The Application of Quantum Meruit to Attorney Fee Litigation

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THE APPLICATION OF QUANTUM MERUIT TO ATTORNEY FEE LITIGATION*

Ratio legis est anima legis. The reason of the law is the soul of the law.

In recent years, cases involving attorney fees have accounted for a large percentage of the Louisiana jurisprudence concerning quantum meruit. If the reason of the law is the soul of the law, then it may be said that several Louisiana courts have robbed the law of its soul, for they have applied quantum meruit in these cases indiscriminately, relying blindly upon questionable statements of law in past decisions.

Since quantum meruit first appeared early in Louisiana jurisprudence,¹ the exact scope of the theory as used by the Louisiana courts has been unclear. One clear aspect of quantum meruit, its common law origin, has remained largely unmentioned by the courts.² The theory can legitimately claim no foundation in the Civil Code. Consequently, quantum meruit is a concept alien to the civil law tradition. Nevertheless, the Louisiana judiciary has adopted the doctrine as its own.

This paper discusses the application of quantum meruit to claims for attorney fees in Louisiana courts,³ concentrating particularly on contemporary jurisprudence. The paper begins by identifying those factors that courts, after deciding to apply quantum meruit, examine in order to determine the monetary recovery of attorneys. Then, several fact situations in which the courts commonly apply quantum meruit are

¹ In Gilley v. Henry, 8 Mart. (o.s.) 402 (La. 1820), the court applied the general concept in the form of quantum valebant, which concerns the value of goods. Quantum meruit, on the other hand, pertains to the value of services. See also Dunbar v. Butler, 2 Rob. 32 (La. 1845) and Dauenhauer v Succession of Browne, 47 La. Ann. 341, 16 So. 827 (1895) for early Louisiana applications of quantum meruit.
² See, however, Oil Purchasers, Inc. v Kuehling, 334 So. 2d 420 (La. 1976), in which the Louisiana Supreme Court described quantum meruit as a "striking example of an ill-considered importation from the common law." Id. at 425 (quoting Comment, Quantum Meruit in Louisiana, 50 Tul. L. Rev. 631 (1976)). Still, this criticism of the concept has apparently had little effect on the appellate courts.
³ For more general discussions of the Louisiana concept of quantum meruit, see Nicholas, Unjustified Enrichment in Civil Law and Louisiana Law, 37 Tul. L. Rev 49 (1962); Comment, Quantum Meruit in Louisiana, 50 Tul. L. Rev 631 (1976); Note, Obligations—Quantum Meruit, 18 La. L. Rev. 209 (1957); Note, Obligations—Quasi Contracts—Art. 2293, 24 Tul. L. Rev 141 (1949).
discussed. The approaches that courts have taken to these situations are analyzed and criticized, and recommendations are offered in an attempt to return the jurisprudence surrounding attorney fees to its civilian roots.

I. Determining Attorney Fees on a Quantum Meruit Basis

Setting aside for the moment the issue of whether quantum meruit applies to the particular situation at all, this section discusses the courts' method of determining the fee after it has been determined that quantum meruit applies. Courts awarding compensation to an attorney under a quantum meruit theory have proceeded in a fairly consistent manner.

Quantum meruit recovery has been based on the standard of reasonable remuneration for the attorney's services, as determined by examination of several aspects of the attorney's performance. Since the Louisiana Supreme Court's decision in Saucier v. Hayes Dairy Products, courts have most commonly applied factors set out in the Code of Professional Responsibility to determine quantum meruit recovery by an attorney. Before Saucier, the predominant view was that the rules of ethics applied only in disciplinary proceedings against attorneys. The Saucier court, pursuant to its constitutional grant of power to prescribe rules regulating the practice of law, injected the ethical rules with unprecedented authority by deeming them substantive law. The rules identified by the court prescribed standards for determining the reasonableness of attorneys' fees. Therefore, subsequent courts reasoned, in accordance with the Code of Professional Responsibility, the following factors are to be examined to determine the amount of an attorney's recovery in quantum meruit:

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.

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4. 373 So. 2d 102 (La. 1979) (on rehearing).
6. See, e.g., Fowler v. Jordan, 430 So. 2d 711, 715 (La. App. 2d Cir. 1983): "The determination of an attorney's legal compensation under a quantum meruit analysis is predicated upon an evaluation of the facts in the record and an application of the criteria listed in Disciplinary Rule 2-106(B) of the Code of Professional Responsibility."
8. Saucier 373 So. 2d at 115.
(5) The time limitations imposed by the client or by the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) Whether the fee is fixed or contingent.9

Even before the Saucier decision, some courts were using several of these factors to determine the amount of quantum meruit recovery by an attorney.10

In addition to the factors listed by the Code of Professional Responsibility, other facts have been considered by some courts in determining the amount of quantum meruit recovery owed to an attorney. For instance, in Liles v. Bourgeois,11 the court provided a list resembling an abbreviated version of the Code's factors:

(1) Responsibility incurred.
(2) Extent and character of labor performed.
(3) Importance of questions presented.
(4) Amount involved.
(5) Knowledge and ability of counsel.12

In another case, Oardert Hill, Land Corp. v. Succession of Cambique,13 the Louisiana Supreme Court considered the following factors in determining the reasonableness of a contingency fee contract: the risk of nonrecovery; the amount of legal work performed; the size of the estate involved in the succession proceeding; and the anticipated delay in receiving the fee.14 Other courts have even considered the ability of the party to pay the fee15 and the general economic conditions prevailing at the time the services are rendered as factors in determining the reasonableness of the fee.16

