

Consideration of More Flexible Conversion Clause Ethics Opinion Without Hypos

❖ Elements of a Potentially Permissible Conversion Clause

- Conversion triggered by attorney discharge or attorney withdrawal in compliance with ethical obligations (stronger if withdrawal for “good cause”- *e.g.*, client fraud or litigation misconduct)
- Conversion fee payment obligation remains contingent on recovery unless client’s objectives materially change (*e.g.*, seeking non-monetary recovery; abandoning litigation)
 - No obligation to pay before the contingency or in the absence of the contingency*
 - A change in the client’s objectives might be a legitimate trigger.
- Fee must not be unconscionable.
 - For simplicity, we might consider basing a hypothetical fee on quantum meruit principles or setting it according to a lodestar calculation, but other reasonable methods of determining the fee would be permissible.
 - Flat fee conversion unlikely to be permissible.
 - Cap-conversion fee should not exceed the original contingent fee
 - Reflects fair market rates
- Conversion fee must not operate as a penalty for the client refusing to settle or discharging an attorney
 - Exacting a penalty for client’s exercise of rights would place an impermissible burden on the client’s right to discharge/settle
 - Consider Oregon ethics opinion that not all conversion clauses that are triggered by a refusal to settle violate ethics rules
- Informed consent / sophisticated client*

* May not always be required for the conversion clause to be permissible.

❖ Additional Factors That Would Support Reasonableness of Conversion Clause (Not Required)

- Lawyer is the only one willing to take the case (conversion clause is motivating representation).

- The contemplated case requires lawyer to invest a significant amount of time and money and the client's objectives change to non-monetary objectives.
- The client's conduct warrants withdrawal.
- Conversion clause is subject to negotiation.
- The client insists on the conversion clause to provide certainty in the event of termination by either party.

❖ **Factors That Would Tend to Make a Conversion Clause Unethical**

- Triggered by client's refusal to settle
 - Improper burden on client's right to decide whether to settle
 - If client's objective change to non-monetary recovery and the lawyer's reasonable expectation of payment via settlement can no longer be met, this factor alone would not necessarily make the conversion clause impermissible.
 - Potential example: Engagement letter made clear that likelihood of an early settlement within an acceptable range was a big motivator in the attorney taking the case and having to litigate was a risk the attorney was willing to take only if a reasonable settlement could not be achieved.
- Triggered by withdrawal of attorney without justifiable cause or withdrawal in violation of ethical obligations
 - Grounds for mandatory withdrawal under Rule 1.16
 - Ground for permissible withdrawal under Rule 1.16 (except situations where client freely assents to termination)
 - May attorney and client agree in advance to a definition of "justifiable cause?"
- Triggered by discharge of attorney with justifiable cause
 - This trigger places an improper burden on a client's right to discharge counsel/choose counsel.
 - This determination is fact-specific.
 - While it arguably burdens the decision for some clients, the burden may vary greatly from client to client.
 - If fees are not unconscionable and the conversion clause is negotiated at the outset with informed consent of client, the conversion clause may be permissible.

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68 **Issues to Discuss:**

- 69 1. Public commenter's note that the opinion causes confusion about statutory fees.
70 2. Orange County Bar Association Legal Ethics Committee's suggestions to define
71 "penalty" and to consider applicable contract case law.
72 3. Availability of quantum meruit recovery (discussion or requirement that lawyer
73 sue client).
74 4. Colorado ethics opinion and Richmond article's discussion of setting conversion
75 fees as a percentage of the highest settlement amount offered before the attorney
76 was terminated with cap of what original contingent fee would have been. I
77 would like to think more about this and am interested in your thoughts.

Revised Working Group Recommendation
re Conversion Clause Interim Opinion

For September 15, 2023 Meeting

Based upon the California authorities cited in the draft Proposed Formal Opinion Interim No. 20-0005, “Conversion Clauses in Contingent Fee Agreements” and after consideration of public comments received in response to the Interim Opinion, the Working Group continues unanimously to recommend that the “bottom line” conclusion should be that such clauses which purport to entitle a discharged attorney to any fee calculated in any manner inconsistent with the California Supreme Court’s holding in *Fracasse v. Brent* (1972) 6 Cal.3d 784, 791, are never ethically proper. Accordingly, submitted with this Recommendation is a revised “clean” draft of 20-0005 that the Working Group submits for consideration and hopefully adoption at the September 15, 2023 meeting.

In past meetings, some COPRAC members have been hesitant to accept this recommendation. The hesitancy apparently stems from two considerations. First, a minority of ethics opinions and some caselaw in other jurisdictions have concluded that a contract clause that converts a contingent fee to an hourly fee is not *per se* unethical. Second no California authority to date has expressly held that such a conversion clause is *per se* ethically improper.

The Working Group believes the first criticism is misplaced because California is unique among all jurisdictions in the Nation regarding the ethical standards by which fee contracts are evaluated. In all other jurisdictions, the ethical standard for the enforceability of a fee contract is that no fee agreement ethically may provide for the charging or collection of an “unreasonable” fee. Typically, this means subjecting the operation of the contract to a lodestar-type of analysis, taking into account all the usual factors that go into determining a reasonable fee. In other words, in all other jurisdictions, a fee agreement typically is ethical only where the resulting fee is not unreasonable.

