

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
6
7

8 **ISSUES:** Under what circumstances, if any, are “conversion clauses” in contingent
9 fee agreements ethically permissible?
10

11 **DIGEST:** Conversion clauses are not ethically prohibited *per se*, but require careful
12 ethical scrutiny, and it is the rare circumstance where a conversion clause
13 is not prohibited. They are ethically prohibited where their use may
14 improperly interfere with important client rights or may violate an
15 attorney’s ethical duties, primarily client’s right to discharge the lawyer
16 or the client’s right to determine whether to settle, and where they
17 would not result in an unconscionable fee.
18

19 **AUTHORITIES**

20 **INTERPRETED:** Rules of Professional Conduct 1.2, 1.5, 1.16 of the Rules of Professional
21 Conduct of the State Bar of California.¹
22

23 **INTRODUCTION AND SCOPE**

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

32 It is the view of the Committee that conversions clauses are not ethically prohibited *per se*, but
33 whether a conversion clause is ethically permissible must be carefully evaluated on a case-by-
34 case basis. Conversion clauses are ethically permissible only where they do not interfere with
35 the client’s right to discharge the lawyer or the client’s right to determine whether to settle,
36 and where they would not result in an unconscionable fee. Therefore, the circumstances of
37 each representation, as well as the precise terms of the fee arrangement and conversion
38 clause, should be carefully scrutinized to ensure that neither the client’s right to discharge

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

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counsel nor the client's right to decide whether or not to settle (and on what terms) are burdened, and also to ensure that the conversion clause would not result in an unconscionable fee.² The Committee notes that when this analysis is performed, the circumstances wherein a particular conversion clause is not ethically prohibited are rare.

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 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

² 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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74 already protected by the principles of *quantum meruit* to the extent the lawyer has earned and
75 is entitled to a fee. See, *Rus Miliband & Smith v. Conkle & Olesten* (2003) 113 Cal. App. 4th 656;
76 *Fracasse, supra*, 1013, footnote 8. A conversion clause that operates as a penalty for a client
77 discharging a lawyer improperly burden's the client's right to do so, and is ethically prohibited.

78 Related to the issue of unconscionability (addressed in Section C. below) is whether the
79 conversion clause provides for an alternate fee which would have the effect of improperly
80 restricting a client's right to discharge counsel by rendering the representation unreasonably
81 unappealing to potential successor contingency counsel. For example, a conversion clause
82 which claims to entitle the lawyer to more than a quantum meruit fee, no matter how much
83 work has been performed or remains to be performed, is likely to make it impossible for the
84 client to secure replacement counsel, thus impermissibly burdening the client's right to
85 discharge counsel.³

86 The Committee also notes that a lawyer's contingent fee typically includes a premium for the
87 risk that the contingency may not occur. A conversion clause that allows a lawyer to effectively
88 avoid contingent risk likely renders the ostensible "contingent fee" not contingent at all, and
89 therefore potentially unconscionable. Moreover, whereas a *quantum meruit* fee may not
90 exceed the contract price⁴, under a conversion clause the hourly rate fee which the lawyer
91 might claim might contain no such limit and may even exceed the total value of the case. In
92 light of these considerations, it is the view of the Committee that a conversion clause triggered by
93 the termination of the lawyer which purports to entitle the lawyer to a non-contingent fee
94 regardless of outcome, or which purports to entitle the lawyer to *more* than a quantum meruit
95 recovery in the event the attorney is discharged by the client, is ethically prohibited.

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

103 Additionally, in appropriate circumstances, a conversion clause must also be scrutinized to
104 ensure it is not inconsistent with a lawyer's advertisements or assurances to potential clients.
105 For example, any conversion clause that would provide for a lawyer to be entitled to non-

³ 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*.

⁴ *Cazares v. Saenz* (1989) 208 Cal. App. 3d. 279.

contingent alternate fee likely would be ethically impermissible where the lawyer had made a representation to the client to the effect that no fee would be due unless the client recovers.

