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ARTICLE

SETTING THE FEE WHEN THE CLIENT DISCHARGES A CONTINGENT FEE ATTORNEY

Lester Brickman*

I. INTRODUCTION

The bold and precedent-setting case of Martin v. Camp† endowed the attorney-client relationship with the legacy of the "client discharge rule"; it provides that a client can discharge his attorney at any time without cause and without penalty.‡ The predicate of the rule is that trust and confidence are essential features of the attorney-client relationship.§ If that trust and confidence dissipate, the client should not be forced to continue to confide in and rely upon that attorney. Accordingly, the client should not be penalized financially if he elects to change attorneys. The discharged attorney, precluded from realizing the contingent percentage as contract damages, is, however, entitled to a quantum meruit recovery.*

* Professor of Law, Benjamin N. Cardozo School of Law. I would like to acknowledge the invaluable assistance of my research assistants, Stephanie Goldstein and Rebecca Silberstein, in the preparation of this Article.
† 114 N.E. 46, reh'g denied, 114 N.E. 1072 (1916), modified, 115 N.E. 1044 (N.Y. 1917).
‡ 114 N.E. at 48. While clients have freedom to dismiss their attorneys for any reason, attorneys do not have the ability to arbitrarily withdraw from the representation of their clients. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-32, DR 2-110 (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1983).
§ See infra notes 44-58 and accompanying text.
* Martin, 114 N.E. at 48.
The central unresolved issue which has divided the jurisdictions adopting Martin v. Camp is whether the contract percent is a cap on the discharged attorney’s recovery. That is, is the discharged attorney limited to the percentage of the underlying recovery set by his contingent fee and, therefore, a zero recovery if the client recovers nothing in the underlying action? Some jurisdictions which follow the client discharge rule regard the occurrence of the contingency in the underlying suit as essential to the discharged attorney’s recovery and limit that recovery to the contract price, i.e., the contingent fee percentage applied to the recovery. Others have allowed the discharged attorney to sue at once for quantum meruit, thereby deeming the realization of the contingency and the amount actually recovered by the client as irrelevant in determining the quantum meruit fee. Still other courts, determining the discharged attorney’s fees after the client has recovered in the underlying suit, have allowed the attorney to recover in excess of the contract price. The genesis of allowing a penalizing assessment against the discharging client is a peculiar twist in the Martin v. Camp facts. In Martin v. Camp, the New York Court of Appeals, to preclude the discharged attorney from collecting any fee, held that the statute of limitations was tolled at the time of discharge. Not realizing that this could give rise to the possibility that a lawyer would sue in quantum meruit immediately upon discharge, long before the outcome of the underlying contingent fee action, the court inadvertently sowed the seed that would partially destroy what it had labored to create. Subsequently, courts seized upon the language in Martin v. Camp pertaining to immediate accrual to allow a recovery by the attorney even if the client in the contingency fee action does not ultimately prevail.

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8 See infra note 24 and accompanying text.
9 See infra note 37.
7 See infra notes 67-75 and accompanying text.
8 See infra note 76 and accompanying text.
9 See infra note 78.
10 See infra note 77 and accompanying text.
11 See infra notes 39-43 and accompanying text.
12 Martin, 114 N.E. at 49.
13 See infra notes 76-89 and accompanying text.
Thus, the literal language of the statute of limitations issue in *Martin v. Camp* is used to defeat its major thrust — enabling the client to discharge his attorney at any time and for any reason without penalty. Under this anomalous interpretation of *Martin v. Camp*, a client who discharges his contingent fee attorney and realizes no recovery may be worse off than a client having to pay contract damages in a jurisdiction which has rejected *Martin v. Camp*. In the latter, the client is liable only for the contracted-for contingent fee — a percentage of the recovery. Thus, if there is no recovery, there is no fee.

Although *Martin v. Camp* guaranteed the client a penalty-free discharge right by implying it into the contract, obviously the client is penalized if he has to pay a fee irrespective of a recovery in the underlying suit. This penalty is particularly unfair when the retainer agreement stipulates that the fee is contingent on recovery. *Martin v. Camp*, as the sower of the seed that consumed its progeny, must be revisited and the language allowing immediate suit redefined to accomplish what the court in *Martin v. Camp*, and what the courts adopting *Martin v. Camp*, sought to do — protect the interests of the client.

This Article critiques those decisions which elevate the literal language of the statute of limitations issue in *Martin v. Camp* over its central holding, as well as those decisions which allow recovery beyond the contract price. To resolve the anomaly that has resulted, this Article recommends that clients who employ an attorney under a contingency fee arrangement, and thereafter discharge the attorney, may not be forced to pay a quantum meruit fee unless the underlying suit is successful. In those cases, the contingency percent should be a cap on the attorney’s recovery. Simply stated, a client who agreed to retain a lawyer on the condition that, except for

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11 “Damages for wrongful discharge or breach of a contract for services are ordinarily the profits which might have been earned except for such breach.” *In re Montgomery’s Estate*, 6 N.E.2d 40, 42 (N.Y. 1936) (Lehman, J., dissenting). For example, one jurisdiction, rejecting the client discharge rule, allows the attorney to recover only the price of the contract less expenses saved as a consequence of the breach, according to traditional contract principles. *See Anderson v. Gailey*, 606 P.2d 90, 96 (Idaho 1980); *see also Tonn v. Reuter*, 95 N.W.2d 261, 265 (Wis. 1959).

16 The lawyer’s loss of expectancy, however, may be regarded as compensable. *See, e.g.*, *Anderson*, 606 P.2d at 94-95.

17 *See infra* note 75 and accompanying text. If a client is penalized, the discharge right is substantially threatened since a client’s ability to discharge his attorney is inhibited by the prospect of paying two contingency fees.
litigation costs, he would not have to pay an out-of-pocket fee, should not have to pay such a fee for any reason when exercising his right to terminate a lawyer in whom he no longer reposes trust and confidence. To effectuate this policy, the courts that have depreciated the central holding of *Martin v. Camp* must either 1) overrule the statute of limitations aspect of *Martin v. Camp* and hold that the cause of action does not accrue until there is success in the underlying suit or 2) continue the rule but add as a corollary that the attorney’s action is stayed until the underlying action is resolved. However, in either case, the courts must limit the attorney’s recovery to the contract price.

II. THE CLIENT’S RIGHT TO DISCHARGE

In *Martin v. Camp*, an attorney employed under a contingent fee agreement was discharged without cause and substituted after he had rendered services under the contract of employment. The New York Court of Appeals unanimously held that a client’s right to discharge his attorney is an implied term of their contract flowing from “the peculiar relation of trust and confidence that such a relationship implies.” Therefore, when a client exercises this implied contractual term it is not a breach of contract, and hence there is no liability for contract damages. The discharged attorney is relegated to a quantum meruit recovery —

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18 Courts have discretion to review whether the election of a presently payable quantum meruit fee is reasonable. See, e.g., Shelbourne Garage Inc. v. Licht, 309 N.Y.S.2d 850 (N.Y. App. Div. 1970) (whether fee shall be paid immediately or deferred until the outcome of the case is within the sound discretion of the court); Friedman v. Gordan, 23 N.Y.S.2d 757 (N.Y. App. Div. 1940). While arguably the court’s discretionary powers could prevent injustice, this Article recommends that the establishment of a prophylactic rule which fully embodies the principles of the client discharge rule is a far better approach to the problem. See infra notes 119-37 and accompanying text (discussing the issue of cause).

19 *Martin*, 114 N.E. at 46.

20 *Id.* at 47. For a fuller discussion of fiduciary principles underlying the attorney-client relationship, see *infra* notes 44-58 and accompanying text.

21 Reiterating the strong policy stance guiding this decision, the court stated that “if the client has the right to terminate the contract, he cannot be made liable in damages for doing that which under the contract he has a right to do.” *Martin*, 114 N.E. at 48; see also Fracasse v. Brent, 494 P.2d 9, 13 (Cal. 1972) (“It would be anomalous and unjust to hold the client liable in damages for exercising that basic implied right.”); Rhodes v. Norfolk & W. Ry. Co., 399 N.E.2d 969 (Ill. 1979) (maintaining that a client’s right to discharge his attorney at will is a term implied by law which inures from the special features of the attorney-client relationship).

22 *Martin*, 114 N.E. at 48. By awarding quantum meruit to innocently dismissed attorneys, the courts have thus attempted to promote public confidence in the legal profession while simultaneously
the reasonable value of services rendered.

When writing the decision, the court was aware that it was rejecting the existing contract damage rule that had been adopted in Ohio, California, Indiana, Minnesota, Missouri, Texas, and Illinois. Its opinion incorporated fiduciary principles into the retainer agreement and elevated the interests of the client over those of the attorney. The court's recognition of the significance of the client discharge rule is patent since its articulation was not essential to the outcome of the case. The court simply could have said the discharged attorney was entitled to quantum meruit without reference to the special nature of the attorney-client relationship which usurped the attorney's right to contractual damages. According to the court, the special nature of the attorney-client relationship unequivocally necessitated the establishment of the client discharge rule.

A. The Contract Damages Rule

As damages for breach of contract, the injured party may, *inter alia*, seek restitution, which is the value of the benefit conferred on the breaching party. As the restitutionary interest is usually smaller than the expectation or reliance interests, the injured party will rarely choose restitution as the measure of damages. A notable exception is in the situation of the losing contract. Here, the non-breaching party has made an improvident bargain; if he completes the contract and receives the contract price, he will be worse off than if he had not entered the bargain. In such

preventing the unjust enrichment of clients who, knowing they have an unbridled right of discharge, might try to capitalize on their counsel's tenuous standing. DeMov, Morris, Levin & Shein v. Glantz, 428 N.E.2d 387, 390 (N.Y. 1981); see also Rosenberg v. Levin, 409 So. 2d 1016, 1019 (Fla. 1982) (discussing need to balance attorney's right to compensation with client's freedom to discharge at will). One commentator discussing both the quantum meruit rule and contract damages rule maintained that a court's willingness to adopt one or the other would largely depend upon whether it wanted to protect the "attorney-client professional relationship" or the attorney's economic interests. See William F. Hoefs, Note, *Attorney Client — Damages — Breach of Contingent Fee Contract*, 1960 Wis. L. Rev. 156, 158-59. Thus, what a court wants to do "depends upon which policy it desires to protect." *Id.* at 161.

