

2020-005 Potential Topic Memo

Draft for 12/4/20 meeting

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I. ISSUE

May an attorney structure a contingent fee representation such that

(1) if the attorney-client relationship is terminated prior to achievement of the contingency, the client is obligated to pay the attorney per the attorney's hourly rates; and/or

(2) if the client settles or refuses to settle the matter per the attorney's advice, the client is obligated to pay the attorney per the attorney's hourly rates?

[Note, this memo initially explored only question #1 above. Potential expansion to question #2 was only recently discussed; the hypos and authorities have not been updated to reflect question #2 yet]

II. POTENTIAL HYPOTHETICALS

Scenario 1: Attorney Fee Agreement for a litigation matter provides that Attorney will be paid a contingent fee of 35% of the recovery, but if Attorney is discharged prior to recovery, Client agrees to pay Attorney at Attorney's hourly rate for all time expended.

Scenario 2: Attorney Fee Agreement for a litigation matter provides that Attorney will be paid a contingent fee of 35% of the recovery, but if for any reason the attorney-client relationship ends before the recovery is reached (whether the Attorney withdraws or is terminated by the Client), Client agrees to pay Attorney at Attorney's hourly rate for all time expended.

Scenario 3: Attorney Fee Agreement for a litigation matter provides that Attorney will be paid per Attorney's hourly rates, however Attorney will cap the total hourly fees at 35% if Client does not discharge Attorney prior to recovery.

Scenario 4: Attorney Fee Agreement for a litigation matter provides that Attorney will be paid the greater of Attorney's hourly fees or 35% of the recovery.

****NOTES on Hypotheticals –**

- should we specify in Scenario's 1 and 2 that Attorney also waves rights to QM recovery?
- Should the agreements in the hypos distinguish between termination for cause or without cause, or who (client or attorney) does the terminating?
- These hypos address only the contract terms, not application – should some or all hypos address application in a case? (i.e. who terminates, at what point, for what reason, what impact, etc.)

[Note, if we wish to explore question #2, we will need hypos reflecting that topic]

III. DISCUSSION

[Note – I intend to reorganize these authorities per application to questions # 1 or #2, and to continue to research potential authorities]

*** Note, I think the Colorado ethics opinion (below) provides a very promising framework for evaluating the issues, which we could use in applying California rules/law. I like the terminology used: “conversion clauses” (I’m not suggesting we agree or adopt all the conclusions, just the analytical approach).

Potential applicable authority.

California Rules of Professional Conduct:

- 1.16(a)(4) (client right to terminate lawyer)
- 1.5 – does the clause result in an unconscionable fee? (per se or as applied?)
- 1.4 communication – duty to advise client that fee agreement provision is or may be unenforceable?
- 8.4(c) – is putting an unenforceable term in the attorney-client fee agreement “conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation”; [requires many assumptions, including possible legal conclusion as to unenforceable term]
- 1.2 (especially cmnt 1 – application to question #2 above)

Ethics Opinions:

- Colorado State Bar Ethics Opinion 100 (referring to such provisions as “conversion clauses” –no *per se* improper; whether ethical must be determined on a case by case basis to determine if the clause improperly interferes with clients’ right to terminate representation; conversion clauses are not *per se* unethical, but must not interfere with that right); Also suggests limiting use of such clauses to circumstances of *termination by client without cause*, and *termination by attorney with cause*; relevant factors for consideration:
 1. Whether clause provides for conversion even if client terminates lawyer for cause;
 2. Whether conversion applies QM, or specifies alternate basis for comp.;
 3. Whether fees computed on alternate basis are unreasonable (CO rule applies unreasonableness, not unconscionability);
 4. Whether conversion calls for immediate payment before contingency occurs or regardless of contingency occurring;
 5. Whether clause applies cap, at contingent amount;
 6. Sophistication of client;
- Philadelphia Bar Association Ethics Opinion 2001-1 (addresses question in context of impermissible burdens or penalties on client’s right to decide whether to settle; opinion contains majority and dissent -majority would permit “conversion” if there is clear

advanced agreement on goals of representation; dissent views clauses as ok for sophisticated clients, not for unsophisticated clients).

- Wis. State Bar Prof'l Ethics Comm., Formal Op. E-82-5 (1982). (a contingent fee agreement that permits charging hourly fees if attorney deems a settlement offer inadequate is overreaching and unethical).
- LACBA Formal Ethics Opinion No. 505 (2000); Engagement Agreement Restrictions on Client Settlement Authority; approving use of an engagement agreement that waives specified attorney's fees if client agrees not to accept confidentiality clause in a settlement, and if client agrees to confidentiality clause, requires payment of full attorney's fees; [In context of a nonprofit law firm – goal of firm is related to public interest]

California Cases:

- Kroff v. Larson (1985) 167 Cal.App.3d 857, 860; The "client has an absolute right at any time to discharge an attorney, with or without cause."
- Fracasse v. Brent (1972) 6 Cal.3d 784, 792; client has right to discharge attorney; discharge not a breach of contract; improper to burden client (in contingency case) with absolute obligation to pay attorney regardless of outcome;
- Bird, Marella, Boxer & Wolpert v. Superior Court (2003) 106 Cal.App.4th 419, 430-31 (attorney fee agreements and billings "'must be fair, reasonable and fully explained to the client.'" [Citation.] No fee agreement 'is valid and enforceable without regard to considerations of good conscience, fair dealing, and . . . the eventual effect on the cost to the client.'" (quoting Altschul v. Sayble (1978) 83 Cal.App.3d 153, 162)
- Fair v. Bakhtiari (2011) 195 Cal.App.4th 1135, 1140; "[I]f a contract is entered into between a trustee and his beneficiary through which the former gains an inequitable advantage, either by reason of inadequacy of consideration or otherwise, the latter is entitled to rescind the contract, subject to the limitations imposed by the law governing the application of this remedy. Such contract, however, is not void, but is voidable at the election of the beneficiary."

Out of State Cases:

- Compton v. Kittleson 171 P.3d 172 (2007, Alaska Supreme Court) contingent fee agreement which retroactively converted to hourly fee upon discharge of attorney was unconscionable and violation of Model Rule 1.2; [agreement called for contingency unless client settled for amount that would pay attorney less than \$175 per hour- otherwise fee based on the \$175 per hour rate; this was a malpractice case where client alleged the agreement impermissibly pressured him to reject a favorable settlement offer]
- U.S. Postal Service v. Haselrig Corp. (D. Md. 2004) 349 F.Supp.2d 955, 962. Agreement that attempted to "unlawfully" penalize client for discharge of attorney (by requiring payment of hourly rate, 40% contingency, or flat \$35,000) was "unreasonable at inception";

Disciplinary cases:

- Matter of Scapa & Brown (Rev. Dept. 1993) 2 Cal. State Bar Ct.Rptr. 635, 652 (attorney's fee contract requiring payment of "minimum" fee if client discharged attorney regardless of work performed constitutes attempt to charge unconscionable fee).
- In re Van Sickle, No. 99-O-12923, 2006 WL 2465633 (Cal. Bar Ct., Aug. 24, 2006)- successor counsel attempting to stack 35% contingent fee in addition to processor counsel contingent fee unconscionable.
- Cazares v. Saenz (1989) 208 Cal.App.3d 279, 287 ("[a]s a matter of professional responsibility, California lawyers are entitled to charge clients no more than a reasonable fee for legal services.").(citing to former, former rule 2-107).

END MEMO