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Contracts: An Eight-Factor Test for Quantum Meruit Compensation for a Dismissed Contingency Fee Counsel—Faricy Law Firm, P.A. v. API, Inc. Asbestos Settlement Trust, 912 N.W.2d 652 (Minn. 2018)

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CONTRACTS: AN EIGHT-FACTOR TEST FOR QUANTUM MERUIT COMPENSATION FOR A DISMISSED CONTINGENCY FEE COUNSEL—FARICY LAW FIRM, P.A. V. API, INC. ASBESTOS SETTLEMENT TRUST, 912 N.W.2D 652 (MINN. 2018)

Mitch Ohiwa*

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I. INTRODUCTION

How do we value ten hours of legal work performed by a discharged attorney who significantly contributes to a twenty-million-dollar settlement? In *Faricy v. API Trust*, the Minnesota Supreme Court provided eight factors that district courts should use to determine the quantum meruit value of services provided by an attorney under a contingent fee agreement when the attorney is discharged before the contingency occurs. Two of the eight factors address concerns specific to the context of a discharged contingent fee attorney, which was an issue of first impression for the court.

This case note begins by exploring the factors and approaches that were historically considered to determine the quantum meruit value of legal work and the compensation of attorneys. A discussion of the facts, procedural history, and holdings of *Faricy v. API Trust* follows. Next, the case note argues the likely limitations of the eight-factor test when applied to future cases and provides potential solutions for avoiding fee disputes in situations similar to *Faricy v. API Trust*. Finally, this note concludes that inconsistencies may remain in future district court decisions because the weight that applies to each of the factors in the eight-factor test is unclear.

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JD Candidate, Mitchell Hamline School of Law. I would like to thank Professor Gregory M. Duhl for insightful guidance and the Mitchell Hamline Law Review staff for feedback.


2 Faricy Law Firm, P.A. v. API, Inc. Asbestos Settlement Trust, 912 N.W.2d 652, 656 (Minn. 2018) (“The district court found that ‘the events leading to the settlement between API Trust and the Home Liquidator lead to the reasonable inference that Faricy’s work product, advice, and recommended negotiation strategy led to the settlement in significant part.’” (emphasis omitted)).

3 Id. at 655 (“API Trust settled the Home Liquidator claim for $21.5 million.”).

4 Id. at 658.

5 See id.; see also Faricy Law Firm, P.A. v. API, Inc. Asbestos Settlement Tr., No. A16-1539, 2017 WL 1832415, at *4 (Minn. Ct. App. May 8, 2017), aff’d as modified, 912 N.W.2d 652 (Minn. 2018). Previous decisions concerning multiple law firms were from cases at the Minnesota Court of Appeals. See Ashford v. Interstate Trucking Corp. of Am., 524 N.W.2d 500, 504 (Minn. Ct. App. 1994); *In re L-tryptophan Cases*, 518 N.W.2d 616, 621 (Minn. Ct. App. 1994).

6 See infra Part II.

7 See infra Part III.

8 See infra Part IV.

II. HISTORY

A. History of Attorney’s Fees

It is the “American Rule” that each party in a lawsuit bears its own attorney’s fees unless there is an express statutory authorization providing otherwise. Courts have upheld and enforced fee contracts between attorneys and clients since the nineteenth century. When there were statutory limitations on attorney’s fees, courts allowed attorneys to recover in quantum meruit, implying that there was some standard when assessing fees. Once the freedom to contract between attorneys and clients was acknowledged, courts had little ground for rejecting contingent fee contracts and allowed fee arrangements to enable those who could not pay large fees in advance to access the courts. By the middle of the nineteenth century, courts had become more receptive to contingent fee contracts, and such contracts were well established in practice. Contingent fee contracts between attorneys and clients are widely adopted based on their merits for client protection.

10 Hensley v. Eckerhart, 461 U.S. 424, 429 (1983); Fownes v. Hubbard Broad., Inc., 310 Minn. 540, 542, 216 N.W.2d 700, 702 (1976) (“The general American rule is that attorneys fees may not be awarded to a successful litigant without explicit statutory or contractual authorization.”). Examples of Minnesota statutes authorizing an award of attorney fees include denial of insurance coverage without reasonable basis, M N N. STAT. § 604.18, subdiv. 3 (2019), action against a creditor who used a misleading form, M N N. STAT. § 571.72, subdiv. 7 (2019), and action for physical interference with safe access to health care, M N N. STAT. § 609.745, subdiv. 4 (2019). See generally MARY MULLEN, M INN. HA USE RESEARCH DEPT’T, ATTORNEY FEE AWARDS IN M INNESOTA STATUTES (2018), https://www.house.leg.state.mn.us/hrd/pubs/attyfee.pdf [https://perma.cc/9TYV-9TXM].

11 John Leubsdorf, Toward a History of the American Rule on Attorney Fee Recovery, 47 L AW & CON TEM P. PROBS. 9, 16 (1984) (citing Bayard v. McLane, 3 Del. (3 Harr.) 139, 217-22 (1840); Stevens & Cagger v. Adams, 26 Wend. 57 (N.Y. 1841), aff’d, 26 Wend. 451 (N.Y. 1841)). There were legislative limits on what attorneys could charge their clients, and higher fees were charged after the statutes were repealed or forgotten by the late eighteenth century. Id. at 13. Courts and attorneys were more interested in establishing the attorney’s right to collect larger fees from the attorney’s client rather than justifying or criticizing a system which awarded the prevailing party a small attorney fee. Id. at 14.

12 Quantum meruit is Latin for “as much as he has deserved.” Quantum meruit, BLACK’S L AW DICTIONARY (11th ed. 2019).

13 Leubsdorf, supra note 11, at 16 (citing Foster v. Jack, 4 Watts 334 (Pa. 1835); Newman v. Washington, 8 Tenn. 86 (1 Mart. & Yer. 79) (1827); Vilas v. Downer, 21 Vi. 419 (1849)).

14 Id.

15 Id.

16 See Kenneth A. Ewing, Quantum Meruit in Ohio: The Search for a Fair Standard In Contingent Fee Contracts, 18 U. DAYTON L. REV. 109, 110-12 (1992) (citing numerous state cases recognizing contingent fee contracts; discussing fields applying contingent fee contracts, integrated functions of contingency fee contracts, merits and benefits offered by contingent fee contracts, and types of contingency fee contracts).
Since 1927, Minnesota has allowed parties to freely enter into agreements with attorneys without restricting the type of fee agreement which may be used.\footnote{MINN. STAT. § 9470 (1927) ("A party shall have an unrestricted right to agree with his attorney as to his compensation for services, and the measure and mode thereof . . . ."). The text in the current statute remains unchanged except for gender neutrality. See MINN. STAT. § 549.01 (2019).} The Minnesota Supreme Court has also long recognized that contracts for contingent fees benefit the client as well as the attorney.\footnote{Hollister v. Ulvi, 199 Minn. 269, 276–77, 271 N.W. 493, 497 (1937) (quoting 2 R.C.L. § 121, pp.1039–40) (“Contracts for contingent fees are as much for the benefit of the client as for the attorney, because if the client has a meritorious cause of action, but no means with which to pay for legal services unless he can, with the sanction of the law, make a contract for a contingent fee to be paid out of the proceeds of the litigation, he cannot obtain the services of a law-abiding attorney, and if perchance he should find one who would secretly make with him a contract in violation of the law, he might put himself in unsafe hands.”).}

A contingent fee is a fee payable to the attorney only when the case is successful.\footnote{How Do I Settle on a Fee with a Lawyer? AM. BAR ASS’N (June 7, 2018), https://www.americanbar.org/groups/public_education/resources/public-information/how-do-i-settle-on-a-fee-with-a-lawyer/ [https://perma.cc/8ANU-5A8B].} In a contingent fee arrangement, the lawyer agrees to accept a fixed percentage of the amount recovered, with the fee coming out of the money awarded to the client.\footnote{Id.} While there is a chance that, under a contingent arrangement, there will be no payment for the attorney, there is also a chance of obtaining a higher payment than that under an hourly fee arrangement, especially when the client’s recovery is large.\footnote{Id. As in Faricy v. API Trust, the potential compensation in question can become significant under a contingent fee contract.\footnote{In re Petition for Distrib. of Attorney’s Fees, 870 N.W.2d 755, 761 (Minn. 2015).}]

B. Quantum Meruit

In a contingent fee contract, the client can discharge the attorney without cause before the contingency occurs because the right to terminate is an implied term of the contract.\footnote{In re Petition for Distrib. of Attorney’s Fees, 870 N.W.2d 755, 761 (Minn. 2015).} When an attorney is discharged from a contingent fee contract before the contingency is reached, the discharged attorney may not sue for breach of contract damages because of the client’s
implied right to terminate the attorney-client relationship. This same rule prevents a contingent fee attorney from recovering the contingent fee under the terms of the contract if the contingency occurs after the client terminates the attorney’s representation. The discharged attorney is instead entitled to compensation for the reasonable value of the services under the equitable theory of quantum meruit.

Quantum meruit may apply in two different circumstances: as a claim at law for the fair market value of a party’s performance under an implied-in-fact contract, or as a claim in equity for restitution of the value of a benefit conferred in the absence of a contract under a theory of unjust enrichment.

Quantum meruit, as discussed in *Faricy v. API Trust*, was a claim in equity, and the calculation of the reasonable value of services was distinct from the hourly calculation used in non-equitable contexts. To prove a claim in quantum meruit, one element the discharged attorney must prove is the value of the services provided. Multiple factors have been used to determine this value.