*24* Martin, 114 N.E. at 48. The only one of these states that remains a contract damages jurisdiction is Texas. However, a recent Fifth Circuit decision made a plea to Texas courts that they reconsider the rule in order to avoid what it perceived as inequitable results. Johnston v. California Real Estate Inv. Trust, 912 F.2d 788, 789 (5th Cir. 1990).


*26* *Id.*
a losing contract, where the injured party would suffer loss but for the other party's serendipitous breach, the non-breaching party will prefer quantum meruit as a measure of damages because that will yield him more than a recovery under the contract. Under the majority rule, such a non-breaching party is not limited to the contract price, but can receive quantum meruit in excess of the contract price. Therefore, under contract law, the breaching party may be assessed an amount greater than the contract price.

The application of this restitutionary rule to the attorney-client contract leads to the conclusion that the discharged attorney is not limited to the contract price. However, Martin held that attorney-client agreements are not decided according to contract principles, but rather are governed by fiduciary principles. A split of authority exists between jurisdictions adopting Martin and those adhering to contract rules in the resolution of attorney-client disputes. Courts not adopting Martin have continued to treat a discharge as a breach of the employment contract between attorney and client. Under the contract damages rule in Texas, for example, the

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28 See Scaduto v. Orlando, 381 F.2d 587 (2d Cir. 1967) ("Although the contract rate may be considered in receiving evidence of value, it neither measures value nor limits the amount which can be recovered."); United States v. Zara Contracting Co., 146 F.2d 606 (2d Cir. 1944) (contract price of a construction or excavation contract does not limit recovery). But see Kehoe v. Mayor of Rutherford, 27 A. 912 (N.J. 1893) (contractor limited to fraction of contract price corresponding to fraction of work completed). Farnsworth notes that if the contract price is not a ceiling on recovery, the result may be a more generous recovery for part performance than full performance. See Farnsworth, supra note 25. See also Oliver v. Campbell, 273 P.2d 15 (Cal. 1954) (lawyer who fully performed was limited to $750 fee agreed upon in the contract, but if his performance had been considered partial, he would have received $5,000 value of services rendered).

29 See infra notes 45-46. See also In re Swartz, 686 P.2d 1236, 1243 (Ariz. 1984) (holding contract for fee must be reduced if it later proves unreasonable); Simon v. Metoyer, 383 So. 2d 1321, 1323 (La. Ct. App. 1980) (In suing his client for collection of fees, an attorney "urges the application of ordinary commercial laws. In light of the fiduciary obligation involved, the Court finds those rules inapplicable.").

30 See supra note 24 and accompanying text.

31 E.g., Rocha v. Ahmad, 676 S.W.2d 149 (Tex. Ct. App. 1984). Texas has consistently remained a contract damages jurisdiction. See supra note 24. Only a small number of jurisdictions allow an attorney to sue for contract damages, and the formula used varies. See Anderson v. Gailey, 606 P.2d 90, 96 (Idaho 1980) (wrongfully discharged attorney entitled to recover on contingency contract, but damages are measured by contract price minus expenses saved by not completing performance);
discharged attorney may elect either to treat the contract as rescinded and recover under quantum meruit or recover the full contract price. This allows the attorney to recover under quantum meruit although the client does not recover in the underlying suit. When the client does recover, the attorney may recover in quantum meruit in excess of the contract price.

Some courts which have adopted Martin v. Camp have nonetheless retained significant aspects of the contract damages rule. These courts allow the attorney to recover in quantum meruit irrespective of the recovery by the client in the underlying action or in excess of the contract price and are, in fact, closer in spirit to contract damages jurisdictions than to quantum meruit jurisdictions. For example, in Salem Realty Co. v. Matera, the Massachusetts Appeals Court eloquently advocated in favor of the client’s right to discharge his attorney. However, the court then permitted the attorney to recover in excess of the contract price, using language very similar to that used in contract damages jurisdictions. The court thus donned the judicial mantle of protector of clients’ rights by adopting the modern fiduciary rule to govern attorney fees while permitting the attorney to reap the benefits of the contract damages rule which most jurisdictions have rejected.

B. Evolution of Martin v. Camp

So compelling was the court’s rationale in Martin v. Camp that it has now become the national rule, conquering the jurisdictions with its force of reasoning. Unfortunately, despite its enduring contribution to national

LaBach v. Hampton, 585 S.W.2d 434, 436 (Ky. Ct. App. 1979) (proper measure of damages for discharged attorney employed under contingent contract is the contract price minus the reasonable value of services of other attorneys needed to complete the contract). Kentucky once allowed the attorney only quantum meruit recovery. See Henry v. Vance, 63 S.W.2d 273 (Ky. 1901). Now, however, Kentucky has reversed the trend most other states are following. See infra note 37.

88 Rocha, 676 S.W.2d at 156.
89 See infra notes 76-80.
91 Id. at 719. See infra note 77.
92 Compare Salem Realty, 410 N.E.2d at 719, a “Martin v. Camp” case (“Since the contingent fee agreement will not govern a discharged lawyer’s compensation [it cannot be used to limit the attorney’s recovery. The client] cannot have it both ways.”) with the “contract damages” case of Thompson v. Smith, 248 S.W. 1070, 1073 (Tex. Ct. App. 1923) (“[the contingency fee agreement] was broken by one of the parties, and was no longer binding in any respect on either of them”).
93 See, e.g., Owens v. Bolt, 118 So. 590 (Ala. 1928); State Farm Mut. Ins. Co. v. St. Joseph’s
jurisprudence, *Martin v. Camp* has been ill-treated by several jurisdic-
tions.\(^3\) Although it was, and still remains, an exemplary decision, in de-
feating the discharged lawyer by invoking a statute of limitations rule the *Martin*
court inadvertently sowed the seeds for the partial destruction of the very client discharge rule it was so determinedly articulating.

**The Statute of Limitations**

In *Martin v. Camp*, the court was aware that the client had already recovered a fee in the underlying action. Attempting to avoid being barred by the statute of limitations, the discharged attorney argued that since his compensation was initially contingent upon an award being made to the client, his cause of action did not accrue until the bargained for contin-

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gency transpired. Rather than respond to the attorney's argument, the court determined to preclude the discharged attorney from realizing any fee whatsoever and therefore, oblivious to the underlying pathology of its focus, blithely followed general principles regarding the tolling of the statute of limitations. Perhaps it was motivated to do so by the attorney's extreme dilatoriness in pursuing a fee. The lawyer, discharged in 1900, did not commence an action for attorney's fees until 1908 even though his former client had recovered an award in 1902.

\[39\] Martin, 114 N.E. at 49. There is an additional anomaly which arises from the court's rejection of the attorney's argument. The discharged attorney was arguing for the client discharge rule, which this Article advocates and which is exemplified by such decisions as Fracasse v. Brent, 494 P.2d 9 (Cal. 1972) (en banc) and Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982) wherein the courts disallow the discharged contingent fee attorney a recovery of a fee unless there is a recovery by the client in the underlying suit.

\[40\] In effect, this was the argument upon which the appellate court rested. 146 N.Y.S. 1041 (N.Y. App. Div. 1914) ("If the action may be based on the contract, the terms of it must be observed. Obviously, plaintiff could not prove a percentage of the recovery until the amount of it should be known."). Although quantum meruit is not an action on the contract, the terms of the contract can certainly be taken into account in making a determination of the reasonable amount of fees owed the discharged attorney. See, e.g., Shattuck v. Pennsylvania R. Co., 48 F.2d 346 (W.D.N.Y. 1931). Forcing the attorney to pay immediately effectively incorporates a unilateral acceleration clause into the contract which entirely disregards the discharge right implied by law.

\[41\] Martin, 114 N.E. at 49 (citing Bathgate v. Haskin, 59 N.Y. 533 (1875) and Adams v. Fort Plain Bank, 36 N.Y. 255 (1867)). The determination in Martin that the attorney was only entitled to recover a fee based upon quantum meruit ostensibly resolved the statute of limitations argument for the court. In both Bathgate and Adams, the New York Court of Appeals addressed the issue of when the attorney had been terminated for the purpose of the statute of limitations which required that an action be commenced within six years. In Bathgate, the court stated that "the statute does not begin to run against his claim for compensation until his relation as attorney in the suit has terminated." Bathgate, 59 N.Y. at 535. Similarly, in Adams, relying upon contract theory the court stated that "the statute would undoubtedly run against the claim of an attorney for professional services if the services were in any way brought to an end." Adams, 36 N.Y. at 260. However, these cases were not contingency fee cases and should be inapposite to the question at hand. For instance, one commentary citing both Bathgate and Adams makes it explicit that their relevance is to situations where an attorney is not employed under a contingency fee contract. 60 A.L.R.2d 1008 (1958).

But see First Nat'l Bank & Trust Co. of Tulsa v. Bassett, 83 P.2d 837 (Okla. 1938) (discharged contingent fee attorney must await conclusion of case before his cause of action accrues; any demand for fixing the value of services ahead of settlement is unreasonable). In Bassett, the court recognized that there was a conflict in New York between Martin and Shattuck v. Pennsylvania R. Co., 48 F.2d 346 (W.D.N.Y. 1931) in that the former required immediate accrual while the latter maintained that the discharged attorney should await the conclusion of the action. See also Bartlett v. Odd-Fellows' Sav. Bank, 21 P. 743 (Cal. 1889) (Although overruled by the adoption of the quantum meruit rule, the court held that the cause of action in a contingency fee case accrues when there is a recovery.).

\[42\] Martin, 114 N.E. at 48-49. In fact, it was not even the discharged attorney who was suing the client for the fee. The attorney's assignee sued the executor of the client's estate. Id. at 47.
Although *Martin* held that the cause of action arose at discharge, it neither stated nor implied that the occurrence of the contingency was not essential to a recovery. That the statute of limitations is held to begin to run upon the attorney’s discharge does not inexorably lead to the conclusion that the attorney can collect a quantum meruit award irrespective of whether the client wins the underlying action. Indeed, the proposition is a non-sequitor. Nonetheless, that is precisely the course of decision that has followed.

