

1 THE STATE BAR OF CALIFORNIA  
2 STANDING COMMITTEE ON  
3 PROFESSIONAL RESPONSIBILITY AND CONDUCT  
4 PROPOSED FORMAL OPINION INTERIM NO. 20-0005  
5 CONTINGENCY FEE AGREEMENTS AND EARNING AN HOURLY RATE WHEN TERMINATED  
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8 **ISSUES:** Under what circumstances, if any, are “conversion clauses” in contingent  
9 fee agreements ethically permissible?  
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11 **DIGEST:**  
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14 **AUTHORITIES**

15 **INTERPRETED:** Rules of Professional Conduct 1.2, 1.5, 1.16 of the Rules of Professional  
16 Conduct of the State Bar of California.<sup>1</sup>  
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19 **INTRODUCTION AND SCOPE**

20 This opinion addresses the ethical permissibility of conversion clauses in contingent fee  
21 agreements. For purposes of this opinion, where an attorney-client fee agreement provides for  
22 the attorney to be paid a contingent fee (the “primary contingent fee”) a conversion clause is a  
23 contractual provision that, if triggered, converts the fee due to a lawyer from that primary  
24 contingent fee to an alternate fee arrangement. Conversion clauses may be drafted so as to be  
25 triggered by manner of events, but in practice they are typically triggered upon (1) the  
26 termination of the attorney-client relationship, or (2) the client’s failure to follow the lawyer’s  
27 recommendation regarding whether to accept a settlement proposal.

28 It is the view of the Committee that conversions clauses are not ethically prohibited *per se*, but  
29 whether a conversion clause is ethically prohibited must be carefully evaluated on a case-by-  
30 case basis. The circumstances of each representation, as well as the precise terms of the fee  
31 arrangement and conversion clause, should be carefully scrutinized to ensure that neither the  
32 client’s absolute right to discharge counsel nor the client’s right to decide whether or not to  
33 settle (and on what terms) are burdened, and also to ensure that the conversion clause would  
34 not result in an unconscionable fee.<sup>2</sup> Conversion clauses are ethically permissible only where

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<sup>1</sup> Unless otherwise indicated, all references to “rules” in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

<sup>2</sup> This opinion concerns only the issue of whether conversion clauses are ethically prohibited, not whether or to what extent they are legally enforceable. Additionally, this opinion does not address the propriety or enforceability of attorney’s liens resulting from conversion clauses.

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they do not interfere with the client's right to discharge the lawyer or the client's right to determine whether to settle, and where they would not result in an unconscionable fee.

## DISCUSSION

Conversion clauses require careful ethical scrutiny because their use may improperly interfere with important client rights and may violate an attorney's ethical duties. These considerations, addressed herein, include a client's right to discharge counsel, a client's right to determine the objectives of a representation (especially with regard to settlement), and the attorney's duty not to seek or collect an unconscionable fee. Because conversion clauses are often complex in their operation, the sophistication of the client is also an important consideration.

### A. The Client's Right to Discharge Counsel.

Both the rules and California decisional law confirm a client's absolute right to discharge his or her attorney. Rule 1.16(a)(4); *Fracasse v. Brent* (1972) 6 Cal. App. 3d 784; *Kroff v. Larson* (1985) 167 Cal. App. 3d 857, 860 (client has absolute right at any time to discharge an attorney, with or without cause). Conversion clauses must be scrutinized to ensure that they do not directly or indirectly interfere with this right. For example, conversion clauses which purport to entitle a lawyer in a contingent fee representation, if terminated, to his or her hourly rate for hours worked (regardless of whether the contingency occurs, or what amount is recovered) pose a high risk of interfering with the client's right to discharge counsel. *See, Fracasse, supra* (improper to burden the client [in contingency cases] with an absolute obligation to pay the attorney regardless of outcome). Often a client in a contingent fee representation does not possess the means to pay an hourly fee, and has retained contingent fee counsel for this reason. A conversion clause that requires the client to pay the lawyer's hourly rate if the attorney is discharged is likely to impermissibly interfere with the client's absolute right to discharge the lawyer, and must be carefully scrutinized for this possibility. *See, Colorado State Bar Ethics Opinion 100; Compton v. Killtelson* (2007, Alaska Supreme Court) 171 P.3d 172 (contingent fee agreement which retroactively converted to hourly fee upon discharge of attorney was unconscionable and violation of Model Rule 1.2); *U.S. Postal Service v. Haselrig Corp* (D. Md. 2004) 349 F. Supp. 2d 955 (agreement that attempted to unlawfully penalize client for discharge of attorney (by requiring payment of 40% contingency or flat \$35,000) was "unreasonable at inception").