9. Model Code of Professional Responsibility DR 2-106 (1982). It must be noted that the Louisiana Supreme Court recently adopted the Model Rules of Professional Conduct (1983) to replace the Code of Professional Responsibility. The factors listed in Model Rule 1.5(a), however, are substantially identical to those quoted above from the earlier Code.
11. 517 So. 2d 1078 (La. App. 3d Cir. 1987).
12. Id. at 1082.
13. 306 So. 2d 718 (La. 1975).
14. Id. at 723.
16. Henriques, 51 So. 2d at 611.
Although the method of calculating an attorney's recovery under quantum meruit is important, the subject does not lend itself readily to in-depth reasoned analysis. The trial courts have been afforded much discretion in setting monetary recovery in quantum meruit.\textsuperscript{17} The second circuit, after a detailed discussion of quantum meruit, concluded "[q]uantum meruit analysis cannot be reduced to the mere application of mathematical formulas; it involves, instead, a complex calculus of the many factors delineated above, and is sensitive to the unique facts of each case."\textsuperscript{18} Therefore, aside from listing basically the same abstract factors to consider with only occasional minor variations, no two courts figure recovery under quantum meruit in exactly the same manner.

II. Jurisprudential Application of Quantum Meruit

The most important question in the area of quantum meruit does not concern the actual manner of calculating the attorney fees, but rather, the appropriate circumstances, if any, for the application of quantum meruit. When should the quantum meruit theory be used? This is the greatest area of inconsistency and lack of reason among the courts.

Whether quantum meruit will be applied in a particular case depends to a large extent upon a number of factors. A very significant factor is whether the attorney has been discharged before completing all or substantially all of his obligations under the contract. Also relevant is the nature of the compensation, if any, to which the parties have agreed: Was there an agreement for an hourly retainer, a contingency fee, or a flat fee? Finally, whether the client hired a new attorney after discharging the first also influences the determination.

How these various factors are combined in a particular case will determine the court's choice of the basis for the attorney's recovery. In the sections below, the approaches that Louisiana courts have taken to several common fact situations, each of which represents a particular combination of these factors, will be considered.

A. Absence of Compensation Provision

Attorneys occasionally perform services notwithstanding the absence of an express agreement between the client and attorney about compensation. The Louisiana decisions addressing this issue appear to adopt one of two lines of thought.

\textsuperscript{17} See, e.g., Succession of Butler, 294 So. 2d 512 (La. 1974); Liles v. Bourgeois, 517 So. 2d 1078 (La. App. 3d Cir. 1987); Oppenheim v. Bouterie, 505 So. 2d 100 (La. App. 4th Cir. 1987).

\textsuperscript{18} Fowler v. Jordan, 430 So. 2d 711, 718 (La. App. 2d Cir. 1983).
**Nugent v. Downs** exemplifies the first approach. In Nugent, an attorney agreed to represent his aunt in filing a personal injury action. After reaching a settlement, he sent his aunt a bill for 30% of that amount, contending that there had been an oral agreement for the attorney to collect a fee of one-third of the recovery. The aunt refused to pay, arguing that no such agreement as to compensation had been reached, and that she expected to pay her nephew nothing. At trial, the judge accepted the attorney’s version of the facts, finding that “the preponderance of the evidence establishes a contract.” On appeal, the Louisiana Third Circuit Court of Appeal stated:

We cannot say that the trial judge erred in finding that a contract of employment was entered into between Nugent and Mrs. Downs, as contended by plaintiff. The evidence convinces us, however, that in any event plaintiff is entitled to recover the full amount claimed as attorney’s fees and expenses on quantum meruit and we thus prefer to base our decision on that ground.

Justifying this approach, the court stated that where no express contract fixes an attorney’s fee, “he is entitled to remuneration for services rendered on quantum meruit.” The court then figured recovery under quantum meruit, using factors very similar to those listed by the Code of Professional Responsibility.

In other cases, courts have employed similar approaches in the absence of express provision for attorney fees. It should be noted that in none of these cases did the client contend that he did not authorize the attorney to act on his behalf or that no contract at all had been

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20. Id.
21. Id.
22. Id.
23. Id. See supra text accompanying note 9. Paradoxically, after stating its preference for quantum meruit over contract, the court found that 30% of the recovery, the amount billed by the attorney under the contract, was a “fair and reasonable fee” and affirmed the trial court’s award of that amount.
24. In Robinson v. Bethay, 338 So. 2d 969, 971 (La. App. 4th Cir. 1976), the court wrote: “While it would have been better practice had [the attorney] arrived at a clear fee agreement before undertaking the defense, this does not preclude his recovery under a quantum meruit theory.” Similarly, in Pittman & Matheyn v. Davidge, 189 So. 2d 706, 709 (La. App. 1st Cir.), writ denied, 249 La. 768, 191 So. 2d 143 (1966), the court stated: “It is settled law that where there is no express contract fixing his fee, an attorney-at-law is entitled to remuneration for services rendered on quantum meruit.” Other cases calling for quantum meruit recovery in this situation include Simon, Corne & Block v. Duke, 429 So. 2d 507 (La. App. 3d Cir.), writ denied, 437 So. 2d 1147 (1983); Henriques v. Vaccaro, 218 La. 1020, 51 So. 2d 611 (1951); Jackson v. New Orleans Bd. of Trade, 207 La. 571, 21 So. 2d 731 (1945).
reached. Except as to compensation, some agreement did exist between the attorney and client in each of these cases.

