

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 487**

**June 18, 2019**

## **Fee Division with Client's Prior Counsel**

*In a contingent fee matter, when a counsel (successor counsel) from one firm replaces a counsel (predecessor counsel) from another firm as counsel for the client, Rules 1.5(b) and (c) require that the successor counsel notify the client, in writing, that a portion of any contingent fee earned may be paid to the predecessor counsel. The successor counsel may not be able to state at the beginning of the representation the specific amount or percentage of a recovery, if any, that may be owed to the predecessor counsel unless the amount or percentage has been agreed by the client and both predecessor and successor counsels. The successor counsel is not bound by the requirements of Rule 1.5(e), either at the time of engagement or upon a recovery, because Rule 1.5(e) addresses situations where two lawyers are working on a case together, not situations where one lawyer is replacing another. Upon a monetary recovery, the successor counsel may only disburse a portion of the overall attorney's fee to the predecessor counsel with client consent or pursuant to an order of a tribunal of competent jurisdiction. If there is a dispute as to the amount due to the predecessor counsel under Rule 1.15(e) the disputed amount may have to remain in a client trust account until the matter is resolved. If successor counsel negotiates with predecessor counsel on the client's behalf, successor counsel must explain to the client the potential conflict of interest in the dual roles pursuant to Rule 1.7, where successor counsel has a personal interest in the amount predecessor counsel may receive or in the timing of the release of funds held pursuant to Rule 1.15(e).<sup>1</sup>*

### **I. Introduction**

A client has the right to terminate a lawyer's services at any time<sup>2</sup> but when the client terminates the services of a contingent fee counsel, without cause, prior to the occurrence of the contingency on which the parties' agreement is based, the counsel may be entitled to a fee for services performed before discharge under *quantum meruit* or, in some jurisdictions, pursuant to a so-called "conversion clause" or "termination clause" in the contingent fee agreement. This opinion addresses the successor counsel's obligations under the Model Rules of Professional Conduct after taking over the case when there is a monetary recovery. A counsel who subsequently takes over the case (the successor counsel) must advise the client, in writing, of the predecessor counsel's potential claim on a recovery.<sup>3</sup>

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<sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2018. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

<sup>2</sup> MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 4 (2018) [hereinafter MODEL RULES]; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32(1) (2000) [hereinafter RESTATEMENT].

<sup>3</sup> This opinion applies where the client terminates a lawyer without cause and hires a new lawyer to replace that lawyer to handle a contingent fee matter. The opinion does not apply when a client terminates a lawyer with cause, or the lawyer withdraws without cause. In such situations, a lawyer may forfeit some or all of her fee.

## II. Analysis

### A. The Successor Counsel's Obligation to Advise the Client that the Predecessor Counsel May Make a Claim Against Any Recovery

Just as in any contingent fee matter, the successor counsel must comply with both Model Rule 1.5(b) in describing the rate or basis of the fee and with Model Rule 1.5(c)'s requirement that the written fee agreement include the method of determining the fee. Paragraphs (b) and (c) of Rule 1.5 provide:

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Although Rules 1.5(b) and 1.5(c) do not specifically address obligations when one counsel replaces another, both rules are designed to ensure that the client has a clear understanding of the total legal fee, how it is to be computed, when it is to be paid, and by whom. “[A]n understanding as to fees . . . must be promptly established.”<sup>4</sup> A contingent fee agreement that fails to mention that some portion of the fee may be due to or claimed by the first counsel in circumstances addressed by this opinion is inconsistent with these requirements of Rule 1.5(b) and (c).<sup>5</sup> To avoid client confusion,

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RESTATEMENT § 37 (2000); David Hricik, *Dear Lawyer: If you decide it's not economical to represent me, you can fire me as your contingent fee client, but I agree I will still owe you a fee*, 64 MERCER L. REV. 363 (2012-2013).

<sup>4</sup> MODEL RULES R. 1.5 cmt. 2.

<sup>5</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-389, at 4 (1994) (explaining that “the nature (and details) of the compensation arrangement should be fully discussed by the lawyer and client before any final agreement is reached.”); *Joyce v. Elliott*, 857 P.2d 549, 552 (Colo. App. 1993) (stating that “one of the principal purposes of the rules respecting contingency fee agreements is to assure that a client is fully advised at the time such agreement is executed of all of the financial obligations that such client is assuming by the establishment of the attorney-client relationship.”); *Shaw v. Manufacturers Hanover Trust Co.*, 499 N.E.2d 864, 866 (N.Y. 1986) (“The importance of an attorney’s clear agreement with a client as to the essential terms of representation cannot be overstated. The client should be fully informed of all of the relevant facts and the basis of the fee charges, especially in contingent fee arrangements[.]”); *In re Davenport*, 522 S.W.3d 452, 458 (Tex. 2017) (“The goal of an attorney-client fee agreement is to ensure that the client is informed of its terms. . . . whether the lawyer was reasonably clear is determined from the client’s perspective.”) (footnotes omitted).

making the disclosure in the fee agreement itself is the better practice, but this disclosure may be made in a separate document associated with the contingent fee agreement and provided to the client at the same time.