**C. Reasonable Attorney’s Fees under Minnesota Rules of Professional Conduct**

The Minnesota Supreme Court adopted the American Bar Association (ABA) *Canons of Professional Ethics* in 1955 and the ABA...
Code of Professional Responsibility in 1970.\textsuperscript{32} “The Minnesota Rules of Professional Conduct were patterned after the ABA Model Rules of Professional Conduct, and were formally adopted in 1985 to replace the Minnesota Code of Professional Responsibility.”\textsuperscript{33} To determine the reasonableness of a fee, Rule 1.5(a) of the Minnesota Rules of Professional Conduct considers:

(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.\textsuperscript{34}

The factors specified are not exhaustive and not all factors may be relevant in each case.\textsuperscript{35} Since the adoption of the ABA Code of Professional Responsibility in 1970, there have been minimal changes to these factors to assess the reasonableness of attorney’s fees.\textsuperscript{36}

D. The Lodestar Approach

The lodestar approach, described in Hensley v. Eckerhart,\textsuperscript{37} determines the attorney’s reasonable fee by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate.\textsuperscript{38} While other considerations may adjust the fee upward or downward, the lodestar approach considers the results obtained by the attorney as an important factor.\textsuperscript{39} In some cases of exceptional success, an enhanced award may be justified.\textsuperscript{40} There is no precise rule or formula for making these adjustments,\textsuperscript{41} and the party seeking an award of fees should submit

\textsuperscript{33} State v. Miller, 600 N.W.2d 457, 463 n.5 (Minn. 1999) (citing Petition of Weiblen, 439 N.W.2d 7, 9 n.2 (Minn. 1989)).
\textsuperscript{34} MINN. R. PROF’L CONDUCT 1.5(a) (2019).
\textsuperscript{35} Id. r. 1.5(a) cmt. 1.
\textsuperscript{36} Compare id. r. 1.5(a), with CODE OF PROF’L RESPONSIBILITY DR 2-106 (AM. BAR ASS’N 1970).
\textsuperscript{37} 461 U.S. 424 (1983).
\textsuperscript{38} Id. at 433.
\textsuperscript{39} Id. at 434.
\textsuperscript{40} Id. at 435. The ratio of this enhanced award to the lodestar value is called an enhancement or multiplier. See Milner v. Farmers Ins. Exch., 748 N.W.2d 608, 624 (Minn. 2008).
\textsuperscript{41} Hensley, 461 U.S. at 436.
evidence supporting the hours worked and rates claimed using prevailing market rates in the relevant community. Where the documentation of hours is inadequate, the district court may reduce the award.

Upward adjustments to the lodestar method are justified in rare cases when specific evidence shows there was exceptional success. Risk involved in the litigation may also allow an upward adjustment. When multipliers are used to adjust the attorney’s fee upward, states that allow the practice typically limit the multipliers to the single digits. Through Specialized Tours, Inc. v. Hagen, Minnesota adopted the lodestar approach described by the United States Supreme Court in Hensley v. Eckerhart.

E. Factors Considered in Minnesota Cases

Minnesota cases present a comprehensive list of factors that courts have used to evaluate attorney’s fees. Notably, Kittler & Hedelson v. Sheehan Properties, Inc. listed twelve factors that Minnesota courts have considered:

(1) The time and labor required; (2) the responsibility assumed; (3) the magnitude of the principal amount; (4) the results obtained; (5) the fees customarily charged for similar services; (6) the experience, character, reputation, and ability of counsel; (7) the fee arrangements; (8) the circumstances under which the services were rendered; (9) the nature and difficulty of the proposition involved; (10) the doubtful solvency of the client and the apparent difficulties of collection; (11) the anticipation of future services; and (12) the preclusion of other employment.

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42 Id. at 433.
44 Hensley, 461 U.S. at 433.
45 Blum, 465 U.S. at 899.
47 Matthew D. Klaiber, A Uniform Fee-Setting System for Calculating Court-Awarded Attorneys’ Fees: Combining Ex Ante Rates with a Multifactor Lodestar Method and a Performance-Based Mathematical Model, 66 Md. L. Rev. 228, 244–45, 250 (2007) (providing multipliers calculated from cases employing the lodestar method).
48 392 N.W.2d 520, 542 (Minn. 1986).
50 Kittler & Hedelson v. Sheehan Properties, Inc., 295 Minn. 232, 236–37, 203 N.W.2d 835, 839 (1973) (citing O’Donnell v. McGee Trucks, Inc., 294 Minn. 110, 199 N.W.2d 432 (1972); State by Head v. Paulson, 290 Minn. 371, 188 N.W.2d 424 (1971); In re Atwood’s Tr., 227 Minn. 495, 497, 35 N.W.2d 736, 738 (1949). Kittler has one of the most comprehensive sets of criteria, likely due to its reliance on State by Head v. Paulson, 290 Minn. 371, 373, 188 N.W. 2d 424, 426 (1971), which cites the Code of Professional Responsibility.
Ashford v. Interstate Trucking Corp. of America affirmed additional factors that the district court used—proportion of funds invested by each firm and the result of each firm’s efforts—to determine the distribution of fees to two law firms retained under contingency fee contracts for the same client. 

F. Factors Considered in Federal and Non-Minnesota Jurisdictions

Many federal district courts and some state courts consider the Johnson factors when adjusting the lodestar amount. There are twelve Johnson factors: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

The Andersen factors, comparable to the Johnson factors, are also used in multiple jurisdictions to determine the reasonableness of a fee. The Andersen factors are:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood . . . 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

Ashford v. Interstate Trucking Corp. of Am., 524 N.W.2d 500, 504 (Minn. Ct. App. 1994).


Andersen factors, comparable to the Johnson factors, are also used in multiple jurisdictions to determine the reasonableness of a fee. The Andersen factors are:


Mid-Continent Cas. Co. v. Chevron Pipe Line Co., 205 F.3d 222, 232 (5th Cir. 2000).

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 on results obtained or uncertainty of collection before the legal services have been rendered.\(^5\)

While there are variations, many states consider similar points when evaluating the adjustments to the lodestar calculation or assessing the reasonableness of the attorney’s fee. Some states apply the factors differently, with many leaving the factors potentially open-ended. New York courts consider “various factors” to determine the reasonable value of the services rendered when a discharged attorney seeks to recover fees in quantum meruit.\(^6\) Rather than listing factors, other courts may consider the “totality of circumstances”\(^7\) or “all relevant factors,”\(^8\) based on deference for the trial court’s discretion.

G. Compensation for Multiple Law Firms

In the New Jersey case of *La Mantia v. Durst*, a contingent fee had to be divided between an attorney’s new and former law firms after the attorney left the former firm, taking the client with him to the new firm.\(^9\) To reasonably allocate the fees, the court in *La Mantia* considered: (1) the length of time each firm spent on the case; (2) the proportion of funds invested by each firm; (3) the quality of representation; (4) the result of each firm’s efforts; (5) the reason the client changed firms; (6) the viability of the claim at transfer; (7) the amount of recovery realized; and (8) any pre-

\(^{5}\) *Andersen*, 945 S.W.2d at 818 (citing TEX. DISCIPLINARY R. PROF’l CONDUCT 1.04).

\(^{6}\) *Dweck Law Firm, L.L.P. v. Mann*, No. 03 Civ. 8967(SAS), 2004 WL 1794486, at *5–6 (S.D.N.Y. Aug. 11, 2004) (citing *Ingber v. Sabato*, 229 A.D.2d 884, 887 (N.Y. 1996)) (noting a less exhaustive list of factors, including “the difficulty of the matter, the nature and extent of the services rendered, the time reasonably expended on those services, the quality of performance by counsel, the qualifications of counsel, the amount at issue, and the results obtained (to the extent known)” (internal citation omitted)).

\(^{7}\) *See Rosenberg v. Levin*, 409 So. 2d 1016, 1022 (Fla. 1982) (“In computing the reasonable value of the discharged attorney’s services, the trial court can consider the totality of the circumstances surrounding the professional relationship between the attorney and client.”).


\(^{9}\) *See Goldstein & Price, L.C. v. Tonkin & Mondl, L.C.*, 974 S.W.2d 543, 549 (Mo. Ct. App. 1998) (citing *Roberds*, 733 S.W.2d at 447) (“[T]he trial court sits as an expert in consideration of attorney fees due after consideration of all relevant factors.”). The trial court’s discretion is respected “unless the award is so arbitrary or unreasonable that it indicates indifference and lack of proper judicial consideration.” *Id.* (citing *Estate of Strauss v. Schaeffer*, 781 S.W.2d 274, 275 (Mo. Ct. App. 1989)).

existing partnership agreements.¹⁵ Even jurisdictions outside of New Jersey rely on *La Mantia* when cases involve splitting fees between multiple law firms based on a contingency agreement.¹⁶

**III. THE FARICY V. API TRUST DECISION**

**A. Facts and Procedural Posture**

In *Faricy v. API Trust*, respondent API, Inc., (API) Asbestos Settlement Trust (API Trust) was the trust established for the benefit of claimants on asbestos-related claims under API’s plan of reorganization under Chapter 11 bankruptcy.¹⁷ API Trust retained appellant, Faricy Law Firm, P.A. (Faricy), under a fee agreement with no hourly fee and a one-third contingent fee.¹⁸

From January 2009 to August 2012, Faricy represented API Trust on an insurance claim against Home Liquidator.¹⁹ Attorneys from Faricy drafted letters, conducted legal research, and advised and strategized with API Trust on settlement negotiations with Home Liquidator.²⁰ In June 2012, while Faricy was still representing API Trust, Home Liquidator extended an $11 million settlement offer.²¹ On August 31, 2012, API Trust terminated Faricy’s representation.²² In late September 2012, Faricy requested a third of the settlement recovery API Trust was supposed to— but did not—receive from Home Liquidator.²³ In November 2012, API Trust settled the Home Liquidator claim for $21.5 million.²⁴ Faricy again requested one-third of the settlement payments, based on the contingent fee agreement.²⁵ API Trust refused to pay Faricy any amount that reflected the contingent fee.²⁶ Faricy filed an attorney’s lien under section 481.13 of the Minnesota Statutes, asserting entitlement to one-third of all received and

