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Ethics and Professional Responsibility—Contingency Fees—An Attorney's Right of Recovery When Discharged from a Contingent Fee Contract in Arkansas. *Salmon v. Atkinson*, 355 Ark., 137 S.W.3d 383 (2003)

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ETHICS AND PROFESSIONAL RESPONSIBILITY—CONTINGENCY FEES—AN ATTORNEY’S RIGHT OF RECOVERY WHEN DISCHARGED FROM A CONTINGENT FEE CONTRACT IN ARKANSAS. *Salmon v. Atkinson*, 355 Ark. 325, 137 S.W.3d 383 (2003).

I. INTRODUCTION

Contingent fees compensate attorneys for their services by awarding attorneys a share of the plaintiff’s recovery.¹ The primary advantage of the contingent fee is that it allows a person of modest means to obtain legal services.² Contingent fee contracts become problematic when clients discharge their attorneys. Questions then arise as to what, if any, compensation the attorneys are entitled to receive for services rendered and, if the attorneys are entitled to compensation, when the cause of action to recover such compensation accrues. In the case of *Salmon v. Atkinson*, the Arkansas Supreme Court considered these questions when it addressed the issue of “[w]hether an attorney who enters into a contingent fee contract with a client and is later discharged by the client may bring an action for a *quantum-meruit* fee prior to the resolution of the former client’s lawsuit.”³

In addressing the question presented in *Salmon*, this note examines the facts of the case, focusing on the events that brought the parties into court, what the parties sought in court, and the procedural history of the case leading up to the Arkansas Supreme Court’s decision.⁴ This note delves into the historical background of the contingent fee by exploring its evolution under English common law.⁵ Then the focus shifts to the historical development of contingent fees within the United States,⁶ followed by a detailed evolution of contingent fees within Arkansas exploring all the components thereof.⁷ Finally, this note provides a synopsis and background of the bodies of law that the court considered in its holding in *Salmon*.⁸

This note then sets forth the reasoning of the majority and the concurring opinion in *Salmon*.⁹ Then this note explores the significance of the court’s decision in *Salmon*, focusing on how the court’s holding affects the Arkansas Model Rules of Professional Conduct and Arkansans’s access to

1. JOHN W. TOOTHMAN & WILLIAM G. ROSS, LEGAL FEES LAW AND MANAGEMENT 159 (2003).

2. *Id.* “[I]n our heart of hearts we know that 90 percent of the American people cannot afford to pay lawyers by the clock.” *Id.* (quoting Arthur R. Miller, *Maybe Light at the End of the Tunnel: Is the Litigation Explosion Imploding?*, 61 DEF. COUN. J. 378, 379 (1994)).

3. 355 Ark. 325, 326, 137 S.W.3d 383, 383 (2003) (italics omitted).

4. *See infra* Part II.

5. *See infra* Part III.A.1.

6. *See infra* Part III.A.2.

7. *See infra* Part III.B.

8. *See infra* Part III.C.

9. *See infra* Part IV.

the courts.¹⁰ Finally, the note sets forth a proposed rule aimed at alleviating the problematic ramifications of the court's decision in *Salmon*.¹¹

II. FACTS

On June 19, 2000, Joy Salmon hired Atkinson Law Offices on a contingency fee basis to pursue a claim for damages against the estate of George Brown.¹² Salmon lived with Brown for some time prior to Brown's death and provided care for him in a nursing capacity.¹³ Salmon believed that she was the widow of Brown and that his heirs were mistreating her, and thus, Salmon wanted to bring suit against the estate.¹⁴ The Atkinson Law Offices took the case and entered into a contingent fee contract with Salmon, whereby the Atkinson Law Offices would take fifty percent of any recovery plus costs, and in the event of no recovery, no fee was due.¹⁵

James Howell, who had recently graduated from law school, began work on the case under the supervision of Atkinson.¹⁶ The Atkinson Law

10. See *infra* Part V.

11. See *infra* Part V.

12. *Salmon v. Atkinson*, 355 Ark. 325, 326, 137 S.W.3d 383, 383 (2003). This was the first time that Salmon had met Atkinson's associate, James Howell. Appellants' Brief at 1, *Salmon v. Atkinson*, 355 Ark. 325, 137 S.W.3d 383 (2003)(No. 03-535).

13. *Salmon*, 355 Ark. at 326, 137 S.W.3d at 383. In June of 2000, Salmon told Atkinson, Howell, and Connie Dejesus, a part-time receptionist for the Atkinson Law Offices, that she was a registered nurse. Appellants' Brief at 1, 4, *Salmon* (No. 03-535).

14. Appellants' Brief at 1, *Salmon* (No. 03-535).

15. *Salmon*, 355 Ark. at 326, 137 S.W.3d at 383. The Atkinson Law Offices took the case on a contingency fee basis because Salmon told them that she did not have any money, and they believed that she did not have any money and was living on the street. Appellants' Brief at 1, 3, *Salmon* (No. 03-535). The contingent fee contract form reads as follows:

This contract and agreement made and entered into by and between the undersigned client and Atkinson Law Offices

WHEREAS, client has a claim or demand against Joy Salmon (Brown) and possibly others now unknown

IT IS UNDERSTOOD AND AGREED AS FOLLOWS:

In consideration of the services rendered and to be rendered by Atkinson Law Offices, client agrees that the Atkinson Law Offices shall receive for their services 50% of any amount that is recovered . . . after deducting court costs and other legal expenses

It is understood that in the event of no recovery, no fee shall be charged by Atkinson Law Offices.

Id. at 31, *Salmon*.

16. Appellants' Brief at 1, *Salmon* (No. 03-535). Atkinson said that Howell was a new attorney and had a lot of free time. *Id.* at 2. Howell received his Juris Doctor from the University of Arkansas at Little Rock in 1999 and obtained admission to the Arkansas Bar that same year. MARTINDALE-HUBBELL LAW DIRECTORY AR47P (Reed Elsevier, Inc. 2004). Atkinson received her Juris Doctor from the University of Arkansas and obtained admission to the Arkansas Bar in 1955. *Id.* at AR24P.

Offices began work on Salmon's case by interviewing multiple witnesses, researching Salmon's claim that she was Brown's wife, researching the general law, and negotiating with the estate of Brown.¹⁷ In their research, they discovered that Salmon was not Brown's wife.¹⁸ Even so, Atkinson Law Offices believed that Salmon had a valid claim for four million dollars against the estate of Brown for the care Salmon provided to Brown prior to his death.¹⁹ Supported by their research and investigation, Howell, under the supervision of Atkinson, drew up a petition for Salmon to file in the probate case.²⁰

In late July of 2000, Atkinson Law Offices presented the petition to Salmon for her signature, but Salmon said she wanted to think about filing the claim and left the law offices with the petition.²¹ The next communication the Atkinson Law Offices received from Salmon was a note dated August 1, 2000,²² in which Salmon wrote, "I am writing to inform you that I am terminating your services effective immediately."²³ In response, Howell, at the direction of Atkinson, sent a letter to Salmon dated August 21, 2000, billing Salmon for forty-eight hours at the customary billing rate of \$150 an hour for a total of \$7200 for services rendered.²⁴ The letter also stated that Salmon must file her claim against the estate of Brown by September 1, 2000.²⁵ On September 1, 2000, Salmon filed a petition against the Brown estate pro se,²⁶ raising the same issues that the Atkinson Law Offices had intended to raise on her behalf.²⁷

17. *Salmon*, 355 Ark. at 327, 137 S.W.3d at 384.

18. *Id.*

19. *Id.* The Atkinson Law Offices talked to Virgil Young, the attorney for the executor of the Brown estate, and thought that Young might make them an offer, but this did not materialize into a settlement. See Appellants' Brief at 2, *Salmon* (No. 03-535).

20. *Salmon*, 355 Ark. at 327, 137 S.W.3d at 384.