_Schaff v. Landers_\(^2\) represents the second line of jurisprudential thought in situations where there is no express fee provision. Quoting article 1816 of the Civil Code of 1870,\(^2\) the court held that "[w]hen one employs a lawyer for professional services and the amount or measure of the lawyer's fees is not expressly agreed upon, there is a contract, including an implied promise to pay the lawyer 'the value' of those services."\(^2\) Thus the court upheld the contract, merely implying an intent to agree on a reasonable fee in the absence of any express provision therefor. Although this approach appears to occupy the minority position, there are at least two other cases in which courts apparently preferred to imply an intention for a reasonable fee rather than to rely upon quantum meruit.\(^2\)

Another noteworthy case, _Brewer v. Scullin_,\(^2\) exhibits a confused mixing of these two approaches. The court first stated: "In a suit on a professional services contract for collection of a note, when there is no agreement as to a fee, the parties are presumed to have intended a reasonable fee."\(^3\) By this statement, the court appeared to concur with the second line of thought identified above, recognizing the contract and implying an intent for a reasonable fee in the absence of a fee provision. Later in the same decision, however, the court stated: "A suit for attorney's fees under a services contract, in which the parties failed to specify the amount of the fee, has been regarded as a suit for breach of a quasi-contract . . . ."\(^3\) The _Brewer_ court, therefore, appears to have adopted both of the lines of thought discussed previously.

By straddling the fence between the implied contractual and the quasi contractual approaches, the _Brewer_ court unintentionally illustrates a point that must be noted. The two approaches stand in sharp contrast theoretically. The first relies on quantum meruit to resolve a matter that the contract did not provide for, namely, compensation. The theory underlying this approach is essentially noncontractual. The second works

\(^{25}\) 355 So. 2d 289 (La. App. 4th Cir. 1978).
\(^{26}\) That article, now repealed, stated in part:

> Actions without words, either written or spoken, are presumptive evidence of a contract, when they are done under circumstances that naturally imply a consent to such contract. To receive goods from a merchant without any express promise, and to use them, implies a promise to pay the value.

\(^{27}\) _Schaff_, 355 So. 2d at 290.


\(^{29}\) 353 So. 2d 386 (La. App. 4th Cir., 1977).

\(^{30}\) Id. at 387.

\(^{31}\) Id. at 388 (citing Succession of Butler, 294 So. 2d 512 (La. 1974)).
within the framework of the contract by supplying the missing term—a provision for a reasonable fee—based on the assumption that the parties implicitly agreed to (or intended) such a provision. On a more practical level, however, the difference between the two lines of thought becomes less apparent. Both approaches ultimately result in judicial determination of a reasonable fee. For this reason, courts such as the Brewer court can confusedly use the approaches interchangeably to reach the same result and never realize the inconsistency. Nevertheless, purity of theory remains a worthy and desirable goal.

Because it is consistent with the civilian tradition, the approach taken by Judge Redmann in Schaff v. Landers deserves praise. Rather than use the ill-defined jurisprudential concept of quantum meruit, that court preferred to base its decision on a much more solid foundation, the Civil Code. However, that court, as well as the others mentioned in this section, should also have cited the second sentence of then-existing article 1965 as authority for the implication of intent to agree on a reasonable fee.

When contemporary courts encounter cases in which no express fee provision exists, they should use new article 2054. Article 2054 seems to be addressed to the exact situation outlined earlier:

> When the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to whatever the law, equity, or usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose.

As a drafter's comment points out, article 2054 provides for the instance where the contract "simply fails to address a particular question." Thus, where no express compensation provision is supplied in an otherwise valid contract, the court should assume, pursuant to article 2054, that the attorney and client intended to bind themselves to a reasonable

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32. La. Civ. Code art. 1965 (1870) provided:

> The equity intended by this rule is founded in the Christian principle not to do unto others that which we would not wish others should do unto us; and on the moral maxim of the law that no one ought to enrich himself at the expense of another. When the law of the land, and that which the parties have made for themselves by their contract, are silent, courts must apply these principles to determine what ought to be incidents to a contract, which are required by equity.


35. Id. comment (b).
fee agreement. Quantum meruit should be rejected where the Code applies.

B. Discharge from an Hourly Fee Agreement

As was noted earlier, another common situation is that in which an attorney is discharged by a client with whom an hourly fee agreement had been reached. Among the Louisiana courts that have addressed this situation, there has been no agreement regarding the applicability of quantum meruit.

The majority rule is that an attorney who has been dismissed by his client is entitled to reimbursement for his services on a quantum meruit basis only, regardless of the character of his fee arrangement. This rule is based on the idea that upon discharge, the contract between the attorney and client is dissolved and terminated, thus rendering the compensation provision of that contract unenforceable.

In the recent case of Lester v. Lester, the court took a different tack. In that case, the client had paid a $4,000 retainer and had agreed by written contract to pay the attorney an hourly fee of $120 for representing him in separation proceedings. Prior to partition of the community, the firm was discharged. The Lester court took note of the cases involving contingency and fixed fee contracts in which the courts had held that quantum meruit provides the proper basis for recovery when an attorney is discharged. The court distinguished those cases, however, stating that the rationale of those cases does not serve, however, to permit a client who has agreed to pay an hourly fee, and on whose behalf services have been performed pursuant to that agreement, to ignore statements for those services, discharge the attorney, and avoid contractual fee obligations theretofore incurred. As to services rendered in accordance with the parties' agreement the contractual fee provision is enforceable....

