

**RULE CHANGE 2020(31)**

**RULES GOVERNING CONTINGENT FEES**

## **Chapter 23.3 Rules Governing Contingent Fees [Repealed and reenacted as amended in Colo. RPC 1.5(c), effective January 1, 2021.]**

### **~~Rule 1. Definitions~~**

~~In this rule, the term “contingent fee agreement” means a written agreement for legal services of an attorney or attorneys (including any associated counsel), under which compensation is to be contingent in whole or in part upon the successful accomplishment or disposition of the subject matter of the agreement.~~

### **~~Rule 2. Construction~~**

~~Unless expressly prohibited by this rule, no written contingent fee agreement shall be regarded as champertous if made in an effort in good faith reasonably to comply with this rule. The Colorado Rules of Professional Conduct may be considered in reviewing disputed contingent fee agreements.~~

### **~~Rule 3. Prohibitions~~**

~~No contingent fee agreement shall be made (a) in respect to the procuring of an acquittal upon any favorable disposition of a criminal charge, (b) in respect of the procuring of a dissolution of marriage, determination of invalidity of marriage or legal separation, (c) in connection with any case or proceeding where a contingency method of a determination of attorneys’ fees is otherwise prohibited by law, the Colorado Rules of Professional Conduct, or governmental agency rule, or (d) if it is unconscionable, unreasonable, and unfair.~~

### **~~Rule 4. Procedure~~**

~~(a) Before a contingent fee agreement is entered into the attorney shall disclose to the prospective client in writing:~~

~~(1) The nature of other types of fee arrangements;~~

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~~(2) The nature of specially awarded attorney fees;~~

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~~(3) The nature of expenses and the estimated amount of expenses to handle the matter to conclusion;~~

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~~(4) The potential for an award of costs and attorneys’ fees to the opposing party.~~

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~~(5) What is meant by “associated counsel”; and~~

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~~(6) What is meant by “subrogation” and effect of any subrogation interest or lien.~~

~~(b) Each contingent fee agreement shall be in writing in duplicate. Each duplicate copy shall be signed both by the attorney and by each client. One signed duplicate copy shall be mailed or delivered to each client within ten days after the making of the agreement. One such copy (and proof that the duplicate copy has been delivered or mailed to the client) shall be retained by the attorney for a period of six years after the completion or settlement of the case or the termination of the services, whichever event first occurs.~~

~~(c) A written disbursement statement shall issue to the client at the time of final disbursement.~~

### **Rule 5. Contents**

~~Each contingent fee agreement shall contain (a) the name and mail address of each client; (b) the name and mail address of the attorney or attorneys to be retained; (c) a statement of the nature of the claim, controversy and other matters with reference to which the services are to be performed; (d) 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; (e) a statement of the precise percentage to be charged subject to the limitations of Rule 3(d); and (f) a stipulation that the client, except as permitted by the Rules of Professional Conduct, including Rule 1.8(e), is to be liable for expenses, such stipulation including an estimate of such expenses, authority of the attorney to incur the expenses and make disbursements, a maximum limitation not to be exceeded without the client's further written authority. The final disbursement statement shall reflect the amount received, expenses incurred in handling of the case and computation of the contingency fee.~~

### **Rule 6. Sanction for Non-Compliance**

~~No contingent fee agreement shall be enforceable by the involved attorney unless there has been substantial compliance with all of the provisions of this Chapter 23.3.~~

### **Rule 7. Forms**

~~The following forms may be used and shall be sufficient. The authorization of these forms shall not prevent use of other forms consistent with this Chapter 23.3.~~

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Form 1

#### **Disclosure Statement**

#### **Type of Attorney Fee Agreements:**

~~I have been informed and understand that there are several types of attorney fee arrangements: (1) time based, (2) fixed, (3) contingent, or (4) combinations of these types of fee arrangements. "Time based" means a fee that is determined by the amount of time involved such as so much per hour, day or week. "Fixed" means a fee that is based on an agreed amount regardless of the time or effort involved or the result obtained. "Contingent" means a certain agreed percentage or amount that is payable only upon attaining a recovery regardless of the time or effort involved. I understand that not all attorneys offer all of these different types of fee arrangements, and I acknowledge that I have the right to contact other attorneys to determine if they may provide such other fee arrangements for my case or matter. After such consideration or consultation, I have elected the fee arrangement set forth in the accompanying contingent fee agreement.~~

#### **Specially Awarded Attorney Fees:**

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~~I have been informed and understand that the court or an arbitrator may sometimes award attorney fees in addition to amount of recovery being claimed. I understand that the fee agreement I enter into with my attorney should contain a provision as to how any specially awarded attorney fees will be accounted for and handled.~~

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#### **Expenses:**

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~~I have been informed and understand that there may be expenses (aside from any attorney fee) in pursuing my claim. Examples of such expenses are: fees payable to the court, the cost of serving process, fees charged by expert witnesses, fees of investigators, fees of court reporters to take and prepare transcripts of depositions, and expenses involved in preparing exhibits. I understand that an attorney is required to provide me with an estimate of such expenses before I enter into an attorney fee agreement and that my attorney fee agreement should include a provision as to how and when such expenses will be paid. I understand that the fee agreement should tell me whether a fee payable from the~~

proceeds of the amount collected on my behalf will be based on the "net" or "gross" recovery. "Net recovery" means the amount remaining after expenses and deductions. "Gross recovery" means the total amount of the recovery before any deductions. The estimated amount of the expenses to handle my case will be set forth in the contingent fee agreement.