21. *Id.*

22. *Id.*

23. Appellee's Brief at 8, *Salmon v. Atkinson*, 355 Ark. 325, 137 S.W.3d 383 (2003) (No. 03-535).

24. *Salmon*, 355 Ark. at 327, 137 S.W.3d at 384; Appellants' Brief at 2, 34, *Salmon* (No. 03-535). Atkinson Law Offices performed services for Salmon from June 19 to July 31 of 2000, *Salmon*, 355 Ark. at 327, 137 S.W.3d at 384, but has no records of time spent on Salmon's claim, Appellants' Brief at 2, *Salmon* (No. 03-535). Atkinson stated that forty-eight hours was a conservative estimate of time spent. *Id.* at 3. Additionally, Dejesus, the Atkinson Law Offices' part-time receptionist, said that Salmon visited frequently, meeting with Howell for thirty minutes or more. *Id.* at 4.

25. *Salmon*, 355 Ark. at 327, 137 S.W.3d at 384; Appellants' Brief 34, *Salmon* (No. 03-535).

26. *Salmon*, 355 Ark. at 327, 137 S.W.3d at 384; Appellants' Brief at 32-33, *Salmon* (No. 03-535). Atkinson testified that Salmon's claim "embodies all of the things we discussed and all of the avenues we pursued to try to recover something for her." *Salmon*, 355 Ark. at 330, 137 S.W.3d at 386.

27. *Salmon*, 355 Ark. at 330, 137 S.W.3d at 386.

On May 21, 2001, Atkinson and Howell filed a complaint in the Circuit Court of Pulaski County against Salmon praying for \$7200 plus interest and costs for services rendered prior to their discharge by Salmon.²⁸ The complaint alleged that Salmon utilized Atkinson's and Howell's services with full understanding of their expectation of payment and that Salmon was liable for the reasonable value of the services in quantum meruit.²⁹ On June 14, 2001, Salmon, represented by Alston Jennings of Wright, Lindsey, and Jennings, L.L.P., filed her Answer stating that she had never received a settlement or judgment on her claim, which was a condition precedent to Plaintiff's receiving a fee for their services³⁰ as stated in the contract into which the parties entered.³¹

On December 3, 2002, the case went before a jury of six members, and the jury returned a verdict in favor of Atkinson and Howell in the amount of \$7200.³² On December 4, 2002, Salmon filed a motion for judgment notwithstanding the verdict, arguing that the contingent fee contract provided that "in the event of no recovery no fee shall be charged" and, because there was not yet a recovery on the claim, the jury verdict could not be supported by substantial evidence.³³ On December 17, 2002, the court denied Defendant's Motion for Judgment Notwithstanding the Verdict, finding that there was substantial evidence to support the jury's verdict.³⁴ That same day the judge entered an order stating that Atkinson and Howell recover \$7200 from Salmon.³⁵ Refusing to accept the verdict, Salmon filed a motion for new trial on January 2, 2003, and renewed her Motion for Judgment Notwithstanding the Verdict.³⁶ On February 4, 2003, the judge denied the motions without written explanation.³⁷

28. Appellants' Brief at 13, *Salmon* (No. 03-535).

29. *Id.*

30. *Id.* at 15. The judge denied the motion for summary judgment that Salmon filed with her Answer. *Id.* at 5.

31. *Id.* at 31.

32. *Id.* at 5. At the close of the evidence, Salmon's attorney moved for a directed verdict. *Id.* The motion was unsuccessful. *Id.* Salmon, represented by counsel, did not attend the trial. Appellee's Brief at 3, *Salmon v. Atkinson*, 355 Ark. 325, 137 S.W.3d 383 (2003) (No. 03-535).

33. *Salmon v. Atkinson*, 355 Ark. 327, 137 S.W.3d 383, 384 (2003). Plaintiffs presented a proposed judgment after the jury verdict. Appellants' Brief at 19, *Salmon* (No. 03-535). On December 9, 2002, Salmon objected to the proposed judgment, stating that her Motion for Judgment Notwithstanding the Verdict was still pending. *Id.*

34. Appellants' Brief at 21, *Salmon* (No. 03-535).

35. *Id.* at 22.

36. *Id.* at 24. Salmon reasoned that the judgment could not stand on the basis of contract law because the condition precedent for any right to fees had not occurred and that the judgment was unsupported by competent evidence. *Id.* at 25. Salmon's basis for a new trial was the improper denial of motions for a directed verdict, improper jury instructions, and an error in admission of evidence concerning Plaintiff's time spent and activities performed on

On February 28, 2003, Salmon filed a notice of appeal.³⁸ On appeal, Salmon argued that the trial court was in error because a “discharged attorney’s cause of action does not accrue unless and until the client is successful in recovering an award.”³⁹ Atkinson Law Offices argued in the converse that a discharged attorney may recover in quantum meruit prior to the discharging client’s successful recovery of an award.⁴⁰

III. BACKGROUND

The contingent fee issue that the court considered in *Salmon v. Atkinson*⁴¹ developed over a long period of time.⁴² This section explores the historical evolution of the contingent fee, tracing its development to the question the court considered in *Salmon*.⁴³ In exploring the evolution of the contingent fee, this section reviews the historical background of the prohibition of contingent fees under English common law, focusing on the law against champerty.⁴⁴ Then the focus shifts to the initial prohibition of contingent fees and their eventual acceptance within the United States.⁴⁵ Next, this section provides a detailed evolution of the contingent fee within Arkansas, while exploring all the components thereof,⁴⁶ followed by a synopsis and background of the bodies of law that the court considers in its holding⁴⁷ in *Salmon*.⁴⁸

A. Historical Development

“Under early English and Roman law, advocates arguing before courts were not entitled to compensation for their services, although they could

Salmon’s case. *Id.* at 26.

37. *Id.* at 28.

38. *Id.* at 29.

39. *Salmon v. Atkinson*, 355 Ark. 325, 326, 137 S.W.3d 383, 383 (2003).

40. Appellee’s Brief at 3, *Salmon v. Atkinson*, 355 Ark. 325, 137 S.W.3d 383 (2003) (No. 03-535).

41. 355 Ark. at 326, 137 S.W.3d at 383.

42. Kenneth B. Hughes, *The Contingent Fee Contract in Massachusetts*, 43 B.U. L. REV. 1, 3 (1963).

43. See *infra* Parts III.A–C.

44. See *infra* Part III.A.1.

45. See *infra* Part III.A.2.

46. See *infra* Part III.B.

47. See *infra* Part III.C.

48. 355 Ark. 325, 137 S.W.3d 383 (2003).

accept donations."⁴⁹ Today, while such extreme restrictions are no longer prevalent, almost every nation prohibits the use of contingent fees.⁵⁰

1. *Champerty*⁵¹ and Its Restriction of the Contingent Fee

In early England, the contingent fee, traditionally considered both illegal and unethical, violated the law against champerty,⁵² which restricted a person from supporting a lawsuit for a share of the expected recovery.⁵³

The English law of champerty developed from the English law of maintenance,⁵⁴ a law that forbids assistance in prosecuting or defending a suit by someone who has no bona fide interest in the action.⁵⁵ The law of maintenance can be traced back no further than the end of the eleventh century when William the Conqueror invaded England and divided the land of the natives into sixty-thousand knights' fees.⁵⁶ The law of maintenance assured that the conquered poor had limited means to seek redress in a court of justice for the taking of their land because they lacked the education, money, and right to transfer the suit to one who had the abilities and means to pursue it.⁵⁷

By 1275 the law against champerty amended the law of maintenance stating, "No minister of the King shall maintain pleas, suits or matters depending in the King's courts for lands, tenements or other things, for to have part thereof, or profit by covenant made; and he that doth so, shall be punished at the King's pleasure."⁵⁸ In 1300, 28 Edward 1, chapter 11 extended

49. Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 35 (1989).