A conversion clause may not penalize a client who discharges the lawyer. Lawyers often argue that conversions clauses are necessary to "protect" contingent fee lawyers from bad-faith termination by wily clients. However, in appropriate circumstances, a contingent fee lawyer is already protected by the principles of *quantum meruit* to the extent the lawyer has earned and is entitled to a fee. *See, Russ Miliband & Smith v. Conkle & Olesten* (2003) 113 Cal. App. 4<sup>th</sup> 656; *Fracasse, supra*, 1013, footnote 8. A conversion clause that operates as a penalty for a client discharging a lawyer improperly burdens the client's right to do so, and is ethically prohibited. Thus, a conversion clause which purports to entitle the attorney to *more* than a quantum meruit recovery in the event the attorney is discharged by the client, is likely to be ethically prohibited.

Timing of the payment of the alternate fee is also an important factor for analysis. If a conversion clause entitles a lawyer (upon discharge) to an *immediate* fee, prior to the occurrence of the contingency, such a clause is highly likely to interfere with a client's right to discharge counsel, and likely to be ethically prohibited. Thus, even an alternate fee that would not be improper or unconscionable if payment were due at the time of the contingent recovery, may be ethically prohibited if its timing is such that it interferes with the client's right to discharge the lawyer.

Related to the issue of unconscionability (addressed in Section C. below) is whether the conversion clause provides for an alternate fee which would have the effect of rendering the case unreasonably unappealing to potential successor contingent fee counsel. For example, a conversion clause which claims to entitle the lawyer to a full contingent fee, or nearly a full contingent fee, no matter how much work has been performed or remains to be performed, is highly likely to make it impossible for the client to secured replacement counsel, and thus likely to impermissibly burden the client's right to discharge counsel.<sup>3</sup>

#### **B. The Client's Right to Decide Whether or Not to Settle.**

A lawyer is ethically required to abide by a client's decision concerning the objectives of the representation. The rules expressly extend this precept to the decision to accept or reject a settlement offer. "[A] lawyer shall abide by a client's decision whether to settle a matter," rule 1.2(a). Nonetheless, conversion clauses are often designed to "protect" an attorney against a client's unreasonable, or even bad-faith, decisions regarding whether to accept or reject settlement proposals contrary to the lawyer's recommendation.

Such conversion clauses often purport to entitle the lawyer to payment of the lawyer's contingent fee percentage calculated against any settlement offer that the lawyer recommends the client to accept, but which the client rejects. Alternatively, some clauses entitle a lawyer to the lawyer's hourly rates if the client accepts a settlement offer (or walk-away agreement) which the lawyer believes is insufficient.

While ethics committees of other states have approached such settlement-related conversion clauses from a variety of perspectives, all tend apply heightened scrutiny to such clauses. By way of example only, see, *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); *Philadelphia Bar Association Ethics Opinion* 2001-1 (majority opinion would permit conversion where there is clear advanced agreement on the goals of representation and agreement as to alternate methods of compensation if the client's goals change; the minority opinion would permit conversion clauses for sophisticated clients, not unsophisticated clients); *Nebraska Ethics Advisory Opinion* 95-1 (a provision triggered by a client not following attorney's settlement advice, which allows the attorney to

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<sup>3</sup> In addition to impermissibly interfering with a client's right to discharge the lawyer, such a conversion clause likely also seeks an unconscionable fee, and must be appropriately evaluated on that basis as well. See, *In re Van Sickle* (Cal. Bar. Ct. Aug. 24, 2006). Accord, *Colorado Ethics Opinion* 100, *supra*.

choose between the contingent percentage or full hourly fee, restricts the client's authority to settle a matter). The Committee agrees that heightened scrutiny of settlement-related conversion clauses is warranted, and that settlement-related conversion clauses are ethically permissible only in very limited circumstances.