Why did the court plant this pathology that would come to devour its offspring? Since the issue of whether the attorney could recover in the absence of a client recovery in the underlying action was not before it, the court both failed to anticipate the possibility that a suit for fees could arise prior to a result in the underlying action and neglected to expressly state that the occurrence of the contingency in the underlying suit is essential to the discharged attorney’s recovery.

Would the court have so held? The entire thrust of *Martin v. Camp* was to protect the client. It is inconceivable that the court would have consciously allowed for the anomalous result that a client would have to pay a fee to the discharged contingent fee attorney even though he recovered nothing in the underlying suit. That would clearly penalize the client for exercising his discharge right, which is prohibited by *Martin v. Camp*. *Martin v. Camp* indubitably deserves greater respect than that.

**C. The Lawyer as Fiduciary**

In rejecting the prevailing rule that allowed the attorney to recover contract damages when the client terminated the relationship without cause, the *Martin v. Camp* court emphasized that “the peculiar relation of trust and confidence that [the attorney-client] relationship implies” renders “[those opposing] decisions in other jurisdictions ... [in]consistent with the principles which define the nature of the contract under which an attorney is employed, as those principles have been declared by the deci-

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43 “If the client has the right to terminate the relationship ... it follows as a corollary that the client cannot be compelled to pay damages for exercising a right which is an implied condition of the contract.” *Martin*, 114 N.E. at 48.

44 *Martin*, 114 N.E. at 47.
sions of this court.\textsuperscript{46} Thus, the client discharge rule is premised upon (and arguably compelled by) the fiduciary standards that underlie the attorney-client relationship.\textsuperscript{48}

A lawyer is a fiduciary for his client\textsuperscript{47} since the client's retention of an attorney to exercise "professional judgment" on his behalf necessarily requires that the client repose a high degree of trust and confidence in his or her attorney.\textsuperscript{48} When the attorney exercises that professional judgment, he

\textsuperscript{46} Id. at 48; see also Krippner v. Matz, 287 N.W. 19, 24 (Minn. 1939) ("[I]t is a misconception to attempt to force an agreement between an attorney and his client into the conventional modes of commercial contracts. . . . [T]he agreement is . . . permeated with the paramount relationship of attorney and client which necessarily affects the rights and duties of each.").

\textsuperscript{47} "The so-called [client discharge] rule is built upon the foundation of the special confidence and trust which should set the attorney-client relationship apart from other employment relationships." Plaza Shoe Store, Inc. v. Hermel, Inc., 636 S.W.2d 53, 58 (Mo. 1982) (en banc). See also Sohn v. Brockington, 371 So. 2d 1089, 1093 (Fla. Dist. Ct. App. 1979) ("Certainly if one of the goals of the attorney-client relationship is absolute confidence, a client should be free to discharge one attorney and hire another at will."); Salem Realty Co. v. Matera, 410 N.E.2d 716, 719 (Mass. App. Ct. 1980), aff'd, 426 N.E.2d 1160 (Mass. 1981) ("Not only is contractual yoking of lawyer and client impractical; it would diminish the integrity of the bar and undermine public confidence in it."); Farkas v. Sadler, 375 A.2d 960, 962 (R.I. 1977) ("It is universally recognized that the office of attorney admits of the very highest confidence and depends upon a working if not harmonious relationship between counsel and client. . . . [therefore,] a client may discharge counsel with or without cause and, thus, terminate the relationship.") (citations omitted); E. Randall Morrow, Note, Attorney's Right to Compensation when Discharged Without Cause from a Contingent Fee Contract, 15 Wake Forest L. Rev. 677, 684 (1979) (client discharge rule protects the attorney-client relationship).

\textsuperscript{48} See Greene v. Greene, 436 N.E.2d 496, 499 (N.Y. 1982) ("relationship between an attorney and his client is a fiduciary one and the attorney cannot take advantage of his superior knowledge and position"); overruled on other grounds by McDermott v. Torre, 437 N.E.2d 1108 (N.Y. 1982); Kelly v. Greason, 244 N.E.2d 456, 460 (N.Y. 1968) ("a lawyer, as one in a confidential relationship and as any fiduciary, is charged with a high degree of undivided loyalty to his client"). See also Gaffney v. Harmon, 90 N.E.2d 785, 788 (Ill. 1950) ("a fiduciary relationship exists as a matter of law between attorney and client"); CHARLES WOLFRAM, MODERN LEGAL ETHICS § 4.1, at 146 (1986) ("the designation of 'fiduciary' . . . surely attaches to the [lawyer-client] relationship").

\textsuperscript{49} E.g., Fisher v. State, 248 So. 2d 479, 484 (Fla. 1971); Williams v. Griffin, 192 N.W.2d 283, 285 (Mich. Ct. App. 1971); In re Wilson, 409 A.2d 1153, 1154-55 (N.J. 1979); Rosner v. Paley, 481 N.E.2d 553, 554 (N.Y. 1985). The need for trust is also reflected in the ethical requirement that communications to lawyers be kept confidential. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1982) [hereinafter MODEL CODE]; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) [hereinafter MODEL RULES]. See also Demov, Morris, Levin & Shein v. Glantz, 428 N.E.2d 387, 389 (N.Y. 1981) ("The unique relationship between an attorney and client [is] founded in principle upon the elements of trust and confidence on the part of the client . . . ."); In re Dunn, 98 N.E. 914, 915 (N.Y. 1912) ("That the relationship between attorney and client is one of an unusual character has been [routinely] affirmed . . . . [A]t its foundation [are] the elements of trust and confidence on the part of the client and of undivided loyalty and devotion on the part of the attorney . . . .")
must advance the client's interests as the client would define them if he were fully informed. Acting primarily, if not exclusively, in a client's interest requires undivided loyalty and zealous devotion. In order to inspire their clients' trust and confidence, attorneys are obliged to maintain confidentiality, avoid conflicts of interest, present information honestly, safeguard property, and disclose information relevant to their duties as fiduciaries. "[N]othing [is] more critical to the professional relationship between attorney and client than the trust and confidence of the person being represented."

A client who loses confidence in his lawyer is less likely to disclose to him information potentially injurious to the client's interests, but essential to the lawyer's performance of the agreed upon service. Because the lawyer is typically retained to evaluate and advise, the client's selection of a course of action based upon that advice is undermined by a loss of trust and confidence. Therefore, the unique relationship between lawyer and client is mortally attenuated by a loss of essential trust and confidence since "inherent in the relationship between attorney and client is the fact that the client must rely almost entirely upon the good faith of the attor-
Accordingly, even though the attorney has not committed such a breach of the employment contract as would allow the client to consider the contract terminated, Martin v. Camp holds that even without legal cause, the client may nonetheless discharge his attorney without penalty when the client is no longer able to place his trust and confidence in that attorney.  

D. The Contingent Fee Contract

A contingent fee is a risk-sharing joint venture to which the client brings his claim and the attorney, his time and effort. The attorney’s compensation is determined by the ultimate recovery. If there is no recovery, the attorney will earn no fee.  

In exchange for assuming the risk of no or low recovery, as well as the risk of having to devote considerably more time to the venture than anticipated, the attorney charges a risk premium: a multiple of his opportunity cost (hourly rate). That premium is both payment for the lawyer’s lend-

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58 “Unless [the client discharge] rule is adopted allowing an attorney as full compensation the reasonable value of services rendered to the time of discharge, clients will often feel required to continue in their service attorneys in whose integrity, judgment or capacity they have lost confidence.” Fracasse, 494 P.2d at 12-13.


60 A contingent fee can be defined as a fee received for services performed on behalf of a client if, and only if, some recovery is achieved through the lawyer’s efforts. Its distinguishing characteristic is the negative: if no recovery is obtained for his client, the lawyer is not entitled to a fee. F.B. Mackinnon, Contingent Fees for Legal Services 3 (1964). “The critical element [of a contingent fee] is that there be some chance that the lawyer will not receive the fee because the representation ends with an unwanted result for the lawyer’s client.” Wolfram, supra note 47, § 9.4.1, at 526. See also Clark v. Sage, 629 P.2d 657, 661 (Idaho 1981) (stating that “a contingent fee ... involves a risk factor”); High Point Casket Co. v. Wheeler, 109 S.E. 378, 380 (N.C. 1921) (stating that a contingent fee contract amounts to at least an equitable assignment of the judgment pro tanto). For a concise discussion of policy arguments mounted in regard to contingent fees in the client discharge context, see Note, Attorney’s Right to Compensation when Discharged Without Cause from a Contingent Fee Contract — Covington v. Rhodes, 15 WAKE FOREST L. REV. 677, 681 nn.25-28 (1979).

61 See Brickman, supra note 59, at 117-19; Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 483 U.S. 711, 735-36 (Blackmun, J., dissenting) (“In the private market, lawyers charge a premium when their entire fee is contingent on winning ... The premium ... compensates for the risk of nonpayment if the suit does not succeed ... .”) (emphasis in original).
ing of services to the client and assumption of the recovery and time expenditure risks. A contingent fee is, therefore, a financing device which provides access to the courthouse for both the impecunious client and the risk-averse client who can afford to pay an hourly rate but opts for a contingent fee. Regardless of the financial status of the client, an essential feature of the contingent fee is the limitation of fee cost to the client to a percentage of the amount awarded as a recovery.

III. ASCERTAINING THE QUANTUM MERUIT RECOVERY

A. The Various Approaches

Although most jurisdictions apply the quantum meruit rule to a client's right to discharge, jurisdictions are split as to whether the contract price is a limit on the recovery when the discharged attorney had been employed under a contingency fee contract. There are two main approaches with variations from state to state.

1. The Preferable Rule as Exemplified by Rosenberg v. Levin

In Rosenberg, a lawyer who had been employed under a contingency fee contract was discharged without cause. The court held that the discharged attorney was entitled to a quantum meruit recovery, a ruling which was bolstered by two salutary caveats. First, the cause of action was deferred until the occurrence of the contingency. If the client failed to

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62 Brickman, supra note 59, at 43, 74; MODEL CODE, supra note 48, § 2-20 (“[T]hey often, and in a variety of circumstances provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim . . . .”); Loraine Minish, The Contingent Fee: A Re-examination, 10 MANITOBA L.J. 65, 75 (1979) (“There are those who feel that ‘the contingent fee is the poor man’s key to the courthouse door.’”) (citation omitted).

