LEGAL ETHICS OPINION 1812
CAN LAWYER INCLUDE IN A FEE AGREEMENT A PROVISION ALLOWING FOR ALTERNATIVE FEE ARRANGEMENTS SHOULD CLIENT TERMINATE REPRESENTATION MID-CASE WITHOUT CAUSE

You have presented a hypothetical in which an attorney who regularly represents plaintiffs in personal injury cases wants to include the following language in her standard fee agreement:

> Either Client or Attorney has the absolute right to terminate this agreement. In the event Client terminates this agreement, the reasonable value of Attorney's services shall be valued at $200 per hour for attorney time and $65 per hour for legal assistant time for all services rendered. In the alternative, the Attorney may, where permitted by law, elect compensation based on the agreed contingency fee for any settlement offer made to Client prior to termination.

Based on the facts presented, you have asked the committee to opine as to whether the provision in the third sentence of that language is ethically permissible and legally enforceable. First, the committee notes that the issue of legal enforceability would involve an application of contract law to this provision and, as such, is outside the purview of this committee. The committee will limit its response to the question of ethical permissibility. The Committee further limits its response to situations where the client has terminated the attorney's services *without cause.* While the committee notes that this request does not specifically ask about the permissibility of the *second* sentence of the proposed language, the committee nonetheless will address that provision as well.

The attorney in this hypothetical would insert the above language in contingent fee contracts for personal injury plaintiffs. The proposed language purports to establish alternative fee arrangements if the client terminates the representation prior to the natural conclusion of the matter. When a client terminates a contingent fee agreement before the contemplated services are fully performed, and the fee agreement does not contain an alternative fee arrangement applicable upon early termination by the client, the discharged attorney is entitled to a fee based upon *quantum meruit* (the reasonable value of the attorney's services up to the date of termination). *Heinzman v. Fine, Fine, Legum, & Fine*, 217 Va. 958 234 S.E. 2d 282 (1977). The Heinzman decision holds that the discharged attorney, under the circumstances of that case, is not entitled to recover the contractual contingent fee, but rather the discharged attorney is limited to recovery on a *quantum meruit* basis. As noted in LEO 1606, the *Heinzman* decision explained that:

> When, as here, an attorney employed under a contingent fee contract is discharged without just cause and the client employs another attorney who effects a recovery, the discharged attorney is entitled to a fee based upon quantum meruit for services rendered prior to discharge …

Heinzman at 964.[1]

The committee notes, however, that the court in *Heinzman* did not have before it a termination or conversion clause of the type presented in your inquiry. Thus, the *Heinzman* court did not have an opportunity to consider whether an attorney and client may properly agree upon alternative fee arrangements in the event the client elects to terminate the contingent fee agreement before the contemplated services have been fully performed. However, the Supreme Court did state the following in *Heinzman*:

> We agree that, absent overreaching on the part of the attorney, contracts for legal services are valid and when those services have been performed as contemplated in the contract, the attorney is entitled to the fee fixed in the contract …

Heinzman at 962 (footnote omitted).

While an attorney may consider including discharge conversion clauses in the contingent fee agreement, he or she must be mindful of the court's characterization in *Heinzman* of contracts between lawyer and client:

> Seldom does a client stand on an equal footing with an attorney in the bargaining process. Necessarily, the layman must rely upon the knowledge, experience, skill, and good faith of the professional. Only the attorney can make an informed judgment as to the merit of the client's legal rights and obligations, the prospects of success or failure, and the value of the time and talent which he must invest in the undertaking. Once fairly negotiated, the contract creates a relationship unique in the law. The attorney-client relationship is founded upon trust and confidence, and when the foundation fails, the relationship may be, indeed should be, terminated.

Heinzman at 963.

As indicated by this committee in LEO 1606, *Heinzman* stands for the proposition that contracts between attorney and client are unique and not governed solely by principles that govern ordinary commercial contracts.