It is the view of the Committee that the requirement imposed by rule 1.2(a) that "a lawyer shall abide by a client's decision whether to settle a matter" is a clear and unwaivable duty, the elimination of which by contract is simply not permitted under rule 1.2(b). A conversion clause that interferes with or burdens a client's right to determine whether to settle is ethically prohibited.<sup>4</sup>

The limited circumstances where the Committee believes that conversions clauses triggered by client settlement decisions may be ethically permissible are where the attorney and client clearly and effectively agree to specific objectives of the representation in advance, and agree to an alternate fee if the client should change her or his mind about those objectives.

Thus, conversion clauses keyed to the acceptance or rejection of settlement offers are ethically prohibited, except in the narrow circumstances where (1) the goals of the representation are clearly agreed-to in advance, (2) the lawyer and client also agree in advance to an alternate payment method that complies with rule 1.5, and, closely related, (3) the client's informed written consent is obtained.<sup>5</sup>

[WHERE TO MENTION RECENT CASE ABOUT SETTLEMENT AUTHORITY]

**C. The Attorney's Duty Not to Seek or Collect an Unconscionable Fee.**

Rule 1.5 prohibits a lawyer from making an arrangement for, charging, or collecting an unconscionable fee, and sets forth 13 factors to be considered (without limitation) in determining the unconscionability of a fee. Just as any primary contingent fee must comply with rule 1.5, so too must any alternate fee. Conversion clauses can impact an unconscionability analysis in numerous ways, and the determination of whether a conversion clause would result in an unconscionable alternative fee requires analysis of the conversion clause both facially, and as-applied.

In evaluating whether a conversion clause is unconscionable and therefore ethically prohibited, important factors include consideration of whether a conversion clause triggers an alternate

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<sup>4</sup> Such conversion clauses also they may introduce an improper speculative element in favor of the lawyer: who can know whether the opposing party would or could have actually performed under the rejected agreement against which the lawyer now seeks to determine his or her fee? Such uncertainty is indicia of overreach by a lawyer which further invades the client's right to determine whether or not to settle.

<sup>5</sup> Cf, *LACBA Formal Ethics Opinion No. 505* (2000) which approved of an engagement agreement by a public interest law firm which waived all attorney's fees only so long as the client did not enter into any settlement agreement which required confidentiality. It is the opinion of this committee that such an arrangement permissibly falls within now exceptions articulated above, and therefor is not prohibited.

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fee regardless of whether the relationship is terminated by the client or the attorney, and regardless of the reason for the termination. Thus, conversion clause that purports to entitle a discharged attorney to more than quantum meruit is highly unlikely to be ethically permissible, as it a conversion clause that would purport to entitle the contingent fee attorney to any fee, where the attorney has lost faith in the matter or has abandoned the client.

Similarly, If the conversion clause entitles the lawyer to an alternate fee determined by the lodestar method (hours times rates) which would exceed the primary contingent fee, the fee is likely to be unconscionable, and therefore ethically prohibited. This is especially true where the fee agreement allows conversion to be subject to manipulation by the lawyer, for example, by allowing the lawyer to claim the higher fee where it is the lawyer who causes the termination of the attorney-client relationship. Unfortunately, some lawyers might continuously evaluate the fee arrangement throughout the representation, looking to act at the moment it is to the lawyer's economic advantage terminate a representation in order to trigger an alternate fee. Conversion clauses which would permit and incentivize such divided loyalty and overreach are not ethically permissible. Thus, depending on the circumstances, the higher alternative fee may be unconscionable.

A conversion clause which calls for payment of an alternate contingent fee *prior* to, or *regardless* of, the occurrence of the contingency, is functionally not a contingent fee at all, and is unlikely survive an unconscionability determination. *See* rule 1.5 (b) (1), (2) (concerning overreach, fraud, and failure to disclose material facts).

In any unconscionability analysis, the sophistication of the client is a relevant consideration. *See*, rule. 1.5 (b)(4), *Cotchette, Pitre & McCarthey v. Universal Paragon Group* (2010) 187 Cal. App. 4<sup>th</sup> 1405. Conversion clauses can be complex in construction and effect, and difficult to understand. Thus, the client's level of sophistication as a consumer of legal services must be considered.