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 to carefully scrutinize 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 choose between the contingent percentage or full hourly fee, restricts the client’s authority to settle a matter).

The Committee agrees that careful scrutiny of settlement-related conversion clauses is required, and that settlement-related conversion clauses are ethically permissible only in very limited circumstances 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, and where the conversion clause at issue under the specific circumstances presented, does not restrict the client’s right to decide whether to settle, and on what terms.⁵

⁵ For Example, *see 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 view of this committee that such an arrangement permissibly falls within now exceptions articulated above, and therefor is not prohibited.

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 clear and unwaivable, and its elimination by contract is simply not permitted under rule 1.2(b). *See, for example, Amjadi v. Brown* (2021) 68 Cal App. 5th 383, holding that a provision in a fee agreement purporting to grant the lawyer the right to accept a settlement offer on behalf of the client in the lawyer’s “sole discretion” violates the rules and is void;⁶ *See also, In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 314-315 in which the State Bar court held that “[a]ttempts by an attorney to restrict a client’s right to control his or her case are invalid and evidence of overreaching.” A conversion clause that interferes with a client’s right to determine whether to settle is ethically prohibited.⁷ Thus, conversion clauses keyed to the acceptance or rejection of settlement offers are ethically prohibited, except in the rare and 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, and (4) the operation of the conversion clause is not otherwise unconscionable under the circumstances.

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 arising from a conversion clause. 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 as it is written, and as it is applied to a specific factual scenario.

In evaluating whether a conversion clause tied to termination of the lawyer is unconscionable and therefore ethically prohibited, important factors include consideration of whether a conversion clause triggers an alternate fee regardless of whether the relationship is terminated by the client or the attorney, and regardless of the reason for the termination. Careful ethical scrutiny is particularly warranted 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. A conversion clause of this type could encourage lawyers terminate a representation (and even to abandon the client) when it is to the lawyer’s economic advantage to terminate a representation in order

⁶ *Amjadi* also held that attempts by lawyers to wrest control from clients as to settlement decisions not only violate rule 1.2, but also create a conflict of interest between the lawyer and client under rule 1.7(b) whenever the client and attorney disagree about settlement.

⁷ Such conversion clauses also 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.

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171 to trigger an alternate fee. Conversion clauses which would permit and incentivize such divided
172 loyalty and overreach are not ethically permissible.

173 It is the view of the Committee that a conversion clause which purports to entitle a discharged
174 attorney to more than *quantum meruit* is ethically prohibited, as is a conversion clause that
175 would purport to entitle the contingent fee attorney to any fee, where the attorney has lost
176 faith in the matter and quit, and/or has otherwise abandoned the client.

177 A conversion clause which calls for payment of an alternate contingent fee *prior* to, or
178 *regardless* of, the occurrence of the contingency, is functionally not a contingent fee at all, and
179 is unlikely survive an unconscionability determination if its amount would typically reflect a risk
180 premium where such risk is not in fact present. *See* rule 1.5 (b) (1), (2) (concerning over-reach,
181 fraud, and failure to disclose material facts).

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

187 Similarly, a conversion clause which requires payment of a pre-determined contingent fee to a
188 discharged lawyer, regardless of the work actually performed or amount of work remaining in
189 the matter, is unlikely to survive an unconscionability analysis, particularly if triggered early in a
190 representation. *See* rule 1.5 (b)(3), (7), (12); *Matter of Scapa & Brown* (Rev. Dept. 1993)
191 (attorney's fee contract requiring payment of a "minimum" fee if client discharged attorney
192 regardless of work performed constitutes an attempt to charge an unconscionable fee).

193 Established law already provides for payment to discharged contingent fee counsel on a
194 *quantum meruit* basis where appropriate. A conversion clause which converts a contingent fee
195 to the attorney's hourly rate upon termination of the attorney-client relationship must be
196 evaluated for unconscionability, especially where, because a representation began primarily as
197 a contingent fee representation, the lawyer may or may not have incurred excessive or
198 unreasonable hours on the matter.⁸

⁸ 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. 4th 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.