63 Brickman, supra note 59, at 43.

64 MODEL CODE, supra note 48, DR 5-103(A). Although the client remains responsible for litigation expenses, in many successful contingent fee representations, the attorney makes no effort to recover litigation expenses from the client.

65 See supra note 37.

66 The issue is often expressed as when the cause of action accrues.

67 409 So. 2d 1016 (Fla. 1982). The other leading case is Fracasse v. Brent, 494 P.2d 9 (Cal. 1972), which ten years earlier established the principle of the contract price cap.

recover in the underlying suit, the discharged attorney would not be enti­
tled to any compensation.69

This policy, while preserving the freedom of the client to discharge the
attorney at will, places a modest burden upon the discharged attorney;
even without being discharged, he would not have benefited unless the
contingency had transpired.70 The Florida Supreme Court particularly
emphasized the inequity of burdening a client, who may be of limited
means, with paying a fee regardless of the outcome of the underlying liti­
gation.71 The court also stressed that the "amount involved" and "results
obtained," two important factors in determining the reasonableness of the
fee, cannot be determined until the conclusion of the case.72 Thus, the
court, in balancing two distinct goals — those of the client’s right to dis­
charge and the attorney’s right to compensation — reconciled them such
that the most equitable result was attained without compromising the rel­
ative importance of each policy. It also sustained the major thrust of Mar­
tin v. Camp — protecting the client’s right to discharge without penalty
— thereby circumventing the quagmire of the anomaly.

Second, the court stated that the attorney's recovery was limited to the
contract percentage.73 Stating the objectives of fostering public confidence
in the legal profession and maintaining the trust and confidence essential
to the attorney-client relationship,74 the court maintained that any rule

69 "If the client fails in his recovery, the discharged attorney will similarly fail and recover
nothing . . . . Deferral, however, supports our goal to preserve the client's freedom to discharge . . . ."
Rosenberg, 409 So. 2d at 1022.

70 Id. at 1020 ("[S]ince the attorney agreed initially to take his chances on recovering any fee
whatever, we believe that the fact that the success of the litigation is no longer under his control is
insufficient to justify imposing a new and more onerous burden on the client."") (citing Fracasse v.
Brent). But see Tillman v. Komar, 181 N.E. 75 (N.Y. 1932) (arguing that the discharged attorney
did not take his chances on relying on another member of the bar). Tillman is discussed extensively
infra note 81.

71 Rosenberg, 409 So. 2d at 1020; see also Plaza Shoe Store, Inc. v. Hermel, Inc., 636 S.W.2d 53
(Mo. 1982) (stressing that it would be improper to burden a client who discharged his attorney
pursuant to the client discharge rule with the obligation to pay a fee regardless of the outcome of the case).

72 Rosenberg, 409 So. 2d at 1020. Although the Martin court failed to state what criteria should
be used to establish a reasonable fee due the attorney, relevant factors are set out in the Model Code
DR 2-106, supra note 48. See infra notes 113-18 and accompanying text for a more complete discus­
sion of the factors involved in determining reasonable fees.

73 Rosenberg, 409 So. 2d at 1021.

74 Id.
failing to limit quantum meruit recovery to the contract price would penalize the client for exercising his contractual right to discharge his attorney.\(^78\)

2. The Contrary Rule: Allowing Recovery Beyond the Contract Price

A contrary approach is followed by courts in Illinois, Minnesota, New York, and Washington, all of which allow immediate suit.\(^76\) Hawaii and Massachusetts, though not dealing with the timing of the attorney’s suits because the clients had already recovered in their underlying actions, held that the attorney’s recovery could exceed the contract price.\(^77\) New York courts, in particular, have issued prolific pronouncements on the issue.\(^78\)

\(^76\) Id. “The right to discharge one’s attorney would be of little value if the client were liable for the full contract price.” Fox & Assocs. Co., L.P.A. v. Purdon, 541 N.E.2d 448, 450 (Ohio 1989). If a client is forced to pay in excess of the contract price, “the client would frequently be forced to choose between continuing the employment of an attorney in whom he has lost faith or risking the payment of double fees.” Succession of Jenkins, 481 So. 2d 607, 611 (La. 1986) (Dennis, J., concurring); see also Miller v. Paul, 615 P.2d 615, 619 (Alaska 1980) (Matthews, J., dissenting) (“Imposing an immediate obligation to pay unduly burdens the client’s right to discharge his attorney, and additionally, is often unfair to the client because he cannot afford to pay a fee unless a recovery in the underlying case is received.”); William D. Hunter, Note, Limiting the Wrongfully Discharged Attorney’s Recovery to Quantum Meruit — Fracase v. Brent, 24 HASTINGS L.J. 771, 774 (1973) (“The protection afforded to the client becomes illusory if the discharged attorney’s recovery on quantum meruit exceeds the contract price.”).


\(^78\) New York, as originator of Martin v. Camp, has extensively addressed this situation: Under New York law a client may discharge an attorney at any time . . . [and] the attorney is entitled to recover compensation from the client measured by the fair and reasonable value of the services rendered whether that be more or less than the amount provided in the contract . . . . [T]he compensation [can] be a fixed dollar amount determined at the time of discharge . . . or, in the alternative, they may agree that the attorney, in lieu of a presently fixed dollar amount, will receive a contingent percentage fee determined either at the time of substitution or at the conclusion of the case.


Though it is clear that New York courts do not limit recovery to the contract price,\textsuperscript{79} some New York courts have rendered conflicting decisions regarding the time when the quantum meruit sum is to be ascertained\textsuperscript{80} and whether the occurrence of the contingency is a necessary condition for a quantum meruit recovery.\textsuperscript{81} In its latest pronouncement, \textit{Lai

\textsuperscript{79} E.g., In re Montgomery, 6 N.E.2d 40 (N.Y. 1936) (holding that the price of the contract does not limit quantum meruit recovery); see also supra note 46, at 689-90 (criticizing the New York rule "as defeating the policy against penalizing the client for exercising his right to discharge his attorney, because he is essentially forced to pay damages for exercising a right").

\textsuperscript{80} See, e.g., In re Tillman, 181 N.E. 75 (N.Y. 1932) (attorney need not await outcome of litigation to have his fee determined; the reasonable amount may be fixed immediately); Paulsen v. Halpin, 427 N.Y.S.2d 333 (N.Y. App. Div. 1980) (attorney may sue at once for quantum meruit but court can take into account the terms of the original retainer agreement). \textit{But see Shattuck v. Pennsylvania R. Co., 48 F.2d 346 (W.D.N.Y. 1931) (finding that Martin v. Camp was silent on whether the fee determination could be deferred until the outcome in the underlying action was known and then going on to hold that it would await the outcome of the underlying case to fix the fee so that the terms of the original contract would not be ignored); Steves v. Serlin, 509 N.Y.S.2d 666 (N.Y. App. Div. 1986) (though discharged attorney is entitled to be reimbursed for disbursements at time of discharge, no fee is owed until there is a recovery); In re Shaad, 399 N.Y.S.2d 822 (N.Y. App. Div. 1977) (amount of attorney's recovery may be determined subsequent to any recovery in the underlying action); Friedman v. Gordon, 23 N.Y.S.2d 808 (N.Y. App. Div. 1940) (whether an attorney may have his fee fixed immediately or deferred until the outcome of the litigation rests in the sole discretion of the court).

\textsuperscript{81} In Tillman v. Komar, 181 N.E. 75 (N.Y. 1932), the New York Court of Appeals held that since the dismissed attorney's cause of action accrues immediately upon discharge, he cannot be forced to await the outcome of the litigation to enforce his claim. The \textit{Tillman} court thus appeared to reject Martin v. Camp's "no penalty for discharge rule" in favor of its statute of limitations holding. \textit{Id. at 76. See also Kronish, Lieb, Shainswit, Weiner & Helman v. Howard Stores Corp., 355 N.Y.S.2d 426 (N.Y. App. Div. 1974) ("Even if services, for which the [lawyer] was retained, had been completed prior to discharge, the [lawyer] would still be entitled to sue in quantum meruit."). This is more than an entitlement to the discharged attorney because under contract principles quantum meruit is not limited by the price of the contract. However, while in accord with contract principles, such a broad rule derived from cases such as this is an affront to Martin v. Camp. This facial discord, however, can be resolved by a close examination of the \textit{Tillman} facts. In \textit{Tillman}, the client had discharged the attorney after his right to a recovery had been established by the attorney's efforts; all that remained to be done was mathematical calculation of the exact amount due to the client. 181 N.E. at 75. It is thus apparent that the client was seeking to avoid paying the contractual fee that the attorney had fully earned.

"Discharge on the courthouse steps" is a recognized exception to Martin v. Camp. Refuting the
Ling Cheng v. Modansky Leasing Co., Inc. ("Cheng"), the New York Court of Appeals once again employed the client discharge rule without fully and unambiguously resolving the issues of when suit may be brought and whether recovery in the underlying action is a prerequisite to a quantum meruit recovery by the discharged attorney. However, the court almost certainly maintained its position that suit could be brought at once and therefore the contract price was not a cap.

Like Martin v. Camp, Cheng involved a contingent fee case in which there was an underlying recovery; like Martin v. Camp, the court anticipated that the fee setting would be done after the underlying action had been decided; like Martin v. Camp, it spoke broadly enough to include within its ambit a right of the discharged attorney to recover a quantum meruit fee even if the underlying action were unsuccessful; and, like Martin v. Camp, the court failed to specifically contemplate the ramifica-

argument that the adoption of the client discharge rule would lead to a wholesale discharging of contingent fee attorneys, one court stated that "[t]o the extent that such discharge occurs 'on the courthouse steps,' where the client executes a settlement obtained after much work by the attorney, the factors involved in a determination of reasonableness would certainly justify a finding that the entire fee was the reasonable value of the attorney's services." Fracasse v. Brent, 494 P.2d 9, 14 (Cal. 1972). Therefore, "[i]n the event of full performance prior to discharge ... the attorney may stand upon his contract and the measure of his damages is the agreed upon services." McAvoy v. Schramme, 238 A.D.2d 225, 228 (N.Y. 1993). "To hold otherwise would deny the performing party of the fruits of his agreement." Dill v. Public Util. Dist. No. 2, 475 P.2d 309, 312 (Wash. 1970). See also Henry, Walden & Davis v. Goodman, 741 S.W.2d 233 (Ark. 1987); MacInnis v. Pope, 285 P.2d 688 (Cal. 1955); Kaushiva v. Hutter, 454 A.2d 1373 (D.C. 1983); Rhodes v. Norfolk & W. Ry. Co., 399 N.E.2d 969, 975 (Ill. 1979); Smith v. Westside Transit Lines Inv., 313 So. 2d 371 (La. App. 1975); Fox & Assoc. Co., L.P.A. v. Purdon, 541 N.E.2d 448 (Ohio 1989); Clerk of Superior Court of Guilford County v. Guilford Builders Supply Co., 361 S.E.2d 115 (N.C. App. 1987); Covington v. Rhodes, 247 S.E. 2d 305 (N.C. App. 1978).