Other states' ethics opinions have held that a lawyer may ethically include in a contingent fee agreement what he is to receive as a fee in the event he is discharged by the client. Kansas Bar Ass'n Ethics Op. 93-03 (lawyer may included in contingent fee agreement his entitlement to a *quantum meruit* recovery which could include a stated percentage of the client's ultimate recov-

FOOTNOTES

1 While not expressly at issue here or in *Heinzman*, the committee does note a body of cases from a number of jurisdictions suggesting that this notion of quantum meruit may not be appropriate in those extreme cases where the client terminates the representation at the last moment before accepting an award or receiving an award, with the attorney's work substantially performed and the client in bad faith attempting to circumvent the contractual agreement. *See* Restatement (Third) of Law Governing Lawyers §40 Comment c at 293 (1988), and cases cited therein.

ery); Colo. Bar Ass'n Ethics Op. 100 (1997) (lawyer not ethically precluded from using "conversion clause" providing for alternative fee, so long as the fee charged does not unreasonably interfere with client's absolute right to fire lawyer); Miss. Bar Ethics Op. 144 (1988) (discharge clause entitling lawyer to $60 per hour or 20% of any recovery is permissible as long as it does not result in an excessive fee); New Mexico Bar Ethics Op. 1995-2 (1995) (approving contingent fee agreement that proposes a *quantum meruit* recovery if lawyer is fired without cause or if client gives lawyer cause to withdraw); Nassau County Bar Ass'n Op. 90-24 (1990) (discharged lawyer may charge contingent fee if it is reasonable and represents reasonable value of services rendered prior to discharge); *cf. Kirshenbaum v. Hartshorn*, 539 So. 2d 497 (Fla. Dist. Ct. App. 1989) (lawyer loses right to any fee when contingent fee contract did not specify compensation in event client elected to discharge lawyer before recovering anything).

The committee opines 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. For example, the alternative fee arrangement must be adequately explained to the client (Rule 1.4 and 1.5(b)), be reasonable (Rule 1.5(a)), and not unreasonably hamper the client's absolute right to discharge his lawyer, with or without cause, at any point in the representation (Rule 1.16)[2]. Given these parameters, the committee believes that when determining reasonableness, the reasonableness of the alternative fee must be evaluated and judged not only in the context of when the fee agreement was signed, but also as of the time that the lawyer's services were terminated, as well as when the recovery, if any, was obtained. An example is in order. Client retains Lawyer A on a one-third contingent fee, with an alternative hourly fee arrangement to apply if the Client terminates Lawyer A's services before recovery. After discovery is completed, Lawyer A concludes that the insurance coverages available total $25,000.00 and the defendant has no means to satisfy a judgment in any amount. Given the expenses involved in trying the case and the risks associated with litigation, Lawyer A recommends to the Client that the Client accept the defendant's last and final offer of $22,500.00. The Client not only rejects the offer, but terminates the relationship with Lawyer A. Employing the alternative hourly fee arrangement, Lawyer A sends Client a bill for $20,000.00, which is properly calculated by Lawyer A by multiplying his stated hourly rate by the number of hours worked on the file. Lawyer A also claims a lien in this amount on any recovery in the case and notifies Lawyer B, who now is reviewing the case to determine whether he will represent Client. The committee believes that while the alternative hourly fee arrangement may have been reasonable at the time the fee agreement was signed, it is not reasonable when viewed at the time of discharge. Under this scenario, the alternative hourly fee arrangement is impermissible and, therefore, Lawyer A would only be left with a *quantum meruit* claim.

With these general principles in mind, the committee will address the second and third sentences of the alternative fee provision presented in your hypothetical.

Second Sentence of the Proposed Language

The second sentence states as follows:

> In the event Client terminates this agreement, the reasonable value of Attorney's services shall be valued at $200 per hour for attorney time and $65 per hour for legal assistant time for all services rendered.