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¹⁵ *Id.* at 278 (citations omitted).
¹⁹ *Id.*
²⁰ *Id.*
²¹ *Id.*
²² *Id.*
²³ *Id.*
²⁴ *Id.*
²⁵ *Id.*
²⁶ *Id.*
pending payments from Home Liquidator to API Trust.\textsuperscript{77} Faricy then sought to enforce the lien.\textsuperscript{78}

The district court considered whether Faricy had proven a claim in quantum meruit.\textsuperscript{79} To determine the quantum meruit value of Faricy’s services, the district court attempted to use two different methods of calculation: the lodestar method and a factor-based method developed by the Minnesota Court of Appeals.\textsuperscript{80} The district court found that Faricy worked together with API Trust and that Faricy’s work significantly led to the excellent outcome.\textsuperscript{81} However, the district court awarded Faricy no compensation for its work because Faricy failed to prove the reasonable value of its work regardless of the calculation or approach.\textsuperscript{82}

On appeal, the court of appeals developed a six-factor test, based on \textit{Ashford v. Interstate Trucking Corp. of America, Inc.},\textsuperscript{83} for calculating the quantum meruit value of a discharged attorney’s services under contingent fee arrangements.\textsuperscript{84} The court of appeals reversed the district court’s decision and remanded the case to the district court to engage in a quantum meruit analysis by applying the six factors,\textsuperscript{85} none of which considered the contingent fee agreement.\textsuperscript{86} After this decision by the court of appeals, Faricy appealed, and API Trust cross-appealed.\textsuperscript{87}

\textbf{B. The Minnesota Supreme Court Decision}

The Minnesota Supreme Court granted review on two issues: (1) “whether the contingent fee agreement can be considered as a factor when determining the reasonable value of services in quantum meruit,” and (2) “the amount of evidence required to prove quantum meruit.”\textsuperscript{88} For the first issue, the majority explained that the contingent fee arrangement is only one factor among many when considering an award for quantum meruit.\textsuperscript{89} In its

\begin{itemize}
  \item \textsuperscript{77} Id. at 656.
  \item \textsuperscript{78} Id.
  \item \textsuperscript{79} Id.
  \item \textsuperscript{80} Id.
  \item \textsuperscript{81} Id.
  \item \textsuperscript{82} Id.
  \item \textsuperscript{83} 524 N.W.2d 500, 503 (Minn. Ct. App. 1994).
  \item \textsuperscript{84} Faricy Law Firm, P.A. v. API, Inc. Asbestos Settlement Tr., No. A16-1539, 2017 WL 1832415, at *3 (Minn. Ct. App. May 8, 2017), aff’d as modified, 912 N.W.2d 652 (Minn. 2018). The factors developed by the court of appeals are: (1) the length and amount of time spent on the case; (2) the quality and level of expertise; (3) results obtained by the attorney’s efforts; (4) contribution of others; (5) risks undertaking in accepting employment on the case; and (6) the relevant circumstances surrounding the discharge. \textit{Id}.
  \item \textsuperscript{85} \textit{Id}.
  \item \textsuperscript{86} \textit{Id}.
  \item \textsuperscript{87} \textit{Id}.
  \item \textsuperscript{88} \textit{Id}.
  \item \textsuperscript{89} \textit{Id} at 658.
\end{itemize}
ruling, the court provided eight factors that district courts should use to
determine the quantum meruit value of a discharged contingent fee
attorney’s services:

(1) time and labor required; (2) nature and difficulty of the
responsibility assumed; (3) amount involved and the results
obtained; (4) fees customarily charged for similar legal services;
(5) experience, reputation, and ability of counsel; (6) fee
arrangement existing between counsel and the client; (7)
contributions of others; and (8) timing of the termination.

The lodestar method considers the first six factors to evaluate the
reasonableness of statutory attorney fees. On the other hand, Faricy
applied the same six factors to establish the fee award in the specific context
of assessing the reasonable quantum meruit value of legal services provided
by a discharged contingent fee attorney. The last two factors “allow the
courts to measure the value of the services depending on how the timing of
the termination related to the ultimate result and whether the discharged
attorney added value compared to other contributors to the case.” The
court believed the set of factors adopted “should guide district courts faced
with the task of balancing the equities in determining the quantum meruit
value of the services of a discharged contingent fee attorney.”

The court remanded the case, directing the district court to determine
the fee by considering, among other factors, the contingent fee arrangement
between Faricy and API Trust under the new eight-factor test. The court
noted that the fee agreement “is merely one factor, among a host of others
that the district court is to consider in awarding reasonable attorney fees.”
Because of the remand, the majority did not decide on the second issue of
evidence required to prove quantum meruit. The dissenting opinion
disagreed with the majority’s conclusion because Faricy had not provided
proof of reasonable value of services during the proceedings, concluding
that Faricy’s motion for fees should be denied.

" Id.
91 Id. at 659.
92 Id. (citing City of Minnetonka v. Carlson, 298 N.W.2d 763, 765 (Minn. 1980); State by
Head v. Paulson, 290 Minn. 371, 373, 188 N.W.2d 424, 426 (1971)).
93 Id. at 660.
94 Id.
95 Id.
96 Id. (quoting Green v. BMW of N. Am., LLC, 826 N.W.2d 530, 536 (Minn. 2013)).
97 Id. at 661.
98 Id. at 663 (Gildea, C.J., dissenting).
IV. ANALYSIS

A. Direct Implication of the Faricy v. API Trust Decision

The Minnesota Supreme Court adopted an eight-factor test that addresses the complexity of determining the reasonable value of services when multiple parties are involved in one case.\(^9\) Prior to the decision in Faricy, cases involving multiple parties with contingency agreements could rely on Ashford v. Interstate Trucking Corp. of America,\(^{100}\) which based its factors on In re L-tryptophan Cases.\(^{101}\) However, the holding in L-tryptophan was not intended to apply to cases in which a discharged attorney sues the client.\(^{102}\) Further, to determine the factors for awarding attorney’s fees, L-tryptophan relied on a case outside the jurisdiction.\(^{103}\) However, even with the eight-factor test from Faricy\(^{104}\) and numerous other factors which could be considered,\(^{105}\) district courts will likely continue facing difficulties when determining the value of and reasonable compensation for a contingent-fee attorneys’ legal work for two reasons.

First, the Minnesota Supreme Court requires the district courts to weigh and balance the equities between the parties,\(^{106}\) without further

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\(^{9}\) Id. at 661 (majority opinion).

\(^{100}\) See, e.g., Kohn v. City of Minneapolis Fire Dep’t, No. C4-00-1625, 2001 WL 138757, at *1 (Minn. Ct. App. Feb. 20, 2001) (citing Ashford v. Interstate Trucking Corp. of Am., 524 N.W.2d 500 (Minn. Ct. App. 1994)).

\(^{101}\) In Ashford, the Minnesota Court of Appeals compared the district court’s factors to the six factors used in L-tryptophan and affirmed the district court’s decision. Ashford, 524 N.W.2d at 503–04 (citing In re L-tryptophan Cases, 518 N.W.2d 616, 621 (Minn. Ct. App. 1994)).

\(^{102}\) Id. (relying on La Mantia v. Durst, 561 A.2d 275, 279 (N.J. Super. Ct. App. Div. 1989)). While L-tryptophan also considered factors from Kittler v. Sheehan Properties, Inc., 295 Minn. 232, 236–37, 203 N.W.2d 835, 839 (1973), all the factors described in La Mantia differ from the factors listed in Kittler to different degrees.

\(^{103}\) Faricy Law Firm, P.A. v. API, Inc. Asbestos Settlement Tr., 912 N.W.2d 652, 661 (Minn. 2018).

\(^{104}\) See Kittler, 295 Minn. at 236, 203 N.W.2d at 839 (noting other factors the court has considered, such as, the magnitude of the principal amount, the circumstances under which services were rendered, the nature and difficulty of the proposition involved, the doubtful solvency of the client and the apparent difficulties of collection, the anticipation of future services, and the preclusion of other employment).

\(^{105}\) Faricy, 912 N.W.2d at 660 (quoting RAM Mut. Ins. Co. v. Rohde, 820 N.W.2d 1, 13 (Minn. 2012)) (“[B]right-line rules of any kind are in conflict with the basic principles of equity, which by definition require a court to weigh and balance the equities between the parties.”).
guidance on how to assign weight to each of the eight factors. The court explained its decision by offering examples, including a situation where the client discharges the attorney moments before settlement occurs. If the weight placed on “time and labor required” or “amount involved and the results obtained” is unclear when establishing the fee, the district courts will likely continue to experience difficulty when deciding cases. This is especially true where minimal time and effort expended leads to an excellent outcome or maximal time and effort expended leads to a poor outcome.

Second, the reasonable value of attorney’s fees is a question of fact, and district courts will use the eight-factor test to determine the reasonable value of services provided by a discharged contingent fee attorney in quantum meruit. However, the possible range of courts’ decisions could be problematic in practice. For example, in the dispute between the appellant and respondent in Faricy, the possible reasonable value of service ranged from $41,000 to about $7 million for five to ten hours of work. This range translates to $4,100 to $1.4 million per hour of work. Regardless of the outcome achieved, the time and labor expended and the fees customarily charged for similar legal services are factors that must be weighed in computing the value of service. Accordingly, it may be difficult to arrive even at the lowest end ($4,100 per hour) of this range when $465 is the highest hourly rate referenced in the court documents for Faricy.