Therefore, the difference between California and all other jurisdictions that have considered the enforceability of a conversion clause is that virtually all other jurisdictions to have done so have applied a “reasonableness” standard that is applicable not only to the fee agreement generally but also to the operation of any conversion clause. In our review of a substantial number of opinions and cases in such other jurisdictions, a conversion clause will be enforced where it’s operation results in the overall charge of no more than a reasonable fee and a conversion clause will **not** be enforced where it results in the overall charge of an unreasonable fee. Such a clause also will not be enforced where it otherwise is tainted with some other violation of a statute or rule of professional conduct. Accordingly, with or without a conversion clause, all contracts in such non-California jurisdictions will be enforceable only to the extent that they provide for the charging of no more than a reasonable fee.

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48 Noteworthy in these analyses in other jurisdictions is the recognition that, since in
49 all circumstances no more than a reasonable fee permissibly can be charged, the
50 conversion clause does not unduly burden the client's unfettered right to terminate the
51 relationship "with or without cause or for no reason at all," which is the Rule in California.
52 See, *CRPC Rule 3.16(a)(4)*; *Fracasse v. Brent*, *supra*, 6 Cal.3d, at 791.

53
54 California, on the other hand, permits an attorney and client to negotiate for a fee
55 that is "north" of reasonable as otherwise might be determined under a lodestar-type
56 analysis provided that the fee is not "unconscionable." See *Pech v. Morgan* (2021) 61
57 Cal.App.5th 841, 846. Notably, in *Pech*, the Court recognized that contracting for such a
58 fee "north" of reasonable requires compliance with B&P Code section 6148, governing
59 only the hourly fee portion of a fee contract. The contingent fee portion of any fee contract,
60 on the other hand, is governed by section 6147 (see, *Arnall v. Superior Court* (2010)
61 190.Cal.App.4th 360.

62
63 Finally regarding the weight of authority in other jurisdictions, it also is noteworthy
64 that in 64 Mercer L. Rev. 363 (2013), the authors review all of the then-existing case law
65 and law review articles that consider conversion clauses and has reported that "Courts
66 Invariably Find Efforts to Contract Around Common Law Protections to the Client as
67 Unenforceable: Several courts and bar association have addressed the terms to
68 contingent fee agreements that restrict the client's right to terminate the lawyer in ways
69 inconsistent with state common law. *All have rejected them* [emphasis added]."

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71 In addition, the article notes that, among other ethical constrictions, "[i]n addition
72 to creating inherent and intractable conflicts of interest and undermining the policies
73 furthered by contingent fee agreements, compensation-on-withdrawal provisions also
74 violate state disciplinary rules regulating withdrawal as well as those prohibiting arranging
75 for, charging, or collecting an unreasonable or unconscionable fee. Importantly, there is
76 no provision in any of these rules for client consent, let alone 'prospective' consent to an
77 unconscionable fee, to impinging upon the client's right to settle, or withdraw without
78 complying with ethical rules. In addition, to the extent that these provisions create non-
79 consentable conflicts of interest, they violate rules relating to conflicts between the
80 lawyer's interests and those of the client."

81
82 Under such circumstances, although California is unique among all the other
83 states, a conversion clause in a contingent fee contract could result in an overall charge
84 that will be in excess of an otherwise reasonable fee. And, for this reason, cases such
85 as *Fracasse* have held that, since the discharged attorney is permitted to recover under
86 *quantum meruit* (absent some other violation of the CRPC or a termination for cause), a
87 conversion clause that requires a fee in addition to *quantum meruit* recovery does place
88 an undue burden on the client's unfettered right to terminate the relationship. Further,
89 cases such as *In re: Scapa & Brown* (1993) 2 Cal. State Bar Ct. Rptr. 635, have held that
90 an attorney's attempt to "contract around" *quantum meruit* to seek a fee higher than
91 *quantum meruit* is a disciplinable offense.

93 In response to the second criticism – that there is no California “on all fours” with
94 the Interim Opinion should it be published “without exceptions” – *Fracasse* and *Scapa*
95 provide ample applicable authority. Specifically, in *Fracasse*, at 792 the Supreme Court
96 answers the question directly: “Having held herein that an attorney henceforth will be
97 entitled to recover only the reasonable value of his services to the time of discharge, the
98 question arises whether his cause of action has accrued at that time. With respect to
99 contingent fee contracts, we hold otherwise for two reasons. . . . First, [i]t is apparent that
100 any determination of the ‘result obtained’ is impossible, and any determination of the
101 ‘amount involved’ is, at best, highly speculative, . . . until the matter has finally been
102 resolved. Second, and perhaps more significantly, we believe it would be improper to
103 burden the client with an absolute obligation to pay his former attorney regardless of the
104 outcome of the litigation.”

