So. 2d 775 (La. Ct. App. 1976); *Cox v. Boggs*, 39,566 (La. App. 2 Cir. 4/6/05); 899 So. 2d 770; *Wright v. Fontana*, 290 So. 2d 449 (La. Ct. App. 1974); *Kramer v. Graham*, 272 So. 2d 716 (La. Ct. App. 1973).

New York, and Florida.

In California, an attorney discharged by his client is entitled to recover a fee whether he is discharged with or without cause.¹⁶⁵ The purpose of this rule is to balance a client's right to discharge her attorney and an attorney's right to fair compensation.¹⁶⁶ Attorneys discharged both with and without cause are entitled to recover the reasonable value of their services rendered up to the time of discharge.¹⁶⁷ However, an attorney may not claim his fee until the occurrence of the contingency.¹⁶⁸ Similarly, an attorney who withdraws from representing a client with justifiable cause is entitled to recover the reasonable value of his services.¹⁶⁹ In contrast, an attorney who withdraws without cause forfeits his right to claim any fee.¹⁷⁰

In Texas, an attorney discharged by his client without cause is given the choice to either recover the reasonable value of his services or recover on the contingent contract for his compensation.¹⁷¹ However, an attorney discharged by his client with cause is limited to recovering the reasonable value of his services rendered until the time of discharge.¹⁷² Like California, Texas requires the occurrence of the contingency before an attorney retained pursuant to a contingent fee contract may collect a fee.¹⁷³ In contrast, an attorney who withdraws without cause or commits a material breach of the contract forfeits all right to compensation.¹⁷⁴ Texas has not squarely decided whether an attorney who withdraws with cause would be entitled to compensation; however, the United States Fifth Circuit Court of Appeals, applying Texas law, has read *Royden v. Ardoin* to imply that compensation would be available.¹⁷⁵

165. *Salopek v. Schoemann*, 20 Cal. 2d 150, 153 (Cal. 1942); *Fracasse v. Brent*, 6 Cal. 3d 784, 791 (Cal. 1972).

166. *Fracasse*, 6 Cal. 3d at 791.

167. *Salopek*, 20 Cal. 2d at 153; *Fracasse*, 6 Cal. 3d at 791.

168. *Fracasse*, 6 Cal. 3d at 792.

169. *Estate of Falco v. Decker*, 188 Cal. App. 3d 1004, 1014 (Cal. Ct. App. 1987).

170. *Hensel v. Cohen*, 155 Cal. App. 3d 563, 568 (Cal. Ct. App. 1984).

171. *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex. 1969); *Hoover Slovacek LLP v. Walton* 206 S.W.3d 557, 561 (Tex. 2006).

172. *Rocha v. Ahmad*, 676 S.W.2d 149, 156 (Tex. Ct. App. 1984).

173. *Hoover Slovacek LLP*, 206 S.W.3d at 563.

174. *Royden v. Ardoin*, 331 S.W.3d 206, 209 (Tex. 1960).

175. *Auguston v. Linea Aerea Nacional-Chile, S.A.*, 76 F.3d 658, 662 (5th Cir. 1996). The court stated that it was unsure whether the withdrawing attorney would be allowed to recover on the contract or be limited to *quantum meruit*. *Id.*

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In New York, an attorney discharged without cause may recover from his client the fair and reasonable value of his services.¹⁷⁶ Unlike California and Texas, a discharged attorney in New York can demand payment of the reasonable value of his services immediately upon discharge.¹⁷⁷ Alternatively, an attorney fee may be set at a percentage of the client's recovery, but this method requires attorney–client agreement.¹⁷⁸ A discharged attorney may also recover his fee from the client's second attorney.¹⁷⁹ In such a case, a discharged attorney may claim either immediate payment of the reasonable value of his services or a percentage of the fee recovered by the second attorney based on the proportionate share of work performed by the discharged attorney.¹⁸⁰ In contrast, an attorney who is discharged by his client with cause has no right to compensation.¹⁸¹ Likewise, an attorney who withdraws without cause is not entitled to claim a fee.¹⁸² However, an attorney who withdraws with cause may recover the reasonable value of his services under the theory of *quantum meruit*.¹⁸³