In the committee's view, this provision is unclear. The committee cannot determine whether the language is attempting to establish an alternative contractual hourly fee arrangement or is attempting to establish an agreed upon hourly rate to be used in employing a quantum meruit calculation. Rule 1.5(b) requires that the fee arrangement be adequately explained to the client, preferably in writing. The committee opines that the second sentence of the proposed language fails to meet this requirement of Rule 1.5(b).

Furthermore, this provision is misleading if it purports to establish a *quantum meruit* fee. An attorney stating in a fee agreement that a particular hourly rate meets *quantum meruit* standards does not in fact make it so. *Quantum meruit* is a common law concept, with case law presenting appropriate factors for determining the fee in a particular case. *See County of Campbell v. Howard*, 133 Va. 19, 112 S.E. 876 (1922) (discussing the pertinent factors). *See also* Virginia Rule 1.5 which sets out the factors used to determine whether a lawyer's fee is reasonable. Significantly, neither *Howard* nor Rule 1.5 employs the attorney's usual hourly rate or "lodestar" as a factor in determining the reasonableness of the fee. If an attorney states a rate in the agreement that would not be reasonable under the *quantum meruit* concept, such a provision would be misleading to the client. Rule 1.5 places an affirmative obligation on an attorney to adequately explain his fee to the client. While the committee believes that an attorney is not required to do so, some attorneys may want to advise their clients that if the attorney is terminated without cause before completion of the attorney's services, the attorney will present evidence of her normal hourly rate in determining an appropriate *quantum meruit* amount. It is not impermissible for the attorney to state that her normal hourly rate is $200 an hour, if that is so, and to indicate to the client that in the event the client prematurely terminates the representation, the attorney will seek *quantum meruit* compensation based on that hourly rate for services performed up to the date of termination. Unfortunately, the second sentence of the proposed language goes too far and actually appears to attempt to set an hourly rate for *quantum meruit* analysis, which is misleading and, therefore, impermissible.

FOOTNOTES

2 Comment 6 to Rule 1.16 ("Declining or Terminating Representation") states that a "client has the right to discharge a lawyer at any time, with or without cause." *See also* Law. Man. On Prof. Conduct (ABA/BNA) 41:116 (2005), citing *Florida Bar v. Hollander*, 607 So. 2d 412 (Fla. Sup.Ct. 1992); *Florida Bar v. Doe*, 550 So.2d 1111 (Fla. Sup.Ct. 1989); *Cincinnati Bar Association v. Schultz*, 643 N.E.2d 1139 (Ohio Sup.Ct. 1994).

Based on the foregoing, the committee opines that the second paragraph of the termination clause in the proposed contract is improper as it is misleading and fails to fully inform the client of the basis of the attorney's fee when a contingent fee representation is terminated by the client before its completion. See Virginia Rules 1.4 and 1.5.

Third Sentence of the Proposed Language

The third sentence states as follows:

> In the alternative, the Attorney may, where permitted by law, elect compensation based on the agreed contingency fee for any settlement offer made to Client prior to termination.

The committee is of the opinion that this provision is likewise improper as it is misleading and fails to fully and properly inform the client of the lawyer's entitlement to compensation in the event the client terminates the representation prior to a recovery from the defendant. The committee notes that the provision does state that it applies "where permitted by law." However, the contract does not explain under what circumstances law may permit the attorney to elect compensation based on the agreed contingent fee or any settlement offer made to client prior to termination. As stated by the Supreme Court in the *Heinzman* case, contracts for legal services are not the same as other contracts. The client actually retains the lawyer for the purposes of explaining the client's legal rights and to advise the client as to what actions are "permitted by law." In this hypothetical, the lawyer's contract does not fully explain when the lawyer would be entitled to elect to receive a contingent fee "where permitted by law."

The Committee concludes that the agreement does not fully and adequately explain to the client the fee arrangement and, in fact, contains language that, without more, is likely to be confusing for and misunderstood by the client.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Committee Opinion
October 31, 2005