Similarly, a conversion clause which requires payment of a pre-determined contingent fee to a discharged lawyer, regardless of the work actually performed or amount of work remaining in the matter, may not survive an unconscionability analysis, particularly if triggered early in a representation. *See* rule 1.5 (b)(3), (7), (12); *Matter of Scapa & Brown* (Rev. Dept. 1993) (attorney's fee contract requiring payment of a "minimum" fee if client discharged attorney regardless of work performed constitutes an attempt to charge an unconscionable fee).

Established law already provides for payment to discharged contingent fee counsel on a *quantum meruit* basis where appropriate. A conversion clause which converts a contingent fee to the attorney's hourly rate upon termination of the attorney-client relationship must be evaluated for unconscionability, especially where, because a representation began primarily as

a contingent fee representation, the lawyer may or may not have incurred excessive or unreasonable hours on the matter.<sup>6</sup>

## FACTUAL SCENARIOS AND ANALYSIS OF EACH

**Scenario No. 1:** Fee agreement for a litigation matter provides that Lawyer will be paid a contingent fee of 35% of the recovery, but if Lawyer is discharged by the client prior to recovery, Client agrees to immediately pay Lawyer at Lawyer’s hourly rate for all time expended. Client has never engaged a lawyer before.

**Analysis of Scenario No. 1:** California law permits a discharged attorney to seek a *quantum meruit* fee. Thus, the effect of this fee agreement is to replace Lawyer’s pre-existing right to seek *quantum meruit*, with a contractual entitlement to immediate payment of Lawyer’s hourly rates, regardless of outcome, results obtained, or the reasonableness of Lawyer’s rate or hours expended. Coupled with the unsophistication of the client here, the conversion to hourly fees without regard to the occurrence of the contingency, and the immediate obligation to pay same, impermissibly interferes with Client’s right to discharge Lawyer. Further, replacement of Lawyer’s *quantum meruit* rights with a contractual entitlement to hourly fees regardless of rate or number of hours could lead to an unconscionable fee being sought or obtained – (although from the limited facts presented it cannot be determined that the fee set forth in the agreement is *per se* unconscionable). Because it interferes with Client’s right to discharge Lawyer, this conversion clause is ethically prohibited.

**Scenario No. 2:** Fee Agreement for a litigation matter provides that Lawyer will be paid a contingent fee of 35% of the recovery, but if the attorney-client relationship ends (for any reason) before the recovery is obtained (whether the Lawyer withdraws or is terminated by the Client), Client agrees to pay Lawyer – if and when the contingency occurs -- per Lawyer hourly rate for all time expended.

**Analysis of Scenario No. 2.** This arrangement is subject to much of the same analysis as Scenario No. 1. It is ethically prohibited for the additional reason that it provides Lawyer with ability to unilaterally convert the contingent fee to a guaranteed hourly fee at Lawyer’s sole discretion, providing Lawyer with the ability to potentially gain a greater fee than the contingent fee. Not only would this arrangement burden Client’s right to discharge attorney as described in the analysis of Scenario No. 1, but it would also provide for Lawyer to obtain unconscionable fee by terminating the representation when it appears profitable.

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<sup>6</sup> While Rule 1.5 determines unconscionability for purposes of an attorney’s ethical duties, California law requires that attorney fee agreements and billings “must be fair, reasonable and fully explained to the client”. *Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App. 4<sup>th</sup> 419, 430-31 (quoting *Altschul v. Syble* (1978) 83 Cal. App. 3d 153, 162). Again, the legal enforceability or unenforceability of conversion clauses is beyond the scope of this opinion.

**Scenario No. 3:** Contingent fee agreement entitles the lawyer to a 40% contingent fee. The agreement also expressly notes that the client has the right to discharge the attorney at any time for any reason, but if the client discharges the attorney, the client agrees to pay the attorney's hourly rates for all work legitimately and reasonably performed prior to discharge, with that payment due at the time of recovery in the case. If no recovery is obtained, no such payment will be due.