The Minnesota Supreme Court could have improved its eight-factor test in Faricy by assigning more weight to results obtained to determine the

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107 Id. at 661 (“The calculation of a quantum meruit award is instead an equitable process by which the court determines the reasonable value of services based on a variety of factors, which, ultimately, produces an equitable remedy.”).
108 Id. at 660.
109 See id. at 658.
110 Id. at 657 (citing Thomas A. Foster & Assocs. v. Paulson, 699 N.W.2d 1, 4 (Minn. Ct. App. 2005)).
111 Id. at 660.
112 Id. at 656 n.2 (“The district court also recognized that the record supported a conclusion that the trustee did most of the work and thus that the reasonable value of Faricy's work is something less than $41,000.”).
113 Id. at 653 (“API Trust settled the Home Liquidator claim for $21.5 million . . . . Faricy again wrote to API Trust and requested 1/3 of the payments.”).
114 The lowest value is calculated by dividing the lower value by the longer hours ($41,000/10 = $4,100); the highest value is calculated by dividing the higher value by the shorter hours ($21,000,000/5 = $4,200,000).
115 Faricy, 912 N.W.2d at 658. These are the first, third, and fourth factors of the eight-factor test.
116 Faricy’s Brief, supra note 22, at *6 (“API initially retained Faricy on an hourly fee agreement providing that John H. Faricy, Jr. and Craig Roen charged $465 per hour while associates charged between $200 and $365 per hour.”).
quantum meruit value of the attorney’s services when the attorney is discharged without cause from the contingency fee contract. While *Farcy* provides a valuable framework for calculating the quantum meruit value of an attorney’s services, without further specification of the weight to be assigned to each of *Farcy*’s eight factors, the *Farcy* test may have limited impact. Without guidance on how to weigh the *Farcy* factors, courts may assign different weights to each factor and arrive at different quantum meruit values even when the facts are the same across cases. An approach that assigns additional weight to the results obtained would have still maintained consistency with the lodestar approach because the lodestar approach treats results obtained by the attorney as an important factor.\(^{117}\)

The Minnesota Supreme Court has held that public policy requires freedom of contract to remain inviolate except in cases where the “contract violates some principle which is of even greater importance to the general public.”\(^{118}\) Further, contingent fee contracts are valid contracts\(^ {119}\) and “a large fee is not necessarily an unreasonable fee.”\(^ {120}\) Since the reasonable value of attorney’s fees is a question of fact, and the findings of the trial court must be upheld by a reviewing court unless clearly erroneous,\(^ {121}\) it will be important for an attorney to be able to justify the fee with specific evidence. Therefore, further analysis of the eight factors from *Farcy* is required and valuable to avoid similar uncertainties concerning fee disputes.

**B. Avoiding Fee Disputes When Results Are Exceptional**

There has been an interest in the *Farcy* factors and their impact on contingency fee contracts.\(^ {122}\) Given the uncertainty with how trial courts will

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\(^{117}\) See Hensley v. Eckerhart, 461 U.S. 424, 434 (1983); see also Carmen Enters., Inc. v. Mumpeter, LLC, 185 A.3d 380, 389 (Pa. 2018) (“The facts and factors to be taken into consideration in determining the fee or compensation payable to an attorney include: . . . and, very importantly, the amount of money or the value of the property in question.”).

\(^{118}\) Rossman v. 710 River Drive, 308 Minn. 134, 136, 241 N.W.2d 91, 92 (1976) (citing James Quirk Milling Co. v. Minneapolis & St. Louis R.R. Co., 98 Minn. 22, 23, 107 N.W. 742, 742 (1906)).

\(^{119}\) Holt v. Swenson, 252 Minn. 510, 514, 90 N.W.2d 724, 727-28 (1958) (quoting Hollister v. Ulsi, 199 Minn. 269, 276, 271 N.W. 493, 497 (1937)).

\(^{120}\) Kittler & Hedelson v. Sheahan Props., Inc., 295 Minn. 232, 236, 203 N.W.2d 835, 839 (1973) (citing Obraske v. Woody, 295 Minn. 103, 109, 199 N.W.2d 429, 432 (1972)).

\(^{121}\) Amerman v. Lakeland Dev. Corp., 295 Minn. 536, 537, 203 N.W.2d 400, 400-01 (1973).

apply the eight factors, the following analysis intends to set forth some considerations for both clients and attorneys when entering a contingency fee agreement to avoid fee litigation after termination of contingency fee contracts.

1. Client’s Perspective

For a client to avoid a fee dispute after discharging a contingent attorney, it may be necessary to begin with an hour-based fee consultation. The client should seek to understand the potential amount of work before entering a contingent fee contract. This enables the client to assess whether an hourly fee contract or a contingent fee contract would yield a higher net recovery after paying attorney’s fees. While a contingent fee arrangement allows a client without much money to access the legal system, it may be financially prudent for the client to explore alternate methods to finance the litigation if there is potential for disagreement over the fees based on prospective recovery and work provided by the attorney.

2. Attorney’s Perspective

As long as courts must consider the time and labor required as factors, it seems extremely unlikely that the full contingency amount will be awarded to an attorney who has the skill and experience to obtain a spectacular result with minimal effort but is discharged from a contingent fee contract immediately before the contingency is met. While the remaining seven factors provided in Faricy could affect the award, the baseline used for the calculation of the fee still appears to be the time and labor required if the lodestar method is used. It is unlikely that the remaining seven factors will significantly change the fee calculation because they would likely be considered “adjustments.”

Taking Faricy as an

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[123] Hiring an Attorney, OFFICE OF THE MINN. ATT’Y GEN. 1, https://www.ag.state.mn.us/Brochures/pubHiringAnAttorney.pdf [https://perma.cc/854W-8XJY] (last visited Feb. 2, 2020) (“Because the hours worked on your case can quickly add up, you should ask for an estimate of the number of hours necessary to complete your case.”).


[125] This is the first factor in Faricy and other cases. See Faricy Law Firm, P.A. v. API, Inc. Asbestos Settlement Trust, 912 N.W.2d 632, 638 (Minn. 2018); see also Johnson v. Georgia Highway Exp., Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), abrogated on other grounds by Blanchard v. Bergeron, 489 U.S. 87 (1989); Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997).

[126] Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (“The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.”).

[127] Id. at 434 (“There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the ‘results obtained.’”).

https://open.mitchellhamline.edu/mhlr/vol46/iss3/8
example, it is also highly unlikely that a large multiplier—such as 175, the multiplier in *Faricy*128—will be considered an “adjustment” when typical multipliers are in the single digits.129

Further, clients may argue, and courts will consider, whether the fee is excessive.130 Although there may be results that justify high rewards, it is unlikely that results will be the sole factor considered when calculating quantum meruit values. Therefore, an attorney will have to ensure that the contractual agreement is clear. Since fee agreements are contracts, traditional contract defenses of mistake, fraud, or unconscionability may be raised.131 In preparing the contingency fee contract, there are likely many aspects to consider and balance to avoid a fee dispute after the attorney is discharged.

The following discussion provides attorneys with potential options for forming contingency fee arrangements that avoid fee disputes in light of the eight factors from *Faricy*.

3. The Eight Factors

a. Time and Labor Required

This factor would contribute positively to the client and negatively to the attorney by limiting the quantum meruit value,132 especially in a case like *Faricy* where minimal time and labor were required.133 However, recording

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128 See *Faricy*, 912 N.W.2d at 655, 656 n.2. Faricy believed it deserved a third of the $21.5 million recovery, and the district court thought $41,000 was the reasonable value. *Id.* To arrive at a third of $21.5 million, assuming $41,000 was a lodestar value calculated by the trial court, the court would have to apply a multiplier of 175 for the enhancement (($1/3) × 21.5 million)/41,000 ≈ 175). *Id.* Courts may use a multiplier to adjust the lodestar amount upward or downward in cases where the lodestar amount is unreasonably low or high. Milner v. Farmers Ins. Exch., 748 N.W.2d 608, 624 (Minn. 2008).
129 See Klaiber, *supra* note 47.
130 Thomton, Sperry & Jensen v. Anderson, 352 N.W.2d 467, 470 (Minn. Ct. App. 1984) (“By adopting the jury’s finding of excessiveness and reducing the award . . . , the court exercised its proper responsibility. We find no abuse of discretion in that exercise.”).
131 Continental Casualty Co. v. Knowlton, 305 Minn. 201, 208–09, 232 N.W.2d 789, 794 (1975) (“The essentials of an express fee contract for legal services are the same as for any other contract of employment and are governed by the ordinary rules of contract law.” (quoting Holt v. Swenson, 252 Minn. 510, 514, 90 N.W.2d 724, 728 (1958))).
the work completed may assist attorneys in proving the accuracy of the evidence used to support the other factors.\(^{133}\)

\(b. \text{Nature and Difficulty of the Responsibility Assumed}\)

This factor is likely to have limited impact because the nature and difficulty of the responsibilities will function as modifiers that are unlikely to drastically alter the fee assessment. Further, the difficulty of the responsibility will likely be reflected in the time and labor required (the first factor), the amount involved (the third factor), and the experience and ability of the attorney (the fifth factor).

\(c. \text{Amount Involved and the Results Obtained}\)

The amount involved and results obtained should be the key factors that the attorney focuses on to avoid a fee dispute when discharged before the contingency. The amount involved can be shown through the exchanges between the attorney, client, and opposing party, which are likely evidenced in the briefs submitted to the court. Multiple, significantly different values could appear throughout the course of the case,\(^{135}\) and so, the values should be appropriately documented.

The results obtained are a complicated matter because the attorney is discharged before the final results of the case are known. Thus, there is a need to be able to capture incremental results as the case progresses. Results produced by the attorney may be shown through the achievement of milestones in the case. The professional field of project management defines a “milestone” as a significant point or event in a project.\(^{136}\) A “project” is an endeavor undertaken to create a unique result with the end reached when the project’s objectives have been achieved or when the project is terminated.\(^{137}\) A project may also be terminated if the client wishes to terminate the project.\(^{138}\) Based on these definitions and descriptions, a legal case has similarities to a project, and project management tools may be

\(^{133}\) Faricy, 912 N.W.2d at 662–63 (Gildea, C.J., dissenting). The dissenting opinion took issue with Faricy not providing the hours spent on the specific case for API Trust and would have denied Faricy any fees.

