SUMMARY
May 9, 2024

2024COA50

No. 23CA0379, *Estate of McClain v. Killmer, Lane & Newman, LLC* Attorneys and Clients — Rules of Professional Conduct — Contingent Fee Agreements — Restatement (Third) of the Law Governing Lawyers — Partial or Complete Forfeiture of a Lawyer's Compensation

In the first reported case in Colorado to do so, a division of the court of appeals applies the Restatement (Third) of the Law Governing Lawyers § 37 (Am. L. Inst. 2000) to assess whether a lawyer's wrongful conduct causes the lawyer to forfeit any fee associated with their representation of the client. The case analyzes the factors set forth in section 37 in view of existing Colorado case law and ethical considerations and applies them to a unique set of facts involving a case of ongoing public interest.

COLORADO COURT OF APPEALS **2024COA50**

Court of Appeals No. 23CA0379
City and County of Denver District Court No. 22CV31376
Honorable Ross B.H. Buchanan, Judge

Estate of Elijah McClain and Sheneen McClain, individually and as co-personal representative of the Estate of Elijah McClain,

Plaintiffs-Appellants,

v.

Killmer, Lane & Newman, LLP,

Defendant-Appellee.

JUDGMENT AFFIRMED IN PART
AND REVERSED IN PART

Division II
Opinion by JUDGE SCHUTZ
Fox and Moultrie, JJ., concur

Announced May 9, 2024

Ciancio, Ciancio, Brown, P.C., Loren M. Brown, Daniel A. Wartell, Denver, Colorado, for Plaintiffs-Appellants

McConnell Van Pelt, LLC, Michael T. McConnell, Robert W. Steinmetz, Denver, Colorado, for Defendant-Appellee

¶ 1 Plaintiffs, Sheneen McClain and the Estate of Elijah McClain (Estate), appeal the district court's judgment awarding attorney fees to defendant, Killmer, Lane & Newman, LLP (KLN).

¶ 2 In a contingency fee agreement, a lawyer agrees to represent a client based on the lawyer's right to collect a fee if a particular contingency is satisfied. Typically, the contingency is the successful recovery of money on the client's behalf. If that contingency is satisfied, the lawyer usually receives a percentage of the amount recovered on behalf of the client. If the contingency is not satisfied, the lawyer is usually not paid for their services.

¶ 3 Contingent fee agreements serve important public policy interests because they allow a client who might not otherwise be able to afford a traditional fee arrangement to obtain representation. But contingent fee agreements also present the potential for conflicts of interest between lawyers and clients, particularly when the lawyer is serving multiple clients.

¶ 4 Clients retain the right to terminate their lawyer at any time and for any reason. But what happens if a lawyer has provided the client with valuable legal services under a contingency fee agreement and the client nevertheless decides to terminate the

lawyer before the fee triggering contingency is satisfied? In such circumstances, if the lawyer's conduct is sufficiently wrongful, the lawyer may be completely prohibited from recovering a fee. But, in other circumstances, the lawyer may be awarded a reasonable fee for the services provided prior to termination.

¶ 5 In this case, we identify the factors a court should apply to determine whether a lawyer should be awarded a fee notwithstanding the existence of a concurrent conflict of interest. We also identify the factors a court should consider in assessing a reasonable fee when the lawyer is terminated for cause but the lawyer's conduct has not resulted in a complete forfeiture of the right to collect a fee. Applying those factors, we affirm in part and reverse in part the judgment entered by the district court.

I. Background

A. Elijah McClain's Death

¶ 6 This case arises from the death of Elijah McClain, who was injected with ketamine by an Aurora Fire Rescue (AFR) paramedic while detained by Aurora Police Department (APD) officers. After a six-day bench trial, the court made the following findings of fact,

which — except as otherwise noted — are largely undisputed by these parties.

¶ 7 On August 24, 2019, at about 10:30 p.m., Elijah[1] was walking home from a gas station after buying several cans of iced tea. APD officers, responding to a call about a "suspicious" person, confronted him. Over the next twenty-two minutes officers detained Elijah, pushed him up against a brick wall, twice put him in a carotid hold, forced him to the ground and placed their weight on him, and handcuffed him.

¶ 8 Elijah questioned why he had been stopped and pleaded with the officers that he was in pain and unable to breathe. They appeared to ignore his pleas. Eventually, the APD officers concluded that Elijah was experiencing "excited delirium" and decided to administer a 500 milligram dose of ketamine, which substantially exceeded the appropriate dosage for a man of Elijah's

[1] To avoid confusion between those who share a last name, we refer to Elijah McClain as Elijah, and we refer to Sheneen McClain, Elijah's mother, as McClain. We mean no disrespect in doing so.

size and weight.[2] The ketamine was supplied by an ambulance crew associated with Falck Rocky Mountain (Falck) and administered by an AFR paramedic.