50. See *id.* at 38–39; see also TOOTHMAN & ROSS, *supra* note 1, at 162; ROBERT H. ARONSON, ATTORNEY-CLIENT FEE ARRANGEMENTS: REGULATION AND REVIEW 77 (Federal Judicial Center 1980). "England no longer prohibits the use of all contingent fees [; however,] their use is still less common than in the United States." See THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY PROBLEMS AND MATERIALS 104 (Robert C. Clark et al., 8th ed. 2003). In the United States, the contingent fee is extending beyond its traditional role in personal injury cases by moving into other professions, such as real estate brokering and investment banking. Brickman, *supra* note 49, at 38 n.41.

51. For a more detailed discussion of champerty, see Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48 (1935).

52. MORGAN & ROTUNDA, *supra* note 50, at 104. Arkansas Model Rules of Professional Conduct Rule 1.8 (j) embodies the old common-law rule of champerty stating, "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client;" however, the rule now provides exceptions for contingent fees and attorney liens. ARK. MODEL RULES OF PROF'L CONDUCT R. 1.8 (2003).

53. BLACK'S LAW DICTIONARY 224 (7th ed. 1999).

54. *Lytle v. State*, 17 Ark. 608, 665 (1857); *Bayard v. McLane*, 3 Del. 139, 208 (1840).

55. BLACK'S LAW DICTIONARY 965 (7th ed. 1999).

56. *Lytle*, 17 Ark. at 665.

57. *Id.*

58. *Id.* (quoting Statute of Westminster, 1275, 3 Edw. 1, c. 25 (Eng.)). Hosts of other

the law of champerty to all persons with even higher penalties.⁵⁹ Then in 1305 the statute *de definitio conspirat* outlawed champerty, declaring that “[c]hampeters be they who move pleas or suits, or cause them to be moved by their own procurement, or by others, and sue at their proper costs, to have part of the land in variance, or part of the gains.”⁶⁰

With the law of champerty defined under English common law,⁶¹ the next section delves into the acceptance and denial of champerty within the United States.⁶²

2. *Denial and Acceptance of Champerty and the Contingent Fee in the United States*

In 1813 Justice Brackenridge said that “parties not monied” would sometimes choose “to stipulate for something out of what was recoverable[.]” and attorneys would take “what are called contingent fees.”⁶³ Justice Brackenridge theorized that the practice of contingent fee use arose from the scarcity of circulating currency in places like colonial Pennsylvania.⁶⁴ While Justice Brackenridge held contingent fees out as tolerated and common, the earliest reported United States decisions on the subject held contingent fee contracts to be champertous and void.⁶⁵ Despite these

officials were prohibited from maintaining champertous suits. *Id.* at 666 (citing Statute of Westminster, 1275, 13 Edw. 1, c. 49 (Eng.)).

59. *Id.* The following exception was seen in 1300, 28 Edward 1, chapter 11: “But it may not be understood hereby, that any person shall be prohibited to have counsel of pleaders, or of learned men in law, for his fee; or of his parents and next friends.” *Bayard*, 3 Del. at 210 (quoting Statute of Westminster, 1275, 28 Edw. 1, c. 11 (Eng.)).

60. *Lytle*, 17 Ark. at 666 (quoting Statute of Westminster, 1275, 33 Edw. 1 (Eng.)). In 1540 after King Henry the Eighth seized the estates of the Knights of Malta and granted the estates to his courtiers, he confirmed all former statutes against champerty in 38 Henry 8, chapter 9. *Id.* at 667.

61. *Id.* at 666.

62. *See infra* Part III.A.2.

63. Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231, 234 (1998) (quoting H.H. BRACKENRIDGE, *LAW MISCELLANIES* (Stanley Katz et al. eds., New York, Arno Press 1972) (1814)).

64. *Id.*

65. *Id.* at 234–35. *See, e.g.*, *Holloway v. Lowe*, 7 Port. 488, 490 (Ala. 1838) (holding champerty is the illegal maintenance of a suit); *Scobey v. Ross*, 13 Ind. 117, 119 (1859) (holding that contingent fees are champertous and void); *Rust v. Larue*, 14 Ky. 411, 418 (1823) (holding that champerty is an offense at common law); *Livingston v. Cornell*, 2 Mart (O.S.) 281, 295 (La. 1812) (holding that any contract where the client agrees to pay the attorney a portion of the object or amount in dispute is null and void); *Thurston v. Percival*, 18 Mass. 415, 417 (1823) (holding that champertous agreements are void, but the attorney might still recover in quantum meruit); *Backus v. Bryon*, 4 Mich. 535, 553 (1857) (holding that it would shock the sense of professional priority to allow an attorney to advertise that they would prosecute on a contingency fee basis).

decisions, however, state high courts began allowing contingent fee contracts.⁶⁶

It was not until the mid 1800's that some state legislatures allowed the use of contingent fees by statute.⁶⁷ In 1839 the Virginia legislature struck a blow to the ancient law of champerty stating that attorneys were free to contract fee arrangements with their clients.⁶⁸ In 1848 New York's statutory enactment of the Field Code repealed statutes regulating lawyers' fees, contributing significantly to the validation of contingent fees.⁶⁹

By 1884 the United States Supreme Court upheld a contingent fee contract in *Taylor v. Bemiss*.⁷⁰ In 1908 the American Bar Association followed the United States Supreme Court in recognizing the validity of contingent fee contracts.⁷¹ In its recognition the American Bar Association also sought to regulate contingent fee contracts through its original adoption of Canon 13,⁷² which reads as follows: "A contract for a contingent fee, where sanctioned by law, should be reasonable under all circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness."⁷³ With fast

66. Karsten, *supra* note 63, at 239. New York was the earliest to sanction contingency fee contracts in 1823, but New York was soon joined by Tennessee (1824), Louisiana (1834), Delaware (1840), Pennsylvania (1852), California (1854), Arkansas (1857), Georgia (1859), Texas (1860), and Virginia (1870). *Id.* at 239 n.65.

67. *Id.* at 240; *see also* Brickman, *supra* note 49, at 37; Hughes, *supra* note 42, at 3.

68. Karsten, *supra* note 63, at 240.

69. *Id.* Arkansas Code of 1987 Annotated section 16-22-302 has the same effect as the Virginia and New York statutes, stating, "The compensation of an attorney at law, solicitor, or counselor for his services is governed by agreement, expressed or implied, which is not restrained by law." ARK. CODE ANN. § 16-22-302 (Michie 2003).

70. 110 U.S. 42, 45 (1884). In the case of *Wylie v. Cox*, decided in 1854, the Supreme Court, in dicta, upheld a contingent fee contract whereby the attorney was to receive a stipulated sum of the amount recovered for the prosecution of a claim against the state of Mexico; but the case was resolved without addressing the contingent fee issue. 56 U.S. 415, 417-20 (1854).

71. Hughes, *supra* note 42, at 3.

72. *Id.*

73. CANNONS OF PROF'L CONDUCT, Canon 13 (1908). Today, Rule 1.5 of the Arkansas Model Rules of Professional Conduct seeks to broaden the regulation of the contingent fee contract as follows:

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following: . . . (8) whether the fee is fixed or contingent . . . (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer

growing acceptance of the contingent fee in the United States,⁷⁴ states had no choice but to regulate this new and controversial form of payment.⁷⁵

B. Evolution and Exploration of the Contingent Fee in Arkansas

In 1857 the Arkansas Supreme Court sanctioned the use of contingent fees by attorneys, holding that contingent fees did not violate any law of champerty in the state.⁷⁶ By 1878 problems arose concerning the compensation entitlement of attorneys discharged from a contingent fee contract.⁷⁷ In *Brodie v. Watkins*, the Arkansas Supreme Court held that when an attorney has a contract with a client to perform certain services, but is wrongfully prevented by the client from performing these services and the attorney remains ready to serve, the attorney can claim the entire amount agreed upon, minus the expenses the attorney would have incurred but not charged to the client had the attorney completed the agreement.⁷⁸ The *Brodie* court also reasoned that the attorney "will not be put upon the quantum meruit [;] he ought not to recover more than he would have made if he had gone on with the case."⁷⁹ Founded upon the common law doctrine of *assumpsit*, quantum

shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination. (d) A lawyer shall not enter into an arrangement for, charge, or collect: (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof. Provided, however, after a final order or decree is entered an attorney may enter into a contingent fee contract for collection of payments which are due pursuant to such decree or order; or (2) a contingent fee for representing a defendant in a criminal case.