Assume, for example, that a client retains a lawyer in a matter and enters into a written fee agreement in which the lawyer is entitled to one-third of any recovery. The client then decides to terminate the lawyer, without cause, and hires new counsel. The successor counsel takes the matter on the same terms as the predecessor counsel (one-third of any recovery) but the successor counsel's written fee agreement is silent on whether that one-third is in addition to or in lieu of the one-third specified in the predecessor counsel's fee agreement, and no such disclosure is made in a separate document provided to the client. In these circumstances, the client may not know whether the client must pay one or both lawyers or the amount of the fees owed. The client may be aware of the right to terminate a lawyer's representation at any time but may not be aware that termination does not necessarily extinguish an obligation to pay prior counsel for the value of the work performed – the *quantum meruit* claim – or in some cases a termination amount specified in the predecessor counsel's fee agreement. If the predecessor counsel was not terminated for cause, that lawyer may be entitled to payment for the fair value contributed to the case before being terminated.<sup>6</sup> Under those circumstances, “a contingency client should be advised by the successor attorney of the existence and effect of the discharged attorney's claim for fees on the occurrence of the contingency as part of the terms and conditions of the employment by the successor attorney.”<sup>7</sup>

Where a client hires successor counsel to handle an existing contingency fee matter, it does not pose an unreasonable burden on the successor counsel to advise the client that the predecessor counsel may have a claim to a portion of the legal fee if there is a recovery. In many instances, precision on this issue may be difficult as successor counsel may need to review the predecessor counsel's fee agreement and assess its enforceability. Similarly, successor counsel may not be fully familiar with the nature and extent of the prior lawyer's work on the matter. Successor counsel also will not know the amount of the recovery, if any, at the beginning of the representation. Nevertheless, Rules 1.5(b) and (c) mandate that successor counsel provide written notice that a portion of the fee may be claimed by the predecessor counsel.

Successor counsel must address with the client whether the client risks paying twice: one contingent fee to the predecessor counsel and another to the successor counsel. A client cannot be exposed to more than one contingent fee when switching attorneys, given that under the Rule 1.5(a) factors, each counsel did not perform all of the services required to achieve the result. Thus, neither the predecessor nor the successor counsel ordinarily would be entitled to a full contingent fee.

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<sup>6</sup> See generally RESTATEMENT § 40 cmts. b & c (2000) (On discharge, a lawyer may be entitled to the fair value of the lawyer's services. Determination of fair value takes into account the proportion of work performed by the discharged lawyer, and the value of work contributed. The determination also may consider a contract amount prorated for work actually performed.).

<sup>7</sup> San Francisco Bar Ass'n, Ethics Comm., Advisory Op. 1989-1 (1989).

## B. Rule 1.5(e) Fee Division Provisions Do Not Apply

There is some authority concluding that successor counsel replacing a client's prior counsel must comply with Rule 1.5(e);<sup>8</sup> however, this Rule is designed to regulate fee-sharing between lawyers in different firms who handle a case simultaneously. Comment 7 to Rule 1.5 underscores this reading. It states:

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. *A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well*, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1. (Emphasis added.)

Comment 7 thus clarifies that Rule 1.5(e) is limited to situations where two or more lawyers are working on a case simultaneously – not sequentially. Accordingly, Rule 1.5(e) was not meant to apply to the situation where one lawyer's services are terminated and the client retains a second lawyer to complete the matter.

Under Rule 1.5(e), fees must either be divided in proportion to the work performed or in some other specified division where both lawyers assume "joint responsibility" for the matter. Fee-sharing in proportion to the work performed by lawyers concurrently representing a client is similar to the *quantum meruit* analysis that is frequently used post-hoc to divide contingent fees between successive law firms. What differs where predecessor and successor counsel are involved in such fee issues before a recovery has been obtained is that the underlying case and the client's rights to discharge her lawyer may be adversely affected if the client is required to enter into a fee-sharing agreement under Rule 1.5(e). Requiring the predecessor and successor counsel and the client to agree on a proportional fee division may hinder the client's right to terminate a counsel by making the process of finding a replacement more difficult and protracted. A simple fee negotiation between the client and successor counsel would turn into a three-way debate.