\(^{135}\) In Faricy v. API Trust, potential claim and settlement values ranged between eleven million dollars and fifty million dollars. See Faricy’s Brief, supra note 22, at *13 (“Proof of claim mentions that ‘API estimates that the total value of such claims asserted in the Proof of Claim exceed $50,000,000.’”); see also Respondent’s Brief at 39, Faricy Law Firm, P.A. v. API, Inc. Asbestos Settlement Tr. Faricy Law Firm, P.A. v. API, Inc. Asbestos Settlement Tr., 2017 WL 1892415 (Minn. Ct. App. May 8, 2017) (No. A16-1539), 2017 WL 7660556, at *39 (“11 million dollar settlement offer that the Trust received while it employed Faricy as its counsel.”) [hereinafter Respondent’s Brief].

\(^{136}\) PROJECT MGMT. INST., A GUIDE TO THE PROJECT MANAGEMENT BODY OF KNOWLEDGE 153 (5th ed. 2013).

\(^{137}\) Id. at 3.

\(^{138}\) Id.
helpful in evaluating the attorney’s results. Accordingly, milestones could be a valid tool when defining points within the attorney-client relationship to trigger determination of a future payment amount.\(^ {139}\)

The parameters for milestones should be tailored to each case. In an insurance settlement case, such as Faricy; each settlement proposal or offer may be seen as a milestone. The use of milestones could assist with quantifying the work performed and results achieved, enabling the showing of a specific completion rate, justification for fees, or substantial completion of the work required.\(^ {139}\) Alternatively, the attorney could show that she or he was prevented from achieving the milestones.\(^ {141}\)

\textit{d. Fees Customarily Charged for Similar Legal Services}

The attorney may be able to justify the fee for the service provided by referencing fees charged in similar cases for other clients. The attorney should be prepared to justify the fee for the service provided if there is a known discrepancy between what the attorney is charging and other public information (e.g., websites, attorney rates for those with insurance, or information from bar associations).\(^ {142}\)

\textit{e. Experience, Reputation, and Ability of Counsel}

Together with the previous three factors, this factor contributes to calculating or justifying the attorney’s hourly fee. The attorney may consider compiling evidence that would justify the hourly rate, including the years of experience, specific case history, lack of sanctions, or community activity.

\(^ {139}\) For example, Nevada’s sample contingent fee agreement form increases the contingent fee percentage as the case progresses. Sample Contingent Fee Agreement Form, NEV. STATE BAR. [https://www.nvbar.org/wp-content/uploads/Sample%20Contingent%20Fee%20Agreement.pdf] (last visited Feb. 8, 2020).

\(^ {140}\) See, e.g., Kaushiva v. Hutter, 454 A.2d 1373, 1375 (D.C. 1983) (holding that an attorney who enters into a contingency fee agreement with a client, substantially performs, and is then prevented by the client from completing performance is entitled to the full amount specified in the fee agreement and that quantum meruit the appropriate measure of damages only when an attorney renders less than substantial performance); Morris v. City of Detroit, 472 N.W.2d 43, 48 (Mich. 1991) (awarding the discharged attorney the entire one-third contingency fee because the attorney’s efforts were a significant factor in achieving the jury verdict in the client’s favor and the attorney completed 99.14% of the services contemplated).

\(^ {141}\) See Mandell & Wright v. Thomas, 441 S.W.2d 841, 847 (Tex. 1969) (“[The client’s] refusal to cooperate in [the attorney’s] prosecution of the claim made it impossible for [the attorney] to proceed further. In Texas, when the client, without good cause, discharges an attorney before [the attorney] has completed [the] work, the attorney may recover on the contract for the amount of [the] compensation.”).

\(^ {142}\) Find a Lawyer, MINN. STATE BAR ASS’N, [https://www.mnbar.org/member-directory/find-a-lawyer] (individual attorneys in directory providing rate information).
participation (among other information) before engaging in contingency fee contracts.\(^\text{143}\)

\textit{f. Fee Arrangement Between Counsel and the Client}

This factor is intended for the courts to understand whether the fee arrangement is a contingent fee agreement.\(^\text{144}\) The attorney should be able to easily show this by producing the signed fee agreement.\(^\text{144}\)

\textit{g. Contributions of Others}

This factor will interact with the third factor (the amount involved and the results obtained) and will require understanding the progress of the case to define key milestones and determine which attorney’s work allowed specific milestones to be achieved. The terminated attorney will have to justify how his or her work directly led to achieving the milestones. Additionally, the court’s consideration of this factor means that an attorney taking on contingency fee contracts would want to map out the entire process of the case to be able to justify the contribution.\(^\text{145}\)

\textit{h. Timing of the Termination}

For evidence on timing to meaningfully contribute to the court’s application of this factor, it would be important to establish the date of the initial contact with the client, the date of termination, and the earliest possible date the case could have concluded. For cases where the attorney begins strategy development upon initial contact, the date of initial contact is likely more important than the date on which the contingency fee contract was signed. The contingency fee contract date would likely function as a backup in case no work was performed by the attorney for the client before

\(^{143}\) See, e.g., Charal v. Andes, 88 F.R.D. 265, 267 (E.D. Pa. 1980) (recognizing the contribution of high specialization in federal securities laws as well as the esoteric aspects of accounting); Kenyon-Noble Lumber Co. v. Dependant Founds., Inc., 432 P.3d 133, 141 (Mont. 2018) (considering the attorney’s high standing in the profession, forty-plus years of experience as a trial lawyer, and decades of nationwide and internationally teaching experience). \textit{But see In re Estate of Smith}, 131 A.D.2d 913, 915 (N.Y. App. Div. 1987) (noting that the length of an attorney’s experience is not necessarily reflective of ability and reputation).

\(^{144}\) Faricy Law Firm, P.A. v. API, Inc. Asbestos Settlement Tr., 912 N.W.2d 652, 660 (Minn. 2018).

\(^{145}\) See \textsc{Minn. R. Prof’l Conduct} 1.5(c) (2019) (“A contingent fee agreement shall be in a writing signed by the client.”).

\(^{146}\) \textit{Id.} r. 1.5(c) (2019) (providing that a division of fees between lawyers who are not in the same firm is allowed only if: “(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable”).
the contingency fee contract is signed. To avoid ambiguity regarding the timeline, the attorney should document interactions with the client, as well as any work performed between the initial contact and the formation of the contingency fee contract.

With this approach, there is still the possibility that the attorney is fired after constructing a complete legal strategy for the case in either an hourly or a flat fee arrangement. This may be a risk that has to be assumed by the attorney based on the arrangement for how the service is provided.

4. Additional Mitigation Strategies

In addition to the analysis of the eight factors provided in Faricy, there are additional principles that can be considered to further adapt the preparation and execution of contingency fee contracts to the eight factors. The following analysis will consider freedom to contract and reasonableness of fees. Since many factors could be included in the attorney-client fee agreement and explained to the client, it will be necessary to consider unique circumstances to appropriately tailor the agreement.

a. Freedom to Contract

The right to enter into a fee arrangement with an attorney is protected by section 549.01 of the Minnesota Statutes, and the essentials of such contracts are the same as any other contract. Based on the freedom to contract, the attorney should aim to craft a clear fee arrangement that is understandable and acceptable to both parties and ensure that there is clear evidence of mutual assent.

147 See Rossman v. 740 River Drive, 308 Minn. 134, 136, 241 N.W.2d 91, 92 (1976) (“[P]ublic policy requires that freedom of contract remain inviolate except only in cases when the particular contract violates some principle which is of even greater importance to the general public.” (citing James Quirk Milling Co. v. Minneapolis & St. Louis R.R. Co., 98 Minn. 22, 23, 107 N.W. 742, 742 (1906))).

148 See MINN. R. PROF CONDUCT 1.5(a) (2019). (“A lawyer shall not . . . collect an unreasonable fee . . . .”). Additionally, “[e]xpenses for which the client will be charged must be reasonable.” Id. r. 1.5 cmt. 1. “Contingent fees, like any other fees, are subject to the reasonableness standard . . . .” Id. cmt. 3.


150 See Continental Casualty Co. v. Knowlton, 305 Minn. 201, 211, 232 N.W.2d 789, 796 (1975) (quoting Holt v. Swenson, 252 Minn. 510, 90 N.W. 2d 724 (1958)).

151 See Benedict v. Pfunder, 183 Minn. 396, 400, 237 N.W. 2, 4 (1931) (“Not mutual assent but a manifestation indicating such assent is what the law requires.” (quoting RESTATEMENT (FIRST) OF CONTRACTS § 20 (AM. LAW INST. 1932))); State v. Bucholz, 169 Minn. 226, 227,
When entering an attorney-client relationship, it may be helpful for the attorney to explain the nature of the contingency fee arrangement to the client, including the idea that each party is taking a financial risk corresponding to the workload required and the potential outcome of the case. Additionally, it may be beneficial for the attorney to explain that dismissing the attorney does not absolve the client from paying the necessary fees because an attorney dismissed without cause is still entitled to compensation.

After dismissal, a client seeking to mitigate liability for attorney’s fees based on quantum meruit may relate the specific circumstances of the attorney’s representation to relevant factors that may lessen the value of the attorney’s services, including the quantity of the service, quality of the service, and the results achieved. In a situation where excellent results were

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210 N.W. 1006, 1006 (1926) (“The main element of the contract-making process is the mutual assent of the parties.”).

See AM. BAR ASS’N, supra note 19. A graphical representation, such as the one below, may assist with explaining to clients the risks taken by attorneys and clients in contingency fee arrangements.