Thus, under the rational of the Lester decision, the compensation provisions of the contract are not rendered unenforceable by the client's

37. Krampe, 510 So. 2d at 1293; Fowler, 430 So. 2d at 715; Simon, 383 So. 2d at 1324; Smith v. Westside Transit Lines, 313 So. 2d 371, 375 (La. App. 4th Cir.), writ denied, 318 So. 2d 43 (1975).
38. 516 So. 2d at 219 (La. App. 4th Cir. 1987).
39. Id. at 221 (discussing Fowler, 430 So. 2d 711 (La. App. 2d Cir. 1983) and Simon, 383 So. 2d 1321 (La. App. 3d Cir. 1980)).
40. Lester, 516 So. 2d at 221.
discharge of the attorney. The attorney is to be paid on the basis of the hourly charges agreed to by the client for work done by the attorney up to the time of discharge.

The Lester case represents the correct approach to determining the fee to which an attorney who has been discharged from an hourly fee agreement is entitled. Although not cited as its primary authority, Civil Code article 2019\(^41\) formed part of the basis for the court's determination that the attorney should receive compensation in accordance with the agreed hourly fee up to the point of discharge. That article provides:

> In contracts providing for continuous or periodic performance, the effect of the dissolution shall not be extended to any performance already rendered.\(^42\)

The Lester court apparently reasoned that the attorney's services are rendered pursuant to a contract for "periodic performance." Thus, the effect of the attorney's discharge and the resulting dissolution of the contract should not extend to those services already rendered by the attorney.

Besides having support in codal authority, the use of the hourly fee agreement to provide compensation to the discharged attorney is surely more reasonable than the use of quantum meruit. Awarding the hourly fee represents the will of the parties more accurately and enforces their intention more correctly than the vague notion of quantum meruit, which allows the court to substitute its will for that of the parties. Thus, in this situation also, quantum meruit should be rejected in favor of the Civil Code provisions.

C. Discharge from a Contingency Fee Agreement

Unique problems arise when a client discharges an attorney with whom a contingency fee agreement has been reached. Because of the nature of contingency fee agreements, the jurisprudence addressing this situation appears to be in a constant state of confusion and flux. Since an attempt to set out exhaustively every variation in the approaches that have been taken and the results that have been reached by the courts would require a separate paper in itself, only four illustrative decisions will be addressed in this section.

Each of these decisions displays the same basic fact situation. Typically an agreement between the client (Client) and his attorney (Attorney 1) is reached to the effect that Attorney 1 is to be compensated by a certain percentage of any funds recovered on behalf of Client. After Attorney 1 performs some services toward this end, Client discharges


\(^{42}\) Id.
him and reaches a similar agreement with a new attorney (Attorney 2). Thereafter, some recovery is made on behalf of Client, through either settlement or trial. The issue for the courts' resolution is usually presented in the context of the proper compensation, if any, for Attorney 1. Even in this restricted fact situation, broad consensus is nonexistent.

The latest pronouncement from the Louisiana Supreme Court on this issue is found in *Saucier v Hayes Dairy Products.* Present with this fact situation, the trial court limited Attorney 1's recovery to quantum meruit, awarding him $3,000. The court of appeal, finding that Attorney 1 had been dismissed "without cause," enforced the contingency fee agreement, increasing the award to $25,000, equal to the agreed upon 33% of the recovery. In its original opinion, the supreme court affirmed. As noted by the dissent to the original opinion, this decision effectively divided Client's gross recovery of $75,000 three ways: Client, Attorney 1, and Attorney 2 each was to receive one-third of the amount of recovery.

Prompted by a change in composition of the court's membership, the supreme court reheard the case and concluded differently. On rehearing the court focused on the ethical rules contained in the Code of Professional Responsibility. The court concentrated particularly on those rules dictating that a lawyer shall not collect an unreasonable fee and that a lawyer shall withdraw from employment when discharged by the client. The court stated that these ethical rules have the force and effect of substantive law, thus dramatically extending their use beyond disciplinary proceedings. The court then reasoned that the rule requiring withdrawal upon discharge "is stripped of effect if the client's exercise of that right is conditioned upon his payment of the full amount specified in the contract." Furthermore, the limitation of the attorney's compensation to a reasonable fee is violated by "permitting a lawyer to reap in full measure the contracted-for fee provided in a contingency fee contract without providing all or substantially all of the legal services contemplated by the contract." The court concluded that "only one contingency fee should be paid by the client, the amount of the fee to

43. 373 So. 2d 102, 114 (La. 1979) (on rehearng).
44. Id. at 104.
45. Id.
46. Id. at 106.
47. Id. at 108 (Dennis, Tate, and Calogero, JJ., dissenting).
48. The majority opinion on rehearing, which begins id. at 114, was written by Justice Calogero.
51. Saucier 373 So. 2d at 115 (on rehearng).
52. Id. at 116.
53. Id.
be determined according to the highest ethical contingency percentage to which the client contractually agreed in any of the contingency fee contracts which he executed." That fee is to be "allocated between or among the various attorneys involved in handling the claim in question, such fee apportionment to be on the basis of factors which are set forth in the Code of Professional Responsibility." Client, in effect, was required to pay only one total contingent fee, and both Attorney 1 and Attorney 2 were required to litigate the allocation of that fee on remand to the trial court. Notably, the court explicitly rejected quantum meruit in this situation: "The amount prescribed in the contingency fee contract, not quantum meruit, is the proper frame of reference for fixing compensation for the attorney prematurely discharged without cause."

