

# 100

## USE OF CONVERSION CLAUSES IN CONTINGENT FEE AGREEMENTS

Adopted June 21, 1997.

### *Introduction*

This opinion addresses the use of conversion clauses in contingent fee agreements. For purposes of this opinion, a conversion clause is a provision that converts the fee due from the primary contingent fee amount set forth in the contract to an alternate fee, if the agreement is terminated before the contingency occurs. The alternate fee set under a conversion clause could be (a) a lodestar fee, derived from the lawyer's hourly rate multiplied by the number of hours devoted to the case, (b) a percentage of the highest settlement amount offered before termination, (c) a fee to be determined under *quantum meruit* principles, or (d) some other fee formulation.

Based on reported Colorado decisions and on inquiries received by the Ethics Committee, the Committee believes that attorneys frequently use conversion clauses in their contingent fee agreements. The Committee is issuing this opinion to assist attorneys in determining whether to include such clauses and in drafting such clauses to comply with the Colorado Rules of Professional Conduct (the "Rules").

### *Syllabus*

The Rules do not *per se* prohibit the use of conversion clauses in contingent fee agreements. Rather, whether such clauses comply with the Rules must be evaluated on a case-by-case basis. Depending on the overall circumstances of an engagement and the terms used in a particular agreement, the conversion clause might interfere impermissibly with the client's absolute right to terminate the lawyer's services, as recognized by the Colorado Supreme Court and set forth in Rule 1.16(a)(3) and the comments to Rules 1.2 and 1.16. In addition, again depending on the particular circumstances and contract language, a conversion clause might result in an unreasonable fee in violation of Rule 1.5, or might cause the fee agreement not to comply with the requirements of the Rules Governing Contingent Fees, which are incorporated in Rule 1.5(c).

Relevant factors in assessing whether a particular fee agreement violates the Rules include the following: (1) whether the clause provides for conversion even if the client terminates the contingent fee agreement with cause or if the attorney terminates the agreement without cause; (2) whether the clause provides for conversion to fees based on *quantum meruit* principles or defines the alternate basis for fees, *e.g.*, a fixed amount, a lodestar fee, a percentage of the highest settlement offer, or some other basis; (3) whether the fees computed on the alternative basis are unreasonable in amount, either facially or under the circumstances that develop in the particular case; (4) whether the clause provides for immediate payment on an alternate basis, before the contingency occurs and even in the absence of the contingency occurring; (5) whether the clause provides for a cap, under which the alternate basis for fees cannot exceed the contingent fee amount; and (6) the sophistication of the client.

Due to the specific nature of the inquiry, attorneys should not unthinkingly use a form conversion clause in their contingent fee agreements. Instead, attorneys should tailor conversion clauses to the circumstances involved in the particular engagement.

### *Analysis*

#### **I. Background**

Rule 1.5(c) permits the use of contingent fee agreements so long as those agreements comply with the Rules Governing Contingent Fee Agreements, C.R.C.P. ch. 23.3. Contingent fee agreements provide two principal benefits to clients:

(1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid.

Colo. Code Prof. Resp. EC 2-20; *see also Anderson v. Kenelly*, 37 Colo. App. 217, 547 P.2d 260, 261 (1976) (“such fee arrangements are frequently the only way in which people of modest means may secure legal representation in certain types of litigation”).

Historically, contingent fee agreements were used almost exclusively in the context of plaintiff’s personal injury representation. The vast majority of contingent fee contracts continues to be for the representation of individuals in personal injury actions. Many of these clients are relatively unsophisticated in the law and many lack the resources to pay an attorney except through the proceeds of the underlying claim.