In Florida, an attorney discharged by his client without cause is compensated based on the modified *quantum meruit* approach.¹⁸⁴ The modified *quantum meruit* rule allows an attorney discharged without cause to recover the reasonable value of his services, but the amount recoverable is limited by the maximum contract fee.¹⁸⁵ Like California, the Florida Supreme Court sought to balance a client's right to discharge her attorney and an attorney's right to fair compensation.¹⁸⁶ Florida also follows California and Texas in requiring the contingency to occur before allowing a discharged contingent fee attorney to recover a fee.¹⁸⁷ An attorney discharged with cause is entitled to recover the reasonable value of his services "less any damages which the

176. *Cohen v. Grainger, Tesoriero & Bell*, 81 N.Y.2d 655, 658 (N.Y. 1993).

177. *Lai Ling Cheng v. Modansky Leasing Co.*, 73 N.Y.2d 454, 459 (N.Y. 1989).

178. *Cohen*, 81 N.Y.2d at 658.

179. *Id.*

180. *Id.*

181. *Teichner v. W. & J. Holsteins*, 64 N.Y.2d 977, 979 (N.Y. 1985).

182. *Holmes v. Evans*, 29 N.E. 233 (N.Y. 1891); *Borup v. Nat'l Airlines*, 159 F. Supp. 808, 810 (S.D.N.Y. 1958).

183. *Borup*, 159 F. Supp. at 810.

184. *Rosenberg v. Levin*, 409 So. 2d 1016, 1021 (Fla. 1982).

185. *Id.*

186. *Id.*

187. *Id.* at 1022.

client incurred due to the attorney's conduct and discharge."¹⁸⁸ In contrast, an attorney who withdraws without cause forfeits all right to compensation; however, an attorney's withdrawal will not be considered without cause if the withdrawal is prompted by client conduct that renders an attorney's continued representation impossible or would cause the attorney to violate an ethical rule.¹⁸⁹ An attorney who withdraws with cause may be entitled to a fee when the contingency occurs.¹⁹⁰

While Louisiana law has favored attorney interests in cases like *Verges*, the approaches of the other states provide varying levels of protection to both client and attorney interests based on varying circumstances. Some states completely deny attorneys recovery unless they withdraw with cause. On the other hand, some states allow a client's first attorney to recover up to the contractual maximum without performing all of the work contemplated by the contract. Overall, the wide variation in approaches taken by the various states shows the uncertainty with which states have approached the problem of attorney fee allocation. The proposal in the following Section provides a normalized set of protections that protects both clients' and attorneys' interests more fairly than the methods currently used by Louisiana and the other states outlined in this Section.

III. FIXING COMPENSATION PURSUANT TO A CONTINGENT FEE CONTRACT FOLLOWING A PREMATURE TERMINATION OF THE ATTORNEY- CLIENT RELATIONSHIP

The previous Sections of this Comment have introduced the problem that has developed in fee allocation law and the applicable legal principles and case law that should be considered in addressing the problem. The following Section contains a proposed solution, support for the proposal, counter-arguments, and rebuttals.

This Comment proposes that the proper frame of reference for determining an attorney fee, where a client retains an attorney pursuant to a contingent fee, the professional relationship is subsequently terminated by the attorney without

188. *Kushner v. Engelberg, Cantor & Leone*, 699 So. 2d 850, 851 (Fla. Dist. Ct. App. 1997).

189. *Faro v. Romani*, 641 So. 2d 69, 71 (Fla. 1994).