¶ 9 Elijah was transported to a nearby hospital. En route he suffered a cardiac arrest and lost consciousness. He never recovered. Elijah was twenty-three years old when he died in the hospital on August 30, 2019. He was unmarried and had no children. His mother and father were his only legal heirs.

¶ 10 All parties, and the district court, emphasized and appreciated Elijah's remarkable humanity. He was, by many reports, kind, gentle, sensitive, introverted, musical, a cat lover, and lived a life of acceptance and gratitude. Both in life and in death, Elijah left profound and lasting impacts on many people and institutions.

¶ 11 Shortly after Elijah's death, McClain sought legal counsel. McClain's goals were multifaceted, including honoring Elijah's life; holding those who caused his death accountable; obtaining financial compensation for Elijah's pain, suffering, and losses; and

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[2] McClain's anticipated expert in the federal litigation was prepared to testify that the dosage of ketamine for a person of Elijah's height and weight actually experiencing excited delirium would have been 325 milligrams.

effectuating change in how law enforcement officers use potentially lethal force.

B. KLN's Hiring

¶ 12 McClain met with Mari Newman, a partner at KLN, within days of Elijah's death. KLN has extensive experience representing plaintiffs in federal civil rights claims against law enforcement officials and related wrongful death actions. KLN does not practice, however, in the area of probate law.

¶ 13 During their initial meeting, Newman asked McClain about Elijah's father. McClain explained that she had raised Elijah by herself, and that Elijah's father, LaWayne Mosley, had denied paternity of Elijah until a test confirmed otherwise. McClain informed Newman that Mosley was an absent father and owed her child support.

¶ 14 Newman advised McClain that, to present a united front, it would be best if KLN represented both parents during the anticipated litigation. McClain phoned Mosley and he joined the meeting approximately thirty minutes later.

¶ 15 McClain and Newman have different recollections about the discussions surrounding the parents' respective objectives and

whether they would need to retain separate probate counsel "down the line" to resolve potential disagreements concerning how any financial recovery was to be divided. McClain testified that she said her primary objective was to hold those who caused Elijah's death accountable and did not remember any discussion about Mosley's objectives. McClain also did not recall any discussion about the possible need to retain additional counsel in the future. Newman, on the other hand, stated that she emphasized KLN's role would be limited to maximizing the financial recovery from the responsible parties, KLN would stay out of the question of how any recovery would be divided, and McClain and Mosley might need separate counsel in the future to address the division of any recovery.

¶ 16 McClain and Mosley signed a contingent fee agreement with KLN (CFA) on the day of their initial visit. The CFA identified McClain and Mosley as the clients. It stated that they would be obligated to pay a fee of 40% of the amounts KLN "collected for clients." The agreement also stated that they could terminate KLN for any reason, and if "clients terminate this Agreement without wrongful conduct by law firm which would cause law firm to forfeit any fee, . . . law firm may ask the court . . . to order clients to pay

law firm a fee based upon the reasonable value of the services provided by law firm." In such event, the agreement specified:

> If law firm and clients cannot agree how law firm is to be compensated in this circumstance, law firm will request the court or other tribunal to determine: 1) if clients have been unfairly or unjustly enriched if clients do not pay a fee to law firm; and 2) the amount of the fee owed, taking into account the nature and complexity of clients' case, the time and skill devoted to clients' case by law firm, and the benefit obtained for client as a result of law firm's efforts.

¶ 17 When they signed the CFA, McClain and Mosley also received and signed an "Addendum" containing additional rules governing the agreement. In a section entitled "Alternative Attorney Compensation," the Addendum advised:

> 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.

¶ 18 Neither the CFA nor the Addendum references the possible retention of probate counsel, whether by general description or

specific name. In addition, neither document contemplated representation of the clients by any other lawyer or firm.

C. KLN's Various Services

¶ 19 Despite lacking expertise in probate matters, in October 2019, Newman filed a case in probate court to establish the Estate. Those filings requested that McClain and Mosley be appointed the co-personal representatives of the Estate, and they were. Even though the Estate was now in existence, the parties did not amend the CFA to include the Estate, and KLN did not enter into a separate contingent fee agreement with the Estate.

¶ 20 KLN also participated in public events regarding the circumstances of Elijah's death. McClain participated in some of these activities, but she was reluctant to participate in others. Aspects of Mosley's participation irritated McClain because he had not been involved in Elijah's life, and she felt that some of his public statements mischaracterized Elijah and his legacy.[3]

[3] Mosley was not a party to the underlying litigation and did not testify at trial. Thus, the record does not reflect Mosley's perspective on these issues.