FACTUAL SCENARIOS AND ANALYSIS OF EACH

[NOTE: It is the drafting committee's view and recommendation that the scenarios be omitted from the opinion; because the conclusions for Nos. 1-4 are that the conversion clauses at issue are not ethically permissible, and the facts of No. 5 are so unusual and specific, we don't believe the scenarios add much value or clarity. We would like to hear the full committee's thoughts on removing the scenarios]

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 under appropriate circumstances. Thus, one 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. Thus, this clause could purport to entitle the attorney to payment where the contingency is never achieved – meaning the attorney's entitlement to payment is not contingent at all. 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, this conversion clause 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, or even higher than a quantum meruit fee). 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 – only if and when the contingency occurs – per Lawyer's 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 the ability to unilaterally convert the contingent fee to a guaranteed hourly fee at Lawyer's sole discretion, rendering the fee non-contingent, and 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. Depending upon the circumstances, the hourly fee claimed by the discharged attorney may also restrict the

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client's right to discharge counsel by operating as a penalty for exercise of that right, and by rendering the case unreasonably unappealing to potential successor contingent fee counsel. Depending on the circumstance, this conversion clause would also improperly permit a contingent fee lawyer who withdraws from the representation without cause to obtain a fee (in quantum meruit or otherwise) to which the lawyer is not legally entitled. *See, Rus Miliband & Smith v. Conkle & Olesten* (2003) 113 Cal. App. 4th 656, addressed *supra*;

Scenario No. 3: Contingent fee agreement between attorney and a client who is a sophisticated consumer of legal services 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. While several factors in Scenario No. 3 suggest client protections that weigh in favor of this particular conversion clause it is the view of the Committee that a deeper analysis reveals it is unlikely to be ethically permissible. The factors suggesting it is ethically permissible include the fact that this conversion clause cannot be triggered or manipulated by the attorney choosing to terminate the representation, that the fee agreement expressly affirms and informs the client of the client's absolute right to discharge the attorney, that the only fees for work legitimately and reasonably performed will be paid, and the fact that 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. However, the effect of this conversion clause, if triggered by the client's exercise of the client's absolute right to terminate counsel, is to replace the terminated lawyer's *quantum meruit* rights with an express agreement to pay for the attorney's time on an hourly basis without any limitation as to total amount. Thus, the discharged lawyer's hourly fee could be grossly disproportionate to the value of the legal services provided or when compared to the value of the entire case, potentially leading to an unconscionable fee. The unlimited hourly fee is also likely to impede client's ability to retain successor contingent counsel, thereby restricting and/or penalizing client's exercise of client's absolute right to discharge counsel. For these reasons, this conversion clause is unlikely to be ethically permissible, despite the sophistication of the client.

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 attempts to shift

decisional authority from the Client to the Lawyer by exposing the Client to increased risk if Client does not do as Lawyer sees fit. 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. Additionally, this conversion clause fails to account for legitimate non-monetary goals which the client may have with respect to the representation, further limiting the client's rights under rule 1.2.

Scenario No. 5: Fee agreement provides that Lawyer will represent client (a business entity) in the prosecution and defense of claims in litigation (where client is both prosecuting its own claims for \$10,000,000, and is being sued for \$2,000,000) on a primary 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" to be computed by reducing the \$2,000,000 sought against client by the amount if any that client is ultimately found liable on that claim, and applying the 35% contingent fee to that delta). 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 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, at any point in the litigation, choose not to pursue its valuable affirmative claims if it can secure resolution, which Client understood could undermine its ability to obtain a simple 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 this to be the rare settlement-related conversion clause that may be ethically permissible. 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. Without an arrangement akin to this conversion clause, client was extremely unlikely to be able to secure contingent fee counsel, which was client's preference. 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

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321 is likely to be ethically permissible. The Committee cautions, however, that this is a rare
322 conclusion, based on highly unusual circumstances.