In view of the Tillman facts, the case does not support the proposition for which it is widely cited — that the contingent fee attorney is allowed to immediately seek quantum meruit, thereby, creating the possibility of obtaining a judgment for a fee even if the underlying case yields no recovery.

Thus, the Cheng court said:

The percentage may be fixed at the time of substitution but, as several courts have recognized, is better determined at the conclusion of the case when such factors as the amount of time spent by each lawyer on the case, the work performed and the amount of recovery can be ascertained.

539 N.E.2d at 572 (citations omitted). The court went on to state that "[a] contingent percentage fee is properly determined at the end of litigation when the amount of the recovery and the relative contributions of the lawyers to it can be ascertained." Id. at 573 (citation omitted).

Upon discharge, "the attorney is entitled to recover compensation ... whether that be more or less than the amount provided in the contract or retainer agreement." Id. at 572.
tions of its broad pronouncement in cases where there was no underlying recovery. In Cheng, the court interpreted an agreement between the outgoing and incoming attorneys which stated that the discharged attorney had "a [contractual charging] lien for prior legal services rendered . . . the amount of which shall be subsequently determined at the conclusion of the litigation." The court held that this language represented an election by the outgoing attorney of a quantum meruit contingent percentage which "is properly determined at the end of the litigation when the amount of the recovery and the relative contributions of the lawyers to it can be ascertained."

Although the holding in Cheng is sound, the troubling aspect of the decision is the court's notation in dicta that when the dispute is between the client and attorney, the attorney can elect between a fixed dollar amount based upon quantum meruit at the time of discharge or a contingent percentage fee determined at the time of substitution or conclusion of the case. Facially, the court's blatant allowance of a fixed fee regardless of the outcome in the underlying litigation, while justified by Martin v. Camp's holding regarding immediate accrual of the cause of action, ignores its policies, fails to promote public trust and confidence in the legal profession, and inhibits the client's right to discharge. Had the attorney not been discharged and the contingency not realized, the client would not have owed the lawyer anything. However, according to Cheng and the other jurisdictions following the contrary approach, the client who exercises an implied contractual right to discharge his attorney can be forced to pay a fee without regard to the eventual success of the underlying suit.

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88 In Cheng, the court repeated the usual litany that "[i]mmediately upon his discharge, [the attorney] was entitled to be compensated in . . . quantum meruit . . . ." Id. at 573. The court then stated that the lower court "could not consider the size of the recovery . . . [because] if the fee is computed at the time of discharge, it is difficult to see how it could be considered." Id. This language could indicate that the court contemplated the possibility that the discharged attorney, by electing quantum meruit, would be able to collect a fee even if the underlying action were unsuccessful. However, since that issue was not before the court, it should not be held to such a view absent a specific declaration, regardless how suggestive its language.

89 Id. at 571.

87 Id. at 573.

88 Id. Other cases also support this proposition. See supra note 78 and accompanying text.

89 See supra note 76.
IV. POLICY CONSIDERATIONS

Courts which have been true to *Martin v. Camp* by holding that the discharged attorney's compensation depends upon the success of the underlying action, have engaged the courts allowing the discharged attorney to collect a fee regardless of the disposition of the underlying action, in a policy discussion. These issues are examined in the following arguments.

A. *The Essence of the Bargain: A Tautology*

One of the frequently cited reasons for rejecting the client discharge rule entirely or upholding it but entitling the attorney to quantum meruit irrespective of the outcome of the underlying action is that while the attorney did enter a contingent fee contract based upon success in the underlying action, he did not bargain for another attorney completing his services. It is argued, therefore, that it is inequitable for the discharged attorney to have to rely upon the skills of the incoming attorney.90 To compensate the attorney for the additional risk being imposed,91 the attorney should be allowed a quantum meruit recovery irrespective of the outcome of the underlying action.

However, the mere fact that the success of the litigation depends on the efforts of another does not, in and of itself, justify shifting the fee burden to the client.92 Under a contingent fee contract, an attorney initially agrees

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90 *See, e.g., In re Estate of Callahan, 544 N.E.2d 112, 115 (Ill. App. Ct. 1989) (“the discharged attorney, who invested valuable time and talent on his client’s behalf should not necessarily be denied any recovery where his successor is inept”); Fracasse v. Brent, 494 P.2d 9, 23 (Cal. 1972) (Sullivan, J., dissenting) (“[A]n attorney bargains for a *limited* risk — the risk that the . . . action may be unsuccessful under his management. He does not expect to hazard compensation for his services on the client’s choice of a substitute attorney . . . .”). The New York Court of Appeals has also stated that “[the incoming attorney] did not contract for his contingent compensation on the hypothesis of success or failure by some other member of the bar . . . .” *Tillman v. Komar*, 181 N.E. 75 (N.Y. 1932); *see also William D. Bremer, Note, Fracasse v. Brent: Contingent Fee Compensation for an Attorney Discharged Without Cause — A Right or a Mere Possibility*, 9 CAL. W. L. REV. 355, 364 (1974).


92 “[S]ince the attorney agreed initially to take his chances on recovering any fee whatever . . . the fact that the success of the litigation is no longer under his control is insufficient to justify imposing a new and more onerous burden on the client.” *Fracasse v. Brent*, 494 P.2d 9, 14 (Cal. 1972). One New York court even stated that “the outgoing [contingent fee] attorney agreed to take the risk of
to receive no fee from the client unless the client prevails. Furthermore, because of the client discharge rule which implies a provision in the retainer agreement that the client may discharge the attorney for any reason at any time, an attorney could be discharged and lose the opportunity to earn a contingent percentage of a recovery. Accordingly, the attorney is on notice at the time of accepting employment that he might be solely dependent for his fee upon the efforts of another attorney if the client elects to exercise his discharge right. To argue then that the attorney did not bargain for that possibility is to state a tautology; if the rule is that he can collect quantum meruit irrespective of the outcome of the underlying action, then, of course, the conclusion duly follows. But if the rule is that he cannot obtain any fee, if discharged, unless the client prevails in the underlying action, then the conclusion follows that he could be solely dependent upon the efforts of another attorney and is, therefore, on notice of that possibility at the time employment is accepted. To state the prevailing rule is to state the conclusion.

B. Chilling Effect

Some judges reject the client discharge rule in its entirety or advocate only a modified version of the rule by allowing the discharged contingent recovery in the original retainer . . . . [Therefore,] the proper course is to defer payment of disbursements out of the proceeds of any recovery." Rizzi v. City of New York, 380 N.Y.S.2d 697, 699 (N.Y. App. Div. 1976). See also Heinzman v. Fine, Fine, Legum & Fine, 234 S.E.2d 282, 286 (Va. 1977). In Heinzman the court, overruling the trial court's award of the contractual fee to the discharged contingent fee attorney, maintained that such a rule "[p]resuppose[s] that [the discharged attorney] . . . would have achieved a recovery exactly equivalent to that achieved by [the substituted attorney]. But this is entirely speculative [since he] might have . . . won a larger verdict . . . [or] he might have recovered nothing." Id.

Cf. Andrews v. Haas, 108 N.E. 423 (N.Y. 1915). In the Andrews case predating Martin v. Camp, Justice Cardozo stated that "[t]he employment of a lawyer to serve for a contingent fee does not make it the client's duty to continue the lawsuit and thus increase the lawyer's profit." Id. at 423. He believed that any other notion "betrays a strange misconception of the function of the legal profession and of its duty to society." Id. at 424.


See Goodman, 741 S.W.2d at 236; Covington v. Rhodes, 247 S.E.2d 305, 308-09 (N.C. Ct. App. 1978); Jacobson v. Sassower, 452 N.Y.S.2d 981, 982 (N.Y. Civ. Ct. 1982). Furthermore, dependence upon the efforts of another attorney for one's fee is not at all unusual in the bar; for example, lawyers often refer clients to another lawyer for a percentage of the other lawyer's fee which is itself contingent on success. See Brickman, supra note 59, at 108 n.317, 109 n.319.
fee attorney to recover irrespective of the underlying action. They have opined that any other outcome would effectively result in the inability of clients to hire attorneys willing to accept contingent fee cases since “a solemn valid agreement between attorney and client [could] be dissolved into thin air at the mere whim of the client” and the contract would “only be as good as a client wishes it to be.”

Couched in *Lochner*-like language, these courts seek to protect clients from being precluded access to courts by restricting the scope of their discharge rights. Accordingly, these judges have maintained that the quantum meruit rule “ignores the realities of the contingent fee system and [would] prevent its use in the future.” Yet, despite the ominous forewarnings of those judges attempt-

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**Footnotes:**

96 *Fracasse*, 494 P.2d at 17 (Sullivan, J., dissenting); see also *Goodman*, 741 S.W.2d at 237 (noting that an amicus brief filed on behalf of the discharged attorney argued that failure to award contract damages to the discharged attorney would have a “chilling effect” on the utilization of contingent fee contracts); *Anderson v. Gailey*, 606 P.2d 90, 96 (Idaho 1980) (characterizing application of the client discharge rule as a “dubious practice of finding ‘implied in law’ terms in the contingent fee contract... [which] strip[s] the attorney entirely of his right to rely on the contingent fee contract and to sue for its breach”); *Saucier v. Hayes Dairy Products, Inc.*, 373 So. 2d 102, 121 (La. 1978) (Dixon, J., dissenting) (arguing the court “unecessarily cast doubts on contingent fee arrangements” when it ruled that the discharged and substituted attorneys had to share fees). *But see Sohn*, 371 So. 2d at 1093 (rejecting argument that adoption of the client discharge rule would lead to a “wholesale discharge of attorneys by clients shopping for the least expensive fees”); *In re Estate of Callahan*, 544 N.E.2d 112, 115 (Ill. App. Ct. 1989) (rejecting the argument that the quantum meruit rule would lead to clients discharging their attorneys in order to avoid paying fees).