The other approach under Rule 1.5(e) to divide a fee among lawyers concurrently representing a client requires that all counsel assume "joint responsibility" for the related matter. Such

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<sup>8</sup> These authorities focus on client consent to a fee division. See, e.g., *Statewide Grievance Comm. v. Dixon*, 772 A.2d 160, 164-65 (Conn. App. Ct. 2001) (concluding that the lawyer violated Rule 1.5(e) by failing to inform the client of payment made from recovery to prior lawyer in a different firm); Conn. Bar Ass'n, *Comm. on Prof'l Ethics Op. 01-10*, 2001 WL 34004971, at \*1 (2001) (involving a new lawyer replacing the original lawyer because of conflict). None discuss other provisions of the rule, for example, how "joint responsibility" works. As discussed above, we agree that client consent to a payment by the successor lawyer to the predecessor lawyer is necessary, but reach that conclusion without reliance on Rule 1.5(e).

responsibility entails financial and ethical responsibility for the representation as if the counsel were associated in a partnership.<sup>9</sup> A referring counsel is allowed to receive a greater portion of the fee than the counsel's own efforts would otherwise merit through the acceptance of joint responsibility.<sup>10</sup> When a client discharges a lawyer and hires a new one, there is no "referring counsel" and there is no simultaneous representation of the client. Joint responsibility in practice does not exist because predecessor counsel has been replaced. To require "joint responsibility" under Rule 1.5(e) in these situations as a pre-condition of paying the predecessor counsel's fee claim is not realistic and ultimately burdens the client's ability to discharge the first lawyer and find replacement counsel. If the successor counsel would be responsible for the errors or omissions of a discharged predecessor, he or she would at best be reluctant to accept the engagement.

### **C. Client Agreement on the Eventual Fee Allocation Between the Discharged Counsel and the Current Counsel and Conflict of Interest Waiver**

Because the client approval requirement is explicit in Rule 1.5(e), some authorities have used it as the vehicle to mandate client consent to fee divisions in consecutive representations even though Rule 1.5(e) is limited to joint representations. Rule 1.5(a), however, alone supports the conclusion that client consent is required to divide the fee at the end of the case.

Rule 1.5(a) requires that any fee be reasonable, including the total fees of predecessor and successor counsel, and client consent is required for all disbursements, including all fees payable to predecessor and successor counsel.

A client always has the right to challenge the total fee charged or the separate fee claimed by the predecessor counsel. The successor counsel may not disburse fees claimed by that counsel absent the client's consent. Otherwise, the client's right to challenge the fee as unreasonable would be impaired, if not extinguished. Of course, there may be circumstances where client consent may be inferred. For example, consent may be inferred where successor counsel has repeatedly provided notice of a proposed payment to predecessor counsel and the client has not responded.<sup>11</sup>

### **D. Role of Successor Counsel with Respect to Predecessor Counsel's Claim for a Share of the Fee**

The role of the successor counsel in the process of addressing the predecessor counsel's claim for a share of the fee may vary. The successor counsel's work may include an assessment of the legitimacy of the predecessor counsel's fee claim to properly advise the client on the client's share of any recovery and the amount of funds, if any, that successor counsel must hold in trust under Rule 1.15. If the initial scope of successor counsel's representation of the client simply leaves the matter to be decided by the predecessor counsel and the client, the successor counsel should so indicate in the engagement agreement. But if the successor counsel offers to represent the client

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<sup>9</sup> MODEL RULES R. 1.5 cmt. 7; N.Y. Cnty. Lawyers' Ass'n, Comm. on Prof'l Ethics Op. 715, 1996 WL 592658, at \*4 & n.2 (1996).

<sup>10</sup> MODEL RULES R. 1.5(e)(1).

<sup>11</sup> The fee must, of course, be within the total fee as authorized by the client in the successor lawyer's fee agreement. The successor lawyer must also have a reasonable basis to conclude that the client has received the communications and is not suffering from any mental or physical disorder that prevents the client from considering the successor lawyer's communications.

in the *client's* dispute (as opposed to the successor counsel's dispute) with the predecessor counsel, such scope of representation should be reflected either in the initial fee agreement or in a new or revised fee agreement. Typically, where successor counsel is negotiating on behalf of a client with predecessor counsel, successor counsel should review with the client the nature and extent of the predecessor counsel's entitlement to a fee, including whether the predecessor counsel has forfeited the right to a fee, in whole or in part.

Successor counsel's compensation for representing the client in the client's dispute with predecessor counsel must be reasonable, which in this context means, at a minimum, that the successor counsel cannot charge the client for work that only increases the successor counsel's share of the contingent fee and does not increase the client's recovery. Successor counsel must also obtain the client's informed consent to any conflict of interest that exists due to successor counsel's dual roles as counsel for the client *and* a party interested in a portion of the proceeds.