323 CONCLUSION

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

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

REDLINE

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19 **AUTHORITIES**

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23 **QUESTIONS/ISSUES FOR COMMITTEE:**
24

- 25 • ~~The drafting team is leaning toward the view that no conversion clause that would~~
26 ~~entitle an attorney to more than quantum meruit is permissible. How does the~~
27 ~~Committee view this? Can anyone present an example of a conversion clause entitling~~
28 ~~a terminated attorney to more than quantum meruit which is permissible?~~
29
- 30 • ~~We are leaning toward view that any conversion clause in a contingent fee agreement~~
31 ~~which entitles attorney to guaranteed payment is not really a contingent fee at all,~~
32 ~~and is not permissible. We want the full Committee’s thoughts on this, and whether~~
33 ~~the full committee can envision an example where such guaranteed payment is ok;~~
34
- 35 • ~~We are wondering if the opinion is more useful as simply a statement of law and~~
36 ~~ethics, without scenarios. Should we remove the examples?~~
37
38
39

INTRODUCTION AND SCOPE

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

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

It is the view of the Committee that conversions clauses are not ethically prohibited *per se*, but whether a conversion clause is ethically permissible must be carefully evaluated on a case-by-case basis. Conversion clauses are ethically permissible only where 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. Therefore, the circumstances of each representation, as well as the precise terms of the fee arrangement and conversion clause, should be carefully scrutinized to ensure that neither the client’s right to discharge counsel nor the client’s right to decide whether or not to settle (and on what terms) are burdened, and also to ensure that the conversion clause would not result in an unconscionable fee.² The Committee notes that when this analysis is performed, the circumstances wherein a particular conversion clause is not ethically prohibited are rare.

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 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

² 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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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, Rus Miliband & Smith v. Conkle & Olesten* (2003) 113 Cal. App. 4th 656; *Fracasse, supra*, 1013, footnote 8. A conversion clause that operates as a penalty for a client discharging a lawyer improperly burden's the client's right to do so, and is ethically prohibited.

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 improperly restricting a client's right to discharge counsel by rendering the representation unreasonably unappealing to potential successor contingency counsel. For example, a conversion clause which claims to entitle the lawyer to more than a quantum meruit fee, no matter how much work has been performed or remains to be performed, is likely to make it impossible for the client to secure replacement counsel, thus impermissibly burdening the client's right to discharge counsel.³

The Committee also notes that a lawyer's contingent fee typically includes a premium for the risk that the contingency may not occur. A conversion clause that allows a lawyer to effectively avoid contingent risk likely renders the ostensible "contingent fee" not contingent at all, and therefore potentially unconscionable. Moreover, whereas a *quantum meruit* fee may not exceed the contract price⁴, under a conversion clause the hourly rate fee which the lawyer might claim might contain no such limit and may even exceed the total value of the case. In light of these considerations, it is the view of the Committee that a conversion clause triggered by the termination of the lawyer which purports to entitle the ~~attorney~~ lawyer to a non-contingent

³ 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.*

⁴ *Cazares v. Saenz* (1989) 208 Cal. App. 3d. 279.

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fee regardless of outcome, or which purports to entitle the lawyer to more than a quantum meruit recovery in the event the attorney is discharged by the client, ~~should be carefully scrutinized and is likely to be~~ ethically prohibited. **DO WE BELIEVE THIS IS EVER PERMISSIBLE? DO WE WANT A STRONGER POSITION?**

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 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.

Additionally, in appropriate circumstances, a conversion clause must also be scrutinized to ensure it is not inconsistent with a lawyer's advertisements or assurances to potential clients. For example, any conversion clause that would provide for a lawyer to be entitled to non-contingent alternate fee likely would be ethically impermissible where the lawyer had made a representation to the client to the effect that no fee would be due unless the client recovers.