However, in recent years, there has been an increased use of contingent fee agreements in contexts other than plaintiffs’ personal injury cases. For example, attorneys representing civil defendants employ reverse contingent fee agreements, under which their fee is based upon an agreed percentage of the amount the client saves. *See ABA Comm. On Ethics And Professional Responsibility, Formal Op. 93-373* (1993) (approving concept of reverse contingent fee agreements). As another example, contingent fee agreements are no longer limited to litigation matters; fees in the mergers and acquisition, public offering, and lending areas frequently are tied to the successful consummation and amount of the transaction. *See ABA Formal Op. 94-389* (1994) (recognizing trend). Traditionally, contingent fee agreements were used almost exclusively where the client could not afford to pay the attorney’s fee on an hourly basis if there was no recovery. However, today more sophisticated clients with the ability to pay fees on an hourly basis increasingly opt to employ contingent fee agreements. *See P. Zeughauser, The Use of Alternative Fee Arrangements to Achieve Smart Results and Improve Outside Counsel Relationships*, 871 PLI/Corp 47 (1994) (according to ABA and Price Waterhouse surveys, the number of in-house corporate attorneys using contingent fee arrangements increased from 26% to 41% between 1984 and 1992). In light of these developments, a stereotyped view of unsophisticated individual clients entering into contingent fee agreements is unwarranted.

Contingent fee agreements shift some of the risk inherent in litigation from clients to attorneys. If the client does not recover, the attorney does not receive a fee. If the client does recover, the attorney’s percentage-based fee might exceed the fee that would have been due under an hourly fee contract. The potential premium in the event of success is viewed as acceptable in light of the potential for no recovery (and no fees) at all. *See J. Fleming, The American Tort Process*, p. 195 (1988); S. Jay, *The Dilemmas of Attorney Contingent Fees*, 2 Geo. J. Legal Ethics 813, 815-16 (1989); M. Schwartz and D. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 Stanford L. Rev. 1125 (1970). The potential premium also compensates the attorney for the delay in payment of the attorney’s fee. *Id.* Thus, a fee that might appear excessive if calculated under a lodestar method might not be excessive if based on a contingent fee agreement.

Because of the enhanced potential for conflicts of interest and overreaching that inhere in contingent fee agreements, *People v. Nutt*, 696 P.2d 242, 247-48 (Colo. 1984), the Colorado Supreme Court has imposed specific limitations on the use and content of such agreements, in order to protect clients. *See C.R.C.P. ch. 23.3; Colo. RPC 1.5(c)*. “Under its general supervisory power over attorneys as officers of the court, a court may and should scrutinize contingent fee contracts and determine the reasonableness of their terms.” *Nutt*, 696 P.2d at 248 (citation omitted); *see also Brillhart v. Hudson*, 169 Colo. 329, 455 P.2d 878, 881 (1969).

The Rules Governing Contingent Fee Agreements require the contingent fee agreement to contain “a statement of the contingency upon which the client is to be liable to pay compensation otherwise than from amounts collected for him by the attorney.” C.R.C.P. ch. 23.3, Rule 5(d); *Elliott v. Joyce*, 889 P.2d 43, 46 (Colo. 1994) (denying recovery in *quantum meruit* where contingent fee agreement did not specifically set forth the basis for recovery if the attorney terminated the representation, in violation of C.R.C.P.

ch. 23.3, Rule 5(d)); *but c.f.*, *Law Offices of J.E. Losavio, Jr. v. Law Firm of Michael W. McDivitt, P.C.*, 865 P.2d 934, 936 (Colo. App. 1993) (permitting *quantum meruit* recovery even though contingent fee agreement did not include clause converting basis for payment to *quantum meruit* if client terminated relationship). The form contingent fee agreement included in those rules contains sample language setting forth a percentage-based fee. C.R.C.P. ch. 23.3, Form 2, §§ 3, 4. However, neither the Rules Governing Contingent Fee Agreements nor the form agreement contains any language that attempts to set the attorney's fee in the event that the contingent fee contract is terminated before the contingency occurs.

This opinion does not purport to speak to the legal enforceability of conversion clauses, as opposed to whether conversion clauses comply with the ethics rules. Although inquiry into the legal enforceability and the ethical propriety of a particular conversion clause generally will yield the same result, the Committee recognizes that in some situations a court might refuse to enforce even an ethically permissible conversion clause. This opinion also does not address what may be a reasonable range of contingent fees, either in the abstract or in particular types of cases. Finally, this opinion does not consider issues relating to retaining liens in contingent fee matters. *See* CBA Ethics Comm. Formal Op. 82 (1989).