190. *Id.*

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cause or by the client with cause, and the client hires a second attorney on an hourly fee basis, is the original contingent percentage, as opposed to *quantum meruit*. A client in such a situation should not be required to pay more than the original contingent percentage unless the client expressly agrees to such a situation.¹⁹¹ To illustrate the proposal, reconsider Mrs. Betty's predicament from introductory hypothetical #3:

Mrs. Betty currently owes \$90,000 in attorney fees after receiving a jury verdict of \$180,000. She owes Attorney A \$60,000 for the reasonable value of his services and Attorney B \$30,000 in hourly fees. Instead of being liable for \$90,000 in attorney fees because of Attorney A's withdrawal, this Comment proposes that Mrs. Betty's liability for attorney fees be limited to \$60,000, the original contingent percentage of her recovery—one-third—based on Attorney A's decision to withdraw without cause. The same would hold true if Mrs. Betty had discharged Attorney A with cause.¹⁹² From the \$60,000 total that Mrs. Betty owes in attorney fees, Attorney B's hourly fee of \$30,000 would be subtracted, and Attorney A would receive the remaining \$30,000 as his fee.

The proposal seeks to broaden the holdings of the Louisiana Supreme Court in *Saucier* and *O'Rourke* beyond only cases where all attorneys are retained pursuant to a contingent fee contract. The goals of the proposal are to treat both attorneys and clients fairly, promote the social utility of the contingency fee contract, and encourage better attorney–client relations. In the following subsections, supporting arguments are presented to explain why the reasons which led to the Louisiana Supreme Court's holdings in *Saucier* and *O'Rourke* are applicable in the circumstances addressed by the proposal.

191. A client would “expressly agree” to pay more than the original contingent percentage *only* in the unusual situation where the client retains a second attorney pursuant to an hourly fee contract and the second attorney's hourly fee is greater than the original contingent percentage of the client's recovery. In the absence of this situation, a client should never be required to pay more than the original contingent percentage of her recovery in attorney's fees.

192. In contrast to discharge with cause and withdrawal without cause, this Comment suggests that Attorney A should have been allowed to recover the reasonable value of his services had he withdrawn with cause or had Mrs. Betty discharged him without cause.

A. THE LOUISIANA SUPREME COURT'S REASONING IN *SAUCIER* AND *O'ROURKE* SUPPORTS THE PROPOSAL

The Louisiana Supreme Court's holdings in *Saucier* and *O'Rourke* support this proposal. *Saucier* sought to treat both attorneys and clients fairly and promote the social utility of the contingent fee contract.¹⁹³ In *O'Rourke*, the supreme court sought to widen the protections of *Saucier* to cover situations where a client discharged his attorney with cause.¹⁹⁴ Like *Saucier*, *O'Rourke* sought to promote the social utility of the contingent fee, prevent a client from being exposed to more than one contingent fee, and account for attorney conduct that reflects poorly upon the profession.¹⁹⁵ By confining client exposure to only one contingent fee, the proposal attempts to further the holdings of these cases by ensuring the fair treatment of both clients and attorneys, promoting the social utility of the contingent fee contract, and fostering better attorney–client relations.

1. THE PROPOSAL TREATS BOTH ATTORNEYS AND CLIENTS FAIRLY

Like *Saucier* and *O'Rourke*, this Comment's proposal treats both attorneys and clients fairly. The proposal seeks to strike a balance between protecting clients from unwarranted liability for attorney fees and protecting attorneys from being denied recovery of a deserved fee. The proposal achieves this balance by limiting the scope of the protections provided to clients and suggesting that, in certain situations, the protections already in place to protect an attorney's right to recover a deserved fee be left unaltered. The changes to existing jurisprudence suggested by the proposal are only intended to apply in limited situations where clients are in most need of protection.

The limitation on liability is only meant to apply where a professional relationship between an attorney and client is terminated "without client fault." Situations that are without client fault include where an attorney withdraws without cause or the client discharges her attorney with cause. The proposal provides protection for clients in these situations because the client, who has either not terminated the professional

193. *Saucier v. Hayes Dairy Prods.*, 373 So. 2d 102, 118 (La. 1979) (on rehearing).