ARK. MODEL RULES OF PROF'L CONDUCT R. 1.5 (2003).

74. Brickman, *supra* note 49, at 38; *see also supra* note 66 and accompanying text. In the middle of the nineteenth century, it was not uncommon for lawyers assisting in collection matters to collect on a contingent fee basis. Brickman, *supra* note 49, at 37. It was not until 1965 that Maine became the last state to accept contingent fee contracts between attorney and client. *Id.* at 39.

75. *See supra* note 73 and accompanying text.

76. Lytle v. State, 17 Ark. 608, 674 (1857) (holding that an attorney could receive a portion of disputed lands for work performed and work to be performed, but could only acquire title for said lands if the suit was successful and that the attorney could pay for the costs of the suit and not violate the law of champerty); *see also* Karsten, *supra* note 63, at 239.

77. *Brodie v. Watkins*, 33 Ark. 545, 547 (1878).

78. *Id.*

79. *Id.* at 548; *Berry v. Nichols*, 227 Ark. 297, 303, 298 S.W.2d 40, 43 (1957); *Brockman v. Rorex*, 212 Ark. 948, 953-54, 208 S.W.2d 991, 995 (1948). Should the client choose not to continue the action, or if the subsequent attorney recovers nothing, the discharged attorney will recover nothing. Louis A. Etoch, Note, Henry, Walden & Davis v. Goodman: *The Value of a Discharged Attorney's Contingent Fee Contract in Arkansas*, 42

meruit becomes available when a contract is unenforceable.⁸⁰ To calculate damages under a quantum meruit recovery, one must measure the value of the service in the labor market where the party sought the service itself.⁸¹ In *Beaumont v. J.H. Hamlen & Son*, the court held that if an attorney, without just cause, abandons a client before the termination of the proceeding or commits a material breach of the employment contract, the attorney forfeits all right to compensation.⁸² The court reasoned that the contract being entire requires entire performance in order for the attorney to receive compensation, because the attorney is in the same position as any person engaged in rendering an entire service who must fully perform to recover the contracted amount.⁸³ These cases constitute the early case law development of the contingent fee in Arkansas.⁸⁴

The next major development involving recovery on a contingent fee contract was the Attorney's Lien Law originally enacted in 1941⁸⁵ and today contained in Arkansas Code of 1987 Annotated sections 16-22-301-304, whereby an attorney can place a lien on the proceeds of his or her cli-

ARK. L. REV. 549, 552 (1989). For a discussion on quantum meruit, see *infra* notes 90-92 and accompanying text.

80. DAN B. DOBBS, *LAW OF REMEDIES* 576-83 (2d ed. 1993).

81. *Id.* The factors to be considered in determining the reasonableness of attorney's fees not specifically fixed by contract are determined on a case-by-case basis examining the attorney's skill and experience, the parties' relationship, difficulty of services, extent of the litigation, the time and labor devoted to the cause, and the results obtained. *Robinson v. Champion*, 251 Ark. 817, 818-19, 475 S.W.2d 677, 678 (1972). The Arkansas Model Rules of Professional Conduct Rule 1.5 also contains considerations in determining reasonableness of attorney 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 by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

ARK. MODEL RULES OF PROF'L CONDUCT R. 1.5. Additionally, Arkansas Code of 1987 Annotated section 16-22-305 provides that the attorney will satisfy any unnecessary costs. ARK. CODE ANN. § 16-22-305 (Michie 2003).

82. 190 Ark 630, 632, 81 S.W.2d 24, 25 (1935).

83. *Id.*, 81 S.W.2d at 25. To allow a discharged attorney to collect the entire fee without providing all of or a substantial amount of the services contemplated in the contract violates the intentions of the Code of Professional Responsibility that an attorney should only collect an earned fee. Laura A. Smith, Recent Development, O'Rourke v. Cairns: *The Louisiana Supreme Court Modifies the Quantum Meruit Test Used to Allocate Fees to Attorneys Fired for Cause From Contingency Fee Arrangements*, 71 TUL. L. REV. 1835, 1838 (1997).

84. See *supra* notes 76-79, 82, 83 and accompanying text.

85. 1941 Ark. Acts 59 & 306.

ent's cause of action, claim, or counterclaim to recover payment due for services related to the action or claim.⁸⁶ The Arkansas Supreme Court has interpreted the Attorney's Lien Law many times since its enactment.⁸⁷ The most significant of these cases is *Henry, Walden & Davis v. Goodman*, in which the Arkansas Supreme Court examined the legislative intent behind the Attorney's Lien Law.⁸⁸ In *Goodman*, the court, contrary to its prior decisions,⁸⁹ held that an "attorney is limited to a quantum meruit recovery for the reasonable value of his [or her] or her services."⁹⁰ One of the reasons given by the court for this decision was the preservation of the client's right to discharge his or her attorney because holding a client liable to a discharged attorney for a contingent fee contract would impede upon the right of a client to discharge his or her attorney.⁹¹ Another reason given by the

86. ARK. CODE ANN. §§ 16-22-301-304 (Michie 2003).

87. *Lancaster v. Fitzhugh*, 310 Ark. 590, 592, 839 S.W.2d 192, 193 (1992) (holding that an attorney can recover from third persons under the Attorney Lien Statute); *Cato v. Ark. Mun. League Health Benefit Fund*, 285 Ark. 419, 424, 688 S.W.2d 720, 723 (1985) (holding that the attorney may proceed against his former client or any or all of the parties litigant to collect his or her fee); *Myers v. Muuss*, 281 Ark. 188, 192, 662 S.W.2d 805, 807-08 (1984) (holding that a court may award a fee under this statute even though no monetary remuneration is given); *Slayton v. Russ*, 205 Ark. 474, 478, 169 S.W.2d 571, 573-74 (1943) (holding that a reasonable fee is not necessarily limited by the amount of the settlement).

88. 294 Ark. 25, 741 S.W.2d 233 (1987).

89. See *supra* note 79 and accompanying text.

90. *Goodman*, 294 Ark. at 32, 741 S.W.2d at 236. The court traced the reasoning of the California Supreme Court decision in *Fracasse v. Brent*. *Id.*, 741 S.W.2d at 236 (citing *Fracasse v. Brent*, 6 Cal.3d 784, 494 P.2d 9 (1972)).

91. *Id.*, 741 S.W.2d at 236. Allowing the discharged attorney to recover in quantum meruit does not inhibit a client's right to discharge his or her attorney. *Id.*, 741 S.W.2d at 236. A client has the right to discharge an attorney even without just cause. *Sikes v. Segers*, 266 Ark. 654, 660, 587 S.W.2d 554, 557 (1979); *Lessenberry v. Adkinsson*, 255 Ark. 285, 294-95, 499 S.W.2d 835, 840 (1973). Rule 1.16 of the Arkansas Rules of Professional Conduct covers the declination or termination of representation:

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or (3) the lawyer is discharged. (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if: (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (2) the client has used the lawyer's services to perpetrate a crime or fraud; (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent; (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (6) other good

court for its decision is that an attorney has a right to compensation for work performed, and the court ruled that this compensation would come in the form of quantum meruit.⁹² The court's holding in *Goodman*, establishing quantum meruit as the sole basis for an attorney's recovery for services rendered, was short lived.⁹³

In 1989, in the first legislative session following the *Goodman* decision, the legislature expressly rejected the holding of *Goodman* in Arkansas Code of 1987 Annotated section 16-22-301, which provides that an attorney "should have the right to rely on his contract with his client; and that the Attorney's Lien Law should be reenacted to protect the contractual rights of attorneys."⁹⁴ Moreover, the lien law still recognizes the attorney's right to recover in quantum meruit in lieu of recovery on the contract because Arkansas Code of 1987 Annotated section 16-22-303(b)(1) expressly states that an attorney's recovery "shall not be necessarily limited to the amount, if any, of the compromise settlement between the parties litigant."⁹⁵ The legis-

cause for withdrawal exists. (c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation. (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

ARK. MODEL RULES OF PROF'L CONDUCT R. 1.16 (2003).