## II. Relevant Ethics Rules and Considerations

Conversion clauses implicate the following ethical considerations:

**The client's absolute right to discharge counsel.** The Rules confirm that a client has an absolute right to discharge its attorney. Colo. RPC 1.2, comm. ("the client may not be asked . . . to surrender the right to terminate the lawyer's services . . ."); Colo. RPC 1.16(a)(3) ("a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the lawyer is discharged"); *id.*, comm. ("A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services."). "In order to assure no compulsion to retain an attorney where trust between attorney and client has been broken, and to further guarantee a client may always be confident with such representation, a client must, and does, have the right to discharge the attorney at any time and for whatever reason." *Olsen and Brown v. City of Englewood*, 889 P.2d 673, 676 (Colo. 1995). A conversion clause is improper if it operates as a penalty upon termination and thereby chills the client's exercise of this inherent right to discharge counsel. *Florida Bar v. Doe*, 550 So.2d 1111, 1113 (Fla. 1989) ("An attorney cannot exact a penalty for a right of discharge.").

**The requirement that fees be reasonable.** Rule 1.5(a) requires a lawyer's fee to be reasonable and states eight factors to be considered in determining reasonableness.<sup>1</sup> Rule 1.5(d) provides that "[a] division of a fee between lawyers who are not in the same firm may be made only if . . . the total fee is reasonable." A conversion clause that results in an unreasonable fee is improper.

**The attorney's duty to make reasonable efforts to ensure that the client understands the fee agreement.** An attorney has a duty to make reasonable efforts to advise the client of the nature and terms of the fee agreement. Colo. RPC 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); Colo. RPC 1.5(b) (" . . . the basis or rate of the fee shall be communicated to the client. . ."); 2 ABA/BNA Lawyers' Manual On Professional Conduct 41:313 (1994) ("Whoever the client and whatever the subject of the representation, a lawyer should be guided by this rule: *Make sure the client understands the fee arrangement and agrees to it.*") (emphasis in original).

## III. Conversion Clauses Are Not *Per Se* Unethical

No provision of the Rules or the Rules Governing Contingent Fees renders conversion clauses *per se* unethical. Although the Colorado Supreme Court has not considered this issue, it has reviewed contingent fee agreements containing conversion clauses, yet has not stated any general objection to those clauses. *See Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244, 1252-53 (Colo. 1996) (contingent fee agreement that converted to lodestar rate if firm withdrew for contract-defined cause "does not facially reflect a clear-cut public policy violation"); *Elliott*, 889 P.2d at 44 (Court did not comment on conversion clause that converted to lodestar rate if client terminated attorney).

Indeed, in the *Elliott* case, the Court applied Rules 5(d) and 6 of the Rules Governing Contingent Fees as *requiring* the contingent fee agreement to include a conversion clause in order for the attorney to seek payment under *quantum meruit* principles when the attorney withdraws without cause. Because the agreement was silent as to how the attorney would be paid if the attorney unilaterally terminated the agreement, the attorney was denied any recovery on his *quantum meruit* claim. Under *Elliott*, the contingent fee agreement presumably should have advised the client that, if the attorney terminated the representation, he could seek fees under *quantum meruit* principles. *See also* Monroe Cty. (N.Y.) Bar Ass'n Op. 86-2 at 5-6 (1986) ("It is preferable that clients learn at the outset of a lawyer-client relationship of an attorney's legal remedies in the event of abandonment of the cause.").