Apparently the only court that has strictly followed the Saucier decision's lead has been the court that rendered the decision, the supreme court. However, one court seems to have reached the same result prior to Saucier, although by a different theoretical route. Smith v. Westside Transit Lines involved the same basic fact situation set out above. Client, after discharging Attorney 1, settled the case for $25,000 with the help of Attorney 2. Attorney 1 claimed that he should be awarded the agreed-upon contingency fee (one-third of the recovery) or alternatively that he should receive the sum of $11,650 on the basis of quantum meruit (computed at $50 per hour for 233 hours of work). The trial court concluded that Attorney 1 was entitled to recover on a quantum meruit basis and found that a fee of $2,400 "would do substantial justice." The appellate court agreed that Attorney 1's recovery was to be rendered on a quantum meruit basis, but noted the "absurdity" of basing a quantum meruit recovery in a contingency fee situation strictly on the hours spent by the attorney on the case. In this situation, Attorney 1 would have recovered far more than the amount he contracted for if his recovery would have been based on the number of hours worked. Instead, the court devised this mechanism:

54. Id. at 118.
55. Id.
56. Id. at 119.
57. Id. at 118. Despite this clear rejection of quantum meruit, at least one court has misinterpreted the Saucier decision as requiring the application of that theory. Defrancesch v. Hardin, 510 So. 2d 42 (La. App. 1st Cir.), writ denied, 513 So. 2d 819 (1987). See also infra text accompanying notes 99-108, discussing how some courts have confused the figuring of quantum meruit recovery with the determination of reasonable fees under the ethical rules.
59. 313 So. 2d 371 (La. App. 4th Cir.), writ denied, 318 So. 2d 43 (1975).
60. Id. at 373.
61. Id. at 376.
62. Id. at 378.
In order for a proper quantum meruit fee to be arrived at for appellant there should be an evidentiary hearing in which the court should take the testimony of both attorneys, evaluate the quality and effectiveness of the services performed by each, allocate a percentage of the total to appellant and fix his fee based on that percentage of the maximum he could have recovered in this case . . . .63

The allocation ordered by the court called for an evaluation of the quality of each attorney's work and the effect that each attorney's work had on the ultimate settlement of the case. In this manner, the court required an apportionment of the one fee between Attorney 1 and Attorney 2.

As was stated before, the result of the Smith approach was very similar to that of the Saucier approach. Both approaches call for the payment by the client of only one contingency fee, that fee to be allocated between the two attorneys proportionately to their services. The theoretical underpinnings of the two approaches, however, are nominally very different. The Smith court relied on quantum meruit. Rejecting the jurisprudential theory of quantum meruit, the Saucier court based its decision instead on substantive positive law, the Code of Professional Responsibility.64

A recent case, Krampe v. Krampe,65 notes and distinguishes the Saucier approach. In that case, Attorney 1 and Client had agreed upon compensation of "40% of recovery." Client was offered a settlement of $350,000, but Attorney 1 refused to consent to the settlement.66 After this refusal, Client discharged Attorney 1 and employed Attorney 2 to accept the settlement offer.

The Krampe court first stated what it termed the "long established general rule"67 that "a discharged attorney must seek compensation on

63. Id.
64. This statement accepts for the moment the questionable propriety of elevating the judicially-adopted ethical rules to the status of substantive law. For purposes of this discussion, it is relevant only that the Saucier court based its decision on what it considered to be positive, substantive law instead of on quantum meruit.
66. Id. at 1290.
67. The attorney argued that he had a proprietary interest in the client’s claim by virtue of La. R.S. 37:218 (1988), which, on its face, permits an attorney to prohibit his client by contract from settling or otherwise disposing of a suit without his consent. In-depth discussion of this provision is beyond the scope of this paper. Nevertheless, suffice it to say that the jurisprudence has held that the interest acquired by an attorney under R.S. 37:218 (1988) is a privilege, rather than an ownership right, to the extent of the fee earned. See Saucier v. Hayes, 373 So. 2d 102 (La. 1979); Calk v. Highland Constr. & Mfg., 376 So. 2d 495 (La. 1979); Krampe, 510 So. 2d 1289 (La. App. 3d Cir. 1987); Kinsey v. Dixon, 467 So. 2d 862 (La. App. 2d Cir. 1985).
68. Krampe, 510 So. 2d at 1292.
a quantum meruit basis regardless of whether the fee arrangement called for a contingency fee or a fixed fee paid in advance by means of a promissory note." 69 This rule is based on the idea that an employment agreement between attorney and client is a contract of mandate. 70 For this reason, Client, who is the principal, may revoke the contract at will, 71 thereby terminating and dissolving the entire attorney-client contract. 72 The general rule of requiring quantum meruit in this situation, then, is based on the idea that no contract for compensation exists upon discharge and therefore that recovery must be based on some other cause of action. Quantum meruit has been used to fill the void. 73

After stating this "general rule," the Krampe court then recognized the Saucier "departure" from this rule, which required the recognition of the contingency fee contract instead of quantum meruit as the proper frame of reference. 74 Next, however, the court attempted to distinguish Saucier on its facts, stating that the basis of Saucier was "to prevent a client from reaping any possible unfair advantage resulting from the discharge of his attorney." 75 The Krampe court ruled that here, the client had reaped no unfair advantage because she had been required to hire another attorney. 76 The Krampe court failed to recognize, however, that a second attorney had also been hired in Saucier. The court's failed attempt at factual distinction reflects a thinly disguised desire to apply the more jurisprudentially accepted theory of quantum meruit rather than the approach of the Saucier court.

