Consumers' rights in the legal marketplace: Problems of contingency fee clients who change attorneys

Richard Alexander

IN 1972 in *Fracasse v. Brent*,[1] the California Supreme Court established a new rule of damages in actions by attorneys seeking payment of attorney's fees from clients who had retained counsel under a contingency fee contract but who subsequently discharged their attorney before the contingency occurred. The court, speaking through Justice Burke, held that under these circumstances, an attorney is limited to a quantum meruit recovery, i.e., the reasonable value of services provided once the contingency has occurred.

While the holding in *Fracasse* is commendable, it has created problems which require further attenattention in order to protect the consumer and further promote the principle that a client should be able to change counsel at will.

The problem

When a contingency client discharges Lawyer A and consults Lawyer B, normally Lawyer A and Lawyer B can agree, after full disclosure to the client, to allocate the contingency fee arising from the client's case based upon the work performed by each attorney.[2] The client should also be advised that in the event they cannot agree:

1) The client will owe to Lawyer A the reasonable value of Lawyer A's services, should the contingency occur;

2) Client will still be obligated to Lawyer B for Lawyer B's services;

3) Lawyer A, under current California law is required to sue the client to enforce his quantum meruit claim, even if Lawyer B agrees to indemnify and hold the client harmless against Lawyer A's claim.

Consequently, consumers are discouraged from changing attorneys freely. A more workable solution must remove this burden from the consumer.

Case law

Prior to *Fracasse*, an attorney discharged under a contigent fee contract could recover the full amount of the contract from the client under the watershed rule of *Baldwin v. Bennett*.[3] The rationale behind this holding was that the client was deemed to have breached the contract, thereby becoming liable to the lawyer for the agreed fee. The contract price rule was specifically held applicable to contingent fee contracts in *Bartlett v. Odd Fellows' Savings Bank*[4] where the court also held that the wrongfully discharged attorney's cause of action accrued at the happening of the contingency and not at the time of discharge.

Fracasse reversed the contract price rule, reaffirming the consumer's absolute right to discharge counsel.[5] Such discharge does not discharge the attorney's lien itself,[6] which survives discharge, al-

[1](1972) 6 Cal.3d 784.

[2]ABA Code of Professional Responsibility, DR 2-106. California Rules of Professional Responsibility, Rule 2-108, provides:

> A member of the State Bar shall not divide a fee for legal services with another person licensed to practice law who is not a partner in or associate of his law firm or law office, unless:
> (1) The client consents to employment of the other person licensed to practice law after a full disclosure that a division of fees will be made; and
> (2) The division is made in proportion to the services performed or responsibility assumed by each; and
> (3) The total fee charged by all persons licensed to practice law is not increased solely by reason of the provision for division of fees.

[3](1854) 4 Cal. 392. See generally, Note, *Limiting the Wrongfully Discharged Attorney's Recovery to Quantum Meruit—Fracasse v. Brent* (1973) 24 Hastings L.J. 771.

[4](1889) 79 Cal. 218.

[5]See also *Goldstein v. Lee* (1975) 46 Cal.App.3d 614, *People v. Wong* (1975) 53 Cal.App.3d 287.

[6]*Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 598 following *Salopek v. Schoenman* (1942) 20 Cal.2d 150, 156.

lowing plaintiff's former counsel to recover attorney's fees out of the proceeds of any settlement or judgment due and owing.[7]

Later appellate cases have refined the procedural application of this rule. *Bandy* v. *Mt. Diablo Unified School Dist.*[8] held that the discharged attorney cannot intervene in the underlying cause of action in order to establish his lien interest in the anticipated recovery; he *must* maintain a separate action against the client to enforce any lien rights. Later the same year the decision in *Siciliano* v. *Fireman's Fund Ins. Co.*[9] established the discharged attorney's right to enforce his lien against a judgment or settlement as an equitable assignee of the client's recovery to the extent of the fees and costs which are due to him. As a result of this case, the discharged attorney can obligate the defendant and his insurer in the underlying cause of action by giving actual notice of the attorney's lien to the potential equitable debtor. Normally this is accomplished by filing a notice of lien in the original action. Remedies for enforcement of the attorney's lien are not abrogated or changed by *Fracasse*.[10]

Siciliano also suggests by way of dicta that discharged counsel has the right to obtain declaratory relief and restraining orders to prevent the disbursement of recovery proceeds until the quantum meruit claim is satisfied, thereby causing the successful plaintiff delay in realizing the immediate benefit of his or her award.

Criticism

Fracasse subjects the client to the jeopardy of paying additional fees.

> To the extent that such discharge is followed by the retention of another attorney, the client will in any event be required, out of any recovery, to pay the former attorney for the reasonable value of his services. Such payment, in addition to the fee charged by the second attorney, should certainly operate as a self-limiting factor on the number of attorneys so discharged.[11]

In effect, the client who changes attorneys may ultimately pay inflated prices for basic legal services. This could happen in the situation where the first attorney is paid for the reasonable value of his services; the second attorney is also paid his agreed-upon fee, and perhaps, in addition, a third fee for defending the fee dispute.

