

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

3
4 QUESTION PRESENTED

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

10 PREVIOUS OPINIONS

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

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

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20 A fixed fee is an advanced legal fee. It remains the property of
21 the client until it is actually earned and must be deposited in the
22 attorney's trust account. If the representation is ended by the
23 client, even if such termination is without cause and constitutes
24 a breach of the contract, the client is entitled to a refund of that
25 portion of the fee that has not been earned by the lawyer at the
26 time of the termination. LE Op. 681. In such circumstances, what
27 portion of the fee has been earned requires a quantum meruit
28 determination of the value of the lawyer's services in accordance
29 with *Heinzman* and *County of Campbell v. Howard*, 133 Va. 19
30 (1922).
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32 In Legal Ethics Opinion 1812 (2005), the committee addressed the
33 premature termination of a contingent fee representation, which is also
34 subject to the quantum meruit analysis in the cases identified above. The
35 question presented in LEO 1812 was whether a lawyer can use a so-called
36 conversion clause in a contingent fee agreement, providing that if the
37 representation is terminated prematurely by the client without cause, the
38 fee will be calculated by a method other than quantum meruit. The
39 committee reviewed the existing legal authority and ethics opinions from
40 other states to conclude that “such alternative fee arrangements are
41 permissible in contingent fee contracts so long as the alternative fee
42 arrangements otherwise comply with the Rules of Professional Conduct.”
43 Considering that one of the applicable Rules of Professional Conduct is
44 Rule 1.5(a), requiring the fee to be reasonable, the committee further
45 opined that when determining reasonableness, the alternative fee
46 (conversion clause) must be evaluated not only as of the time when the fee
47 agreement was signed, but as of the time that the lawyer’s services were
48 terminated, and in the case of a contingent fee, as of when the recovery, if
49 any, was obtained. If the alternative fee is not reasonable at any of those
50 times, the arrangement is impermissible and the lawyer will be left with only
51 a quantum meruit claim.

52 ANALYSIS

53 Because, unless there is an agreement otherwise, none of the flat fee
54 is earned until the matter is concluded, a flat fee presents the same
55 dilemmas as a contingent fee if the matter is prematurely terminated. If the
56 representation is terminated without cause by the client, there is no
57 question that the lawyer is entitled to some compensation for the work done
58 in the case to that point, and in the absence of an alternative agreement,
59 the legal doctrine of quantum meruit must be applied to determine the
60 lawyer's entitlement to a fee. However, both lawyers and clients might
61 prefer the certainty of agreeing to an alternative fee arrangement at the
62 outset, so that if the representation is terminated, both sides are clear on
63 the lawyer's entitlement to a fee and the risk of a legal dispute about the
64 amount of the lawyer's fee is reduced.

65 Contingent fees and flat fees should be treated similarly for these
66 purposes, and the above analysis from LEO 1812 applies to conversion
67 clauses in flat fee cases as well. The mechanics, however, will be different
68 since the flat fee does not involve a potential recovery. First, this means
69 that the reasonableness analysis of a conversion clause arrangement will
70 not evaluate any ultimate recovery, since that concept is irrelevant to a flat
71 fee arrangement. A second difference is that the alternative fee will be

72 capped by the original agreed-to flat fee; the alternative fee arrangement
73 cannot exceed the flat fee because the essence of the flat fee agreement is
74 that the client will never pay more than the flat fee.

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

87 Another option, rather than applying an hourly rate in the event of
88 termination, would be to use benchmarks in the agreement providing that
89 portions of the flat fee can be earned at various points in the representation
90 and then use those benchmarks as the basis for a conversion clause.
91 Again, pursuant to Rule 1.5(a) and (b), the amount earned at each

92 benchmark must be reasonable considering the amount of work to be done
93 in the case, and the arrangement must be adequately explained to the
94 client. Once such an agreement is reached, however, the lawyer can also
95 ask the client to agree that in the event the representation is terminated,
96 the amount of the earned fee will be determined based on the benchmarks
97 that have been reached to that point rather than by quantum meruit.

98 The committee believes that the use of reasonable and adequately-
99 explained conversion clauses as part of the fee agreement is beneficial to
100 the client and the lawyer when undertaking a flat fee representation.
101 Quantum meruit is a multi-factor legal doctrine that provides a remedy for
102 the lawyer when the representation is terminated without cause, but can
103 only be enforced by legal action against the former client. Legal Ethics
104 Opinion 1878 (2021) describes some of the uncertainties involved in
105 applying quantum meruit to a terminated contingent fee matter, including
106 “the ‘unknown’ of the recovery to be had, if any” and “other ‘unknowns,’
107 such as the balance of work which will actually be required to complete the
108 matter and the extent to which predecessor counsel’s legal services will
109 have contributed to the recovery.” On the other hand, a reasonable
110 conversion clause can be adequately explained and agreed to by the client
111 at the outset of the representation and provides more certainty to both the

112 lawyer and the client about what fee will be owed if the representation is
113 not completed.

114 CONCLUSION

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