**The Potential of Costs and Attorney's Fees Being Awarded to The Opposing Party:**

I have been informed and understand that a court or arbitrator sometimes awards costs and attorney fees to the opposing party. I have been informed and understand that should that happen in my case, I will be responsible to pay such award. I understand that the fee agreement I enter into with my attorney should provide whether an award against me will be paid out of the proceeds of any amount collected on my behalf. I also understand that the agreement should provide whether the fee I am obligated to pay my attorney will be based on the amount of recovery before or after payment of the awarded costs and attorney fees to an opposing party.

**Associated Counsel:**

I have been informed and understand that my attorney may sometimes hire another attorney to assist in the handling of a case. That other attorney is called an "associated counsel." I understand that the attorney fee agreement should tell me how the fees of associated counsel will be handled.

**Subrogation:**

I have been informed and understand that other persons or entities may have a subrogation right in what I recover in pursuing my claim. "Subrogation" means the right to be paid back. I understand that the subrogation right may arise in various ways such as when an insurer or a federal or state agency pays money to or on behalf of a claiming party like me in situations such as medicare, medicaid, worker's compensation, medical/health insurance, no fault insurance, uninsured/underinsured motorist insurance, and property insurance situations. I understand that sometimes a hospital, physician or an attorney will assert a "lien" (a priority right) on a claim such as the one I am pursuing. Subrogation rights and liens need to be considered and provided for in the fee agreement I reach with my attorney. The fee agreement should tell me whether the subrogation right or lien is being paid by my attorney out of the proceeds of the recovery made on my behalf and whether the fee I am obligated to pay my attorney will be based on the amount of recovery before or after payment of the subrogation right or lien.

I acknowledge that I received a complete copy of this Disclosure Statement and read it this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

.....  
(Signature)

**Alternative Attorney Compensation:**

I have been informed and understand that if, after entering into a fee agreement with my attorney, I terminate the employment of my attorney or my attorney justifiably withdraws, I may nevertheless be obligated to pay my attorney for the work done by my attorney on my behalf. The fee agreement should contain a provision stating how such alternative compensation, if any, will be handled.

I acknowledge that I received a complete copy of this Disclosure Statement and read it this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

.....  
(Signature)

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**CONTINGENT FEE AGREEMENT**

(To be Executed in Duplicate)

Dated \_\_\_\_\_, 20\_\_

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The Client \_\_\_\_\_ (Name) (Street & No.) (City or Town) retains the

to perform the legal services mentioned in paragraph (1) below. The attorney agrees to perform them faithfully and with due diligence.

(1) ~~The claim, controversy, and other matters with reference to which the services are to be performed are:~~

(2) ~~The contingency upon which compensation is to be paid is:~~

(3) ~~The client is not to be liable to pay compensation otherwise than from amounts collected for the client by the attorney, except as follows:~~

~~In the event the client terminates this contingent fee agreement without wrongful conduct by the attorney which would cause the attorney to forfeit any fee, or if the attorney justifiably withdraws from the representation of the client, the attorney may ask the court or other tribunal to order the client to pay the attorney a fee based upon the reasonable value of the services provided by the attorney. If the attorney and the client cannot agree how the attorney is to be compensated in this circumstance, the attorney will request the court or other tribunal to determine: (1) if the client has been unfairly or unjustly enriched if the client does not pay a fee to the attorney; and (2) the amount of the fee owed, taking into account the nature and complexity of the client's case, the time and skill devoted to the client's case by the attorney, and the benefit obtained by the client as a result of the attorney's efforts. Any such fee shall be payable only out of the gross recovery obtained by or on behalf of the client and the amount of such fee shall not be greater than the fee that would have been earned by the attorney if the contingency described in this contingent fee agreement had occurred.~~

(4) ~~The client will pay the attorney (including any associated counsel)    percent of the (gross amount collected) (net amount collected) [indicate which]. ("Gross amount collected" means the amount collected before any subtraction of expenses and disbursements) ("Net amount collected" means the amount of the collection remaining after subtraction of expenses and disbursements [including] [not including] court awarded costs or attorneys' fees.) [indicate which]. "The amount collected" (includes) (does not include) [indicate which] specially awarded attorneys' fees and costs awarded to the client.~~

