

*Approved by the Supreme Court of Virginia
January 6, 2023*

LEGAL ETHICS OPINION 1899. USE OF CONVERSION CLAUSE IN FLAT FEE AGREEMENTS

QUESTIONS PRESENTED

When a lawyer represents a client on a flat (or fixed) fee agreement, can the agreement provide for an alternative fee arrangement if the representation is prematurely terminated by the client without cause? What, if any, limitations apply to such an alternative arrangement?

PREVIOUS OPINIONS

In Legal Ethics Opinion 1606 (Committee Opinion 1994, Approved by Supreme Court 2016), the committee discussed fixed fees (now more commonly called "flat fees") as follows:

5. Fixed Fee. The term fixed fee is used to designate a sum certain charged by a lawyer to complete a specific legal task. Because this type of fee arrangement provides the client with a degree of certainty as to the cost of legal services, it is to be encouraged.

A fixed fee is an advanced legal fee. It remains the property of the client until it is actually earned and must be deposited in the attorney's trust account. If the representation is ended by the client, even if such termination is without cause and constitutes a breach of the contract, the client is entitled to a refund of that portion of the fee that has not been earned by the lawyer at the time of the termination. LE Op. 681. In such circumstances, what portion of the fee has been earned requires a quantum meruit determination of the value of the lawyer's services in accordance with *Heinzman* and *County of Campbell v. Howard*, 133 Va. 19 (1922).

In Legal Ethics Opinion 1812 (2005), the committee addressed the premature termination of a contingent fee representation, which is also subject to the quantum meruit analysis in the cases identified above. The question presented in LEO 1812 was whether a lawyer can use a so-called conversion clause in a contingent fee agreement, providing that if the representation is terminated prematurely by the client without cause, the fee will be calculated by a method other than quantum meruit. The committee reviewed the existing legal authority and ethics opinions from other states to conclude that "such alternative fee arrangements are permissible in contingent fee contracts so long

as the alternative fee arrangements otherwise comply with the Rules of Professional Conduct." Considering that one of the applicable Rules of Professional Conduct is Rule 1.5(a), requiring the fee to be reasonable, the committee further opined that when determining reasonableness, the alternative fee (conversion clause) must be evaluated not only as of the time when the fee agreement was signed, but as of the time that the lawyer's services were terminated, and in the case of a contingent fee, as of when the recovery, if any, was obtained. If the alternative fee is not reasonable at any of those times, the arrangement is impermissible and the lawyer will be left with only a quantum meruit claim.

ANALYSIS

Because, unless there is an agreement otherwise, none of the flat fee is earned until the matter is concluded, a flat fee presents the same dilemmas as a contingent fee if the matter is prematurely terminated. If the representation is terminated without cause by the client, there is no question that the lawyer is entitled to some compensation for the work done in the case to that point, and in the absence of an alternative agreement, the legal doctrine of quantum meruit must be applied to determine the lawyer's entitlement to a fee. *See Heinzman v. Fine, Fine, Legum and Fine*, 217 Va. 958, 964 (1977). However, both lawyers and clients might prefer the certainty of agreeing to an alternative fee arrangement at the outset, so that if the representation is terminated, both sides are clear on the lawyer's entitlement to a fee and the risk of a legal dispute about the amount of the lawyer's fee is reduced.

The committee concludes that contingent fees and flat fees should be treated similarly for these purposes, and the above analysis from LEO 1812 applies to conversion clauses in flat fee cases as well. The mechanics, however, will be different since the flat fee does not involve a potential recovery. First, this means that the reasonableness analysis of a conversion clause arrangement will not consider any ultimate recovery, since that concept is irrelevant to a flat fee arrangement. A second difference is that the alternative fee will be capped by the original agreed-to flat fee; the alternative fee arrangement cannot exceed the flat fee because the essence of the flat fee agreement is that the client will never

pay more than the flat fee.

As in LEO 1812, a crucial component of a lawyer's ability to use a conversion clause is the duty to adequately explain a fee arrangement to the client under Rule 1.5(b). The conversion clause at issue in LEO 1812 did not satisfy that rule because it was not clear as to whether it established an alternative hourly fee arrangement or established an hourly rate to be used in a quantum meruit calculation; the latter option would be impermissible, even if clearly stated, because the lawyer's usual hourly rate is not the only factor applied in a quantum meruit analysis. Similarly, in a flat fee context, a conversion clause should not attempt to state what the appropriate quantum meruit analysis is, but rather make clear that the clause creates an alternative fee arrangement based on an hourly or other metric as opposed to the flat fee.

Another option, rather than applying an hourly rate in the event of termination, would be to use benchmarks in the agreement providing that portions of the flat fee can be earned at various points in the representation and then use those benchmarks as the basis for a conversion clause. Again, pursuant to Rule 1.5(a) and (b), the amount earned at each benchmark must be reasonable considering the amount of work to be done in the case, and the arrangement must be adequately explained to the client. Once such an agreement is reached, however, the lawyer can also ask the client to agree that in the event the representation is terminated, the amount of the earned fee will be determined based on the benchmarks that have been reached to that point rather than by quantum meruit. The committee believes that the use of reasonable and adequately-explained conversion clauses as part of the fee agreement is beneficial to the client and the lawyer when undertaking a flat fee representation. Quantum meruit is a multifactor legal doctrine that provides a remedy for the lawyer when the representation is terminated without cause, but can only be enforced by legal action against the former client. Legal Ethics Opinion 1878 (2021) describes some of the uncertainties involved in applying quantum meruit to a terminated contingent fee matter, including "the 'unknown' of the recovery to be had, if any" and "other 'unknowns,' such as the balance of work which will actually be required to complete the matter and the extent to which predecessor counsel's legal services will have

contributed to the recovery." On the other hand, a reasonable conversion clause can be adequately explained and agreed to by the client at the outset of the representation and provides more certainty to both the lawyer and the client about what fee will be owed if the representation is not completed.

ANSWER

A lawyer's fee agreement with a client may include an alternative fee arrangement or "conversion clause" if the client terminates the representation prematurely and without cause. However, an alternative fee or conversion provision must be reasonable and adequately explained to the client.

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