The court eventually concluded: "Once a client has exercised the right to terminate the contract of employment . . . the fee provisions of the contract become unenforceable, and the attorney's only claim is in quantum meruit, subject to judicial review of reasonableness." 77 Yet, paradoxically, after briefly discussing the trial court's award on a quan-

69. Id.
73. As was noted by the court in Broussard, Broussard & Moresi v. State Auto & Casualty Underwriters Co., 287 So. 2d 544, 548 (La. App. 3d Cir.), writ denied, 290 So. 2d 908 (1974), "if a distinction exists between the necessary elements of a cause of action in quantum meruit and one in quasi contract, this distinction has long been clouded by repeated interchangeable references to both theories when describing a set of operative facts which constitute a cause of action."
74. Krampe, 510 So. 2d at 1292.
75. Id.
76. Id.
77. Id. at 1293 (citing Simon, Corne & Block v. Duke, 429 So. 2d 507 (La. App. 3d Cir.), writ denied, 437 So. 2d 1147 (1983)).
tum meruit basis, the *Krampe* court affirmed that award, which was equal to the amount agreed upon in the contingency agreement.\(^7\) Thus, definitive analysis of the *Krampe* court's theoretical approach becomes difficult, if not impossible. Did the court genuinely apply quantum meruit principles, or did it only nominally rely on quantum meruit (which in these cases is based on the absence of a contract) and in fact simply enforce the contingency fee contract?

The end result of the *Krampe* case was that Attorney 1 was compensated, as contemplated by the contingency fee agreement, with 40% of the recovery, even though Client had been forced to retain another attorney in order to attain the settlement. The court failed to state what payment Attorney 2 received as compensation for her services, but it was certainly over and above the amount of the original contingency contract. This fact distinguishes the result in *Krampe* from the result in the *Saucier* and *Smith* cases.

The case of *Sims v. Selvage*\(^9\) presents yet another approach to the same basic fact situation. The court first stated the same "general rule" set out by the *Krampe* court, that the dismissed attorney can recover only on the basis of quantum meruit.\(^8\) Quoting from *Saucier*, the court then stated that "the fee should be apportioned between the attorneys 'according to the respective services and contributions for the attorneys for work performed and other relevant factors.' "\(^81\) The court thus mixed quantum meruit with the *Saucier* approach, which required apportionment of the agreed contingency fee and explicitly rejected quantum meruit.

As can be seen from the *Smith*, *Krampe*, and *Sims* cases, quantum meruit apparently is the nominal approach used by the majority of courts that have addressed this fact situation. However, very little uniformity exists in the application of that concept.

What should the courts do? The issue of proper compensation is more difficult to resolve in the case of a contingency fee agreement than in the case of an hourly fee agreement, where the agreed hourly fee can be readily identified as the most logical basis of recovery. Surely it would be unfair to the client if both contingency fee contracts were enforced, with the result that the client would effectively be required to pay two full contingency fees. Furthermore, as the *Saucier* court observed, this approach would emasculate the rule allowing termination of an attorney whenever the client desires. What client will discharge an attorney when faced with the threat of paying two full attorney fees?

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78. *Krampe*, 510 So. 2d at 1293.
79. 499 So. 2d 325 (La. App. 1st Cir. 1986).
80. Id. at 329.
81. Id. (quoting *Saucier* v. Hayes, 373 So. 2d 102, 118 (La. 1979) (on rehearing)).
The result reached in the *Saucier* case on rehearing appears to be the most reasonable. The client should only be required to pay one contingency fee in return for obtaining the result contemplated by the agreement. Payment of that contingency fee, rather than some different fee decided on the basis of quantum meruit, more accurately reflects the will, intentions, and expectations of both parties at the time of agreement that the attorney will seek the desired result. Furthermore, as the *Saucier* court held, this one fee should be divided among the two attorneys in the only practical manner: the character and results of each attorney's services should determine the allocation and should be an issue of fact for the court.

The approach of the *Saucier* court on rehearing is also superior from the standpoint of theory. The *Saucier* court admirably preferred to rely on what it considered substantive positive law, the Code of Professional Responsibility, instead of quantum meruit. However, the court should have chosen to ground its decision in the provisions of the Civil Code. At the time, Civil Code article 1965\(^2\) provided:

> The equity intended by this rule is founded . . . on the moral maxim of the law that no one ought to enrich himself at the expense of another. When the law[s] [that] . . . the parties have made for themselves by their contract, are silent, courts must apply these principles to determine what ought to be incidents to a contract, which are required by equity.

The court could have used the rules contained in this article to reach the same equitable result and thereby avoided having to elevate the ethical rules to the status of substantive law.

Courts facing this situation in the future should apply the second paragraph of article 2018.\(^3\) That passage provides:

> If partial performance has been rendered and that performance is of value to the party seeking to dissolve the contract, the dissolution does not preclude recovery for that performance, whether in contract or quasi-contract.\(^4\)

Thus, recovery for the attorney's services, which were probably of some value to the client, is not precluded by the employment contract's dissolution. Because that is so, a court could use article 2018 to reach the same result as that reached in the *Saucier* case. The comments to that article indicate that if Attorney I has rendered a "substantial part" of the performance, then he would be owed the contracted fee, less damages to Client for the part unperformed, which would be due to

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84. Id.
Attorney 2. If Attorney 1 has rendered “less than a substantial part of the performance” before discharge, then he would be entitled to the value of that performance to Client. Attorney 2 would be due the remainder of the contracted contingency fee amount. It must be noted, however, that Attorney 1’s services up to the point of discharge must have been of some value to Client in order for him to recover under article 2018. If it can be shown that Attorney 1’s services were of no value to Client, then he apparently would be due no compensation.

In the alternative, article 2054 might be applied. That article provides that

[w]hen the parties made no provision for a particular situation, it must be presumed that they intended to bind themselves . . . to whatever the law, equity, or usage regards as implied in a contract of that kind or necessary to achieve its purpose.

The parties likely made no provision for paying Attorney 1 in the event he should be discharged. If they did, that provision should control. In the absence of such a provision the court should assume that the parties intended to bind themselves in an equitable manner, which the court is then free to define. The courts should not feel restricted in the use of article 2054; courts are accorded wide latitude in applying concepts based on equity.