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106 In addition, other California authorities consistently have held contract provisions
107 that violate the CRPC are either void or voidable or unenforceable, leaving the attorney
108 to *quantum meruit* only, absent an “egregious” violation which could permit no recovery
109 at all.

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111 Notable examples are the cases involving violations of old Rule 2-200 and now
112 Rule 1.5.1. In *Chambers v. Kay* (2002) 29 Cal. 4th 152, 159, where the Supreme Court
113 held that an agreement to divide a fee is void and unenforceable absent strict compliance
114 with the rule’s requirement that the client consent in writing, even in the face of testimony
115 that the client was fully aware of and orally had agreed to the fee split between her
116 attorneys. *Chambers* left open the question of whether *quantum meruit* recovery may be
117 had despite the violation. In the related case of *Huskinson & Brown v. Wolf* (2004) 32
118 Cal.4th 113, 125, the Supreme Court concluded that *quantum meruit* recovery was
119 appropriate but, significantly, it also held that such recovery must be determined by
120 appropriate factors (such as the typical lodestar-type factors) *other than the contract*
121 *amount*. The *Chambers* line of cases also begs the question: If an agreed upon fee split
122 in a contingent fee matter cannot burden the client with anything more than the agreed
123 upon overall contingent fee amount even if agreed upon in writing, how can it be ethically
124 proper for one of the two attorneys sharing the ultimate fee to increase his or her
125 compensation unilaterally solely because the client exercises his or her “unfettered” right
126 to terminate the relationship?

127
128 Following the holdings in *Chambers* and *Huskinson*, the Supreme Court next
129 decided *Sheppard, Mullin, Richter & Hampton LLP v. J-M Mfg. Co.* (2018) 6 Cal.5th 59,
130 81, holding that any fee agreement that fails to comply fully with the CRPC is “contrary to
131 the public policy of the state” and “is for that reason unenforceable.” As in *Chambers* and
132 *Wilkinson*, the Supreme Court in *Sheppard Mullin* allowed that *quantum meruit* was an
133 adequate safeguard against any unfairness to the attorneys.

134
135 And, in *Arnall, supra*, at 373, we find instructive reasoning being applied to the
136 related issue of failure to comply with the strict language of B&P Code section 6147
137 regulating contracts for charging a contingent fee. In *Arnall*, in a hybrid contingent fee
138 contract regarding the recovery of a multi-million-dollar tax saving extensively negotiated

139 with an extremely sophisticated client, the omission in the written contract of the singular
140 phrase about the negotiability of the amount was held to have made the contract voidable
141 as to the contingent fee portion of the fee agreement. Explaining its rationale, the Court
142 stated: “[W]hen a statute protects the public by denying compensation to parties who fail
143 to meet regulatory demands, the statute constitutes a legislative determination that the
144 need for compliance outweighs any resulting harshness”
145

146 Finally, one as yet untested proposition also militates against holding conversion
147 clauses enforceable against the client. In *Fletcher v. Davis* (2004) 33 Cal.4th 61, 68-70,
148 the Supreme Court discusses whether a “charging lien” that becomes actionable to
149 recover an hourly fee must comply with then-rule 3-300 (i.e., fair and reasonable and
150 consented to in writing by the client after the opportunity to consult with independent
151 counsel) and concluded that although “a charging lien does not grant an attorney the
152 attorney the power to summarily extinguish the client’s interest in any recovery, a charging
153 lien could significantly *impair* the client’s interest by delaying payment of the recovery or
154 settlement proceeds until any disputes over the lien can be resolved.” While the *Fletcher*
155 Court did not decide whether a charging lien for a contingent fee need comply with then-
156 rule 3-300, it concluded that a charging lien for an hourly fee must comply. Significantly,
157 although in a conversion clause situation the fee starts out as a contingent fee, the
158 operation of the conversion clause converts the lien into a charging lien for an hourly fee
159 that *Fletcher* has held must comply with the rule.
160

161 Accordingly, the Drafting Group is persuaded that ample authority in California
162 supports the proposition that any contract that violates the CRPC or other applicable
163 statute is void or voidable as a matter of public policy and that *quantum meruit* is adequate
164 compensation for any resulting unfairness to the attorney who engages in such a
165 violation. We therefore renew our recommendation that the Interim Opinion be voted out
166 favorably for publication without discussion of possible scenarios where a conversion
167 clause in a contingency fee agreement would result in compensation above or beyond
168 *quantum meruit* upon termination of the attorney-client relationship prior to the happening
169 of the contingent event.
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171 Finally, there is some sentiment among the Drafting Team that, should there
172 continue to be significant opposition to voting out the Interim Opinion with no exception,
173 the foregoing California authority at a minimum should be revisited by COPRAC to
174 consider whether, rather than adopting a qualified opinion, we instead might withdraw the
175 Interim Opinion altogether.