Although the Committee concludes that conversion clauses, as broadly defined in this opinion, are not *per se* unethical, case law has established that certain provisions attempting to restrict a client's rights are against public policy. For example, a contingent fee agreement that converts to an alternate fee if the client settles a claim (or refuses to accept a settlement) contrary to the attorney's advice is void. *Nichols v. Orr*, 63 Colo. 333, 166 P. 561, 562 (1917); *Jones v. Feiger, Collison & Killmer*, 903 P.2d 27, 34-35 (Colo. App. 1995), *rev'd on other grounds*, 926 P.2d 1244 (Colo. 1996). A number of ethics opinions have reached the same conclusion. *E.g.*, Neb. Advisory Op. 95-1 (1995); Phil. Bar Ass'n Prof. Guidance Op. 88-16 (1988); Wash. Formal Ethics Op. 191 (1994); *but see* Ore. State Bar Formal Op. 1991-54 (1991) (noting potential ethical problems in conversion clauses triggered by client's failure to follow attorney's advice regarding settlement, but declining to treat all such clauses as necessarily violating ethics rules).

#### IV. Factors Affecting Whether Conversion Clauses Are Ethical

Whether a conversion clause is ethical in a particular case will depend on a variety of circumstances, including the following: (1) whether the clause provides for conversion even if the client terminates the contingent fee agreement with cause or if the attorney terminates the agreement without cause; (2) whether the clause provides for conversion to fees based on *quantum meruit* principles or defines the alternate basis for fees, *e.g.*, a fixed amount or a lodestar fee; (3) whether the fees computed on the alternative basis are unreasonable in amount, either facially or under the circumstances that develop in the particular case; (4) whether the clause provides for immediate payment on an alternate basis, before the contingency occurs or even in the absence of the contingency occurring; (5) whether the clause provides for a cap, under which the alternate basis for fees cannot exceed the contingent fee amount; and (6) the sophistication of the client. This list of factors is not exhaustive, but these are the most important considerations identified by the Committee.

**Whether the clause provides for conversion even if the client terminates the contingent fee agreement with cause or if the attorney terminates the agreement without cause.** The Committee believes that most attorneys who include conversion clauses in their contingent fee agreement do so for a simple reason: to protect themselves in case the client terminates the agreement after the attorney has devoted substantial time and effort to the case, in the hope of depriving the attorney of the percentage fee provided for in the fee agreement. For example, an attorney who has handled a case for a number of years and has negotiated a pretrial settlement might be entitled to a percentage-based fee that exceeds the attorney's fees under a lodestar calculation; if the client is able to discharge the lawyer on the eve of settlement and if the contingent fee agreement does not include a conversion clause, the client might be able to limit the attorney's recovery to a lodestar rate or under *quantum meruit* principles and thereby greatly reduce the attorney's share of the recovery. *See* Kan. Bar Ass'n Op. 93-03 at 2 & n.2 (1993) ("An underground system of lay advisory books suggests clients hire lawyers to negotiate recoveries for them on a contingency, then once an offer is made discharge the lawyer and either try to collect the entire offered recovery by themselves, or pay the *quantum meruit* fee in hopes it will be less than the contracted contingent fee."). However, if the fee agreement includes a conversion clause, the lawyer might obtain some protection from a bad faith termination by the client.

Just as a conversion clause can protect an attorney who is discharged without cause, it can protect an attorney who has good cause to withdraw from the representation, yet has invested substantial and

valuable time and effort in the matter. Rule 1.16(b) (1) and (2) sets forth a series of circumstances that justify withdrawal.<sup>2</sup> For example, if the client “personally intends to pursue an illegal course of conduct,” the attorney may move to withdraw. Colo. RPC 1.16(b)(1)(B). Under this rule, if the client informs her counsel that she intends to commit perjury on the witness stand, the attorney may seek court permission to terminate the relationship. Assuming the court approves the withdrawal, and further assuming that the case is relatively close to a valuable settlement as a result of the attorney’s efforts, a conversion clause could protect the lawyer from losing a portion of the percentage-based fee as a result of the client’s misconduct and the lawyer’s withdrawal for cause.<sup>3</sup>

On the other hand, where the attorney is not performing satisfactorily and the client has good cause for termination, a conversion clause could impermissibly interfere with the client’s right to discharge the attorney. Similarly, where the attorney terminates the agreement without cause, a conversion clause could make it difficult, if not impossible, for the client to find successor counsel.