194. *O'Rourke v. Cairns*, 95-3054 (La. 11/25/96); 683 So. 2d 697.

195. *Id.*

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relationship or terminated the relationship with good reason, should not be required to pay more than the originally agreed upon contingent percentage of her recovery in attorney fees. This protection comes in the form of limiting a client's total liability for legal fees to the originally contracted contingent percentage by discounting the initial attorney's recovery.

Conversely, a client who discharges his attorney without cause or whose attorney withdraws with cause is entitled to no such protection. In situations where the professional relationship is terminated "without attorney fault," which includes client termination without cause and attorney termination with cause, the general *quantum meruit* rule should continue to be followed. Because the attorney did not terminate the professional relationship or terminated the relationship with good reason, the attorney is entitled to protection and should be entitled to recover the reasonable value of his services.

The reason for this distinction is the fair treatment of both attorneys and clients. A client is entitled to protection from unwarranted fees where she is not at fault in the termination of the professional relationship. Likewise, an attorney is entitled to protection from being denied recovery of a deserved fee where he is not at fault in the termination of the professional relationship. Such a rule will thwart attempts by unsavory clients, who may discharge their attorney without cause after he has performed considerable work on the case in an attempt to avoid liability for legal fees.¹⁹⁶ By using the original contingent fee percentage as the frame of reference for awarding attorney fees, attorneys will be protected from the client who tries to discharge him without cause at the last moment when only a minimal amount of work is necessary for the completion of the case. The proposal will also prevent attorneys from prejudicing clients by withdrawing from a case that they agreed to handle on a contingent basis because the attorney determines that the case is "no longer profitable."¹⁹⁷

196. The Supreme Court in *Saucier*, after determining that "the contingency fee contract, not quantum meruit, is the proper frame of reference for fixing compensation for the attorney prematurely discharged," stated that using the contingent fee as the frame of reference for fixing fees would prevent a client from "reaping any possible unfair advantage resulting from the discharge of his attorney." *Saucier*, 373 So. 2d at 118 (on rehearing). Likewise, the court found that "by this resolution the client is not exposed to the risk of being penalized by being required to pay excessive and duplicitous legal fees." *Id.* (on rehearing).

197. In this context, an attorney determining that a contingent case is "no longer

Both *Saucier* and *O'Rourke* sought to limit a client's liability for legal fees to one contingent fee where two attorneys were retained both pursuant to a contingent fee.¹⁹⁸ A client's liability should be similarly limited where one attorney is retained pursuant to a contingent fee and a second attorney is retained on an hourly basis as long as the client is not at fault in the premature termination of the professional relationship. If the client is at fault, he should not be entitled to protection, and the attorney's interests should be favored. The basic problem addressed in this Section is the conflicting interests of client and attorney following a premature termination of the professional relationship under a contingent fee agreement. In resolving these conflicting interests, the party not at fault in the termination of the professional relationship is the party entitled to have his or her interests protected. Both attorneys and clients are treated fairly by providing protection to the party innocent in the premature termination of the professional relationship.

The main weakness of the fairness argument is the availability of the fourth circuit's approach advanced in *Verges v. Dimension Development*¹⁹⁹ as a pre-existing, judicially-approved alternative to this proposal. The *Verges* method can be argued to also treat both attorneys and clients fairly.²⁰⁰ Under the *Verges* method, a client's liability for fees is reduced; however, this reduction does not provide a client not at fault in the termination of the professional relationship with enough protection, nor does it lead to the fair treatment of not-at-fault clients.

First, a client who retains his second attorney under an hourly fee agreement is provided with less protection than an identical client who retains his second attorney pursuant to a contingent fee agreement. A client who is not at fault in the termination of the professional relationship should not be

profitable" means that the attorney would withdraw from a case in order to seek payment based on the reasonable value of his services. Such a situation would arise where the attorney views payment based on the reasonable value of his services as a more attractive alternative than completing the case. This would occur where the attorney realizes that the amount of time he has spent on the case multiplied by his hourly rate exceeds the amount he will most likely be able to recover under the contingent fee contract. After withdrawing, he is relieved from performing any further legal services. If the client is later successful, he is entitled to seek reimbursement for the reasonable value of his services out of the client's recovery.