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 20-0005**

- ISSUES:** Under what circumstances, if any, are “conversion clauses” in contingent fee agreements ethically permissible?
- DIGEST:** Conversion clauses are not ethically prohibited *per se*, but require careful ethical scrutiny, and the circumstances where a conversion clause is ethically permissible are rare. They are ethically prohibited where their use may improperly interfere with important client rights or may violate an attorney’s ethical duties, primarily the client’s right to discharge the lawyer or the client’s right to determine whether to settle, and where they would result in an unconscionable fee.
- AUTHORITIES
INTERPRETED:** Rules 1.2, 1.5, and 1.16 of the Rules of Professional Conduct of the State Bar of California.¹

INTRODUCTION AND SCOPE

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, a conversion clause is a contractual provision that, if triggered, converts the fee due to a lawyer from that contingent fee to an alternate fee arrangement. Conversion clauses may be drafted so as to be triggered by 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.²

It is the view of the committee that conversion 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, must 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

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.

² This opinion is not intended to address the ethical validity or enforceability of hybrid fee agreements, which are distinct from conversation clauses and usually involve the payment of attorneys’ fees in some combination of an hourly rate, flat rate, or contingency fee. For some analysis on ethical issues related to hybrid fee agreements, see Bar Association of San Francisco Formal Ethics Opn. No. 1999-1 (opining that as long as the client enters into the fee agreement in an arm’s length transaction and agrees to the fee with informed consent, such arrangements would be permissible under rule 1.5 provided that the fee charged is not unconscionable).

settle (and on what terms) are burdened, and also to ensure that the conversion clause would not result in an unconscionable fee.³ The committee notes that when this analysis is performed, the circumstances wherein a conversion clause may be ethically permissible are rare. Because conversion clauses are often complex in their operation, the sophistication of the client is also an important consideration.

DISCUSSION

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.3d 784 [100 Cal.Rptr. 385]; *Kroff v. Larson* (1985) 167 Cal.App.3d 857, 860 [213 Cal.Rptr. 526] [client has the 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 v. Brent, supra*, 6 Cal.3d at p. 792 [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 (1997); *Compton v. Killtelson* (2007) 171 P.3d 172 [contingent fee agreement retroactively converted to hourly fee upon discharge of attorney was unconscionable and a 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 the client for discharge of the 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 perceived bad-faith termination by clients. However, in appropriate circumstances, established law already protects a contingent fee lawyer under the principles of *quantum meruit*,⁴ which allow a terminated contingent attorney to receive a fee commensurate with the reasonable value of the services provided. Because the

³ 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.

⁴ "Quantum meruit" refers to the principle that the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered. The doctrine of *quantum meruit*, where appropriate, allows attorneys to recover the reasonable value of their services even in the absence of a valid or enforceable contract. (See *Sheppard, Mullin, Richter & Hampton, LLP v J-M Manufacturing Co., Inc.* (2018) 6 Cal.5th 59, 88 [237 Cal.Rptr.3d 424].) Although beyond the scope of this opinion, California has a well-developed body of law concerning when a discharged lawyer's conduct entitles or disentitles the lawyer to a reasonable fee (i.e., a *quantum meruit* recovery) such as where a contingent fee attorney withdraws from the case without justifiable cause (see *Rus Miliband & Smith v. Conkle & Olesten* (2003) 113 Cal.App.4th 656 [6 Cal.Rptr.3d 612]; *Hensel v. Cohen* (1984) 155 Cal.App.3d 563 [202 Cal.Rptr. 85]; *Fracasse v. Brent, supra*, 6. Cal.3d. at p. 791) or certain ethical violations such as an egregious conflict of interest (see *Cal Pak Delivery, Inc. v. United Parcel Service Inc.* (1997) 52 Cal.App.4th 1 [60 Cal.Rptr.2d 207]).

existing principles of *quantum meruit* already provide a discharged attorney (who is not otherwise disentitled to a fee) to receive a reasonable fee for the services performed, the committee is skeptical of the claimed need for further “protection” which would entitle a discharged contingent fee attorney to *more* than a reasonable fee.⁵ As the California Supreme Court in *Fracasse* noted (in a different but related context): “. . . we find no injustice in a rule awarding a discharged attorney the reasonable value of the services he has rendered up to the time of discharge,” a rule which the court noted, “preserve[s] the client’s right to discharge his attorney without undue restriction, and yet acknowledge[s] the attorney’s right to fair compensation for work performed.” (*Fracasse v. Brent, supra*, 6 Cal.3d. at p. 791.) In practice, many conversion clauses operate as improper penalties rather than ethically permissible attorney protections. 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.

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 a terminated contingency-fee 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.⁶

For these reasons, it is the view of the committee that any conversion clause which purports to entitle a discharged contingent-fee attorney to more than *quantum meruit* is likely to be ethically prohibited, and the circumstances in which such a conversion would be ethically permissible are rare. Further, it is the view of the committee that a conversion clause which seeks to entitle a contingent-fee lawyer to *any* fee in circumstances under which that contingent-fee lawyer would otherwise be legally disentitled to recover a fee in *quantum meruit*, is ethically prohibited. (See fn. 3, *supra*).