97 *Goodman*, 741 S.W.2d at 239 (Glaze, J., dissenting). Justice Glaze stated that the “court’s decision today, however, will assuredly and inevitably increase the instances of collusion and solicitation in cases and, for all practical purposes, destroy the use of contingency contracts.” *Id.* at 238-39. Other courts have also spoken along these lines. *See, e.g.*, *Dolph v. Speckart*, 186 P. 32, 35 (Or. 1920) (adhering to the contract damage rule when the attorney is discharged by the client, the court stated “[a] party who has wrongfully broken a contract should not be permitted to reap advantage from his own wrong”). *See also Friedman v. Mindlin*, 155 N.Y.S. 295, 299 (N.Y. City Ct. 1915). In *Friedman*, which arose before the New York Court of Appeals decision in *Martin v. Camp*, the court upheld the right of the client to discharge at will, but stated that the attorney should not: be held to assume the risk of his client discharging him at will and then paying him only for the services rendered up to the time of the discharge. If his compensation is to be thus subjected to the whim of his client, then it is useless for him to contract at all, since all contracts of this character, whatever their form, would be only unilateral in effect. . . . [T]he legal profession should [not] thus be shorn of its dignity, or that justice should be thus denied to those who themselves minister at the altar of justice.

*Id.*


99 *Covington*, 247 S.E.2d at 308. Bludgeoning the attorney with his own argument, the court maintained that the purpose of a contingency fee contract is not to enable the lawyer to better balance his checkbook. *Id.* The court also asserted the client discharge rule would not lead to clients “using
ing to preserve the contingent fee system for future clients (clients who potentially would be unable to bring an action but for the availability of contingent fee agreements), there is no evidence whatsoever, in jurisdictions that have either adopted the client discharge rule or defer the attorney's cause of action until recovery in the underlying suit, of a paucity of attorneys willing to enter contingent fee agreements.99 In fact, the enormous growth and overwhelming prevalence of contingency fee agreements reveal exactly the opposite.100 Thus, the argument that the abandonment of the contract damages rule or adoption of a client discharge rule predating the discharged attorney's fee recovery upon the outcome in the underlying suit will have a "chilling effect" upon the availability of contingent fee attorneys is, at best, without foundation.

C. A Penalty is a Penalty is a Penalty101

The core rationale of Martin v. Camp is that the client should not be penalized for exercising his right to discharge his attorney.102 A client who has to pay a quantum meruit fee though he loses in the underlying action or recovers less than the amount of the fee claimed is being penalized for exercising his discharge right.103 Thus, the rule that allows immediate suit for quantum meruit upon discharge, citing Martin v. Camp for sup-

the lawyer's services until all the work is done, then discharging him and settling the case themselves." Id. In fact, the courthouse steps exception would insulate lawyers from this possibility. See supra note 81. The realities of the contingent fee system, to which the attorney referred, are apparently that the contingent fee is the only access impecunious clients have to the legal system. See supra notes 61-62 and accompanying text. Moreover, this argument is at least tangentially related to the issue of whether the client has "legal cause" for discharging his attorney in that courts blithely assume clients discharge attorneys for frivolous reasons. See infra notes 128-36 and accompanying text.

99 Brickman, supra note 59, at 76 n.186.


101 With apologies to Gertrude Stein.

102 Martin, 114 N.E. at 46 ("[I]f the client has the right to terminate the contract, he cannot be made liable in damages for doing that which under the contract he has a right to do.").

103 See supra note 75 and accompanying text.
D. Fiduciary Obligation

*Martin v. Camp*’s discharge rule, which these courts purport to follow, is predicated upon fiduciary concepts of trust and confidence. Fiduciary law imposes a self-disinterested standard upon the fiduciary: in dealing with his client, he must give the client the same non-self-interested advice as the client would receive if he went to a second attorney for advice on dealing with the first attorney. The rule that allows quantum meruit in excess of the contract price turns this fiduciary principle on its head.

By accepting the case on a contingent fee basis, the attorney has made a judgment that the risk premium he is charging will compensate him for the risk he is bearing. If later he finds that he underestimated the risk, he is not permitted to seek additional compensation from the client; likewise, if he overestimated the risk, the client may not seek a reduction in the contingent fee provided that the attorney’s risk assessment has been professionally rather than self-interestedly motivated. An attorney breaches his fiduciary obligation and the ethical standard when he exaggerates the risk in order to justify a contingent fee designed to yield a return grossly disproportionate to the risk.

One effect of entitling the discharged contingent fee lawyer to quantum meruit irrespective of the outcome of the underlying action is to give the attorney a second opportunity to assess risk — at his client’s expense. If at the time of the discharge he believes the claim will yield a substantial return, he can simply elect to wait until a result is achieved by his replacement. The amount of his recovery would then be enhanced by the degree of success realized in the underlying action. If however, his rea-

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105 See supra notes 44-58 and accompanying text.
107 See supra note 29 and accompanying text.
108 The lawyer can decline the case if the risk is too high or the anticipated return too low.
111 Id. at 54 nn.93 & 94, 74 n.171.
112 See infra notes 114-15, 118.
cessment, contrary to his initial assessment, is that the claim is unlikely to prevail or its value is considerably less, he can elect to seek immediate compensation. Indeed, if the case “turns sour” either because his initial assessment is wrong or because it is belied by information elicited during the course of discovery (but not to the point where the claim is frivolous or totally without merit) or because the amount of time he would have to devote appears significantly greater, thereby reducing his projected hourly rate of return, he may be motivated to be relieved of his obligation to pursue the claim. By being uncommunicative or otherwise obviously disinterested in pursuing the claim, he can induce the client to discharge him, thereby entitling him to the more preferable quantum meruit.112 Allowing the attorney to elect quantum meruit without regard to the outcome of the underlying action is, therefore, the antithesis of the fiduciary policy that is the foundation of Martin v. Camp.

E. Relevant Factors in Determining Fees

The essence of the contingent fee agreement is that the attorney’s fee will be determined solely by the result achieved in the case. Accordingly, it makes little sense to depart from this essential feature of the contingent fee agreement absent overriding policy considerations. The relevant policy considerations in the context of client discharge,113 however, support adherence to the general rule requiring that all fees growing out of contingent fee retainer agreements be determined subsequent to the outcome of the litigation.

Although the Martin court failed to state what criteria should be used to establish the reasonable fee due the attorney, in cases where the attorney has elected a contingent percentage, most courts routinely state that the results obtained are important, if not essential, in determining the outgoing attorney’s recovery.114 Moreover, it is not until the conclusion of the

112 One court engaged in a discussion about attorney recovery following discharge and maintained that if recovery were not limited to the contract price, then the rule would encourage attorneys “to induce clients to lose confidence in them in cases where the reasonable value of their services has exceeded the original fee and thereby, upon being discharged, reap a greater benefit than that for which they had bargained.” Chambliss, Bahner & Crawford v. Luther, 531 S.W.2d 108, 113 (Tenn. Ct. App. 1975). For a discussion of what constitutes “cause” for discharge, see infra notes 119-37 and accompanying text.
113 See generally section III of this Article.
114 See, e.g., Shattuck v. Pennsylvania R. Co., 48 F.2d 346 (W.D.N.Y. 1931); Cordes v. Purcell,
case that “all of the factors properly determining compensation, especially the size of the recovery, have been ascertained.”

Awaiting the outcome of the litigation before a fee can be determined comports with the relevant factors listed in the Model Code of Professional Responsibility for determining fees. While guidelines are not given as to how the factors should be balanced, relevant factors include whether the fee is fixed or contingent, the amount involved, and the results obtained. In the case of a contingency fee contract, the latter two elements cannot be ascertained until the underlying litigation is complete. Failure to account for the outcome of the litigation is likely to result in consequences perversive to the client discharge rule. It opens up the pos-


The following factors are listed in DR 2-106(B) as relevant factors in determining the reasonableness of fees:

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 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.

Model Code, supra note 48, DR 2-106(B). The guidelines set forth in DR 2-106 attempt to protect the public from exorbitant fees as well as give lawyers parameters in charging for legal services. Robert H. Aronson, Attorney-Client Fee Arrangements: Regulation & Review 23 (Federal Judicial Center 1980); Fox & Assoc. Co., L.P.A. v. Purdon, 541 N.E.2d 448, 450 (Ohio 1989). Like the Model Code, Model Rule 1.5 necessitates that the attorney’s fee must be reasonable. The comments to this Model Rule highlight that a factor to be considered in determining the reasonableness of the fee includes whether the relationship between the attorney and client is a continuing one.

Model Rules, supra note 48, Rule 1.5. See also Saucier v. Hayes Dairy Products, 373 So. 2d 102, 116 (La. 1978) (“permitting a lawyer to reap . . . the contracted-for [contingency] fee . . . violates the strictures of DR 2-106”).

Model Code, supra note 48, DR 2-106(B)(4), (8).

This was exemplified in O’Brien v. Mulcahy, 244 N.Y.S. 701 (N.Y. Sup. Ct. 1930). The
sibility that the attorney might be unjustly enriched if the fee received at discharge turns out to be disproportionately large relative to the recovery. The resultant penalty is abhorrent to the client discharge rule.

V. THE ELUSIVENESS OF CAUSE

The *Martin v. Camp* paradigm is that a client may discharge his attorney without penalty even "without cause." Throughout this Article, it has been assumed that the attorney retained on a contingent fee basis has been discharged "without cause." If the discharge were for "cause," then the rule's application would be obviated since the attorney would then not be entitled to a fee or to a retaining lien.110

What constitutes "cause," however, in the context of client discharge is an elusive concept. While some courts have blithely assumed that the issue is easily resolvable by ukase,120 other courts acknowledge that the client discharged attorney, presumably believing the case was worth less than at the outset, had his fee fixed immediately upon discharge. This fixed fee of $500 turned out to be much less than the $3,750 fee (25% contingent fee) he would have received had he not been discharged. The court finding the fee unreasonable and inadequate in light of the outcome remanded the case for a rehearing on the issue of fees. 244 N.Y.S. at 702. Implicitly at least, the court recognized that it is inane to set fees without regard to the outcome of the case. Although the courts have discretionary power to intervene in attorney-client fee arrangements and thus can monitor them to preclude such results as in *O'Brien*, in an era of overcrowded dockets this surely is not an efficient use of judicial resources. See also *Shattuck v. Pennsylvania R. Co.*, 48 F.2d 346 (W.D.N.Y. 1931).