In light of these considerations, the Committee concludes that conversion clauses should be drafted to limit their application to client terminations without cause and attorney terminations with cause. The Committee recognizes that “cause” and “without cause” are not precise terms. The parties, however, can take steps to define terminations for cause in the agreement.<sup>4</sup> See, e.g., Annotation, *Circumstances Under Which Attorney Retains Right To Compensation Notwithstanding Voluntary Withdrawal From Case*, 88 A.L.R.3d 239 (1978).

The Committee recognizes that the client’s right to discharge the attorney is absolute, even if without cause or in bad faith. The Committee does not believe that a conversion clause that applies to such terminations necessarily will chill the exercise of that absolute right; it will simply require the client to pay the discharged attorney a reasonable fee if the client acts without good cause. See *Cohen v. Radio-Electronics Officers Union*, 146 N.J. 140, 679 A.2d 1188, 1198 (1996) (notice requirement that operates as limit on client’s right to discharge counsel will withstand ethical scrutiny if it is “fair, reasonable, and [does] not unduly burden the client’s right to choose its counsel”); *Taylor v. Shigaki*, 84 Wash. App. 723, 930 P.2d 340, 344 (1997) (“We agree that Taylor had the right to discharge his attorney at any time, with or without cause. But although a client may fire his attorney at any time, the client has no right to pay less than the attorney has earned.”) (citations omitted).

**Whether the clause provides for conversion to fees based on *quantum meruit* principles or defines the alternate basis for fees.** Under Colorado law, a discharged attorney generally may recover the reasonable value of services rendered under *quantum meruit* principles. *Nutt*, 696 P.2d at 248. A conversion clause that states no more than that the client will be liable to pay the attorney’s fees under *quantum meruit* in the event of termination of the fee agreement is permissible. That is the sort of provision that the Supreme Court faulted the attorney for *not* including in the fee agreement in the *Elliott* case. See also Miss. State Bar Op. 144 at 3, 5 (March 11, 1988) (clause that converts fee to *quantum meruit* upon lawyer’s discharge would be an ethical “safe harbor”).

The Colorado courts have long assumed that *quantum meruit* principles govern in the absence of a conversion clause in a disputed or invalid contingent fee agreement. See *Nutt*, 696 P.2d at 248; *Bryant v. Hand*, 158 Colo. 56, 404 P.2d 521, 523 (1965). However, the Colorado courts have not ruled out alternate bases for fees if they are clearly set forth in the contingent fee agreement. Therefore, conversion clauses that provide for alternate fee arrangements other than under *quantum meruit* principles are not *per se* unethical as against public policy. However, because many such alternate fee structures have a strong potential to penalize clients, counsel should use them with care and attention to the particular circumstances of a given engagement.

The most common type of conversion clause provides for conversion to a lodestar rate based on the attorney’s normal hourly rate, as defined in the agreement, and the number of hours devoted to the matter. Whether such a provision is ethical in a given case will turn largely on the remaining factors discussed in this opinion.

A clause that provides for conversion to a fixed fee upon discharge will be inherently suspect. Because it is impossible to predict when during the course of the matter the agreement might be ter-

minated, such a provision necessarily would be arbitrary. It would result in an unreasonable fee until such time as the value of the attorney's services equaled or exceeded the fixed fee amount. The unreasonable nature of the fee until that point in time would impinge improperly upon the client's free exercise of the right to discharge counsel.

Some conversion clauses provide for conversion to (a) a percentage of the last settlement offer received or (b) a percentage of the total recovery reduced, as appropriate, to reflect the contribution of successor counsel. Assuming that the percentages are reasonable, this type of clause generally will be permissible. If the client received a particular settlement offer while represented by the attorney, then the lawyer likely contributed services of value to the client; a reasonable percentage of that settlement offer generally will represent reasonable compensation under a percentage-based contingent fee agreement. *But see* Monroe Cty. Op. 86-2 at 6 ("Tying the fee to a percentage of a previous offer will likely impair the client in his unfettered discretion whether to accept the offer."). Similarly, an agreement that provides that discharged and substitute counsel will divide the total attorneys' fees between them in proportion to their respective contributions to the case will neither chill the client's exercise of the right to discharge counsel nor result in an unreasonable fee (assuming, of course, that the total fees represent a reasonable percentage of the client's recovery).