As the graph suggests, clients and attorneys are more likely to consider the payment acceptable when the payment under the contingency fee arrangement is approximately the same as what it would have been under hourly rates (Type I). Type II demonstrates clients’ potential loss of savings that could arise if services were performed under an hourly fee arrangement. Type III demonstrates a situation where an attorney assumes the risk by miscalculating the time necessary for a case.

See Faricy Law Firm, P.A. v. API, Inc. Asbestos Settlement Tr., 912 N.W.2d 652, 657 (Minn. 2018). If Google search result counts are considered as any indication of general interest, there is more than twice as much interest in discharging an attorney than hiring an attorney, with a search for how to hire a lawyer (or similar terminology) returning approximately 100 million results and how to fire one returning over 200 million results. The Google search was conducted on October 11, 2019. Explaining this background may reduce the awkwardness inherent in discussing discharge provisions during the formation stage of the contractual attorney-client relationship.

Lauren Krohn, Cause of Action by Attorney to Recover Fees on Quantum Meruit Basis, in 16 CAUSES OF ACTION 85 (Dec. 2019 update).
obtained with minimal effort—or effort perceived as minimal, perhaps due to the high quality of the attorney’s service or lack of complexity of the case—the client’s argument concerning fees will likely be focused on the quality or quantity of the service.

The number of hours spent on the case is likely the most straightforward and common approach for disputing the quantity of service. Hours spent on a case is the starting point for the lodestar method and is also the first factor represented in Faricy. Courts also recommend keeping records of time spent. Given the dissenting opinion in Faricy, it is likely important to be able to prove the hours spent on the specific case in contingency fee contract work. Justice Gildea’s dissent pointed out that the district court could not determine whether the information on the hours, as provided by Faricy, were indeed spent on the claim. Moreover, Faricy did not contend or prove that the hours submitted were a representative estimate of the time and labor spent on the claim. The majority opinion did not address the issue of the amount of evidence required because it chose to remand the matter to the district court.

However, the record of hours will be insufficient or inappropriate to justify the contingent fee when the work required in hours is disproportionately small compared to the results achieved or the value received from the attorney’s work. When the effort required could potentially be minimal, perhaps due to experience in similar litigation or ample likelihood of recovery, an alternative measure may be required for a mutually agreeable contract between the attorney and the client as a basis for recovering the fee the attorney believes is justified after dismissal.

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155 Respondent’s Brief, supra note 135, at 2 (“Appellant performed minimal work on the Home Liquidator claim.”).
156 See Faricy, 912 N.W.2d at 656 (“The lack of evidence of the hours that Faricy had worked stymied the district court’s efforts.”).
158 Faricy, 912 N.W.2d at 658.
159 See Hensley, 461 U.S. at 433. (“The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.”). “A district judge may not, in my view, authorize the payment of attorney’s fees unless the attorney involved has established by clear and convincing evidence the time and effort claimed and shown that the time expended was necessary to achieve the results obtained.” Id. at 440–41 (Burger, C.J., concurring).
160 See Faricy, 912 N.W.2d at 662 (Gildea, J., dissenting) (stating that the record supports the district court’s determination that “Faricy failed to carry its burden of proving the reasonable value of its work”).
161 Id.
162 Id.
163 Id. at 661.
164 Faricy’s Brief, supra note 22, at 32–33.
One method to show quantity may be the duration of representation for the case. This measure will be straightforward if the attorney can show to the client that there is consistent, albeit quantitatively minimal, work being performed during the duration of the attorney-client contract. Periodic updates from attorneys may reassure the client that there is work being done and justify the duration presented as an appropriate measure of work performed before discharge.

It may be tempting for an attorney to rely on the outcome of the case and let the result speak for itself in the contingency arrangement, where additional communication with the client may be seen as unnecessary time spent on the case. However, it is good practice to maintain communication. It will establish to the client that there is ongoing work performed, and it will also likely result in client satisfaction, contributing to a lasting attorney-client relationship through the fulfillment of the contingency.

In *Faricy*, the attorney represented the client in a one-third contingency fee arrangement from January 2009 to August 2012 (forty-three months), with the settlement made nearly three months after termination in November 2012. Applying a duration-based calculation to *Faricy*, an attorney’s fee of 25.6% may be justified.

Therefore, a suggested term in the contract may be:

If the attorney is discharged without cause by the client, the fee payable by the client to the attorney will be calculated by multiplying the settlement amount by a duration factor considering the duration of representation. The duration factor will be calculated by dividing the time between the beginning of the representation and termination of representation by the time between the beginning of the representation and when the final settlement amount is proposed.

Explicit mention of this calculation in the contract is important because even if district courts can now consider the contingent fee agreement based

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65 Duration may be a factor similar to the eighth factor, “timing of termination,” as described in *Faricy*, 912 N.W.2d at 658.
66 See MINN. R. PROF’L CONDUCT pmbl. ¶ 4 (2019) (requiring lawyers to “maintain communication with a client concerning the representation”). Specifically, a lawyer should keep a client informed about the status of the case, reasonably consult with the client regarding the client’s goals and objectives, and provide sufficient information to the client as necessary to allow the client to make decisions regarding the client’s matter. *Id.* r. 1.4.
67 *Faricy*, 912 N.W.2d at 655.
68 The contingency fee multiplied by the duration factor would be \((1/3) \times (43/46) \approx 25.6\%\). *See id.*
69 This term allows a linear calculation of the fee based on the eighth factor from *Faricy* (timing of the termination) by decoupling it from the seventh factor (contribution of others). *See id.* at 660. Decoupling these factors reduces the complexity of the fee calculation. The author does not intend to assume any credit or liability due to the use of the proposed language.
on the sixth factor from Faricy, the attorney is not automatically entitled to the full contingent fee. This is because a discharged contingent fee attorney may not recover the contingent fee as a remedy for breach of contract under Minnesota law.\footnote{See id. at 661.}

As discussed previously for the third factor (results), quantity may also be proven through the milestones achieved in the case.\footnote{See discussion supra Section IV.B.3.c.} In a case involving a settlement, it may be beneficial to adjust the floor value as a basis for compensation once settlement discussions progress to ensure there is a fair relationship between the outcome of the case and the payment the attorney receives.\footnote{This model is inspired by stock trading orders, which are placed in a manner that secures gains or limits losses by using set prices to execute trades where prices fluctuate. See, e.g., Investor Bulletin: Understanding Order Types, U.S. SECS. & EXCH. COMM’N (July 12, 2017), https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_ordertypes (https://perma.cc/WYU4-6R2N) (describing different stock trading order types).} The contract could be written in a manner that updates the floor value as the base for calculating the contingency fee.\footnote{The illustrations below depict different scenarios where the floor value is adjusted throughout settlement negotiations:} The floor value used for the calculation will increase or decrease based on the attorney’s work during the life of the contingency contract, with the latest floor value representing the new baseline as long as there is no inappropriate client intervention. The last updated value during the contingency fee agreement

\begin{verbatim}

\begin{tabular}{|c|c|}
\hline
\textbf{Settlement Amount} & \textbf{Time} \\
\hline
Initial floor set & \\
\hline
Floor increased by final settlement & \\
\hline
Floor increased by new offer & \\
\hline
\end{tabular}

\end{verbatim}
will be used as the baseline for calculation of quantum meruit after discharge of the attorney. Additionally, if the settlement amount increases based on the attorney’s performance under the contingency agreement, there should be a provision to ensure the work by the attorney is reflected. Likewise, decreases in the settlement amount due to errors by the client or the work of subsequent attorney(s) should be ignored. The scarcity of caselaw supporting a contingency fee calculation based on a tentative settlement offer highlights the importance of setting a floor value as a basis for compensation.

Further, the duration factor and the floor value could be combined to calculate the appropriate amount of quantum meruit compensation for the attorney. The suggested language to add to the contract may be:

If the attorney is discharged without cause by the client, the fee payable by the client to the attorney will be determined by multiplying: (1) the last settlement value offered by the opposing party while the attorney represented the client, or the final settlement the client received from the matter in which the attorney represented the client, whichever is higher, unless the increase cannot be attributed to the attorney; (2) the contingency fee percentage; and (3) the duration factor. The client agrees that any communication between the client and the opposing party without the attorney during the time the attorney is representing the client that leads to a lower settlement amount will not lower the first value used in this determination.

Nonetheless, if the attorney sees a significant risk of a decrease in the potential award after discharge, it would be prudent to inform the client of such potential outcome.

Another possible method of determining the quantity of work is to identify the legal theories that enabled the successful outcome. In Faricy,

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175 See, e.g., Sohn v. Brockington, 371 So. 2d 1089, 1092 (Fla. Dist. Ct. App. 1979) (citations omitted) (explaining how “Arkansas allows recovery of the stipulated contingent fee computed upon the amount ultimately realized by the client, less the expenses which the discharged attorney would have been required to make in performing the unperformed portion of the contract,” and Wisconsin attorneys are “allowed to sue for damages on the contingent fee contract based upon the amount of the settlement or judgment ultimately realized by the client, less a fair allowance for services and expenses which would have been expended by the discharged attorney in performing the balance of the contract”). The suggested inclusion of the contingency fee percentage and the duration factors in the proposed language accompanying this footnote respectively reflect the sixth and eighth factors of Faricy. Faricy, 912 N.W.2d at 638. Multiplication of the factors makes calculating the fee simpler than it is under a case-by-case, multi-factor analysis. However, it could be difficult to prove the potential settlement value without settlement offers. See Ruzicka v. Rothenberg, 83 F.3d 1033, 1034 (8th Cir. 1996).
the successful settlement between API Trust and Home Liquidator hinged on the understanding of the insurance policy’s aggregate limits of coverage.\textsuperscript{176} Even though arriving at such an understanding may seem easy in hindsight, the attorney’s ability to focus on the key information of the case to identify the legal theories should be recognized before evaluating the quantity of work and the attorney’s contribution. In \textit{Faricy}, the court documents suggested that the attorneys shared the theory of the case with their client, and the client understood it.\textsuperscript{177} Thus, the identification and development of the legal theories that led to the successful outcome could be an additional and significant milestone that determines a different contingency percentage on its own.\textsuperscript{178}

To recognize the importance of developing a theory of the case, an attorney may include the following language in the contingency fee contract:

\begin{quote}
The attorney will develop the legal strategy ("Theory of the Case") as part of the service to the client. This is a key activity of the legal representation, and completion of strategy development and initiation of the execution of the strategy that contributes positively to the client’s case entitles the attorney to ___\% and ___\% of client’s recovery, respectively, regardless of whether the attorney represents the client through the contingency.\textsuperscript{179}
\end{quote}

Finally, avoiding dismissal by maintaining a positive attorney-client relationship would help ensure that the contractual relationship survives until the contingency is met.