~~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 improperly restricting a client's right to discharge counsel by rendering the representation unreasonably unappealing to potential successor contingency 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 likely to make it impossible for the client to secure replacement counsel, and thus likely to impermissibly burden the client's right to discharge counsel.⁵~~

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

⁵In 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*.

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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 to carefully scrutinize 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 choose between the contingent percentage or full hourly fee, restricts the client's authority to settle a matter).

The Committee agrees that careful scrutiny of settlement-related conversion clauses is warranted~~required~~, and that settlement-related conversion clauses are ethically permissible only in very limited circumstances 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, and where the conversion clause at issue under the specific circumstances presented, does not restrict the client's right to decide whether to settle, and on what terms. ⁶~~[QUESTION - WHAT IF THE CIRCUMSTANCES CHANGE THROUGH NO FAULT OF THE CLIENT?]~~⁷

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 settlement a matter" is clear and unwaivable, and its elimination by contract is simply not permitted under rule 1.2(b). See, for example, *Amjadi v. Brown* (2021) 68 Cal App. 5th 383, holding that a provision in a fee agreement purporting to grant the lawyer the right to accept a settlement offer on behalf of the client in the lawyer's "sole discretion" violates the rules and is void;⁸ See also, *In the Matter of Guzman* (Review

~~⁶ For Example, see 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 view of this committee that such an arrangement permissibly falls within now exceptions articulated above, and therefor is not prohibited.~~

⁷ For Example, see 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 view of this committee that such an arrangement permissibly falls within now exceptions articulated above, and therefor is not prohibited.

⁸ *Amjadi* also held that attempts by lawyers to wrest control from clients as to settlement decisions not only violate rule 1.2, but also create a conflict of interest between the lawyer and client under rule 1.7(b) whenever the client and attorney disagree about settlement.

Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 314-315 in which the State Bar court held that “[a]ttempts by an attorney to restrict a client’s right to control his or her case are invalid and evidence of overreaching.” A conversion clause that interferes with a client’s right to determine whether to settle is ethically prohibited.⁹ Thus, conversion clauses keyed to the acceptance or rejection of settlement offers are ethically prohibited, except in the the rare and 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, and (4) the operation of the conversion clause is not otherwise unconscionable under the circumstances.

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 arising from a conversion clause. 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 as it is written, and as it is applied to a specific factual scenario.

[MUST AN HOURLY FEE CONVERSION CLAUSE COMPLY WITH B&P 6148?]

In evaluating whether a conversion clause tied to termination of the lawyer is unconscionable and therefore ethically prohibited, important factors include consideration of whether a conversion clause triggers an alternate fee regardless of whether the relationship is terminated by the client or the attorney, and regardless of the reason for the termination. ~~A conversion clause that purports to entitle a discharged attorney to more than quantum meruit is 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 and/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.~~ **[DO WE TAKE A STRONGER POSITION?]** Careful ethical scrutiny is particularly warranted 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. A conversion clause of this type could encourage lawyers terminate a representation (and even to abandon the client) when it is to the lawyer’s

⁹ Such conversion clauses also 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.

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economic advantage to 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.~~

It is the view of the Committee that a conversion clause which purports to entitle a discharged attorney to more than *quantum meruit* is ethically prohibited, as is a conversion clause that would purport to entitle the contingent fee attorney to any fee, where the attorney has lost faith in the matter and quit, and/or has otherwise abandoned the client.

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 if its amount would typically reflect a risk premium where such risk is not in fact present. *See* rule 1.5 (b) (1), (2) (concerning over-reach, 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 & McCarthy v. Universal Paragon Group* (2010) 187 Cal. App. 4th 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 may 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~~is unlikely to 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.¹⁰

¹⁰ 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. 4th 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.