The threat of such additional fees clearly inhibits the client from freely changing attorneys in a system where public policy dictates that the interest of the client is always superior to that of the attorney.[12] Consequently, the client who does change attorneys is prejudiced by just that kind "undue restriction" the *Fracasse* court ostensibly desired to prevent.

The present rule requires the original attorney to sue his former client—an action which is repugnant to our traditional concept of the attorney-client relationship.

There are also conflict of interest problems inherent in any action based on the former confidential relationship. Legally, that relationship does not end when the client dismisses his attorney; and attorneys and clients would be equally distressed with any rule of law which requires counsel to sue clients for whom they were formerly obligated to provide their best talents, industry and confidence. Such litigation is destructive of the attorney-client relationship and increases the public's present wariness of the legal profession.

Futhermore, the client-consumer normally has little to contribute to the thorny problem of determining the reasonable value of services performed by either attorney. The difficulty presented by this question is one of the reasons that the quantum meruit rule of damages remains a minority view in the country today,[13] and it was one of the reasons Justice Sullivan registered his dissent in *Fracasse*.[14] The *Fracasse* majority cited *Los Angeles* v. *Los Angeles-Inyo Farms Co.*[15] for the criteria to consider in determining a reasonable fee for the first attorney. They are:

> (T)he nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the success or failure of the attorney's efforts, the attorney's skill and learning, including his age and experience in the particular type of work demanded.[16]

Other factors to be considered are:

> (1) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.

[7] *Id*

[8] (1976) 56 Cal.App.3d 230.

[9] (1976) 62 Cal.App.3d 745.

[10] 62 Cal.App.3d at 759.

[11] 6 Cal.3d at 791.

[12] 6 Cal.3d at 790; *Gage* v. *Atwater* (1902) 136 Cal. 170.

[13] See generally, Annot 109 A.L.R. 674 (1937).

[14] 6 Cal.3d at 799.

[15] (1933) 134 Cal.App. 268.

[16] 134 Cal.App. at 276. *See also*, fn. 2 *supra*.

Richard Alexander *received his B.A. degree from Ohio Wesleyan University and his J.D. from the University of Chicago Law School. He is associated with a San Jose law office and has published articles on a variety of subjects. Mr. Alexander is a member of the State Bar Committee on Professional Ethics and is a Trustee of the Santa Clara County Bar Association.*

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The amount involved and the results obtained.

(4) The time limitations imposed by the client or by the circumstances.

(5) The nature and length of the professional relationship with the client.

(6) The experience, reputation, and ability of the lawyer or lawyers performing the service.

(7) Whether the fee is fixed or contingent.

(8) The time and labor required.

* * * [9]

A normal contingent fee case also presents further difficulties. It is not easily divisible as to the quality of time or labor performed by the attorneys. Often the most difficult and valuable services are rendered in uncovering the true nature of the underlying liability, securing evidence, locating experts and counseling the client before substantial discovery begins or appearances are made.

A proposal

When attorneys cooperate on the transfer of a case in which the fee will be paid on a contingency basis, current custom requires the client pay only one fee from either settlement or judgment. Counsel usually agrees to apportion the fee based upon the work performed, and they obtain the consent of the client pursuant to Rule 2-108 of the Rules of Professional Responsibility.[14] This practice facilitates easy discharge of an attorney by the dissatisfied client-consumer.

Regrettably, California law fails to require a similar result when transfer of a contingency fee case cannot be accomplished cooperatively. California law should recognize that a client who retains counsel on a contingency basis should be charged only one fee from the proceeds of the recovery. Both former and subsequent counsel should expect to satisfy their competing quantum meruit claims solely from that one fee. Where they cannot agree upon an allocation, the lawyer concluding the case should be authorized to discharge the paying parties and their insurers, if any, and to disburse to the client his or her share. The balance then should be either temporarily allocated between the attorneys by agreement or held in trust pending a determination of the quantum meruit interest of each attorney in the fee. Either attorney would then be free to pursue the fee dispute with the other lawyer without burdening the client.

Such a rule would allow defendants and their insurance carriers to promptly pay settlements and awards to the prevailing party and would relieve courts from applications for equitable relief pending determinations concerning attorney's liens and related hearings by discharged former counsel.

This proposal would allow the consumer of legal service, who has an absolute right without the burdens and restrictions imposed by present law. This rule would operate more efficiently than the present rule by no longer involving the client, defendants and insurers in the fee resolution process, thereby resulting in benefits for these persons and the courts as well.

More importantly, it would focus the fee allocation dispute upon the attorneys who actually performed services at no additional cost to the client. Furthermore, it would institute a rule of fairness for the consumer: The consumer who retains a lawyer on a contingency basis should pay only one attorney's fee.

[13]California Rules of Professional Responsibility, Rule 2-107.

[14]See fn. 2 *supra*.