120 For instance, in *Henry, Walden & Davis v. Goodman*, 741 S.W.2d 233 (Ark. 1987), while the reviewing court agreed with the trial court that the client "did not have just cause to discharge his attorney," it willingly stated that there were no specific findings of fact and neither were any requested. *Id.* at 238. One New York court, affirming the lower court's finding that the discharge was without cause, insisted as a matter of faith that the the lower court "must have, at least by implication, first determined that [the discharged attorney] was not discharged for cause or misconduct." *Kyle v. Kyle*, 463 N.Y.S.2d 584, 585 (N.Y. App. Div. 1983). *See also Rosen v. Rosen*, 468 N.Y.S.2d 723 (N.Y. App. Div. 1983) (assuming that the attorney's withdrawal was for "just cause" though not bothering to indicate what that cause was). This typical mode (or failure) of analysis does nothing to get one farther towards what constitutes "cause" for discharge. One commentator saw the element of "cause" as a factor courts would be able to use to protect the professional relationship of attorney and client. William F. Hoefs, Note, *Attorney Client — Damages — Breach of Contingent Fee Contract*, 1960 WIS. L. REV. 156, 159. However, he opined that "the use of this tool [would] be limited to cases involving professional incompetence or bad faith." *Id.*
has been furnished with no reliable test of whether he has legal cause for terminating the retainer agreement.\textsuperscript{121} Though it is sometimes clear at the extremes whether the discharge is with or without cause,\textsuperscript{122} there is a large intermediate area in which lawyers are probably discharged for valid reasons which do not rise to the level of legal cause.\textsuperscript{123} Thus, even when a court has concluded that an attorney has been discharged "without cause," the conclusion that the client had no reasonable cause for discharging the attorney does not readily follow. In \textit{Smith v. Westside Transit Lines, Inc.},\textsuperscript{124} the discharged attorney had been employed under a contingent fee contract and the substituted attorney obtained a settlement. The court maintained that although the client in a certain sense had good cause — at least in everyday vernacular — for discharging the attorney, the client was still liable to him in quantum meruit, thereby negating that good cause rises to the level of legal cause. The court went on to say:

\begin{quote}
The relation between attorney and client is a close personal relationship which is far more complex than simply whether the attorney is performing his professional responsibilities and obligations in the proper manner. . . . The client is frequently impatient with the progress and anxious about the outcome of the case. . . . The personalities of the attorney and client, especially as they are revealed to each other, frequently play a much greater part in the relationship be-
\end{quote}

\textsuperscript{121} \textit{See} Fracasse v. Brent, 494 P.2d 9, 13 (Calif. 1972) (citing \textit{Witkin, California Procedure} 113-14 (2d ed. 1970)).

\textsuperscript{122} \textit{E.g.}, Brill v. Friends World College, 520 N.Y.S.2d 160 (N.Y. App. Div. 1987) (It is clear when the attorney was discharged from the case for conduct violating Disciplinary Rule 5-101(B) that it was for cause.); \textit{In re Zlobec}, 519 N.Y.S.2d 745 (N.Y. App. Div. 1987) (attorney who improperly obtained the consent of the Executrix to represent her and her estate was discharged for cause). \textit{But see} Teichner v. W & J Holsteins, Inc., 478 N.E.2d 177 (N.Y. 1985) (a hearing is required to determine whether allegations of personal misconduct and extortionate conduct constitute cause); Burns Jackson Miller Summit & Jacoby v. Rice (\textit{In re Peerless Sales Corp.}), 480 N.Y.S.2d 508 (N.Y. App. Div. 1984) (an attorney who accomplished that which he was hired to do was not discharged for cause); Covington v. Rhodes, 247 S.E.2d 305 (N.C. Ct. App. 1978) (discharge was without cause even though attorney lost papers and missed meetings).

\textsuperscript{123} This problem was spelled out explicitly by one court which stated, "From the record herein, it cannot be said that defendant discharged plaintiff for cause . . . . However . . . . [u]nder the circumstances, it cannot be said he was removed without cause either." Hausen v. Davis, 448 N.Y.S.2d 87, 90 (N.Y. Civ. Ct. 1981). In \textit{Hausen}, the attorney had prepared a summons and complaint almost a year and a half following the attorney's employment by the client. At that time, the attorney was unable to serve the papers because he was unable to locate the owner of the offending vehicle. Thus, while the attorney did not engage in misconduct, he did not effectively pursue his client's claim. 448 N.Y.S.2d at 90.

\textsuperscript{124} 313 So. 2d 371 (La. Ct. App. 1975).
between the parties than the professional activities of the attorney in the handling of the case.\textsuperscript{126}

This forthright acknowledgment of the role of interpersonal relations in the lawyer-client relationship is indicative of why trust and confidence underpin the client discharge rule. For effective representation, the client must fully confide in his attorney and rely on his professional skills; their relationship, therefore, becomes threateningly attenuated as the client loses confidence or trust in the attorney and the client becomes increasingly inhibited in the sharing of confidences.\textsuperscript{126} Justifiable client discontent with lawyers has been well documented by many commentators. One has discussed at length that while the legal profession assumes that the attorney-client relationship is based upon trust,\textsuperscript{127} many attorneys and clients mistrust one another.\textsuperscript{128} Another commentator has also maintained that there are significant reasons to question the attorney’s ability to identify the cli-

\textsuperscript{126} Id. at 376.

\textsuperscript{127} See supra notes 56-58 and accompanying text.

\textsuperscript{128} See supra note 48 and accompanying text. Contrary to such traditional suppositions, many revisionist commentators question the essential premise of the attorney-client relationship in which trust and loyalty are paramount and conflicts of interest virtually non-existent. See, e.g., DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE 111-12 (1974) ("[T]he inexorability of the economic conflict of interest between lawyer and client in so many cases, raises a serious question about the appropriateness of the traditional ideal that an ethical and competent lawyer can and will make the client's interest his own."); Robert A. Burt, Conflict and Trust Between Attorney and Client, 69 GEO. L.J. 1015, 1021 (1981) (arguing that there is an intrinsic conflict in the attorney-client relationship since the attorney grows rich at the client’s woes); Judith L. Maute, Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct, 17 U.C. DAVIS L. REV. 1049, 1058-59 (1984) (arguing that the "paternalistic lawyer subverts client autonomy, imposes her own moral values and pursues standardized, imputed ends that are unresponsive to the client's actual needs"); Marcy Strauss, Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy, 65 N.C. L. REV. 315 (1987).

\textsuperscript{129} Burt, supra note 127, at 1019-26. Although attorneys can mistrust their clients, client mistrust is more problematic since the lawyer is generally the dominant party in the relationship and because clients are dependent upon their attorneys. Burt argues that the legal profession’s denial of the mistrust harms the ability of the two to work together effectively. Others have also argued that the attorney-client relationship is viewed by the profession as unilateral with the attorney as the dominant actor providing the professional services which he deems appropriate. Eric H. Steele & Raymond T. Nimmer, Lawyers, Clients, and Professional Regulation, 1976 AM. B. FOUND. RES. J. 917, 950. Similarly, Rosenthal maintains that the traditional paternalistic model of the attorney-client relationship discourages client involvement. Rosenthal found that clients who actively participated in their cases and were more demanding of their lawyers received better services than did passive clients whom lawyers do not feel as accountable towards. ROSENTHAL, supra note 127, at 61. See also Roger W. Andersen, Informed Decisionmaking in an Office Practice, 28 B.C. L. REV. 225 (1987) (when clients are fully informed they can make intelligent decisions).
ent’s concerns accurately.\textsuperscript{129} Others have reported that clients generally do not feel at ease with their lawyers’ attitudes towards them.\textsuperscript{130} These arguments are further augmented by a survey in which 44.1 percent indicated that lawyers are not very good at keeping clients informed;\textsuperscript{131} sixty-two percent believed that lawyers charge more for their services than they are actually worth; and 38.6 percent felt that lawyers are not prompt\textsuperscript{132} about getting things accomplished.\textsuperscript{133} Thus, although there is ample documentation to support the proposition that clients discharge attorneys for valid reasons, courts generally refuse to recognize that these reasons rise to the level of legal cause.

Moreover, it is difficult for the client to establish that he had legally sufficient cause for discharge because of problems of proof. To the extent that the reasons are the failure of the attorney to keep the client informed or to respond to inquiries, it is highly unlikely that a sufficient paper trail exists to support the client’s claim.\textsuperscript{134} Clients are typically unprepared to deal with their lawyers in an adversarial posture and, therefore, do not

\textsuperscript{129} Strauss, \textit{supra} note 127, at 328-31. Other commentators studying attorney-client interactions have found that “condemnation of other lawyers occurs frequently [during attorney-client discourses] and tends to promote client cynicism. As a result, clients might increasingly perceive legal professionals as insufficiently self-disciplined or as excessively self-interested, or simply as insensitive and unethical.” Austin Sarat & William L.F. Felstiner, \textit{Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer’s Office}, 98 \textit{Yale L.J.} 1663, 1682 (1989). This observation could lead clients to lose confidence in their own attorneys prompting their discharge. It is unlikely, however, that these client perceptions and responses would constitute legal cause for discharge.

\textsuperscript{130} Steele & Nimmer, \textit{supra} note 128, at 951, 957; see also Lisa G. Lerman, \textit{Lying to Clients}, 138 \textit{U. Pa. L. Rev.} 659, 663 (1990) (arguing that attorneys deceive their clients more than the ethics code or bar acknowledges).

\textsuperscript{131} “A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.” \textit{Model Rules}, \textsuperscript{supra} note 48, Rule 1.4.

\textsuperscript{132} However, the Model Rules state that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” \textit{Model Rules}, \textsuperscript{supra} note 48, Rule 1.3.