92. *Goodman*, 294 Ark. at 30, 741 S.W.2d at 236. Quantum meruit means "as much as he has deserved." BLACK'S LAW DICTIONARY, 1255 (7th ed. 1999). Quantum meruit, traditionally used to secure compensation for work performed, derived from equity. Judy Beckner Sloan, *Quantum Meruit: Residual Equity in Law*, 42 DEPAUL L. REV. 399, 401 (1992).

93. ARK. CODE ANN. § 16-22-301 (Michie 2003). Arkansas Code of 1987 Annotated section 16-22-301 reads as follows:

It is hereby found and determined by the General Assembly of the State of Arkansas that the Supreme Court, in *Henry, Walden, and Davis v. Goodman*, 294 Ark. 25 (1987), limited the existing Attorney's Lien Law by allowing only a quantum meruit recovery in a case in which the attorney was dismissed by the client; that the Supreme Court's interpretation of the Attorney Lien Law is contrary to what was intended by the enactment of Acts 59 and 306 of 1941, the Attorney Lien Law; that an attorney should have the right to rely on his contract with his client; and that the Attorney's Lien Law should be reenacted to protect the contractual rights of attorneys. Therefore, it is the intent of §§ 16-22-302-16-22-304 to allow an attorney to obtain a lien for services based on his or her agreement with his or her client and to provide for compensation in case of a settlement or compromise without the consent of the attorney.

Id.

94. *Id.* Under the reenacted Attorney's Lien Law, if a client discharges an attorney retained on a contingent fee contract and hires another attorney on a contingent fee basis, the client will have to pay a contingent fee to both attorneys in the event of an award or settlement. *Id.*

95. *Id.* § 16-22-303(b)(1) (Michie 2003). For a discussion on allowing recovery beyond

lature's reenactment of the Attorney's Lien Law in Arkansas Code of 1987 Annotated section 16-22-301 also has constitutional implications because the law appears to violate the separation of powers in the Arkansas Constitution by infringing upon the Arkansas Supreme Court's power to regulate the legal profession.⁹⁶ The court responded to this issue when it stated, "The General Assembly, by repeating its statement in the lien law that an attorney-client contract governs the attorney's right to a fee, has not altered the common law"⁹⁷ Even so, the statute, as reenacted by the legislature, is still being upheld.⁹⁸ Despite the reenactment of the lien law and the legislature's rejection of the *Goodman* ruling, the Arkansas Supreme Court has breathed life back into the *Goodman* holding in *Crockett & Brown, P.A. v. Courson*.⁹⁹

In *Crockett*, the court held that the statutory lien is not available to an attorney discharged with cause and recovery is limited to quantum meruit, but attorneys dismissed without cause are entitled to recover under the Attorney's Lien Law¹⁰⁰ in either quantum meruit or on the contract.¹⁰¹

This note addresses the most recent issue to arise in the Arkansas contingent fee arena, which is "[w]hether an attorney who enters into a contingent-fee contract with a client and is later discharged by the client may bring an action for a quantum-meruit fee prior to the resolution of the for-

the contract price, see Lester Brickman, *Setting the Fee When the Client Discharges a Contingent Fee Attorney*, 41 EMORY L.J. 367, 382 (1992).

96. ARK. CONST. amend. XXVIII; see also HOWARD W. BRILL, ARKANSAS PROFESSIONAL AND JUDICIAL ETHICS 100 (3d ed. 1994).

97. *Lancaster v. Fitzhugh*, 310 Ark. 590, 594, 839 S.W.2d 192, 194 (1992).

98. *McDermott v. McDermott*, 336 Ark. 557, 565, 986 S.W.2d 843, 847 (1999).

99. 314 Ark. 578, 864 S.W.2d 244 (1993).

100. *Id.* at 581, 864 S.W.2d at 245; *Finnegan v. Johnson*, 326 Ark. 586, 587, 932 S.W.2d 344, 345 (1996); *Williams v. Ashley*, 319 Ark. 197, 199, 890 S.W.2d 260, 260-61 (1995). In Arkansas, what is sufficient "cause" to discharge an attorney remains an elusive concept. Linda Ann Reid, Note, *Crockett and Brown, P.A. v. Courson: Determining the Fee of an Attorney Discharged "For Cause,"* 47 ARK. L. REV. 725, 743 (1994). In *Goodman* the court did offer some clues as to what is sufficient cause to discharge an attorney when it stated, "The relationship between the attorney and his client must be based upon the utmost trust and confidence, and if that basis has been substantially undermined, the relationship should be terminated." *Henry v. Goodman*, 294 Ark. 25, 31, 741 S.W.2d 233, 236 (1987). The Arkansas Supreme Court in *Williams* found the client had cause to discharge her attorney when she indicated her attorney was unable to communicate with her. *Williams*, 319 Ark. at 200, 890 S.W.2d at 261-62. The California Supreme Court held that when a "client has, for whatever reason, lost faith in the attorney" this is sufficient to establish cause for discharge. *Fracasse v. Brent*, 6 Cal.3d 784, 790, 494 P.2d 9, 13 (1972). Some scholars have suggested using the Rules of Professional Conduct as a guide to determine cause. Reid, *supra*, at 744-45. In *Orsini v. Larry Moyer Trucking, Inc.*, however, the Arkansas Supreme Court held that "[t]he rules are not designed for a basis of civil liability, but are to provide guidance to lawyers." 310 Ark. 179, 184, 833 S.W.2d 366, 369 (1992).

101. See *supra* notes 94-95 and accompanying text.

mer client's lawsuit."¹⁰² There is a split of authority on how to resolve this issue; the two predominate approaches are known as the New York and California rules.¹⁰³

C. The New York and California Rules¹⁰⁴

The New York rule, as set forth in *Tillman v. Komar*,¹⁰⁵ states that on the client's termination of a contingent fee contract, the cause of action for the reasonable value of services, in quantum meruit, immediately accrues to the attorney.¹⁰⁶ This holding has its roots in earlier court decisions that held that the statute of limitations against a claim for services begins to run at the termination of the services or after the performance of the final service.¹⁰⁷

The California rule, as set forth in *Fracasse v. Brent*,¹⁰⁸ states that the cause of action of a discharged attorney against a client for compensation of services rendered under a contingent fee contract does not accrue unless and until the occurrence of the stated contingency.¹⁰⁹ In the 1889 case of *Bartlett v. Odd-Fellows' Savings Bank*,¹¹⁰ the California Supreme Court set forth the groundwork for *Fracasse*¹¹¹ holding that the statute of limitations for an attorney discharged without cause on a contingent fee contract begins to run upon the receipt of money by the client.¹¹² Almost forty years later in *Tracey v. MacIntyre*, a California Court of Appeals,¹¹³ citing *Tillman*,¹¹⁴ ruled that an attorney could immediately bring suit after discharge and be-

102. *Salmon v. Atkinson*, 355 Ark. 325, 326, 137 S.W.3d 383 (2003).

103. *Id.*

104. For a more complete discussion on the reasoning and policies behind these rules, see *infra* Part IV.A.

105. 181 N.E. 75 (N.Y. 1932).

106. *Id.* at 76. Cases following the New York rule include: *In re Estate of Callahan*, 578 N.E.2d 985, 987 (Ill. 1991); *Skeens v. Miller*, 628 A.2d 185, 191 (Md. 1993); *Adkin Plumbing & Heating Supply Co. v. Harwell*, 606 A.2d 802, 804 (N.H. 1992); *Trenti, Saxhaug, Berger, Roche, Stephenson, Richards & Aluni, Ltd., v. Nartnik*, 439 N.W.2d 418, 420 (Minn. App. 1989).