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 the charging of a risk-premium may be unconscionable. Moreover, whereas a *quantum meruit* fee may not exceed the contract price,⁷ 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.

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

⁵ For further analysis on the factors involved in determination of a reasonable fee, see State Bar of California Arbitration Advisory 1998-03.

⁶ In addition to impermissibly interfering with a client’s right to discharge the lawyer, such a conversion clause may likely also be found to be an attempt to charge or collect an unconscionable fee and must be appropriately evaluated on that basis as well. (See, *In re Van Sickie* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980. Accord, Colorado Ethics Opinion 100 (1997).)

⁷ *Cazares v. Saenz* (1989) 208 Cal.App.3d 279 [256 Cal.Rptr. 209].

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.

In light of these considerations, it is the view of the committee that a conversion clause triggered by the termination of the lawyer (whether initiated by the lawyer or the client) which purports to entitle the lawyer to a noncontingent fee regardless of whether the contingency actually occurs or in what amount, is likely to be ethically prohibited for improperly burdening a client's right to discharge their 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 a noncontingent alternate fee likely would be ethically impermissible where the lawyer advertised or 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, Wisconsin State Bar Professional Ethics Committee Formal Opinion No. 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 No. 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 No. 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, agree to an alternate fee if the client should change their 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.⁸

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, e.g., *Amjadi v. Brown* (2021) 68 Cal.App.5th 383 [283 Cal.Rptr.3d 448] [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];⁹ *In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 314–315 [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"].) Conversion clauses keyed to the acceptance or rejection of settlement offers are ethically prohibited, except in rare and narrow circumstances. Such conversion clauses might be ethically permissible where the goals of the representation and alternate payment arrangement are communicated to the client in a manner that is reasonably understood by the client and confirmed by the client, and the operation of the conversion clause under the circumstances is not otherwise unconscionable under rule 1.5.

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 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 the 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 to terminate a representation (and even to abandon the client) when it is to the lawyer's 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.

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 to survive an

⁸ For example, see Los Angeles County Bar Association Formal Ethics Opn. No. 505 (2000) which approved of an engagement agreement by a public interest law firm which only waived all attorney's fees 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 therefore is not prohibited.

⁹ *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.

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) and (b)(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.4th 1405 [114 Cal.Rptr.3d 781].) 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 should be considered.

Similarly, a conversion clause which requires payment of a predetermined contingent fee to a discharged lawyer, regardless of the work actually performed or amount of work remaining in the matter, is unlikely to survive an unconscionability analysis, particularly if triggered early in a representation.¹⁰ (See rule 1.5(b)(3), (7), & (12); see also *In the Matter of Scapa & Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635 [although finding culpability for other violations, when assessing aggravating and mitigating circumstances, the State Bar Court noted that the attorney's fee contract required payment of the attorney's full contingent fee percentage even if discharged and in the alternative entitled the attorney to payment of a "minimum" hourly fee if client discharged attorney regardless of work performed, and that the attorneys "knew" that if discharged for any reason they were limited to the reasonable value of services (per *Fracasse v. Brent*, *supra*, 6 Cal.3d at p. 792)].)¹¹ A conversion clause which converts a contingent fee to the attorney's hourly rate upon termination of the attorney-client relationship must be carefully evaluated for unconscionability and overreach, 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.¹²

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 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

¹⁰ This opinion does not address agreements between attorneys, or between departing attorney's and their firms, as to the respective entitlement of a contingent attorney's fee portion of a client recovery (where such agreement does not affect the amount of recovery to which the client is entitled). Such circumstances are not conversion clauses as addressed by this opinion. They are governed by rule 1.5.1 and other authorities, and are beyond the scope of this opinion.

¹¹ As is discussed in section A., *supra*, established law already provides for payment to discharged contingent fee counsel on a *quantum meruit* basis where appropriate.

¹² 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 [130 Cal.Rptr.2d 782] [quoting *Altschul v. Syble* (1978) 83 Cal.App.3d 153, 162 [147 Cal.Rptr. 716]].) Again, the legal enforceability or unenforceability of conversion clauses is beyond the scope of this opinion.

Lawyer's preexisting 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 Lawyer to payment where the contingency is never achieved—meaning the attorney's entitlement to payment is not contingent at all. Coupled with the unsophisticated Client here, the conversion to hourly fees without regard to the occurrence of the contingency, and the *immediate* obligation to pay the hourly fees, 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 Lawyer withdraws or is terminated by 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 noncontingent, 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 Lawyer as described in the analysis of Scenario No. 1, but it would also provide for Lawyer to obtain an unconscionable fee by terminating the representation when it appears profitable. Depending on the circumstances, the hourly fee claimed by Lawyer may also restrict Client's right to discharge counsel by operating as a penalty for exercising 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*, *supra*, 113 Cal.App.4th 656.)