In many situations, the fees paid to predecessor and successor counsel may not affect the client's recovery. In these instances, successor counsel may obtain the client's consent to any fee split that does not alter the client's recovery. The client can, after consultation and adequate disclosure, decide that the matter should be worked out between counsel without further need for consent or consultation with the client. The client's consent should be informed and successor counsel may need to raise the possibility of protracted proceedings that could burden a client who may have nothing to gain and may be indifferent about the outcome.<sup>12</sup> Where the client is indifferent as to the fee allocation between the two counsel, both counsel must, in adjudicating their own dispute over their respective shares of the contingent fee, take adequate steps to protect client confidentiality under Rule 1.6, as well as any confidentiality provisions in any underlying settlement agreement.

The predecessor counsel may also seek client consent to a share of the fee. If the successor counsel represents the client in the fee dispute, then the predecessor counsel may not communicate about the fee directly with the former client without successor counsel's consent under Rule 4.2.

#### **E. The Successor Counsel's Obligations with Respect to the Funds**

Where a disagreement persists between the predecessor counsel and the client, or predecessor counsel and successor counsel, about the amount of the predecessor counsel's fees from the proceeds obtained by the successor counsel, the successor counsel must comply with Rule 1.15 and substantive law in notifying predecessor counsel of the receipt of the funds and in deciding how to handle the funds. In many jurisdictions, a counsel terminated without cause has the right to payment based on *quantum meruit*. If the client asserts that client terminated the predecessor counsel for cause, that counsel may not have any right to proceeds from the recovery.<sup>13</sup> If there is

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<sup>12</sup> Most disputes between lawyers about a fee will likely involve the client as a witness. The disputes may also involve disclosure of the client's confidential information under Rule 1.6. In many such circumstances, the client may wish simply to move on and not be involved in any dispute between her lawyers. In addition, where recoveries are obtained through settlement, many settlement agreements impose confidentiality obligations on the client as to the settlement terms. In adjudicating a fee dispute with predecessor counsel, the successor lawyer must take steps to ensure that any confidentiality term of a settlement is respected.

<sup>13</sup> Determination of what constitutes terminating a lawyer's services "for cause" or a lawyer withdrawing from a representation *without* "just cause" vary by state, but some examples of situations where a lawyer had justifiable

a dispute as to whether some or all of those funds should be paid to the predecessor counsel by the client but there is a claim to the proceeds by that counsel, the successor counsel must hold the disputed portion of the funds in a client trust account pursuant to Rule 1.15(e).<sup>14</sup>

### III. Conclusion

Where a client has engaged successor counsel in a contingent fee matter to replace predecessor counsel, successor counsel must inform the client in writing that predecessor counsel may have a claim against the contingent fee. Successor counsel is not, however, bound by the fee-division procedures set forth in Model Rule 1.5(e) because such procedures are designed to address situations where two lawyers from different firms handle a case concurrently. Upon a recovery, successor counsel must obtain the client's agreement before dividing any fee with predecessor counsel. In resolving any dispute, particularly a dispute solely between counsel, both successor and predecessor counsel remain bound by their confidentiality obligations to the client and any further confidentiality obligations undertaken by the client in a settlement of the underlying matter. In handling funds that are in dispute, the successor lawyer must follow the requirements of Model Rule 1.15.

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#### AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328

CHAIR: Barbara S. Gillers, New York, NY ■ John M. Barkett, Miami, FL ■ Robert Hirshon, Ann Arbor, MI ■ Thomas B. Mason, Washington, DC ■ Michael H. Rubin, Baton Rouge, LA ■ Douglas R. Richmond, Chicago, IL ■ Lynda Shely, Scottsdale, AZ ■ Norman W. Spaulding, Stanford, CA ■ Elizabeth Clark Tarbert, Tallahassee, FL ■ Lisa D. Taylor, Parsippany, NJ

**CENTER FOR PROFESSIONAL RESPONSIBILITY:** Dennis A. Rendleman, Ethics Counsel

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cause to withdraw and may be entitled to a *quantum meruit* fee are: obligation to withdraw due to unforeseen conflict of interest (Smith & Burnetti, P.A. v. Faulk, 677 So. 2d 404 (Fla. Dist. Ct. App. 1996)); unanticipated costs and expenses of litigation (Smith v. R.J. Reynolds Tobacco Co., 630 A.2d 820 (N.J. Super. Ct. App. Div. 1993)); client refused to comply with discovery obligations (Ashford v. Interstate Trucking Corp. of America, Inc., 524 N.W.2d 500 (Minn. Ct. App. 1994)).

<sup>14</sup> The statements in this section are general in nature and do not address substantive law issues that may vary from state to state regarding charging or retaining liens. The rights and claims of the predecessor lawyer may depend on whether the client terminated the lawyer for cause or without cause, whether the lawyer withdrew with or without cause, or whether the lawyer has an effective lien. These substantive law issues are not addressed in this Opinion.