Contingent Fees: Conversion Clauses, Withdrawal and Termination, and Fee Forfeiture

By Cecil Morris

Contingent fees are the lifeblood of a plaintiffs' practice. To protect their right to a contingent fee, plaintiffs' lawyers must ensure that they have a proper, written contingent fee agreement, signed by the client(s).

Colorado Rule of Professional Conduct 1.5(c) requires that the terms of a contingent fee agreement be communicated in writing before or within a reasonable time after commencing the representation, and the writing must include certain, specified information.[1]

Rule 1.5(c) also provides that "[n]o contingent fee agreement shall be enforceable **unless** the lawyer has substantially complied" with all the provisions of the Rule.[2] A form Contingent Fee Agreement is provided as an appendix to Rule 1.5, and that form Agreement "shall be sufficient to comply with paragraph (c)(1) of this Rule [1.5]."[3]

Lawyers are not required to use the form Contingent Fee Agreement authorized in Rule 1.5, as long as the agreement is consistent with the Rule.[4]

However, using the authorized form Agreement is the prudent approach. Doing so ensures that the Agreement will be enforceable. Further, the language in the authorized form Agreement is well established and predictable because it has been interpreted in numerous appellate decisions.

Withdrawal, Termination, and Conversion Clauses

One of the issues that arises in practice is that a representation ends before the event occurs that triggers the lawyer's right to a contingent fee (e.g., a recovery of money).

Sometimes, the lawyer withdraws from the representation, either because withdrawal is mandatory[5] or permissive.[6] Of course, if a lawyer moves to withdraw in a civil action or arbitration, the lawyer must strictly limit the information disclosed in the motion, in light of the lawyer's duty of confidentiality under Rule 1.6(a).[7]

Other times, the client terminates the lawyer and retains a new lawyer to pursue the claim and obtain a recovery as successor counsel. Rarely, a client terminates the lawyer after a settlement has been negotiated—but before it is finalized or funds disbursed—but the client does not engage successor counsel and instead proceeds to conclude the settlement without counsel in an effort to avoid paying the terminated lawyer a contingent fee and thus increase the funds payable to the client.

The effect of withdrawal or termination on a lawyer's right to a contingent fee is addressed in a so-called conversion clause in a contingent fee agreement. The conversion clause notifies the client of the lawyer's right to compensation if the representation is concluded before the event occurs that trigger's the lawyer's right to a contingent fee, whether by the lawyer's withdrawal or the client's termination of the representation.

Importantly, a conversion clause is one of the provisions that **must** be included in a contingent fee agreement if it is to be enforceable.[8]

The conversion clause in the authorized form Contingent Fee Agreement provides:

> The Client is not to be liable to pay compensation otherwise than from amounts collected for the Client by the Lawyer, except as follows: In the event the Client terminates this contingent fee agreement without wrongful conduct by the Lawyer which would cause the Lawyer to forfeit any fee, **or** if the Lawyer justifiably withdraws from the representation of the Client, the Lawyer may ask the court or other tribunal to order

> that the Lawyer be paid a fee based upon the reasonable value of the services provided by the Lawyer.[9]

Further, the conversion clause in the authorized form Contingent Fee Agreement provides at least a general approach to determining "the reasonable value of the services provided by the Lawyer." It provides:

> If the Lawyer and the Client cannot agree how the Lawyer is to be compensated in this circumstance, the Lawyer will request the court or other tribunal to determine: (1) whether the Client has been unfairly or unjustly enriched if the Client does not pay a fee to the Lawyer; and, if so (2) the amount of the fee owed, taking into account the nature and complexity of the Client's case, the time and skill devoted to the Client's case by the Lawyer, and the benefit obtained by the Client as a result of the Lawyer's efforts.[10]

Finally, the conversion clause in the authorized form Contingent Fee Agreement limits the amount of any such fee and provides that it is payable only from the recovery. This is important, because in essence, it requires a division of the contingent fee between predecessor and successor counsel. It provides:

> Any such fee shall be payable only out of the gross recovery obtained by or on behalf of the Client and the amount of such fee shall not be greater than the fee that would have been earned by the Lawyer if the contingency described in this contingent fee agreement had occurred.[11]

Calculating the reasonable value of the services provided by the lawyer will be the subject of the next article in this series.

In essence, the conversion clause in the authorized form Contingent Fee Agreement simply summarizes the equitable principles of quantum meruit and unjust enrichment. Quantum meruit is an equitable remedy designed to prevent one party from being unjustly enrichment if a contract fails or is not enforceable, but the other party has provided a benefit to the one party.[12]

However, the importance of the conversion clause is to notify the client of the lawyer's right to a fee in this situation.