**Whether the fees computed on the alternate basis are unreasonable in amount, either facially or under the circumstances that develop in the particular case.** Attorneys should consider the reasonableness of the fees under a conversion clause both at the outset of the engagement and when the fee agreement is enforced. A conversion clause that appears ethical on its face might become unethical as enforced in a particular situation. *See* Ore. Op. 1991-54 at 1 ("[I]t may happen that subsequent events make it improper for an attorney to charge or collect the full amount of an agreed-upon fee [under a conversion clause] that turns out to be excessive even though it did not appear to be excessive at the outset."); *see also* *Anderson*, 547 P.2d at 261 (scrutinizing reasonableness of facially reasonable, one-third contingent fee percentage in light of work actually performed).

A clause that provides for conversion to a lodestar fee will be unethical if the hourly rate employed is unreasonable. *E.g.*, *Florida Bar v. Doe*, 550 So.2d at 1111-13 (\$350 per hour "converted" fee deemed excessive). Even where the attorney's hourly rate as stated in the contingent fee agreement is reasonable, *i.e.*, where the lodestar rate appears facially reasonable, the total fees may be unreasonably high. This may occur because the attorney has devoted too many hours to the case in light of the tasks that were required. It may occur because, although both the hourly rate and total hours were reasonable, the result obtained cannot justify the fees. For example, if the fees computed on a lodestar basis exceed the fees that would have been recoverable under the contract's percentage-based fee provision, those fees probably would be unreasonable. *See* discussion *infra* of cap provision in agreement.<sup>5</sup>

Implicit in the requirement that fees be reasonable is that, when more than one firm handles a client's case, the aggregate fee for both firms must be reasonable. *See* Colo. RPC 1.5(d)(3); Kan. Op. 93-03 at 3, 6. Thus, the first attorney should not include or enforce a conversion clause that effectively leaves the client unable to retain new counsel because the alternate fee is expected to be too high to render retention of new counsel economically feasible. Successor counsel should inquire about the first attorney's fee arrangement in order to ensure that the overall fee is reasonable, and should make reasonable efforts to ensure that the client understands the fee arrangements with both original and successor counsel. *Id.* at 11-12. On the other hand, a fee that would be unreasonable if paid to one attorney might not be unreasonable if paid to two attorneys through no fault of the attorneys. Thus, for example, if the client opts without cause to replace counsel who has done substantial work on a matter, and new counsel must duplicate much of the original lawyer's work in order to competently represent the client, then it may be reasonable to impose additional attorneys' fees on the client, rather than to expect the two attorneys to divide the original contingent fee.

**Whether the clause provides for immediate payment on an alternate basis, before the contingency occurs and even in the absence of the contingency occurring.** In the typical contingent fee matter, the client lacks the resources required to fund the litigation except out of the proceeds of the case.

For these clients, a conversion clause that requires payment of the alternate fee immediately upon termination and regardless of the occurrence of the contingency would operate as a severe disincentive to discharging counsel. It would function as a double penalty by, *first*, requiring immediate payment and, *second*, requiring payment of fees even if the client recovers little or nothing. *Fracasse v. Brent*, 6 Cal.3d 784, 100 Cal. Rptr. 385, 390 (1972); *Florida Bar v. Spann*, 682 So.2d 1070, 1072-73 (Fla. 1996); *Reid, Johnson, Downes, Andrachik & Webster v. Lansberry*, 38 Ohio St. 3d 570, 629 N.E.2d 431, 436 (1994). The Committee views such language as presumptively improper, unless the client is relatively sophisticated, has the demonstrated means to pay counsel's fees even before the occurrence of the contingency, and has specifically negotiated the conversion clause.