Scenario No. 3: Contingent fee agreement between Lawyer and Client, who is a sophisticated consumer of legal services, entitles Lawyer to a 40% contingent fee. The agreement also expressly notes that Client has the right to discharge Lawyer at any time for any reason, but if Client discharges Lawyer, Client agrees to pay Lawyer's set 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 Lawyer choosing to terminate the representation, that the fee agreement expressly affirms and informs Client of the Client's absolute right to discharge Lawyer, that only fees for work legitimately and reasonably performed will be paid, and the fact that the alternate

fee is only due if Client obtains the recovery in the litigation, thus Client will not owe any fee if Client is not successful in the litigation. However, the effect of this conversion clause, if triggered by the Client's exercise of their absolute right to terminate counsel, is to replace the terminated lawyer's *quantum meruit* rights with an express agreement to pay for Lawyer's time on an hourly fee 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 or recovery obtained, potentially leading to an unconscionable fee. The uncapped hourly fee, depending upon its full amount relative to the size of any reasonably anticipated recovery in the case, may also impede Client's ability to retain successor contingent counsel, thereby restricting and/or penalizing Client's exercise of their 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 Client to the Lawyer by exposing 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 Client is a sophisticated consumer of legal services. It also likely seeks an unconscionable fee by imposing Attorney's contingent fee percentage against a phantom-recovery that never actually occurred. Additionally, this conversion clause fails to account for legitimate nonmonetary goals which Client may have with respect to the representation, further limiting 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 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 as 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 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 is likely to be ethically permissible. The committee cautions, however, that this is a rare conclusion, based on highly unusual circumstances which, here, include a highly sophisticated client and informed written consent to the unusual fee arrangement.

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 to (1) terminate an attorney, or (2) decide whether to settle are ethically 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.

Public Comment - Proposed Opinion 20-0005 [90-day]

Commenting on behalf of an organization	No
Name	Craig Byrnes
City	Manhattan Beach
State	California
Email address	cbyrnes_esq@yahoo.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>The proposed opinion dismisses the concerns of contingent lawyers -- who almost exclusively represent plaintiffs - that clients' bad faith terminations of their lawyers requires protection beyond "quantum meruit."</p> <p>If "quantum meruit" provides adequate protection, and does not impermissibly impeded a client's ability to fire an attorney, then there is no in terrorem effect added by including an hourly rate in the agreement. Quantum meruit seeks to compensate the attorney with a reasonable amount for the work her or she performed. In doing so, an hourly rate usually has to be determined. That is no more or less than what conversion clauses do in a retainer agreement: determine the hourly rate. If the rate is unconscionable or unreasonable, then it is unethical and unenforceable anyway.</p> <p>If anything, the explicit statement of an hourly rate is <i>*better*</i> and <i>*more protective*</i> for the consumer than quantum meruit. Most plaintiffs don't know what quantum meruit is, or even of its existence as a means of recourse. They don't</p>

understand its implications. By explicitly stating the hourly rate, the plaintiff-consumer is put on notice, and can make a more informed decision about the consequences of the bad-faith firing of their attorney.

This proposal is a solution seeking a problem. There is a strong perception that the State Bar spends its time and our money pursuing low hanging fruit, which it perceives to be plaintiff's lawyers, unfairly singling us out. But there is no problem here that needs solving. This opinion should go back in the dustbin.

Public Comment - Proposed Opinion 20-0005 [90-day]

Commenting on behalf of an organization	No
Name	Ann Hull
City	Woodland Hills
State	California
Email address	a.hull@annhull.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Many employment attorneys spend thousands of dollars to obtain the evidence necessary for a worker to vindicate his or her rights. Conversion clauses protect both employment attorneys and workers from unethical defendants who offer back-door settlements (often through a third party attorney that is recommended by the defendant) for the purpose of avoiding paying attorney fees and costs. Conversion clauses ensure that an employment attorney who has spent substantial time and money is properly compensated.

Public Comment - Proposed Opinion 20-0005 [90-day]

Commenting on behalf of an organization	Yes
Professional Affiliation	Consumer Attorneys of California
Name	Jacqueline Serna
City	Sacramento
State	California
Email address	jserna@caoc.org
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Attached please find CAOC's comment. thank you, Jacqueline Serna
ATTACHMENTSYou may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	COPRAC_Comment_CAOC_Final.pdf (260 KB)



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November 11, 2022

Standing Committee on Professional Responsibility and Conduct (COPRAC)

State Bar of California
180 Howard Street
San Francisco, CA
94105

RE: **Proposed Formal Opinion Interim No. 20-0005 (Conversion Clauses in Contingency Fee Agreements)- OPPOSE**

Dear Committee Member:

On behalf of Consumer Attorneys of California (CAOC), we submit the following comments regarding COPRAC's Formal Opinion Interim No. 20-0005. **We urge the Board to reject the proposed opinion No. 20-0005.** Overall, this opinion raises numerous concerns for maintaining the availability of contingency fee agreements in California by all but prohibiting conversion clauses in such agreements.

Founded in 1962, the Consumer Attorneys of California (CAOC) is an organization of plaintiff's attorneys fighting for justice across the state. CAOC works closely with a number of chapters and independent trial lawyers' associations, representing all the major metropolitan areas and many rural regions of California. CAOC is the leading statewide voice for California lawyers representing victims injured as a result of the negligence or wrongdoing of others. CAOC's central purpose is to promote access to justice for all Californians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others.