**Analysis of Scenario No. 3.** Several factors in Scenario No. 3 suggest that it may be ethically permissible. First, this conversion clause cannot be triggered or manipulated by the attorney choosing to terminate the representation. Additionally, the fee agreement expressly affirms and informs the client of the client's absolute right to discharge the attorney. Importantly, the alternate fee is only due if the client obtains the recovery in the litigation, thus the client will not owe any fee if the client is not successful in the litigation. The effect of this conversion clause, if triggered, is to replace the attorney's *quantum meruit* rights with an express agreement to pay for the attorney's time on an hourly basis – albeit only if recovery is ultimately obtained. Hourly fee agreements routinely entitle attorneys to their hourly rates, and there is nothing unethical about such an arrangement, so long as it complies with Business & Professions Code Section 6148. As with all hourly fee agreements, the attorney may not seek or obtain an unconscionable fee, but that duty is not directly related to the conversion clause in the agreement. Under the circumstances described, this conversion clause is likely to be ethically permissible.

**Scenario No. 4:** Contingent fee agreement provides that if (1) a settlement offer is made to client, (2) Lawyer recommends Client accept the offer, (3) Client rejects that settlement offer, and (4) Client ultimately recovers less than that settlement offer, then Lawyer shall be entitled to Lawyer's contingent fee computed as against the amount of the rejected settlement offer.

**Analysis of Scenario No. 4.** The effect of the fee agreement in Scenario No. 4 is to provide significant pressure upon Client to follow Lawyer's advice to accept a settlement by potentially penalizing Client for failing to do so. This arrangement would expose the Client to increased risk if Client does not do as Lawyer sees fit in order to shift decisional authority from the Client to the Lawyer. This arrangement impermissibly interferes with Client's right to decide whether to settle, and is therefore ethically prohibited, regardless of whether the Client is a sophisticated consumer of legal services. It also likely seeks an unconscionable fee by imposing the attorney's contingent fee percentage against a phantom-recovery that never actually occurred.

**Scenario No. 5:** Fee agreement provides that Lawyer will represent client (a business entity) in the prosecution and defense of claims in litigation on primarily a contingent fee of (1) 35% of affirmative recovery and (2) 35% of the amount of any reduction in the amount sought by client's litigation adversaries (the "defensive contingency"). The fee agreement further provides that in the event that Client chooses to settle the litigation for a walk-away, Lawyer shall be entitled to the greater of (1) the 35% defensive contingent fee, or (2) a *quantum meruit*

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fee determined by lodestar method per Lawyer's reasonable hours incurred and Lawyer's reasonable hourly rates (set forth in the agreement). Client is an entity that has extensive experience retaining and working with attorneys in both the litigation and transactional contexts, and was represented in the negotiation of the fee agreement by in-house counsel. During the negotiation of the fee agreement, Lawyer and Client (including Client's in-house counsel) discussed Client's strong preference for contingent fee representation for cash-flow reasons, as well as the possibility that, depending on Client's ever-changing business needs, Client might ultimately choose not to pursue its valuable affirmative claims if it can secure resolution, which Client understood could undermine its ability to obtain contingent fee representation. The fee agreement terms were the agreed-upon result of such discussion.

**Analysis of Scenario No. 5.** This arrangement appears, at least facially, to improperly interfere with Client's right to decide whether to settle. However, closer analysis reveals otherwise. The significant sophistication of the client (indeed, represented in negotiation of the fee agreement by in-house counsel) is a material factor, and is important to the analysis. It is also material that the fee agreement negotiations explored the impetus and effect of the alternate fee and that the alternate fee was designed to encourage Lawyer to provide a contingent fee representation (Client's preference) despite the real and disclosed risk that Client may chose not to pursue its valuable affirmative claims to conclusion. Thus, under the specific circumstances presented, the alternate fee neither interferes with Client's decision whether to settle, nor constitutes an unconscionable fee, as described. Therefore, this conversion clause is ethically permissible.

## CONCLUSION

Conversion clauses are not ethically prohibited *per se*, but must be carefully scrutinized on a case-by-case basis, including application of the factors identified above. Conversion clauses that interfere with a client's right (1) to terminate an attorney, or (2) to decide whether to settle are prohibited, as are conversion clauses that would result in an unconscionable fee, either facially or as-applied.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.