107. *Martin v. Camp*, 114 N.E. 46, 49 (N.Y. 1916); *Eliot v. Lawton*, 89 Mass. 274, 276 (1863); *Powers v. Manning*, 28 N.E. 290, 292 (Mass. 1891); *Adams v. Fort Plain Bank*, 36 N.Y. 255, 260 (1867); *Bathgate v. Haskin*, 59 N.Y. 533, 535 (1875).

108. 494 P.2d 9, 14 (Cal. 1972).

109. *Id.* Cases following the California Rule include: *Rosenberg v. Levin*, 409 So.2d 1016, 1022 (Fla. 1982); *Plaza Shoe Store, Inc. v. Hermel, Inc.*, 636 S.W.2d 53, 60 (Mo. 1982); *First Nat'l Bank & Trust Co. of Tulsa v. Bassett*, 83 P.2d 837, 840 (Okla. 1938); *Clerk of Superior Ct. of Gilford County v. Gilford Builders Supply Co., Inc.*, 361 S.E.2d 115, 118 (N.C. App. 1987).

110. 21 P. 743 (Cal. 1889).

111. *Fracasse*, 494 P.2d at 9.

112. *Bartlett*, 21 P. at 744.

113. 84 P.2d 526 (Cal. Ct. App. 1938).

114. *Tillman v. Komar*, 259 N.Y. 133, 181 N.E. 75 (1932).

fore the occurrence of the contingency.¹¹⁵ In the fifties and sixties, however, the California courts followed their prior decision in *Bartlett*.¹¹⁶ In 1972 *Fracasse* affirmed those cases and delivered the rule set forth above, overruling any cases to the contrary, specifically the 1938 *Tracey* decision of the California Court of Appeals.¹¹⁷

The Arkansas Supreme Court in *Salmon v. Atkinson* considered both the New York and California rules in formulating a holding.¹¹⁸

IV. REASONING

A. Majority Opinion

The court decided the case of *Salmon v. Atkinson* on December 11, 2003, and Justice Donald L. Corbin wrote the majority opinion.¹¹⁹ The Arkansas Supreme Court found its jurisdiction to be proper under Arkansas Supreme Court Rule 1-2(b)(1) because the case presented an issue of first impression.¹²⁰ The court framed the issue as follows: "Whether an attorney who enters into a contingent-fee contract with a client and is later discharged by the client may bring an action for a quantum meruit fee prior to the resolution of the former client's lawsuit."¹²¹

Although this was a case of first impression, the Arkansas Supreme Court had consistently held that a discharged attorney may recover for the reasonable value of his or her services even though the parties originally entered into a contingent fee contract.¹²² The court reasoned that the client is responsible to pay reasonable attorney fees when the attorney has conferred a benefit upon the client.¹²³ The court stated that "[t]he question in this case is not whether the discharged attorney may recover a quantum meruit fee, but whether recovery of such a fee is dependent upon the contingency originally agreed to in the contract."¹²⁴

115. *Tracey*, 84 P.2d at 528.

116. *Bartlett*, 21 P. at 743; *Brown v. Connolly*, 2 Cal. App. 3d 867 (1969); *Jones v. Marin*, 256 P.2d 905 (1953).

117. 494 P.2d 9, 14-15 (1972).

118. 355 Ark. 325, 328, 137 S.W.3d 383, 385 (2003).

119. 355 Ark. at 325-26, 137 S.W.3d at 383.

120. 355 Ark. at 326; ARK. SUP. CT. R. 1-2 (b)(1).

121. *Salmon*, 355 Ark. at 326, 137 S.W.3d at 383.

122. *Id.* at 328 (citing *Crockett & Brown, P.A. v. Courson*, 312 Ark. 363, 849 S.W.2d 938 (1993); *Lancaster v. Fitzhugh*, 310 Ark. 590, 839 S.W.2d 192 (1992); *Henry, Walden, & Davis v. Goodman*, 294 Ark. 25, 741 S.W.2d 233 (1987)).

123. *Id.*, 137 S.W.3d at 385.

124. *Id.*, 137 S.W.3d at 385.

There is a split of authority among the states on this issue.¹²⁵ One faction follows the California rule, which states that the cause of action for a discharged attorney does not accrue unless and until the happening of the stated contingency.¹²⁶ The California rule bars a discharged attorney from recovering any fee if the client does not recover on the principal matter, regardless of whether the client discharges the attorney with or without cause.¹²⁷

The other school of thought follows the New York rule, which states that the cause of action for a discharged attorney accrues immediately upon discharge and is not dependent upon the discharging client's recovery.¹²⁸ Courts follow the New York rule for two primary reasons.¹²⁹ First, when a client terminates a contingent fee contract by discharging his or her attorney, the contract no longer exists and the contingency term is no longer effective.¹³⁰ When a client terminates a contract, the client cannot use the terms of the contract to prevent the attorney from recovering in quantum meruit.¹³¹ The second primary reason for following the New York rule is the belief that forcing a discharged attorney to wait for the occurrence of a contingency is unfair and goes beyond the scope of what the parties contemplated when contracting.¹³² The Arkansas Supreme Court believed that the New York Court of Appeals best articulated this proposition when it stated, "The value of one attorney's services is not measured by the result attained by another. This one did not contract for his contingent compensation on the hypothesis of success or failure by some other member of the bar."¹³³ The

125. *Id.*, 137 S.W.3d at 385.

126. *Id.*, 137 S.W.3d at 385 (citing *Fracasse v. Brent*, 494 P.2d 9 (Cal. 1972); *Rosenberg v. Levin*, 409 So.2d 1016 (Fla. 1982); *Plaza Shoe Stores, Inc. v. Hermel, Inc.*, 636 S.W.2d 53 (Mo. 1982); *First Nat'l Bank & Trust Co. of Tulsa v. Bassett*, 83 P.2d 837 (Okla. 1938); *Clerk of Superior Ct. of Gilford County v. Gilford Builders Supply Co., Inc.*, 361 S.E.2d 115 (N.C. Ct. App. 1987)).

127. *Salmon*, 355 Ark. at 328, 137 S.W.3d at 385.

128. *Id.* at 329, 137 S.W.3d at 385 (citing *Tillman v. Komar*, 181 N.E. 75 (N.Y. 1932); *In re Estate of Callahan*, 578 N.E.2d 985 (Ill. 1991); *Skeens v. Miller*, 628 A.2d 185 (Md. 1993); *Adkin Plumbing & Heating Supply Co. Inc., v. Harwell*, 606 A.2d 802, (N.H. 1992); *Trenti, Saxhaug, Berger, Roche, Stephenson, Richards & Aluni, Ltd., v. Nartnik*, 439 N.W.2d 418 (Minn. App. 1989)).

129. *Id.*, 137 S.W.3d at 385.

130. *Id.*, 137 S.W.3d at 385. The New York Court of Appeals reasoned that the contract either wholly stands or it totally falls. *Tillman*, 181 N.E. at 75.

131. *Salmon*, 355 Ark. at 329, 137 S.W.3d at 385. "A client cannot terminate the agreement and then resurrect the contingency term when the discharged attorney files a claim." *Estate of Callahan*, 578 N.E.2d at 988.

132. *Salmon*, 355 Ark. at 329, 137 S.W.3d at 385.