\paragraph{b. Reasonableness}

It is clear from case law,\textsuperscript{180} the Minnesota Rules of Professional Conduct,\textsuperscript{181} and the ABA Model Rules of Professional Conduct\textsuperscript{182} that reasonableness is a limiting factor on the amount of recovery for the attorney.

\textsuperscript{176} Faricy's Brief, \textit{supra} note 22, at 5. ("API's insurers refused to pay . . . claiming that their aggregate limits were exhausted. Faricy advised API to dispute the insurers’ assertions of exhaustion as their policies had no aggregate limits. That central issue has proved crucial to all of API’s insurance recoveries over the years.")

\textsuperscript{177} Faricy shared the strategy with API Trust via a draft memo. Faricy's Brief, \textit{supra} note 22, at 11.

\textsuperscript{178} See NEV. STATE BAR, \textit{supra} note 139.

\textsuperscript{179} The wording is modeled after the Nevada Sample Contingent Fee Agreement Form. See \textit{id}.

\textsuperscript{180} See In re Petition for Distrib. of Attorney’s Fees, 870 N.W.2d 755, 761 (Minn. 2015) (citing Burns v. Stewart, 290 Minn. 289, 301, 188 N.W.2d 760, 767 (1971)) ("[T]he attorney, who had performed substantial services under the contingent-fee agreement and was terminated by the client before funds were recovered, was entitled to recover the reasonable value of his services.").

\textsuperscript{181} MINN. R. PROF’L CONDUCT 1.5(a) (2019) (“A lawyer shall not make an agreement for, change, or collect an unreasonable fee or an unreasonable amount for expenses.”).

\textsuperscript{182} MODEL R. OF PROF’L CONDUCT 1.5(a) (AM. BAR ASS’N 2019). This model rule has the same language as MINN. R. PROF’L CONDUCT 1.5(a).
discharged from a contingency fee. Further, there is an expectation in the legal profession that “the fee charged by a lawyer should be reasonable from an objective point of view.” One way to show this is through clear and unambiguous language in the contract, which shows that both parties understood the fee agreement contract as providing a reasonable fee under quantum meruit if the attorney were to be discharged.

In reviewing *Faricy*, it may be fair to question whether API Trust would have brought the lawsuit against Faricy if the settlement and contingency fee were lower. Additionally, API Trust may not have sued Faricy if Faricy had a full-time team of attorneys working on the case. These observations raise the question of whether the attorney and the client shared a mutual understanding of the value of the attorney’s service.

To avoid such misunderstandings and miscommunication, it may be helpful to clearly describe the fee arrangements to ensure a mutual understanding of the value of the attorney’s services. Value could be

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183 AM. BAR ASS’N, supra note 19.
184 When the language of the contract is clear and unambiguous, courts enforce the parties’ agreement as expressed in the language of the contract. Dykes v. Sukup Mfg. Co., 781 N.W.2d 578, 582 (Minn. 2010). Clear language could also thwart the potential contract defense of misrepresentation.
185 However, if API Trust sought Faricy’s representation based on a recommendation from one of Faricy’s clients and knew about the $2.3 billion settlement, it is plausible that API Trust also expected a high settlement value. See Faricy’s Brief, supra note 22, at 4–5. There may have been an altogether different lawsuit if the settlement value was lower than API Trust expected, with API Trust potentially questioning Faricy’s competency.
186 As an example, if the case genuinely required Faricy to assign a team of ten attorneys, each billing $100 per hour, for 2,000 hours per year for three years, the initial calculation based on the lodestar method would indicate $6 million as the reasonable compensation (10 × 100 (dollars/hour) × 2,000 (hours/year) × 3 (years) = $6,000,000).
187 The illustrations below show the costs and savings based on contingency fee arrangement and outcome. If the attorney had to spend many hours, yet the recovery was low (left figure), the client would have savings under a contingency fee arrangement. If the client entered a contingency fee arrangement, and the attorney had to spend minimal hours to recover a high amount (right figure), the attorney’s fee would be higher than that under an hourly fee arrangement.
explained as the significance or monetary worth of the services.\textsuperscript{188} In a contractual sense, the service promised by the attorney would be the consideration, bargained for and mutually agreed upon by the attorney and the client.\textsuperscript{189} Even then, the attorney must be able to defend against traditional breach of contract lawsuits by demonstrating that the fee for the attorney’s services are reasonable when compared to the value of the services.

Where the attorney is without fault and discharged from a contingency fee contract, the attorney may demonstrate the reasonableness of the fees in a few different ways. The first is to use a graduated scale of percentages of the total amount ultimately recovered.\textsuperscript{190} However, this method would only be an indirect basis for determining the contingent fee when the attorney has been discharged. Then, documenting the completion of each step by recording the explicit agreement on the completion of steps would assist with memorializing the mutual agreement of the milestones. As each contingency fee rate is established, the contract language should state that the recovery is only being delayed until the contingency is met, regardless of whether the attorney is discharged before the contingency is met. This would ensure that both parties agree that a fee percentage has been cleared based on the work completed.

Another way to show value may be to explicitly state a maximum potential fee in the initial contingent fee contract, with the option to revise this amount after sufficient research has been conducted.\textsuperscript{191} This way, the client would have notice of the maximum potential recovery fee, thereby agreeing to the representation only on the understanding that the fee under the contingency contract is reasonable.\textsuperscript{192} To avoid client disputes, the

\textsuperscript{188} Value, BLACK’S LAW DICTIONARY (11th ed., 2019).

\textsuperscript{189} Continental Casualty Co. v. Knowlton, 305 Minn. 201, 208–09, 232 N.W.2d 789, 794 (1975) (“The essentials of an express fee contract for legal services are the same as for any other contract of employment and are governed by the ordinary rules of contract law.” (quoting Holt v. Swenson, 252 Minn. 510, 514, 90 N.W.2d 724, 728 (1958))).

\textsuperscript{190} See CAL. STATE BAR, supra note 149; NEV. STATE BAR, supra note 139. Nevada’s and California’s sample contingency fee agreement forms provide examples of a graduated scale of percentages at different stages of a case’s progress. The Nevada form provides specific percentage examples that increase as the case progresses (25% before filing a complaint, 33\frac{1}{3}\% before trial is commenced, 40\% during or immediately after the first trial or settlement, and 45\% on appeal or with further action). NEV. STATE BAR, supra note 139. The California form provides blank areas to insert percentages based on progress of the case.


\textsuperscript{192} For example, in Farcy, the maximum recovery could have been between $40–50 million, based on the total claim. Farcy’s Brief, supra note 22, at 13, 25 (“API estimates that the total value of such claims asserted in the Proof of Claim exceed $50,000,000.”) (“Farcy proposed a settlement demand in ‘the near 40 million dollar range.’”).
contract should also clarify that the amount presented is to be used only to communicate the potential maximum fee, rather than the upward potential of the recoverable amount. Such communication may be reflected in the initial fee agreement or in subsequent attorney-client communications. An example of such contractual language could be:

For the purpose of communicating the potential maximum fee the client may be paying the attorney, the initial assessment of the case suggests that there could be a potential for recovering $__________. Multiplied by the contingency rate described in the fee agreement, the fee payable to the attorney by the client has the potential to be $__________. The client agrees that this fee is reasonable and reflects the value the attorney will provide to the client through the attorney’s work. This assessment is to present fee information to the client and does not constitute an estimate, promise, or guarantee of recovery amount.

This language should give the client an opportunity to consider whether the contingency fee agreement is the best approach for the client, as opposed to a flat-fee or an hourly-rate contract. When the client agrees to this clause, it will show that the client understands the value of the attorney’s services and the potential fee, regardless of the time that will be spent by the attorney on the case.

5. Future Implications of the Faricy v. API Trust Decision

To predict the future implications of the Faricy decision, an examination of cases connected to Faricy may help understand how the contingency fee arrangement has been weighted as a factor in quantum meruit calculations in the past. This section discusses the negative implications of increased complexity of fee agreements and the need for attorneys to reconsider the financial risk of contingent fee agreements as a result of the Faricy decision.

The eight factors used in Faricy can be traced back to Ashford and Kittler. The factor relating to the existing fee arrangement likely has the

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>(1) time and labor required</td>
<td>(1) time and labor required</td>
<td>(1) length of time each firm spent on the case</td>
</tr>
</tbody>
</table>

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194 The following table compares the factors from the three cases:
most significance under the *Faricy* framework. Although the fee arrangement discussed in *Kittler* pertained to a particular financial arrangement, giving partial interest in a property as fee payment, *Kittler* cites *State by Head v. Paulson* as the authority supporting consideration of the existing fee arrangement between counsel and the client. *Faricy* noted that the fee agreement “is merely one factor, among a host of others that the district court is to consider in awarding reasonable attorney fees.” *Faricy* treating the fee agreement as merely one factor among many may be concerning for attorneys engaging in contingency fee contracts because such treatment of the fee agreement could negate the financial risk attorneys take by opting for a contingency fee. Additionally, because *Paulson* did not consider the contingent fee arrangement to be the most controlling factor, the contingent fee arrangement is unlikely to receive primary consideration when determining the amount of quantum meruit recovery by the attorney.