Any approach incorporating quantum meruit should be rejected. The courts appear unable to apply the idea reasonably and consistently. Indeed, the courts have been unable to agree even upon the general approach that should be taken in applying the concept. Furthermore, this jurisprudential import from the common law should be rejected whenever the Civil Code supplies adequate direction, as it does in this situation.

D. Substantial Performance

Like the cases discussed in the prior section, Farrar v. Kelly involved a contingent fee contract and dismissal of the attorney by the client.

85. Id. comment (c). Although they are not positive law, these comments are persuasive authority.
86. Id. comment (d).
87. Id. comment (e).
88. Id.
90. La. Civ. Code art. 2046. Such was the situation in Anderson, Hawsey & Rainach v. Clean Land Air Water Corp., 489 So. 2d 928 (La. App. 5th Cir.), writ denied, 492 So. 2d 1221 (1986). In that case, Client and Attorney 1 had agreed to a contract providing for hourly rates should the contingency not be realized. Rejecting the attorney’s claims for quantum meruit after discharge, the court properly held that “the plaintiff law firm was fully compensated under the terms of its contract.” Id. at 930.
91. 440 So. 2d 939 (La. App. 2d Cir. 1983).
The contract provided that the attorney would receive a fee of 50% of all money and property the client might receive from a succession.\textsuperscript{92} \textit{Farrar}, however, presents a new factual twist: the client dismissed the attorney after a judgment was rendered but before recovery was made.

If the \textit{Farrar} court had followed the "general rule"\textsuperscript{93} of attorney fee litigation in dismissal situations, it would have stated that an attorney-client relationship is one of mandate and that the client may therefore terminate the relationship at will. Since the client exercised that right and discharged the attorney before occurrence of the contingency, the compensation agreement was dissolved and unenforceable. Under that line of jurisprudence, the attorney's proper basis of recovery would have been quantum meruit.

The \textit{Farrar} court, however, took another tack. The court stressed the fact that the attorney had performed "substantially all of the services contemplated by the contract."\textsuperscript{94} The court concluded: "Having done substantially all of the work contemplated by the contract, plaintiffs are entitled to the full fee provided by the contract."\textsuperscript{95} The court thus enforced the contingency fee contract despite the fact that the suspensive condition, the contingency, had not been fulfilled before discharge.

The result and reasoning of \textit{Farrar} appear proper. Courts that face similar situations in the future could, however, strengthen the \textit{Farrar} rationale by relying on article 2014\textsuperscript{96} of the Civil Code, which provides:

A contract may not be dissolved when the obligor has rendered a substantial part of the performance and the part not rendered does not substantially impair the interest of the obligee.\textsuperscript{97}

Thus, since the attorney has rendered a substantial part of the performance, the obligation of the client to pay the contingency fee should not be dissolved.

In opposition to the application of article 2014, the client might cite article 3028,\textsuperscript{98} which permits the client to revoke the mandate at any time; thus, article 2014 may not prevent dissolution of the attorney-client contract. A suitable response to that argument may be that just because the mandate is revoked, the compensation agreement need not be dissolved. Also, the attorney might rely alternatively on article 2018,\textsuperscript{99}

\begin{itemize}
\item \textsuperscript{92} Id. at 941.
\item \textsuperscript{93} See supra text accompanying notes 36-37 and 68-73.
\item \textsuperscript{94} \textit{Farrar}, 440 So. 2d at 941.
\item \textsuperscript{95} Id.
\item \textsuperscript{96} La. Civ. Code art. 2014.
\item \textsuperscript{97} Id. Supporting the application of this article is the notion that an attorney possesses an interest in a contingent fee contract even before the occurrence of the contingency. See \textit{Due v. Due}, 342 So. 2d 161 (La. 1977).
\item \textsuperscript{98} La. Civ. Code art. 3028.
\end{itemize}
which could allow recovery for the attorney in this situation even in the event that the entire attorney-client contract is dissolved.

Furthermore, article 2054 also provides a position that is much more palatable to civilian analysis than is quantum meruit. Under article 2054, a court could reason that equity requires the court to assume a provision providing compensation to an attorney who has performed substantially everything necessary to fulfill the contingency.

III. THE ETHICAL LIMIT OF REASONABLENESS—WAVE OF THE FUTURE OR PRESENT REALITY?

As was stated earlier, the Louisiana Supreme Court in the Saucier case stated that the ethical rules regulating attorney practices have the force and effect of substantive law. Relying on that holding, the supreme court in Leenert Farms, Inc. v. Rogers expansively held that “[a]lthough parties are permitted to contract with respect to attorney fees . . . , attorney fees are subject to review and control by the courts.” With these cases as a foundation, the courts have freely inquired into the reasonableness of attorney fees as required by the ethical rules.

This jurisprudential development bears serious implications for the application of quantum meruit in attorney fee situations. Carried to its extreme, this line of decisions could render moot the whole issue of whether quantum meruit should apply in attorney fee cases as opposed to the obligations and equity provisions of the Civil Code. All compensation agreements between attorneys and clients would become worthless because of the overriding nature of the ethical rules' requirement of reasonableness. Contract, quantum meruit, and codal equity would become irrelevant.