133. *Id.*, 137 S.W.3d at 385 (quoting *Tillman*, 181 N.E. at 76). The New York Court of Appeals in *Tillman* additionally stated:

In making their agreement, the parties may be deemed to have estimated this lawyer's pecuniary merit according to his own character, temperament, energy,

court also gave an additional reason for following the New York rule, explained by the Illinois Supreme Court as follows:

[Q]uantum meruit is based on the implied promise of a recipient of services to pay for those services which are of value to him. The recipient would be unjustly enriched if he were able to retain the services without paying for them. The claimant's recovery here should not be linked to a contract contingency when his recovery is not based upon the contract, but upon quantum meruit.¹³⁴

The Arkansas Supreme Court believed that the New York rule was the superior rule, and in applying the New York rule to the facts of *Salmon*, the court held that the trial court did not err in awarding a quantum meruit fee to discharged attorneys Virginia Atkinson and James Howell.¹³⁵ The court briefly restated the evidence in the case and, based upon that evidence, held that Atkinson's and Howell's cause of action to recover reasonable attorney's fees accrued immediately upon their discharge by Salmon.¹³⁶ Thus, the Arkansas Supreme Court affirmed the trial court's judgment.¹³⁷

B. Concurring Opinion

Justice Annabelle Imber concurred that the court was correct in affirming the trial court, but she felt that the court was correct because Salmon offered no convincing argument or citation to authority in her Appellate Brief for reversal.¹³⁸ Furthermore, Justice Imber, while agreeing with the majority's decision, wrote a concurrence because she felt that the majority's

zeal, education, knowledge and experience which are the important factors contributing to his professional status and constituting in a large degree, when viewed in relation to the volume of work performed and the result accomplished, a fair standard for gauging the value of services as prudent counsel and skillful advocate.

Tillman, 181 N.E. at 76.

134. *Salmon*, 355 Ark. at 330, 137 S.W.3d at 386 (quoting *In re Estate of Callahan*, 578 N.E.2d at 988).

135. *Salmon*, 355 Ark. at 330, 137 S.W.3d at 386.

136. *Id.* at 330-31, 137 S.W.3d at 386. The court stated that it had taken notice of a client's right to discharge his or her attorney but did not believe that the holding in this case impaired that right. *Id.* at 331, 137 S.W.3d at 386. The court went on to say that it had "previously determined that the client's right to discharge the attorney is not comprised by allowing the discharged attorney to recover in quantum meruit." *Id.*, 137 S.W.3d at 386. In a final footnote, the court retraced prior Arkansas legislation and Arkansas Supreme Court decisions in the area of attorneys' contingent fees. *Id.* at 331 n.1, 137 S.W.3d at 386 n.1. For a complete discussion on this area of the law, see *supra* Part III.B.

137. *Salmon*, 355 Ark. at 331, 137 S.W.3d at 386.

138. *Id.*, 137 S.W.3d at 387 (Imber, J., concurring).

holding was too broad.¹³⁹ “A fair reading of the majority opinion could deny . . . a client the option of dropping a suit,” and that result would strike at the heart of the attorney-client relationship.¹⁴⁰

Justice Imber restated the issue of the case, as framed by the majority, but held out the facts of this case, i.e., that Salmon, after discharging her attorneys, moved on with her suit using the discharged attorneys’ work product.¹⁴¹ Justice Imber agreed with the New York rule in that it is unfair for a discharged attorney to wait on the occurrence of a contingency before receiving payment for services rendered.¹⁴² Justice Imber felt, however, that the majority’s blanket holding went too far because it was not narrowly tailored to the facts of the case.¹⁴³ In the present case, Salmon discharged her attorneys without cause and used their work product to support her suit pro se.¹⁴⁴ It would be unfair to require the discharged attorneys to base their compensation on Salmon’s abilities to competently represent herself.¹⁴⁵

What if Salmon had decided to drop the suit for “illness, or stress, or a change of heart?”¹⁴⁶ The majority’s opinion would require a client to continue a suit they no longer wanted to pursue in order to avoid paying quantum meruit fees that could reach into the hundreds of thousands.¹⁴⁷ This would in effect become the attorney’s suit because the only person the suit would benefit is the attorney counting on the contingent fee.¹⁴⁸ This circumstance would violate at least two of the Arkansas Model Rules of Professional Conduct.¹⁴⁹ First, rule 1.2(a) states, “A lawyer shall abide by a client’s decisions concerning the objectives of representation.”¹⁵⁰ Second, rule 1.8(j) states, “A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation . . . except that a lawyer may . . . contract with a client for a reasonable contingent fee in a civil case.”¹⁵¹

139. *Id.*, 137 S.W.3d at 387 (Imber, J., concurring).

140. *Id.*, 137 S.W.3d at 387 (Imber, J., concurring).

141. *Id.*, 137 S.W.3d at 387 (Imber, J., concurring).

142. *Id.* at 331–32, 137 S.W.3d at 387. The concurring opinion goes on to cite *Tillman v. Kamar*, 181 N.E. 75, 76 (N.Y. 1932), where the New York Court of Appeals reasoned that the attorney did not contract to have the value of his or her services measured by the success of another member of the bar. *Id.* at 332, 137 S.W.3d at 387 (Imber, J., concurring).

143. *Salmon*, 355 Ark. at 332, 137 S.W.3d at 387 (Imber, J., concurring).

144. *Id.*, 137 S.W.3d at 387 (Imber, J., concurring).

145. *Id.*, 137 S.W.3d at 387 (Imber, J., concurring). Justice Imber further reasoned that it was Salmon’s decision to fire her attorneys, take their work, and proceed forward. *Id.*, 137 S.W.3d at 387 (Imber, J., concurring).

146. *Id.*, 137 S.W.3d at 387 (Imber, J., concurring).

147. *Id.*, 137 S.W.3d at 387 (Imber, J., concurring).

148. *Id.* at 332, 137 S.W.3d at 388 (Imber, J., concurring).

149. *Salmon*, 355 Ark. at 332, 137 S.W.3d at 388 (Imber, J., concurring).

150. *Id.*, 137 S.W.3d at 388 (Imber, J., concurring) (quoting ARK. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2003)).

151. *Id.* at 333, 137 S.W.3d at 388 (Imber, J., concurring) (quoting ARK. MODEL RULES

Justice Imber stated that under the majority holding, an attorney is always entitled to a quantum meruit fee when discharged from a contingent fee contract.¹⁵² The effect is that poor clients without the funds to pay such a fee must continue a lawsuit that they would rather drop. Rule 1.2(a) is thus violated.¹⁵³ Additionally, an attorney who pursues a suit for the sole reason of securing a contingent fee, violates the letter and spirit of rule 1.8(j) because only the attorney's proprietary interest is driving the suit.¹⁵⁴ "Even though rule 1.8(j) allows an attorney to have a proprietary interest in a contingent outcome," Justice Imber does not believe that the fee should be the sole reason for the suit.¹⁵⁵

Moreover, what about the attorney discharged for cause?¹⁵⁶ Justice Imber noted that the majority's opinion did not distinguish between attorneys discharged with or without cause, and the Arkansas Supreme Court's precedent has never required a client in a contingent fee contract to pay a fee to an attorney discharged with cause unless and until there is a recovery, and if there is a recovery, the fee is based on quantum meruit.¹⁵⁷

Justice Imber agreed with the majority that when a client discharges his or her attorney without cause, breaching the contingent fee agreement, and pursues "the suit *pro se* or with the benefit of another attorney's services," the discharged attorney "is entitled to a quantum meruit fee for services rendered."¹⁵⁸ Justice Imber also agreed with the majority that an attorney discharged without cause should not wait for the client's recovery to receive a fee, "but the fee should be due immediately if the client proceeds forward with the suit."¹⁵⁹

In Justice Imber's view, however, the majority's holding would force poor clients who cannot afford an hourly fee to continue litigation when they would prefer to drop the suit.¹⁶⁰ "It is true that attorneys who contract on contingency-fee cases may" recover nothing, "but that is a risk those attorneys take for the chance to receive a percentage of a large settlement or damages award."¹⁶¹ Low income Arkansans are the ones who will suffer from this holding; while they might be willing to enter into a contingent fee contract, they will decide "not to pursue lawsuits at all for fear they will be

OF PROF'L CONDUCT R. 1.8(j)).

152. *Id.*, 137 S.W.3d at 388 (Imber, J., concurring).

153. *Id.*, 137 S.W.3d at 388 (Imber, J., concurring).

154. *Id.*, 137 S.W.3d at 388 (Imber, J., concurring).