198. *Saucier*, 373 So. 2d at 118 (on rehearing); *O'Rourke*, 683 So. 2d at 704.

199. *Verges v. Dimension Dev.*, 08-1336 (La. App. 4 Cir. 02/10/10); 32 So. 3d 310.

200. For a discussion of the "*Verges* method," see *supra* Section II.D.1.

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penalized for hiring a second attorney on an hourly basis when, in fact, he may have had no choice in the matter. This unequal treatment is out of line with the Louisiana Supreme Court's precedent in *Saucier* and *O'Rourke*.²⁰¹

Second, the *Verges* method treats clients unfairly. In *Verges*, the client was exposed to liability for more fees than she originally agreed to pay based on her attorneys' decision to withdraw from her case.²⁰² A client should not be required to pay more in attorney fees than she originally agreed under a contingent fee agreement because the attorneys initially hired to represent her withdrew for financial reasons. The client had no say in the premature termination of the professional relationship. The holding of *Verges* was unfair.

In contrast, reducing the recovery of a client's former attorney by the amount of legal fees that were required to complete the case from which the former attorney chose to withdraw is fair. If an attorney does not complete a contingent fee contract, it is logical to reduce his recovery by the amount of fees charged for the legal services required to complete the original contract. This Comment's proposal treats both attorney and client fairly instead of protecting attorneys' interests over those of their clients.

The fair treatment of attorneys and clients was a major factor in the Louisiana Supreme Court's decisions in both *Saucier* and *O'Rourke*. Like *Saucier*, this Comment uses the contingent fee, instead of *quantum meruit*, as the "proper frame of reference for fixing compensation."²⁰³ By fixing compensation using the contingent fee as a frame of reference, the proposal treats both attorneys and clients fairly. The *Verges* method does not and should not be followed. Besides fairness, another major consideration in both *Saucier* and *O'Rourke* was the purpose and social utility of the contingent fee contract.

2. THE PROPOSAL PROMOTES THE PURPOSE AND SOCIAL UTILITY OF THE CONTINGENT FEE

The contingent fee serves a useful social function, and this

201. *Saucier v. Hayes Dairy Prods.*, 373 So. 2d 102 (La. 1979) (on rehearing); *O'Rourke v. Cairns*, 95-3054 (La. 11/25/96); 683 So. 2d 697.

202. *Verges*, 32 So. 3d at 317-18 (Murray, J., dissenting).

203. *Saucier*, 373 So. 2d at 118 (on rehearing).

proposal promotes the social utility of the contingent fee contract by limiting a client's liability for fees to the original contingent percentage in instances where the professional relationship is terminated by no fault of the client. This limitation of liability is in line with the Louisiana Supreme Court precedents in *Saucier* and *O'Rourke*.²⁰⁴ Like the Supreme Court in *Saucier*, the proposal seeks to "vindicate the contingency fee contract rather than render it nugatory."²⁰⁵ The proposal supports the social utility of the contingent fee and attempts to counteract an unintended negative consequence that has developed as a result of the protections provided by *Saucier* and *O'Rourke*. By limiting the recovery of multiple attorneys to one contingent fee in instances where more than one attorney handles a case pursuant to a contingent fee contract, the Louisiana Supreme Court has inadvertently provided an incentive for second attorneys to refuse to take cases previously handled by an attorney pursuant to a contingent fee contract unless the client will pay an hourly fee. By charging an hourly fee instead of a contingent fee, a second attorney can avoid the difficulty of having to litigate for his portion of one contingent fee.