As contingency fee attorneys we offer fee agreements where the consumer does not pay a fee unless their case is resolved favorably. Contingency fee arrangements are readily available to the average consumer, significantly increasing access to justice for consumers in areas where they otherwise would not be able to afford representations. Our members provide consumers with contingency fee arrangement in the areas of personal injury, health and malpractice, insurance, wrongful death, employment and elder law, to name a few.

The relevant portion of the opinion states: (pg. 1-2 "Introduction and Scope"):

*"It is the view of the committee that conversion 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, must 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. **The committee***

LEGISLATIVE DEPARTMENT

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notes that when this analysis is performed, the circumstances wherein a conversion clause may be ethically permissible are rare. Because conversion clauses are often complex in their operation, the sophistication of the client is also an important consideration."

Comment from CAOC member Deborah Wolfe:

My name is Deborah Wolfe and I have been practicing law in the area of civil litigation since 1981. My practice has focused for the past 30 years primarily in the area of legal and other professional negligence, in addition to personal injury, child molestation, and general civil litigation matters. I serve on the San Diego County Bar Association's Legal Ethics Committee and am a certified legal specialist in legal malpractice law. I currently serve in the capacity of Special Deputy Counsel to the Office of Chief Trial Counsel of the State Bar of California. This opinion will limit the availability of contingency agreements in California by essentially prohibiting conversion clauses in such agreements.

The opinion targets contingency fee agreements without necessarily identifying a problem with conversion clauses in practice. In fact, the opinion assumes that if the result is that the client feels economic pressure to end the litigation because of the attorney's advice, that is "interference" with the client's decision to continue the litigation. By prohibiting conversion clauses in contingency fee agreements, which this opinion essentially does, this opinion will disincentive contingency fee lawyers from taking certain cases. This will also undermine the State Bar's goal of ensuring access to justice for all persons, regardless of their economic status.

I. The opinion provides no real protections for a lawyer in the case where an unreasonable client deprives them of a fee that they have rightfully earned.

Conversion clauses play an important role in the economic viability of maintaining a contingency fee practice by protecting the attorney in the case where an unreasonable or unscrupulous client decides to deprive them of a fee that they have earned. In fact, the opinion is dismissive of such a clause being included to "protect" a lawyer's fee, as if that is not a valid consideration in the contingency fee arrangement.

The opinion further states that current law already provides the attorney with sufficient protection through the principles of *quantum meruit*, which allows a terminated contingent attorney to receive a fee commensurate with the reasonable value of the services provided. However, *quantum meruit* is compensation after the fact, and requires an additional legal action to be filed by the attorney. Further, a mere dollars-per-hour reckoning is not likely to be fair compensation considering all the other factors associated with bringing the additional legal action.

II. The opinion would make it very unlikely that any conversion clause would pass ethical muster and in doing so, provides no consideration for the financial risks taken by contingency fee lawyers.

At the end of Section A, the last paragraph states:

“a conversion clause triggered by the termination of the lawyer (whether triggered by the lawyer or the client¹) which purports to entitle the attorney to a noncontingent fee regardless of whether the contingency actually occurs or in what amount, is likely to be ethically prohibited for improperly burdening client’s right to discharge their lawyer.”

All attorneys, regardless of the basis of their fee, are subject to the Rules of Professional Conduct meaning that they are not entitled to charge an unconscionable fee, may not penalize a client for discharging them, and ultimately must leave the final decision to settle a matter up to the client. Any provision in a lawyer-client engagement agreement must take those factors into consideration.

The reality is that a lawyer agreeing to take a litigated matter on a contingency fee basis is essentially in a “partnership” with the client. The attorney must do the same cost-risk-benefit analysis as an attorney engaged in litigation pursuant to an hourly fee agreement, and has the same obligations to let the client know about this analysis, and to provide the client with information to make an informed decision that ultimately more in costs may be spent on obtaining a result than is warranted by the ultimate probable result.

This proposed opinion seems to indicate that if a client decides they want to pursue a case that is not economically going to produce a result where both attorney and client will have adequate remuneration considering the costs of pursuing it, the attorney’s obligation is to simply walk away from the work the attorney has already done, and to let the client’s decision to pursue the case be the only determining factor. This would apply even if pursuing the case is not justified in the sound legal judgment of the lawyer. In effect, this will lead to fewer attorneys being willing to work on a contingency fee basis and will greatly limit access to justice for California consumers who cannot afford an hourly attorney.

III. The opinion targets contingency fee agreements but does not similarly burden hourly fee agreements.

The opinion targets the contingency fee lawyer, but says nothing about a lawyer who is working for a client on an hourly basis who may also end up charging the client more money than the client is able to obtain in the litigation. This does not automatically mean that the fee is “unconscionable”.

Contingency fee lawyers already have the serious economic burden of having to obtain a successful benefit to their client in order to yield any compensation for their labor. Lawyers who work for clients on an hourly basis are not similarly subjected to having their fees be forfeit depending on their success in a matter.

