State Bar Says Lawyers Can't Have Contingency-Fee-Cake And Eat It Too: Interim Ethics Opinion Curtails Use of Conversion Clauses In Contingency Fee Agreements

By Carl I.S. Mueller, Esq. and Patrick Maloney, Esq.

In its recent Interim Formal Opinion, No. 20-0005 (the "Opinion"), the State Bar of California Standing Committee on Professional Responsibility and Conduct (the "Committee") considered the ethical implications of conversion clauses within contingency fee agreements. "[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." In its interim status, the Opinion is not yet binding and subject to the standard review and approval process. However, a wise practitioner will avoid a conversion clause, if at all possible, after reading the Committee's repeated warnings about ethical limits on them:

> 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.

The Committee considered what fees a lawyer could seek via a conversion clause without running afoul of Cal. Rules of Professional Conduct ("CRPC") 1.5's limit on unconscionable fees. A contingent fee agreement often anticipates that attorneys may obtain a windfall if they are successful, and they are allowed to do so based on the risk they undertake in the contingent fee arrangement. As such, a conversion clause should not entitle an attorney to more than the contingent fee. Furthermore, it is likely unethical to allow an attorney to seek more than the reasonable value of the attorneys' services when they are reallocating the risk back to the client:

> [I]t 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.

Further, many clients who seek contingent fee representation lack the financial means to pay for hourly representation. As such, a large attorneys' lien on a case resulting from a conversion clause may effectively bar a client from finding alternative contingent fee representation.

> [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.

Similarly, when conversion clauses are triggered by a client's refusal to accept settlements at certain values, the Committee found that the conversion clause likely violates CRPC 1.2's edict that attorneys must allow clients to determine whether and how to resolve their cases.

> 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). [Citation omitted]. Conversion clauses keyed to the acceptance or rejection of settlement offers are ethically prohibited, except in rare and narrow circumstances.

While the Opinion states that a conversion clause is "not ethically prohibited *per se*" and *might* be allowable in "rare and narrow" circumstances, the Committee unfortunately failed to illuminate **any** circumstances where a conversion clause was appropriate. Instead, the Committee provided five hypothetical scenarios, each describing improper conversion clauses.

Contingency fee clients can become extremely dissatisfied with their representation when, at the conclusion of a case, they find out that they will receive a very small or no net recovery due to high costs and attorneys' fees. In those instances, clients are more likely to make bar complaints or seek other redress against their attorneys. Unsurprisingly, lawyers may be tempted to utilize a conversion clause in these same situations. A wise practitioner will simply take their lumps, knowing that the financial gain of a conversion clause is not worth the increased risk.

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