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(5) ~~Costs and attorneys' fees awarded to an opposing party against the client before completion of the case will be paid (by the client) (by the attorney) [indicate which] when ordered. Any award of costs or attorneys' fees, regardless of when awarded, (will) (will not) [indicate which] be subtracted from the amount collected before computing the amount of the contingent fee under this agreement.~~

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(6) ~~The client is to be liable to the attorney for reasonable expenses and disbursements. Such expenses and disbursements are estimated to be \$ \_\_\_\_\_. Authority is given to the attorney to incur expenses and make disbursements up to a maximum of \$ \_\_\_\_\_ which limitation will not be exceeded without the client's further written authority. The client will reimburse the attorney for such expenditures (upon receipt of a billing), (in specified installments), (upon final resolution), (etc.) [indicate which].~~

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**WE HAVE EACH READ THE ABOVE AGREEMENT BEFORE SIGNING IT.**

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~~Witnesses to Signatures:~~

-

~~(Signature of Client)~~

-

~~Witness to Client's Signature~~

-

~~(Signature of Attorney)~~

-

~~Witness to Attorney's Signature~~

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~~\* [Here insert the percentages to be charged in the event of collection. These may be on a flat basis or on a descending scale in relation to amount collected.]~~

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~~(7) The client (authorizes) (does not authorize) [indicate which] the attorney to pay from the amount collected the following: (e.g., all physicians, hospitals, subrogation claims and liens, etc.). Where the applicable law specifically requires the attorney to pay the claims of third parties out of any amount collected for the client, the attorney shall have the authority to do so notwithstanding any lack of authorization by the client, but if the amount or validity of the third party claim is disputed by the client, the attorney shall deposit the funds into the registry of an appropriate court for determination. Any amounts paid to third parties (will) (will not) [indicate which] be subtracted from the amount collected before computing the amount of the contingent fee under this agreement.~~

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~~WE HAVE EACH READ THE ABOVE AGREEMENT BEFORE SIGNING IT.~~

-

~~Witnesses to Signatures:~~

-

~~(Signature of Client)~~

-

~~Witness to Client's Signature~~

-

~~(Signature of Attorney)~~

-

~~Witness to Attorney's Signature~~

-

**FINAL DISBURSEMENT STATEMENT**

GROSS RECOVERY ..... \$

Itemization of expenses incurred in handling of case:

\$

\$

\$

\$

Total Expenses \$

Amount of Expenses

Advanced by Attorney \$

Amount of Expenses

Paid by Client \$

NET RECOVERY ..... \$

Computation of Contingent Fee:

% of (Net) (Gross)

Recovery = \$ \_\_\_\_\_  
- -

Total Fee  
-

(and expenses ad-  
-

vanced by attorney)\*

\$ \_\_\_\_\_  
-

DISBURSEMENT TO CLIENT .....

\$ \_\_\_\_\_  
-

\* (If fee is on "Net Recovery" and attorney has advanced expenses which are being reimbursed from the "gross recovery.")  
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(Signature of Attorney)  
-

(Signature of Client)  
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By signature client acknowledges receipt of a copy of this disbursement statement.

#### COMMITTEE COMMENT

The Rules contained in this Chapter 23.3 set forth the minimum requirements of all enforceable contingency fee agreements in Colorado. The Rules do not prohibit additional terms, provided that such terms are not inconsistent with these Rules or the Colorado Rules of Professional Conduct.

One type of provision that is sometimes included in contingent fee agreements is a "conversion clause." A conversion clause is a provision that converts the fee due from the contingent amount set forth in the contract to some other type of fee, often an hourly based fee, when the contract is terminated before the contingency occurs.

There are a number of factors that must be considered to determine the ethical propriety and legal enforceability of a conversion clause. These factors are set forth and analyzed in Formal Opinion 100, issued by the Colorado Bar Association Ethics Committee. Opinions of the CBA Ethics Committee are available on the Internet at [www.cobar.org](http://www.cobar.org). This Committee notes that any conversion clause that purports to remove the contingency by making the attorney's fees payable without regard to the occurrence of the contingency, is presumptively invalid, unless the client is relatively sophisticated, has the demonstrated



~~means to pay the attorney's fee even before the occurrence of the contingency, and has specifically negotiated the conversion clause.~~

~~The Colorado Supreme Court has held that an attorney cannot recover a fee based upon quantum meruit or unjust enrichment, unless the contingent fee agreement provides notice to the client of the possibility of such a fee. *Dudding v. Norton Frickey & Associates*, 11 P.3d 441 (Colo. 2000). Section (3) of the form Contingent Fee Agreement, which is a part of Chapter 23.3, provides notice to the client of the possibility of a quantum meruit or unjust enrichment fee recovery.~~

**Chapter 23.3 Rules Governing Contingent Fees [Repealed and reenacted as amended in  
Colo. RPC 1.5(c), effective January 1, 2021.]**

**Amended and Adopted by the Court, En Banc, October 1, 2020, effective January 1, 2021.**

**By the Court:**

**Monica M. Márquez  
Justice, Colorado Supreme Court**