For a client caught in this situation, the effects can be devastating. If the professional relationship is prematurely terminated, a client who can neither find a second attorney to handle her claim pursuant to a contingent fee contract nor afford to pay an hourly fee will be forced to abandon her claim. A client's access to legal services should not be limited when the professional relationship between herself and her first attorney is terminated by no fault of her own. *Saucier* and *O'Rourke* protect a client who hires two successive attorneys, both pursuant to contingent fee contracts, from paying more than one contingent fee. Louisiana courts should extend this protection to clients who are not at fault in the termination of the professional relationship, regardless of the type of fee contract they enter with their second attorney. This minor change in the law would greatly increase the protection available to a client in the difficult position of either incurring additional hourly fees or abandoning her claim. Furthermore, extending the limitation of liability for attorney fees to these types of situations promotes the social utility of the contingent fee by allowing greater access to the

204. *Saucier v. Hayes Dairy Prods.*, 373 So. 2d 102, 118 (La. 1979) (on rehearing); *O'Rourke v. Cairns*, 95-3054 (La. 11/25/96); 683 So. 2d 697, 704.

205. *Saucier*, 373 So. 2d at 118 (on rehearing).

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courtroom to those with lesser means.

The added protections provided by this proposal promote the purpose and social utility of the contingent fee agreement in two distinct ways. First, the proposal limits the potential for abuse of the contingent fee risk-shifting mechanism. Upon entering into a contingent fee contract, a client is assured that her attorney will provide all services necessary to complete the claim, and she will only have to pay legal fees if her case is successful. By agreeing to take the risk of non-payment in the event of an unsuccessful case, an attorney is able to secure a promise of payment out of the proceeds of the case that would likely be significantly greater than the normal hourly fee.²⁰⁶ If the professional relationship between client and her contingent fee attorney is prematurely terminated, the client is exposed to liability for fees regardless of success if she retains a second attorney on an hourly basis. The proposal discourages the use of the contingent fee in this manner by limiting the liability of a client in the event of success to the originally agreed contingent percentage instead of holding a client liable for an amount potentially larger than that to which she originally agreed. If her case is successful, the client who was not at fault in the termination of the professional relationship will never be exposed to more than the originally agreed contingent percentage.

The main weakness of this argument is that in the event of non-recovery, the client will still be liable for the hourly fees incurred by their second attorney. While unfortunate, this is an unavoidable consequence of an hourly fee agreement. Although the entire risk of liability cannot be shifted from the client, the proposed approach, by limiting an attorney's recovery once he ceases to bear the entire risk of non-recovery, protects clients in the event of success. This outcome is markedly better than the protection currently provided to such clients who are at risk of exposure to fees greater than the original contingent percentage in the event of success.

Second, the proposal limits the liability of the client to what the client originally agreed to pay. Recall that in a contingent fee contract, an attorney agrees to perform all of the legal services necessary to complete a client's claim in exchange for the client's promise to pay the attorney a certain percentage of her recovery

206. *See supra* Section II.A.

as his fee in the matter.²⁰⁷ If an attorney withdraws prior to the completion of the case, he should not be entitled to full payment because he has not performed all of the work contemplated by the contract. In instances where a client retains a second attorney on an hourly basis, a convenient measure of how much work the first attorney was not required to perform is available. To illustrate, again reconsider Scenario # 3 in the introductory hypotheticals:

At the outset of her case, Mrs. Betty and Attorney A entered into a contingent fee contract. Attorney A agreed that he would perform all legal services necessary for the completion of Mrs. Betty's claim. In return, Mrs. Betty agreed that she would pay Attorney A one-third of any recovery she received. Prior to the completion of Mrs. Betty's case, Attorney A withdraws without performing all legal services necessary for the completion of Mrs. Betty's claim. The services left to be performed, which Attorney A originally agreed to provide but did not provide, are represented by the hours worked and fees charged by Attorney B equaling \$30,000.

If the professional relationship was terminated without Mrs. Betty's fault, she should be protected from having to pay more than she originally agreed to have her case completed. The fee to which Attorney A is entitled should not be determined by the reasonable value of his services but instead by the contingent percentage under which he originally contracted to handle the case. Attorney A's fee should be reduced because he did not complete the contract. The amount of reduction should be equal to the cost of services rendered by Attorney B to complete the claim. Attorney A should only be entitled to one-third of Mrs. Betty's recovery, minus the hourly fees charged by Attorney B.