The impact of the *Faricy* decision may be limited for contingency fee cases where the hours and effort required by the attorney to reach the recovery or settlement are proportionate to the fee amount because the attorney’s effort and the client’s expectation would be commensurate.

<table>
<thead>
<tr>
<th>(2) nature and difficulty of the responsibility assumed</th>
<th>(2) nature and difficulty of the proposition involved</th>
<th>(2) result of each firm’s efforts</th>
</tr>
</thead>
<tbody>
<tr>
<td>(3) amount involved and the results obtained</td>
<td>(3) magnitude of the principal amount</td>
<td></td>
</tr>
<tr>
<td>(4) fees customarily charged for similar legal services</td>
<td>(4) results obtained</td>
<td></td>
</tr>
<tr>
<td>(5) experience, reputation, and ability of counsel</td>
<td>(5) fees customarily charged for similar services</td>
<td></td>
</tr>
<tr>
<td>(6) fee arrangement existing between counsel and the client</td>
<td>(6) experience, character, reputation, and ability of counsel</td>
<td></td>
</tr>
<tr>
<td>(7) contributions of others</td>
<td>(7) fee arrangements</td>
<td></td>
</tr>
<tr>
<td>(8) timing of the termination</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*Kittler*, 295 Minn. at 234, 203 N.W.2d at 838 (“[An arrangement giving plaintiffs a 25-percent interest in the ranch for forbearance in demanding immediate payment for services and expenses.”).”

*Id.* at 839 (citing *Head v. Paulson*, 290 Minn. 371, 373, 188 N.W.2d 424, 426 (1971)).

*Faricy*, 912 N.W.2d at 660 (quoting *Green v. BMW of North America, LLC*, 826 N.W.2d 530, 538 (Minn. 2013)).

*Paulson*, 290 Minn. at 374, 188 N.W.2d at 426 (“[T]he court properly did not regard the contingent fee arrangement as the most controlling factor . . . but considered it along with all other relevant factors . . . in determining the value of the legal services.”).

See supra note 152 and accompanying text. This situation will fall in the Type I zone of the chart in supra note 152.
However, there may be a more significant implication for cases that require minimal hours or effort—where the theory of the case plays a larger role in determining the outcome—because the client’s payment to the attorney may seem disproportionately large and unjustified to the client.  

In the latter set of cases requiring minimal hours or effort, the contingency arrangement could receive less weight because the nature of the fee arrangement may be outweighed by other factors. Moreover, the trial court’s discretion to restrict the fee to what the court considers reasonable and conscionable may override the pre-recovery, bargained-for understanding of a successful legal strategy between the attorney and the client. The Faricy decision could have positive implications for clients because district courts will be able to limit the fee payable to a discharged attorney by considering the hours spent by the attorney. Faricy also has the potential to lower the cost of the original litigation by allowing the client to opt for the financially prudent manner of legal representation. By requiring further clarity to ensure mutual assent, clients can benefit from clear communication about their legal journey.

Despite these potential positive implications for clients, there may be more serious negative implications. First, the fee agreement for contingent fee agreements may become more complex to ensure the attorney can receive payments based on the contractual agreement rather than quantum meruit if the attorney is discharged before the contingency is met.

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See Type II in supra note 152.b

Faricy, 912 N.W.2d at 658 (requiring district courts to use the time spent by the attorney to determine the quantum meruit value of a discharged, contingent fee attorney’s services).

This projection is hypothesized based on the potential for improved attorney-client communication and the client’s understanding of the cost implication of contingency fee arrangements, which would aid the client’s decision in selecting the fee arrangement that has a higher potential to be more beneficial to the client.

For general concerns, see William D. Hunter, Limiting the Wrongfully Discharged Attorney’s Recovery to Quantum Meruit—Fracasse v. Brent, 24 Hastings L.J. 771, 791 (1973) (considering the demand for higher retainer fees, the reluctance to enter into contingent fee contracts, the increased incentive for third persons to interfere in the attorney-client contract, the decreased incentive for attorneys to work diligently on behalf of clients who they suspect may discharge them, and the attempts to circumvent the quantum meruit limitation as potential undesirable effects of Fracasse v. Brent, 494 P.2d 9 (Cal. 1972), which adopted quantum meruit for recovery by discharged attorneys).

An attorney discharged from a contingent fee agreement is entitled to prompt payment for the reasonable value of services performed based on quantum meruit. Trenti, Saxhaug, Berger, Riche, Stephenson, Richards & Allin, Ltd. v. Nartnik, 439 N.W.2d 418, 421 (Minn. Ct. App. 1989). However, the impact of the attorney’s services on the final outcome of the case may be uncertain until the occurrence of the contingency. Sohn v. Brockington, 371 So. 2d 1089, 1094 (Fla. Ct. App. 1979). Additionally, delaying the quantum meruit action until the occurrence of the contingency could risk recovery being barred by the statute of limitations in jurisdictions that have adopted the rule that the cause of action accrues immediately upon discharge. Id. n.6. If the recovery under quantum meruit is uncertain, relying on contractual agreements could reduce the uncertainty.
could lead to more fee litigation because it is unlikely that the client will voluntarily pay the previous attorney when the client likely had a reason for discharging the attorney.

Second, attorneys would have to rebalance their calculation of the financial risk involved in entering a contingent fee agreement. The risk is often justified by the potentially large payout. However, if the client can discharge the attorney shortly before the contingency occurs, and quantum meruit places limited emphasis on the contingent nature of the fee arrangement, the attorney assumes an additional risk of discharge that would require a reconsideration of the previous financial risk calculation. If the quantum meruit calculation will limit the fee to what would have been obtained under an hourly fee arrangement (even when the attorney achieves excellent results), the attorney would essentially be financing a legal action for the client. This is because the practical effect would simply be a delayed payment of an hourly fee. This could cause the contingent fee attorney to require a higher payment from the client due to the added uncertainty or altogether discourage attorneys from entering into contingent fee contracts.

The legal community may have to wait for another case to reach the Minnesota Supreme Court before understanding whether the time and labor required will dominate the analysis, as in the lodestar method. Additionally, further instruction from the court will likely be necessary to determine how much weight should be given to the contingent nature of the fee arrangement. It may be helpful for attorneys to prepare strong

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205 This risk is also noted in Hunter, supra note 203, at 791 (citing Tracy v. MacIntyre, 84 P.2d 526, 528 (Cal. Ct. App. 1938)). There may be further uncertainty with when the fee can be obtained if the attorney is discharged sooner because the potential fee amount remains uncertain until the result is determined. See In re Downs, 363 S.W.2d 679, 686 (Mo. 1963) (“There can be no doubt of the right of a client to discharge [the] lawyer, whether [the lawyer is] employed on a quantum meruit basis or for a contingent fee. In such event, if the lawyer has a contingent contract and is without fault, [the lawyer] has the election to claim a reasonable fee for the work done, as upon a mutual rescission, or to wait until the claim is liquidated by judgment or settlement and then sue (if necessary) for [the] contract fee.”).

206 Although the fee awarded by the court of appeals on remand ($84,000) can be considered substantial based on the hours expended by Faricy (up to ten hours) and the highest hourly rate ($465), this amount pales in comparison to the amount that is one-third of the eventual settlement received by API Trust (~$7,166,666, i.e. a third of $21.5 million). See Faricy Law Firm, PA v. API, Inc., No. A19-0846, 2019 WL 6461323, at *2–3 (Minn. Ct. App. Dec. 2, 2019). The Minnesota Court of Appeals, on remand, interpreted the Faricy decision to require consideration of “all of the factors and weigh them together to determine the reasonable value of an attorney’s services.” Id. at *4.

207 The Minnesota Court of Appeals, on remand, noted that the supreme court’s holding did not elevate the eighth factor (termination timing) above all the other factors. Id. at *4. On remand, the court of appeals found that the supreme court “instructed district courts to consider all of the factors and weigh them together to determine the reasonable value of an attorney’s services,” without specifying the weight of any of the eight factors. Id. Additionally, the court of appeals did not find the district court’s existing-fee-arrangement analysis—that a
arguments that justify weighing case results more heavily when excellent results are achieved with minimal effort.  

V. CONCLUSION

The Minnesota Supreme Court’s eight-factor test in *Faricy* clarified what factors should be considered when calculating the quantum meruit value of services provided by a terminated contingency fee attorney.  

By providing the eight-factor test, the court also addressed how to establish fees in difficult cases with multiple service providers and potential fee recipients.  

This case note analyzed potential methods for addressing the eight factors provided in *Faricy*. Additional analysis considered the principles of freedom of contract and reasonableness to further mitigate litigation concerning the compensation of contingency fee attorneys who, without fault, are involuntarily discharged by clients before the contingency occurs.

However, uncertainty remains for trial courts due to the lack of clarity on how to weigh the eight factors presented in *Faricy*. The outcome of cases will depend not only on the facts of the cases but also on how the factfinders apply the *Faricy* test and what they consider to be reasonable fees.

fee award greater than ten times the highest customary hourly rate is unreasonable—to be erroneous. *Id.* at *3.

* For a potential argument, see Derdiarian v. Futterman Corp., 254 F. Supp. 617, 620 (S.D.N.Y. 1966) (“It must be kept in mind, however, that the amount of recovery rather than the time spent is the prime factor in fixing [the] fee. . . . Expertise in a field of law should be rewarded rather than be used as the basis for fee reduction.”).


* Id.*
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