A contingency fee agreement, no less than an hourly fee agreement, obligates a lawyer to potentially spend countless hours of work, except for zero contemporaneous income. The contingency fee attorney incurs both the normal overhead expenses of an office (rent, supplies, personnel, etc.) and paying costs to further the clients’ interests, while foregoing other hourly paying work to cover those ongoing expenses. This opinion effectually discriminates against lawyers undertaking matters on a contingency fee, who are mainly lawyers working for clients who are otherwise unable to afford legal representation.

¹ There is a big and important difference in evaluating whether or not an attorney is entitled to a fee depending on who terminates the agreement, that the opinion completely ignores.

IV. Also troubling in this proposed opinion is the differentiation of an attorney's duty to a so-called "sophisticated consumer of legal services".

We are troubled by the opinion's differentiation of an attorney's duty to a so-called "sophisticated consumer of legal services". A lawyer's fiduciary obligation to a client is not dependent on a client's level of sophistication.

It is a very slippery slope to suggest conditioning an appropriate level of ethical conduct between lawyer and client on a client's supposed level of sophistication. Does this mean, for example, that a lawyer employing another lawyer as a representative should have no expectation of receiving the benefit of a fiduciary relationship? It is a subjective standard that has no place in a discussion of a lawyer's ethical duties.

V. Conclusion

In practice, the opinion will limit the number of attorneys who are willing to enter into a contingency fee agreement at all, thus limiting access to justice for those numerous individuals who are unable to pay a lawyer by the hour. For these reasons we urge the Board to reject the proposed opinion.

What would be most beneficial is the committee instead devising language that *would* be ethically acceptable in a conversion clause that provides some amount of security and incentive for lawyers to undertake contingency fee cases—a necessity in our system of justice—in order to provide adequate legal representation for persons otherwise not able to afford it. We urge the committee to refrain from making contingency fee arrangements less available for California consumers by enacting these broad and overly restrictive changes.

We thank the committee for its consideration of these issues.

Sincerely,

Consumer Attorneys of California (CAOC)

Public Comment - Proposed Opinion 20-0005 [90-day]

Commenting on behalf of an organization	No
Name	John Stephen Durrant
City	Los Angeles
State	California
Email address	john@durrantlawfirm.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>I am a co-chair of the Legislation Sub-Committee of the LA County Bar Litigation Section Executive Committee. While I appreciate the hard work that went into the draft opinion, my concern – which is personal and not on behalf of LACBA or any of its agencies / committees – is that this proposal does not provide sufficiently clear guidance on a pre-dispute contractual mechanism for attorneys and clients; it seems to indicate that many creative approaches would likely be unacceptable. It only provides very narrow scenarios where an approach *might* pass muster.</p> <p>I share the Committees respect for the ethical rules surrounding a client's rights to terminate counsel and to control settlement decisions. The idea of "unconscionable fees" candidly strikes me as somewhat amorphous and archaic – it seems incongruous with the sorts of hourly rates and contingency fees that attorneys regularly earn without any reproval or criticism.</p> <p>My primary concern with the proposal is the impact of opportunistic terminations on counsel.</p>

Refusals to settle are more squarely within the risks that a contingency lawyer assumes, in my opinion, and client and counsel should have aligned incentives with regard to settlement, even if they might reach good faith, divergent decisions about the advisability of particular settlements.

Regarding terminations, we should recognize that clients are sometimes highly sophisticated, shrewd, and opportunistic – sometimes, more so than their lawyers. The approach of the Committee would enable more opportunistic terminations. The...

... Committee does not appear to have asked itself how a client operating in bad faith could exploit the regulatory framework. It would seem as though there should be an economic / financial mechanism to value attorney work fairly (hourly, value of time worked, etc. with a risk multiplier) and to embed that in an engagement agreement, so as to allow a fair contractual mechanism for compensating a terminated attorney.

Leaving a terminated attorney with only the opportunity to bring a claim for quantum meruit seems very unfair – it is really no solution at all. Most of the time, you do not want to sue a client even if you are 100% in the right. I have heard it said that you should never sue a client. I also have heard it said that you should only sue a client when the receivable poses an "existential threat" to your Firm. Regardless, it's not an option that most sensible attorneys will choose unless they have no other option. And, here, you seem to be saying that quantum meruit should be the only way to avoid potential scrutiny by the

Bar. Moreover, I believe (though I have not read your cases) quantum meruit neglects to apply a risk premium for work on contingency and, regardless, courts would seem unlikely to award such amounts for the added risk an attorney takes on by not being paid in cash.

Many of those who write to you will be plaintiffs' lawyers who work on contingency. I very rarely work on contingency – about 95% of my work is not on contingency, but hourly. While this is admittedly a difficult issue, the proposed opinion strikes me as...

... somewhat lacking in pragmatism, rigor, and creativity. The Committee looked at this issue more than me and clearly thought about it carefully, but I would think there should be a more balanced approach.

Sincerely,
John Durrant