Such a reduction is in line with the purpose of the contingent fee contract as well as the method of allocation employed by the Louisiana Supreme Court in both *Saucier* and *O'Rourke*.

The main weakness of this argument is that in certain circumstances, Attorney A's recovery may be reduced to zero. In the event that Attorney B's hourly fee reaches or surpasses the original contingent percentage, Attorney A would be entitled to

207. See BLACK'S, *supra* note 4, at 362.

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no fee after performing a significant amount of work on the case. While an unfortunate possibility, this result is unlikely to occur. Contingent fees normally award an attorney a significantly higher fee for agreeing to take on the risk of non-recovery than an hourly attorney would receive for handling a similar case. Therefore, it is unlikely that a second attorney, who only handles a part of a case, would perform enough work to generate an hourly bill that would be greater than the original contingent percentage of the client's recovery.

Furthermore, if this result were to occur, a client becomes most in need of the protection provided by this Comment's proposal. If the protection was not available, the client would be liable for paying Attorney A the reasonable value of his services and Attorney B his full hourly fee, which alone already equals the amount of fees which the client originally agreed to pay for the completion of her claim.²⁰⁸ The client will only receive the protection of the proposal if she was not at fault in the premature termination of the professional relationship. If the client is not at fault, the attorney's recovery should be reduced to zero before requiring the client to pay an exorbitant amount in attorney's fees. If the attorney is not at fault, he will be protected from having his fee reduced. The proposal not only treats both attorneys and clients fairly and promotes the use of the contingent fee but also encourages better attorney-client relations, as discussed in the next subsection.

B. PROPOSAL WILL PROMOTE BETTER ATTORNEY-CLIENT RELATIONS

Lastly, the proposal will promote better attorney-client relations. An attorney who knows that his recovery will be limited either to sharing one contingent fee with a second attorney or by the amount of hourly work performed by a second attorney will be less likely to withdraw from representation of his client without cause. The proposal provides an incentive for attorneys to work with clients in the professional relationship instead of providing an incentive for attorneys to withdraw by guaranteeing attorneys the reasonable value of their services if the client is subsequently successful. If an attorney withdraws with cause, his fees should be protected by allowing him to recover under the theory of *quantum meruit*. In such a situation,

208. See *supra* Section I, Scenario #4.

he should receive the reasonable value of his services. Therefore, the attorney without cause to withdraw is given incentive to maintain a healthy attorney–client relationship, while the attorney with cause to withdraw has his right to recover the reasonable value of his services protected.

Likewise, a client will be less likely to discharge her attorney without cause if she is advised that she will be liable for the reasonable value of her first attorney’s services, as well as the full hourly fee of her second attorney. The proposal does not limit a client’s absolute right to discharge her attorney with or without cause; however, if she discharges her attorney retained pursuant to a contingent fee contract without cause, the attorney has a right to recover in *quantum meruit*. The proposal protects a client’s right to discharge her counsel with or without cause, but also gives a client incentive to continue a healthy attorney–client relationship.

IV. CONCLUSION

Louisiana fee allocation law currently protects clients who retain two different attorneys to handle a claim, as long as both attorneys are retained pursuant to a contingent fee contract. However, the client who retains his first attorney pursuant to a contingent fee contract and his second attorney on an hourly fee contract is not adequately protected. This Comment proposes a solution that protects both clients and attorneys, promotes the social utility of the contingency fee contract, and fosters better attorney–client relations. The Louisiana Supreme Court has established and reaffirmed the importance of these considerations in determining fee allocation disputes. By providing similar protections to clients not at fault in the premature termination of the professional relationship and who retain a second attorney on an hourly basis, Louisiana fee allocation law will be better suited to accomplish these goals.

Jonathan J. Fox