FACTUAL SCENARIOS AND ANALYSIS OF EACH

[NOTE: It is the drafting committee's view and recommendation that the scenarios be omitted from the opinion; because the conclusions for Nos. 1-4 are that the conversion clauses at issue are not ethically permissible, and the facts of No. 5 are so unusual and specific, we don't believe the scenarios add much value or clarity. We would like to hear the full committee's thoughts on removing the scenarios]

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 under appropriate circumstances. Thus, ~~the~~one 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. Thus, this clause could purport to entitle the attorney to payment where the contingency is never achieved – meaning the attorney's entitlement to payment is not contingent at all. 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, this conversion clause 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), or even higher than a quantum meruit fee. 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 – only if and when the contingency occurs – per Lawyer's 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 the ability to unilaterally convert the contingent fee to a guaranteed hourly fee at Lawyer's sole discretion, rendering the fee non-contingent, and 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. Depending upon the circumstances, the hourly fee claimed by the discharged attorney may also restrict the

client's right to discharge counsel by operating as a penalty for exercise of that right, and by rendering the case unreasonably unappealing to potential successor contingent fee counsel. ~~This~~[Depending on the circumstance, this](#) conversion clause would also improperly permit a contingent fee lawyer who withdraws from the representation without cause to obtain a fee (in quantum meruit or otherwise) to which the lawyer is not legally entitled. *See, Rus Miliband & Smith v. Conkle & Olesten* (2003) 113 Cal. App. 4th 656, addressed *supra*;

Scenario No. 3: Contingent fee agreement between attorney and a client who is a sophisticated consumer of legal services 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. While several factors in Scenario No. 3 suggest client protections that weigh in favor of this particular conversion clause it is the view of the Committee that a deeper analysis reveals it is unlikely to be ethically permissible. The factors suggesting it is ethically permissible include the fact that this conversion clause cannot be triggered or manipulated by the attorney choosing to terminate the representation, that the fee agreement expressly affirms and informs the client of the client's absolute right to discharge the attorney, that the only fees for work legitimately and reasonably performed will be paid, and the fact that 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. However, the effect of this conversion clause, if triggered by the client's exercise of the client's absolute right to terminate counsel, is to replace the terminated lawyer's *quantum meruit* rights with an express agreement to pay for the attorney's time on an hourly basis without any limitation as to total amount. Thus, the discharged lawyer's hourly fee could be grossly disproportionate to the value of the legal services provided or when compared to the value of the entire case, potentially leading to an unconscionable fee. The unlimited hourly fee is also likely to impede client's ability to retain successor contingent counsel, thereby restricting and/or penalizing client's exercise of client's absolute right to discharge counsel. For these reasons, this conversion clause is unlikely to be ethically permissible, despite the sophistication of the client.

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 attempts to shift

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decisional authority from the Client to the Lawyer by exposing the Client to increased risk if Client does not do as Lawyer sees fit. 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. Additionally, this conversion clause fails to account for legitimate non-monetary goals which the client may have with respect to the representation, further limiting the client's rights under rule 1.2.

Scenario No. 5: Fee agreement provides that Lawyer will represent client (a business entity) in the prosecution and defense of claims in litigation (where client is both prosecuting its own claims for \$10,000,000, and is being sued for \$2,000,000) on ~~primarily~~ a primary 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" ~~will~~ to be computed by reducing the \$2,000,000 sought against client by the amount if any that client is ultimately found liable on that claim, and applying the 35% contingent fee to that delta). 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~~ 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, at any point in the litigation, choose not to pursue its valuable affirmative claims if it can secure resolution, which Client understood could undermine its ability to obtain a simple 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~~ this to be the rare settlement-related conversion clause that may be ethically permissible. 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. Without an arrangement akin to this conversion clause, client was extremely unlikely to be able to secure contingent fee counsel, which was client's preference. 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

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359 is likely to be ethically permissible. [The Committee cautions, however, that this is a rare](#)
360 [conclusion, based on highly unusual circumstances.](#)

361 CONCLUSION

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

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