Furthermore, if the client engages successor counsel to take over the representation after withdrawal or termination of predecessor counsel, then successor counsel also has a duty to inform the client of the predecessor counsel's right to a fee.[13]

As noted above, lawyers can use a contingent fee agreement that is different from the authorized form, as long as it satisfies Rule 1.5(c)(1).[14] This includes conversion clauses. CBA Formal Ethics Opinion 100 considers alternative conversion clauses and the factors affecting whether they are ethical.[15]

However, these alternative conversion clauses may be problematic and unenforceable under the circumstances.

Attorney's Liens

If the lawyer withdraws or is terminated, the lawyer should consider asserting an attorney's lien.[16] If the matter is in litigation, the lawyer would file a notice of attorney's lien in that matter with the clerk of the court, which would give notice to all the parties and those who claim through them that the lawyer has a first lien.[17] If the matter is not yet in litigation, the lawyer could simply send a similar letter to the parties through their counsel and to the adjuster(s) for the insurance company(ies) involved at least to give notice of the lawyer's right to a fee and to try to resolve that issue. .

Fee Forfeiture

In the language of the conversion clause in the authorized form Contingent Fee Agreement, if the lawyer does not "justifiably withdraw" from the representation **or** if the client terminates the contingent fee agreement "without wrongful conduct by the Lawyer which would cause the Lawyer to forfeit any fee," then the lawyer "may ask the court or other tribunal to order that the Lawyer be paid a fee based upon the reasonable value of the services provided by the Lawyer."

On the other hand, if the lawyer does not withdraw "justifiably" **or** if the client terminates the agreement based on the lawyer's "wrongful conduct," then the lawyer may forfeit some or all of the fee.

Courts construing conversion clauses in this situation sometimes refer to termination "for cause," but this is just a convenient shorthand. The language in the contingent fee agreement controls, and the conversion clause in the authorized form Agreement uses the language "wrongful conduct by the Lawyer which would cause the Lawyer to forfeit any fee." This language limits the basis for fee forfeiture and is significant.

"Justifiabl[e] withdrawal" is the converse situation. If withdrawal is mandatory under Rule 1.16(a)[18] or if withdraw is permissive under Rule 1.16(b),[19] then withdrawal is likely "justifiable."

The standard for determining whether a terminated lawyer has forfeited any part of the fee is summarized in Section 37 of the *Restatement (Third) of the Law Governing Lawyers* (the "*Restatement*"). Indeed, Section 37 is based on decisions of the Colorado Supreme Court and the Tenth Circuit, among others.[20] Colorado courts have reiterated these principles in more

recent cases, including *In re Gilbert*[21] and *People v. Egbune*.[22]

Section 37 of the *Restatement* provides:

> A lawyer engaging in **clear and serious violation** of duty to a client **may** be required to forfeit **some or all of** the lawyer's compensation for the matter. **Considerations relevant to the question of forfeiture include** the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.[23]

The comments to the *Restatement* provide guidance. Comment *b* provides:

> **Forfeiture of fees, however, is not justified in each instance in which a lawyer violates a legal duty, nor is total forfeiture always appropriate**. Some violations are inadvertent or do not significantly harm the client. Some can be adequately dealt with by the remedies described in Comment *a* [*e.g.*, malpractice] or by a partial forfeiture (*see* Comment *e*). **Denying the lawyer all compensation would sometimes be an excessive sanction, giving a windfall to a client. The remedy of this Section should hence be applied with discretion**.[24]

As Comment *d* explains, "A lawyer's violation of duty to a client warrants fee forfeiture **only if the lawyer's violation was clear and serious**."[25]

Several factors are relevant in approaching the ultimate issue of whether a violation of duty warrants fee forfeiture.[26] The extent of the misconduct is one factor.[27] Normally, forfeiture is more appropriate for repeated or continuing violations than for a single incident.[28] Whether the breach involve knowing violation or conscious disloyalty to a client is also relevant.[29] **Forfeiture is generally inappropriate when the lawyer has not done anything willfully blameworthy**, for example, when a conflict of interest arises during representation because of an unexpected act of a client or third person.[30]

Further, forfeiture should be proportionate to the seriousness of the offense, and the adequacy of other remedies is also relevant. In this regard, Comment *d* provides:

> If, for example, a lawyer improperly withdraws from representation and is consequently limited to a quantum meruit recovery significantly smaller than the fee contract provided (*see* §40), it might be **unnecessary to forfeit the quantum meruit recovery as well**.[31]

Finally, Comment *e* discusses the extent of any forfeiture:

> **Sometimes forfeiture for the entire matter is inappropriate**, for example when a lawyer performed valuable services before the misconduct began, and the misconduct was not so grave as to require forfeiture of the fee for all services. **Ultimately the question is one of fairness in view of the seriousness of the lawyer's violation and considering the special duties imposed on lawyers, the gravity, timing, and likely consequences to the client of the lawyer's misbehavior, and the connection between the various services performed by the lawyer**.[32]