Pharis & Pharis v. Rayner foreshadows this extreme result. In that case, the trial and appellate courts had found that a contingent

101. 373 So. 2d at 115.
102. 421 So. 2d 216 (La. 1982).
103. Id. at 218.
104. See, e.g., Richard v. Broussard, 482 So. 2d 729 (La. App. 1st Cir. 1985), aff’d, 495 So. 2d 1291 (1986); Watson v. Cook, 427 So. 2d 1312 (La. App. 2d Cir. 1983); McCarthy v. Louisiana Timeshare Venture, 426 So. 2d 1342 (La. App. 4th Cir. 1982), writ denied, 433 So. 2d 163 (1983). Notably, the legislature has attempted to solidify attorney fee agreements in written contracts. See La. Civ. Code art. 2000. The courts, however, have refused to allow this legislation to override the mandate of reasonableness from the ethical rules. See also Mengis, Developments in the Law, 1982-1983—Professional Responsibility, 44 La. L. Rev. 489 (1983), discussing this jurisprudential development.
fee contract was void for lack of consent due to an error of fact.106 Justice Dennis, in a very short opinion, first stated that it was "unnecessary to decide whether the contingent fee contract was valid in this case."107 The court concluded: "Regardless of the validity of the employment contract, it is clear that the attorney rendered valuable services for which he should be compensated but that the fee provided by the contract would have been excessive and unreasonable under the circumstances."108 The case was then remanded with instructions that the lower courts determine a reasonable fee in light of the ethical rules.

The Pharis case illustrates that the courts are considering the reasonableness requirements of the ethical rules as the maximum limit of attorney's fees. This requirement is not restricted to disciplinary proceedings. In adopting this position, however, the Louisiana Supreme Court in Pharis seems to have skipped over a vital question: On what basis was the attorney allowed to recover?109 Contract? Quantum meruit? Equity? The court cites only the ethical rules and Saucier as authority for the attorney's recovery; the validity of the employment contract was considered irrelevant. Has the court created a new cause of action for the recovery of reasonable attorney fees under the ethical rules?

Whole papers could be written on the propriety of the supreme court's extending ethical rules beyond the bounds of disciplinary proceedings and elevating them to the status of substantive law. One difficulty with this action is that it permits the courts to substitute their own determinations regarding appropriate fees for those made by the parties themselves, a practice that runs afoul of the codal principle of autonomy of the will. Furthermore, serious separation of powers problems arise as a result of the elevation of judicially adopted rules over those of the legislature, the traditional source of law in the civilian scheme.110 Arguably, application of the ethical rules should be limited to disciplinary proceedings only.

Whatever the merits of this objection, it must be noted that the standard of reasonableness dictated by the ethical rules calls for substantially the same analysis as that which is required by the courts in

106. Id. at 1296. Other courts have applied quantum meruit to allow the attorney to recover in this situation. See, e.g., Succession of Butler, 294 So. 2d 512 (La. 1974); Liles v. Bourgeois, 517 So. 2d 1078 (La. App. 3d Cir. 1987). See Pharis, 397 So. 2d at 1296 (Marcus and Blanche, J., dissenting) (calling for recovery under quantum meruit). 107. Pharis, 397 So. 2d at 1296. 108. Id. 109. On remand, the third circuit set the attorney's fee using the factors of the ethical rules, but stated that quantum meruit was the basis of recovery. Pharis & Pharis v. Rayner, 406 So. 2d 723, 726 (La. App. 3d Cir. 1981). 110. In Saucier, the court stated that the ethical rules "override legislative acts which tend to impede or frustrate" its authority to "regulate the practice of law." 373 So. 2d at 115 (La. 1979) (on rehearing).
figuring quantum meruit recovery. In fact, as was noted earlier, several courts seem to be mixing the factors used for figuring quantum meruit recovery with those for determining the ethical reasonableness of fees.\textsuperscript{111}

In light of the considerations reviewed above, it seems that there are at least four different ways in which the ethical rules' limit on attorney fees may be incorporated into the determination of an attorney's recovery. First, a court may follow the \textit{Pharis} court's lead by basing the attorney's recovery upon the rules of ethics alone. Second, a court may award recovery on a quantum meruit basis, in which case no further examination of the fee for ethical reasonableness would be necessary—the tests for quantum meruit and reasonableness are virtually identical. There are however other alternatives that are more in keeping with civilian analysis. The court might award recovery pursuant to the contract and the Civil Code's obligations articles, then examine the fee further for ethical reasonableness in disciplinary proceedings if the point is contested. Or the court could award recovery on the basis of the Civil Code's equity provisions, obviating the need for further examination of the fee for ethical reasonableness.

\textbf{IV. CONCLUSION}

When the courts of Louisiana have decided to apply the doctrine of quantum meruit in attorney fee cases, their method of determining recovery has been surprisingly consistent. The courts have examined several aspects of the attorney's performance in an effort to determine the reasonable fee for the attorney in each situation.

Nevertheless, the concept of quantum meruit should be discarded by the Louisiana courts as inconsistent with civilian theory. Such common law jurisprudential theories have no place in a civilian jurisdiction, at least when the provisions of the Code supply adequate direction for resolving the problem. Even if no express provision of the Civil Code's obligations articles covers the situation, the codal equitable provisions should always be used rather than quantum meruit.

Quantum meruit, however, does not present the only threat to traditional analysis in this area. The Louisiana Supreme Court's elevation of the judicially adopted ethical rules to a station above legislative provisions arguably clashes with the notion of legislative superiority in the enactment of laws. This judicial innovation should therefore likewise be discarded.

Obviously, the changes advocated in this paper would require a clean break with prior decisions of the state’s courts. It should be remembered, however, that

the decisions of a court of last resort are not the law, but only the evidence of what the court thinks is the law. Previous statements even by this Court [the Louisiana Supreme Court] cannot supersede what we now see is the plain letter and intent of the statute.112

Armed with this idea, Louisiana courts should resist blind adherence to erroneous jurisprudence and strive to maintain the Louisiana civil law tradition.

H. David Vaughan, II

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