\textsuperscript{133} Curran & Spalding, \textit{The Legal Needs of the Public}, A Preliminary Report (1974). See also Steele & Nimmer, \textit{supra} note 128, at 975. In that survey it was estimated that approximately 16% of people who used lawyers had problems with them. The major complaints were that the lawyers 1) failed to effectively communicate, 2) did not work promptly, and 3) did not work hard. Although such factors are non-quantifiable, they undoubtedly contribute to the attenuation of confidence that a client reposes in his attorney. Yet, it seems unlikely that a court would conclude that these factors constitute legal cause. Failure to return phone calls is another factor that would lead to client discontent yet would not likely constitute legal cause.

\textsuperscript{134} Lerman, \textit{supra} note 130, at 664 (arguing that a consequence of the private nature of attorney-client communications is that lawyers’ conduct with clients receives less scrutiny than their conduct before a public tribunal).
keep detailed records of their attempts to communicate with, and the responses from, their attorneys.

Finally, despite suggestions otherwise,\textsuperscript{185} there is no evidence that clients discharge lawyers for frivolous reasons.\textsuperscript{186} In fact, the very act of the client discharging his attorney belies the notion that it is for frivolous reasons since the client must take on the additional task of finding another attorney and the attendant risk he will be liable for additional fees.\textsuperscript{187}

Relying on "without cause" as a policy basis for penalizing the client's act of discharge is without justification.

\section*{VI. Legislative Policy Supports Martin v. Camp}

Several legislatures have enacted attorney lien statutes reflecting policies contrary to those of the courts misapplying Martin v. Camp. While the statutes do not deal directly with client discharge, they do illustrate the importance of focusing on the underlying recovery. Thus, the Illinois Attorney's Lien Act\textsuperscript{138} provides that an attorney shall have a charging lien on the effectuation of the judgment.\textsuperscript{189} If the attorney perfects a lien without the client recovering on the underlying claim, the attorney receives

\begin{itemize}
\item \textsuperscript{135} See supra notes 95-98 and accompanying text.
\item \textsuperscript{136} Id. Although courts rejecting the quantum meruit rule and other judges dissenting from the application of the rule maintain that use of the client discharge rule results in the wholesale discharge of attorneys and thus a reluctance on their part to enter into contingency fee contracts, there is no support for these claims. See supra notes 99-100 and accompanying text.
\item \textsuperscript{137} See Gair v. Peck, 6 N.Y.2d 97, 111 (1959), cert. denied, 361 U.S. 374 (1960). The Gair court held that:
\begin{quote}
[t]he duty and function of the Appellate Divisions to keep the house of the law in order does not hinge upon whether clients, worn down by injuries, delay, financial need and counsel holding the purse strings of settlement, knowing little about law or lawyers, have had the stamina to resist in court by hiring other lawyers to be paid out of the other half of the recovery for defending against the first lawyer.
\end{quote}
\item \textsuperscript{138} Ill. Rev. Stat. ch. 13, para. 14 (1909). The Illinois statute states in relevant part:
\begin{quote}
Attorney at law shall have a lien upon all claims, demands and causes of action . . . which may be placed in their hands by their clients for suit or collection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients . . . and such lien shall attach to any verdict, judgment or decree entered and to any money or property which may be recovered . . .
\end{quote}
\item \textsuperscript{139} Id. A charging lien gives the attorney the right to have the proceeds of the client's claim applied to the payment of his fees in connection with that claim, thereby protecting the attorney's right to compensation. People v. Keeffe, 405 N.E.2d 1012 (N.Y. 1980); In re Estate of Gutches, 456 N.Y.S.2d 249 (N.Y. App. Div. 1982).
\end{itemize}
nothing as “the failure of [the attorney’s] client to receive any proceeds from the prior judgment meant the lien was incapable of attaching to anything.”

Similarly, Minnesota’s lien law provides for an attorney to obtain a charging lien upon a judgment; the theory behind permitting the lien is that “a successful party should not be permitted the fruits of the judgment secured by the attorney’s services without paying for those services.” This theory reflects a policy underlying charging liens of both avoiding unjust enrichment to the client and not allowing the attorney recovery when the client has not benefited from the attorney’s services.

Instructively, New York’s charging lien law, which predates Martin v. Camp, sets forth a legislative policy which conflicts with the judicial decisions entitling an attorney to quantum meruit even if the underlying action fails. This legislative policy is consonant with the rationale in Martin v. Camp that a client not be penalized for discharging his attorney. However, it is inconsistent with those cases allowing for the possibility of enriching the contingent fee attorney at the client’s expense.

Section 475 confers upon an attorney the right to a charging lien on his client’s cause of action and hence any proceeds which ensue therefrom. Essentially, this allows the discharged attorney to retain a type of security interest when turning over the client’s files to his replacement, thereby substituting a charging lien for his relinquished retaining lien. To en-

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143 N.Y. Jud. Law § 475 (McKinney 1938).

144 Kaplan v. Port Taxi, Inc., 452 N.Y.S.2d 437, 438 (N.Y. App. Div. 1982) (“the sina [sic] qua non for asserting a nonpossessor charging lien is existence of proceeds created by the attorney’s efforts”).

145 For an analysis of attorneys’ liens in New York, see 1 Warren’s Weed New York Real Property, Attorneys at Law § 6, at 84 (Pocket Part May 1991). A retaining lien compels payment because the attorney can withhold documents that the client may need to continue the action, forcing the client to pay charges justly due. Tri-Ex Enters, Inc. v. Morgan Guaranty Trust Co., 583 F. Supp. 1116 (S.D.N.Y. 1984). The attorney may withhold the property until the lien is satisfied or
force the charging lien, either the client or the attorney must first petition the court which will then determine its amount. In its enforcement order, the court may "direct that the lien be satisfied out of money or property to which the lien attaches even though it is not in the possession or control of the attorney." Furthermore, "if an attorney is discharged without cause he will be allowed [his] charging lien upon the proceeds of the lawsuit, the amount to be determined on a quantum meruit basis at the conclusion of the case, and his fees will be made a charge included within the fees to which the incoming attorney will be entitled."

Significantly, under these lien laws, the fixing of the quantum meruit amount in the case of the discharged attorney is not done until there is a final outcome in the underlying action. Hence, the right of an attorney to recover his charging lien depends on the success or failure of the client in the underlying action. "When the cause of action does not eventuate in a recovery for the client, the lien has nothing to fasten to. Hence, when the cause of action is dismissed the lien fails."

These lien laws, as interpreted and administered by the courts, embody the most equitable and sound application of the quantum meruit rule. Essentially, the statutes' intent is to uphold the policy rationale which the Martin v. Camp court espoused while eliminating the potential dan-

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146 People v. Keefe, 405 N.E.2d 1012, 1015 (N.Y. 1980) (quoting Hovey v. Elliot, 23 N.E. 475 (N.Y. 1890)).
147 Id. at 1015 (citations omitted).
148 Id. (citations omitted).
149 Id. See also DeSalvatore v. Lavigne, 533 N.Y.S.2d 41 (N.Y. App. Div. 1988) (the amount of a charging lien should be determined subsequent to any recovery at trial or settlement in the underlying action); In re Shaad, 399 N.Y.S.2d 822, 823 (N.Y. App. Div. 1977) (the amount of the lien is determined subsequent to any recovery because the amount of recovery is an element in determining a reasonable fee).
ger of unjust enrichment, a danger which the courts' misapplications of *Martin v. Camp* have created. Under these lien laws, in a contingent fee action, the client is not obligated to pay a fee unless he succeeds in the underlying action. Such a result preserves the incentive structure that is the basis for the contingent fee agreement. It also preserves the feature of the certainty of attorney recovery if the claim prevails. While there is a risk of no recovery — indeed there has to be such a risk for the contingent fee to be legally and ethically valid — and this risk is somewhat accentuated by the client discharge rule, the court will account for this risk in fixing the quantum meruit award in light of the outcome of the underlying action. For those courts concerned about clients' abilities to secure contingent fee representation, adoption of this policy would at least maintain attorneys' incentives for entering such agreements. Moreover, it appears that any such concerns for attorneys' incentives are misplaced; the incentives present already appear far in excess of the requirements to secure access for impecunious clients to the legal claims process.

**CONCLUSION**

*Martin v. Camp* established the rule that a client could discharge his attorney without penalty even if without cause. The rule's rationale is based upon the necessity of reposing trust and confidence in the attorney. Once that trust and confidence dissipate, the basis for the relationship is undermined and the client should have the right to terminate the relationship. The right to terminate would be evanescent if the client were then to be liable for contract damages. Allowing the client to discharge his attorney without penalty deprives the attorney of the value of his expectancy but allows him to recover in quantum meruit for his efforts prior to discharge.

The use of overbroad language to resolve the subsidiary issues in *Martin v. Camp* involving the statute of limitations and maturity of the right to seek a fee led several jurisdictions to conclude that a discharged attorney employed on a contingent fee basis could be entitled to a fee in excess

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112 So if the underlying action is very successful, the quantum meruit amount will yield a higher amount. See *supra* notes 108, 112.

113 See *supra* text accompanying notes 98-99; see also Walter Olson, *Sue City, The Case Against the Contingency Fee*, POLICY REV. 46 (Winter 1991).
of the contract price.

This Article has demonstrated that this application of *Martin v. Camp* misconstrues its basic policy rationale and misapplies its central holding by allowing the client to be penalized for exercising his discharge right.

By enacting charging lien laws, legislatures created a structure which fully serves both client and contingent fee attorney in the event the client dismisses the attorney. The results embody the policies underlying contingent fee agreements while avoiding unjustly enriching either party, because the amount of the attorney's compensation is not determined until the client's recovery occurs. The language in those cases allowing for a contrary outcome should be rejected. Policy arguments advanced by courts in support of their anomalous application of *Martin v. Camp* have been demonstrated to be unfounded, implausible, inconsistent with reality, and adverse to other, equally important, policies. Actions by contingent fee attorneys for quantum meruit in the event of client discharge should be stayed until the outcome of the underlying action, and if the client fails to recover then no fee should be recoverable by the discharged contingent fee attorney. If the client does recover, the recovery should be limited by the contract percentage.

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188 See *supra* notes 83-89 and accompanying text.