Thus, a lawyer does not forfeit a fee merely because a client or successor counsel asserts that the fee agreement was terminated "for cause" or that the lawyer committed "wrongful

conduct." Instead, forfeiture requires proof of a "clear and serious violation of duty to the client," whether the violation was inadvertent or knowing and willful, whether the client was harmed, and whether other remedies are adequate. ▲▲▲

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Endnotes:

[1] Colo. RPC 1.5(c)(1). Before January 1, 2021, the contingent fee rules and forms were codified in C.R.C.P. chapter 23.3. Although these rules and forms are now incorporated into Rule 1.5, the substance and even the language of the contingent fee rules remain mostly unchanged, to preserve continuity. One difference is that a separate Notice to the clients is no longer required, in addition to the Contingent Fee Agreement.

[2] Colo. RPC 1.5(c)(6) (emphasis added). This Rule is unusual in that it addresses the **enforceability** of the agreement. *Id.* In general, the Rules of Professional Conduct define proper conduct for purposes of professional discipline. Colo. RPC, Scope, [14], [19]. The Rules presuppose a larger legal context, including the substantive law in general. *Id*., [15]. Thus, the enforceability of an agreement is generally an issue of substantive contract law, and the mere violation of a Rule of Professional Conduct does not automatically render a related agreement unenforceable. *See, e.g*., *Calvert v. Mayberry*, 2019 CO 23, ¶¶ 14-15, 20-27, 440 P.3d 424, 429-32 (Colo. 2019) (the issue, instead, is whether the Rule expresses a fundamental public policy, such that failure to comply with a Rule render the related agreement unenforceable because it violates public policy) (involving Colo. RPC 1.8(a) on business transactions with a client). Like most rules, however, Rule 1.5(c)(6) has its exceptions. *See Mullens v. Hansel-Henderson*, 65 P.3d 992 (Colo. 2003).

[3] Colo. RPC 1.5(c)(7) & Form—Contingent Fee Agreement.

[4] *Id*.

[5] See Colo. PRPC 1.16(a).

[6] See Colo. RPC 1.16(b)

[7] Colo. RPC 1.6(a) & 1.16 cmt. [3]. *See* Arizona Ethics Op. 09-02 (2009) (lawyer withdrawing "should resist any disclosure during the withdrawal process" and any disclosures must be "strictly limited" to those authorized by ethics rules); Oregon Ethics Op. 2011-185 (lawyer seeking to withdraw may not tell court that client will not follow advice or cooperate with counsel, hasn't paid legal bills, or is not cooperating with discovery unless an exception in Rule 1.6 applies); Rhode Island Ethics Op. 2003-04 (lawyer's reasons for withdrawing from representation constitute "information relating to the representation" and may not be disclosed).

[8] Colo. RPC 1.5(c)(1)(iv).

[9] Colo. RPC 1.5, Form—Contingent Fee Agreement, § 4 (emphasis added).

[10] *Id*.

[11] *Id.*

[12] *See, e.g*., *Denver Venture, Inc. v, Arlington Lane Corp.*, 754 P.2d 785 (Colo. App. 1988) (citing RESTATEMENT (SECOND) OF CONTRACTS, § 374(1)), cited in CJI-Civ. 30:12, *Source and Authority* § 4.

[13] ABA Standing Committee on Ethics and Professional Responsibility, Formal Op. 487, *Fee Division with Client's Prior Counsel* (June 18, 2019).

[14] Colo. RPC 1.5(c)(7).

[15] CBA Formal Ethics Op. 100, *Use of Conversion Clauses in Contingent Fee Agreements* (June 21, 1997).

[16] C.R.S. §§ 13-93-114, 115 (2022). *See, e.g*. *Cope v. Woznicki*, 140 P.3d 239 (Colo. App. 2006), The attorney's lien statutes were repealed, replaced, and recodified in 2019, but the new statutes are substantially similar. Previously, the attorney's lien statutes were codified at C.R.S. §§ 12-5-119, 120.

[17] C.R.S. § 13-93-114 (2022).

[18] Colo. RPC 1.16(a).

[19] Colo. RPC 1.16(b).

[20] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37, *Reporter's Note* to cmt. c, citing *Frank v. Bloom*, 634 F.2d 1245 (10th Cir. 1980); and *Brillhart v. Hudson*, 455 P.2d 878 (Colo. 1969).

[21] 13SA254 (Colo. 2015).

[22] 58 P.3d 1168, 1174 (Colo. P.D.J. 1999).

[23] RESTATEMENT, *supra*, §37 (emphasis added).

[24] *Id.* §37, cmt. *b* (emphasis added).

[25] *Id.*, cmt. *d*.

[26] *Id.*

[27] *Id*.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* (emphasis added).

[32] *Id.*, cmt. *e* (emphasis added).