**Whether the clause provides for a “cap,” under which the alternate basis for fees cannot exceed the contingent fee amount.** An unrestricted conversion clause, which includes no cap on fees calculated on a lodestar basis, could improperly impinge upon the client's right to discharge counsel and also could result in an unreasonable fee:

[T]he *quantum meruit* recovery of a discharged attorney should be limited to the amount provided for in the disavowed contingent fee agreement. . . . ‘This limitation is believed necessary to provide client freedom to substitute attorneys without economic penalty. Without such a limitation, a client's right to discharge an attorney may be illusory and the client may in effect be penalized for exercising a right.’

*Reid, Johnson*, 629 N.E.2d at 436 (citations omitted). The Colorado Court of Appeals has assumed that fees recoverable under a contingent fee agreement set a ceiling on the fees computed on an alternate basis. *Law Offices of J. E. Losavio*, 865 P.2d at 936. However, where the client is in a position to absorb and fully understands and accepts the potential risk of an uncapped conversion provision, such a clause might withstand ethical scrutiny.

**The sophistication of the client.** As observed above, the use of contingent fee agreements has expanded significantly in recent years. Whereas those agreements originally were used almost exclusively in the representation of relatively unsophisticated individual clients with limited resources to fund litigation, today a sophisticated corporate client might opt to employ a contingent fee agreement as an alternative to a traditional hours-based fee arrangement. *See Jay*, 2 Geo. J. Legal Ethics at 852-53 (among clients who choose contingent fee arrangements, “there are a considerable number who not only appreciate the risks involved and the efforts expended by their lawyers, but . . . also are satisfied that a contingent percentage is the superior way to maximize their gain”). In that circumstance, a conversion clause might not operate to encumber the client's right to discharge counsel. Rather, the clause might be a negotiated and freely-accepted provision of the contingent fee agreement. So long as the rate provided for under the conversion clause is not unreasonable, it would not be unethical. *See Feiger*, 926 P.2d at 1252-53 (noting the relative sophistication of client as relevant to Court's conclusion that conversion clause does not facially reflect a public policy violation: “Jones was, or at least, should have been, well aware of the implications of the representation agreement.”); *Cohen*, 679 A.2d at 1199 (“Sophisticated clients who bargain with their lawyers from positions of substantial parity are less susceptible to overreaching.”); *Phil. Op.* 88-16, at 2 (if client is “a person or entity of substantial means, [conversion clause] might be reasonable so long as it did not create a ‘hammer’ to be used to overcome the client's independent determination . . .”).

By contrast, a contingent fee agreement with an unsophisticated client with limited resources (the presumed client under the Rules Governing Contingent Fees) requires greater scrutiny.

## Conclusion

Counsel should not use a conversion clause that, as a practical matter, is likely to restrict the client's ability to terminate the representation. Consistent with the factors discussed above, the conversion clause should fairly set forth the client's obligations upon termination, and should ensure that those obligations are not unreasonable in light of the work performed and the relief ultimately obtained by the client.

**NOTES**

1. The rule makes clear that its list of factors is not intended to be exhaustive.
2. The rule recognizes that court approval is required for matters in litigation, and that a lawyer should not materially impair the client's interests upon withdrawal.
3. The Committee emphasizes that the fact that an attorney later determines that a case is not as profitable on a contingent fee basis as originally projected is *not* good cause for termination. A conversion clause that permits or is enforced to yield this result would be improper. Colo. RPC 1.5, comm. ("An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client . . ."); *Florida Bar v. Hollander*, 607 So.2d 412, 415 (Fla. 1992).
4. One ethics committee has mandated a definition in the agreement: "The agreement should give, or refer to, a reasonable definition of 'cause,' as it applies to the lawyer's conduct. . ." N.M. State Bar Advisory Op. 1995-2, at 4 (Sept. 9, 1995). This Committee concludes that a definition of "cause" is not mandatory.
5. A clause converting the fee to a lodestar fee will work to the attorney's disadvantage in some circumstances. If the lodestar fee calculation results in a fee less than the contingent fee calculation, it may create an incentive for the client to discharge the attorney and pay on the reduced lodestar basis.