155. *Salmon*, 355 Ark. 333, 137 S.W.3d at 388 (Imber, J., concurring).

156. *Id.*, 137 S.W.3d at 388 (Imber, J., concurring).

157. *Id.*, 137 S.W.3d at 388 (Imber, J., concurring) (citing *Crockett & Brown, P.A. v. Courson*, 312 Ark. 363, 849 S.W.2d 938 (1993)).

158. *Id.* at 333-34, 137 S.W.3d at 388 (Imber, J., concurring).

159. *Id.* at 334, 137 S.W.3d at 388 (Imber, J., concurring).

160. *Id.*, 137 S.W.3d at 388 (Imber, J., concurring).

161. *Salmon*, 355 Ark. 333, 137 S.W.3d at 388 (Imber, J., concurring).

forced into financial ruin if they need to drop their lawsuit for some unforeseeable reason."¹⁶²

Justice Imber reiterated that she concurred with the result because Salmon provided no argument or authority for reversal of the trial court, but she restated her disagreement with the majority's blanket holding.¹⁶³

V. SIGNIFICANCE

The case of *Salmon v. Atkinson* creates new law in the arena of contingent fees, allowing attorneys discharged with or without cause an immediate cause of action in quantum meruit for the value of services rendered.¹⁶⁴ This section outlines an Arkansas attorney's right of recovery when discharged from a contingent fee contract in light of the court's ruling in *Salmon*. This section then discusses the ramifications of the Arkansas Supreme Court's ruling in *Salmon*, focusing on the Arkansas Model Rules of Professional Conduct and Arkansans's access to the courts. Finally, this section presents a proposed rule that will attempt to alleviate the problematic ramifications of the *Salmon* decision.

The ruling in *Salmon* expanded an attorney's avenues of recovery when discharged from a contingent fee contract.¹⁶⁵ Currently, an attorney discharged without cause from a contingent fee contract may recover in quantum meruit immediately upon discharge,¹⁶⁶ or the attorney may wait until a recovery is had by the client and then the attorney may recover on the contract.¹⁶⁷ An attorney discharged from a contingent fee contract for cause may only recover in quantum meruit,¹⁶⁸ but the cause of action to recover a quantum meruit fee accrues immediately upon discharge.¹⁶⁹ While the rule of law on this issue appears to be sound on its face, it is not without flaws.

The court's holding in *Salmon* violates the Arkansas Model Rules of Professional Conduct. Rule 1.2(a) states, "A lawyer shall abide by a client's decisions concerning the objectives of representation."¹⁷⁰ Under the court's holding, an attorney is always entitled to a quantum meruit fee after discharge, thereby forcing clients to continue suits they would rather drop because they cannot afford to pay attorneys' fees and thus violating rule 1.2(a)

162. *Id.*, 137 S.W.3d at 388 (Imber, J., concurring).

163. *Id.*, 137 S.W.3d at 388-89 (Imber, J., concurring).

164. *Id.*, at 330-31, 137 S.W.3d at 386.

165. *Id.*, 137 S.W.3d at 386.

166. *Id.*, 137 S.W.3d at 386.

167. ARK. CODE ANN. § 16-22-301 (Michie 2003).

168. *Crockett & Brown, P.A. v. Courson*, 314 Ark. 578, 581, 864 S.W.2d 244, 245 (1993).

169. *Salmon*, 355 Ark. at 330-31, 137 S.W.3d at 386.

170. ARK. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2003).

because the lawyer is not abiding by the client's objectives in that the client is only continuing the suit for fear of financial ruin.¹⁷¹ *Salmon* also violates rule 1.8(j), which states, "A lawyer shall not acquire a propriety interest in the cause of action."¹⁷² If a client would rather drop the suit but cannot for fear of financial ruin, then the suit's only purpose is to obtain a contingent fee for the attorney, violating the spirit and letter of 1.8(j).¹⁷³ Rule 1.8(j) allows an attorney to acquire a contingent interest in a cause of action,¹⁷⁴ but surely the drafters of the Model Rules of Professional Conduct did not intend for an attorney's contingent interest to be the sole reason for the suit.

Another more frightening ramification of the court's decision in *Salmon* is that it potentially limits access to the courts for all but the wealthiest Arkansans who are able to pay an hourly or set fee for legal services. This holding could compel Arkansans willing to contract on a contingent fee basis to decide not to pursue a suit for fear of financial ruin if they have to drop their suit for an unforeseen reason. This result would strike at the primary justification of contingent fees as "the poor man's key to the courthouse."¹⁷⁵

These negative consequences could be overcome with a more pointed rule to address contingency fees, and the following proposal provides such a rule. When a client discharges an attorney without cause and pursues the suit pro se or with another attorney, the discharged attorney's cause of action immediately accrues and recovery may be had in quantum meruit or the attorney may forgo the right to recover in quantum meruit to recover on the contract; however, when a client wholly drops a suit,¹⁷⁶ the client owes nothing to the attorney who is discharged without cause, unless the client made a misrepresentation to the attorney that induced the attorney to initially take the case. Then the attorney may recover in quantum meruit. While there is a risk that an attorney may recover nothing, this is a risk that

171. *Salmon*, 355 Ark. at 333, 137 S.W.3d at 388 (Imber, J., concurring). The holding in *Salmon* restricts the operation of rule 1.16(a)(3) in that it limits the client's right to discharge his or her attorney. See ARK. MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(3). The holding in *Salmon* also runs contrary to prior Arkansas Supreme Court decisions in that it limits the client's right to discharge his or her attorney. *Sikes v. Segers*, 266 Ark. 654, 660, 587 S.W.2d 554, 557 (1979); *Lessenberry v. Adkissen*, 255 Ark. 285, 294-95, 499 S.W.2d 835, 840 (1973).

172. ARK. MODEL RULES OF PROF'L CONDUCT R. 1.8(j).

173. *Id.*

174. *Id.*

175. TOOTHMAN AND ROSS, *supra* note 1, at 159.

176. For the purposes of the proposed rule, a client wholly drops a suit when the statute of limitations on the cause of action in question has run and the client has taken no further action in the matter. It is the responsibility of the discharged attorney to determine if the former client has wholly dropped the suit.

an attorney must take for the opportunity to receive a percentage of a large settlement or award.¹⁷⁷

An attorney discharged with cause should collect no fee unless and until there is a recovery by the client, and then the recovery is limited to quantum meruit. Whether discharged with or without cause, an attorney's quantum meruit recovery should not exceed recovery under the contract.¹⁷⁸ This proposed rule strives to balance both the interests of Arkansans's clients and their attorneys.

The Arkansas Supreme Court should reconsider its holding in *Salmon*, making the appropriate changes in the law to avoid placing attorneys in a position to violate the rules that govern their profession and to place the contingent fee in a position to continue holding the courthouse doors open for Arkansans.¹⁷⁹

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177. Contingent fee attorneys typically earn between twenty-five to thirty percent more per hour than if they billed at an hourly rate. TOOTHMAN AND ROSS, *supra* note 1, at 162.

178. The Arkansas Supreme Court has allowed a quantum meruit recovery greater than the contracted amount. *Jarboe v. Hicks*, 281 Ark. 21, 22–25, 660 S.W.2d 930, 931–32 (1983) (awarding a fee of \$750 when the settlement was for \$1000 and the contingent fee contract called for a forty percent recovery); *Slayton v. Russ*, 205 Ark. 474, 475–79, 169 S.W.2d 571, 571–73 (1943) (awarding a fee of \$318.54 when the case was settled for \$50); *St. Louis S.W. Ry. v. Poe*, 201 Ark. 93, 94–96, 143 S.W.2d 879, 879–80 (1940) (awarding a fee of \$1500 when the settlement was for \$1000 and the contingent fee contract called for a fifty percent recovery).

179. The Arkansas Supreme Court alone cannot accomplish these goals; the Arkansas Legislature will have to refrain from placing statutory roadblocks in the court's path.

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