D. The Growing Conflicts

¶ 21 McClain testified that she was always uncomfortable with KLN representing her and Mosley, especially after Mosley made what she thought were inappropriate public statements concerning Elijah. McClain also thought it was inherently inappropriate for Mosley to expect a fifty percent share in any proceeds of the legal proceedings when he had not played a significant role in Elijah's life. McClain expressed her concerns in an email she sent Newman in late January 2020:

> Who determines how much of the funds will be distributed to the custodial parent vs the absent parent, probate court right? Accountability on all levels is the only way I can move, [Mosley] claims a right to any lawsuit dividends because he was forced to pay child support through the courts, I also have overwhelming evidence to this fact . . . . Once the [E]state is funded, if at all from the lawsuits, I will be seeking another way to properly distribute the funds accordingly by accountability . . . .

Despite these concerns, McClain allowed KLN to continue representing her.

¶ 22 KLN's litigation strategy was to first file a lawsuit against Falck for its role in providing the ketamine that was injected into Elijah.

Despite not having a fee agreement with the Estate, KLN proceeded — with McClain's and Mosley's approval — to pursue litigation against Falck. The case settled by August 2020 for the gross amount of $350,000. KLN prepared a disbursement schedule for the settlement proceeds, which McClain and Mosley signed and approved, that contemplated payment of a 40% contingent fee to KLN. After payment of outstanding medical liens and legal expenses, the remaining settlement proceeds were split 50/50 between McClain and Mosley. McClain stated that she was fine with this disbursement because it would help Mosley "get back on his feet." No funds were withheld from Mosley's proceeds to pay McClain what he owed her for child support.

¶ 23 On the same day of the Falck disbursement, Newman wrote to McClain summarizing the various steps that KLN was taking to achieve McClain's numerous goals. Newman stated that she would continue to pursue the civil rights claims in a manner to maximize recovery, but she also stated,

> As we discussed, I believe that when it comes to the division of any funds we win for you in the civil rights case, it makes sense for you to each hire your own separate probate lawyers to represent you. My role is to work to get the

> most money for you that I can in the civil rights case, and your probate lawyers will make sure that you are fairly represented in how it gets divided up.

McClain responded with an email stating, "I agree that a separate lawyer is needed after the previous events showed funds may not be divided correctly due to incorrect placement of responsibilities performed in Elijah's life and death. As the custodial parent, I Shaneen McClain, will challenge future payments to . . . Mosley."

¶ 24 KLN filed a lawsuit the next day on behalf of the Estate, McClain, and Mosley against the City of Aurora, twelve APD officers, two AFR paramedics, and AFR's medical director (the Aurora defendants). The complaint and jury demand was 106 pages long and asserted five separate claims for relief based on 42 U.S.C. § 1983 and Colorado's wrongful death statute — sections 13-21-201 through 13-21-204, C.R.S. 2023.

¶ 25 Two days later, McClain wrote Newman again:

> It[']s going to come out anyway, everyone already knows I raised Elijah by myself and child support, among other things, is proof of my words. As long as [Mosley] understands his position, then all should be fine, but if any piggyback riding is going on with things my daughters and I started, this will all become public real soon. Stop Spotlighting, [Mosley].

> Lies for cameras, t[-]shirts and any sports endorsement are AGAINST ELIJAH AND MYSELF. [Newman], with all due respect, please do not tell me how to defend my son in his death, [Mosley] wants the rewards for a job I did alone. Divine Justice for Elijah McClain means all lies will be uncovered and known worldwide.

¶ 26 For the remainder of 2020, the tensions between McClain and KLN continued. During this period McClain and Mosley retained separate probate counsel.

¶ 27 In late 2020, the conflicts between Newman and McClain escalated over how best to address the Aurora defendants' requests to obtain Elijah's medical and school records. McClain perceived the requests as an attack on Elijah's memory and privacy, while Newman counseled that the discovery would likely be allowed by the court and they should produce the requested information. These various conflicts came to a head on January 27, 2021, when McClain terminated KLN as her counsel.

E. RM's Engagement

¶ 28 On the same day that she terminated KLN, McClain hired the law firm of Rathod Mohamedbhai (RM) as her counsel. McClain signed a 40% percent contingent fee agreement with RM (RM CFA),

which like the CFA, was largely based on Colorado's model contingent fee agreement. *See* Colo. RPC 1.5.[4] Like the CFA, the RM CFA did not identify associate counsel that would be assisting RM in McClain's representation.

¶ 29 In late February 2021, Qusair Mohamedbhai — on behalf of RM — and Darold Killmer — on behalf of KLN — discussed ongoing representation in the case. Mohamedbhai communicated that McClain did not like or trust Newman and wanted her off the case. Mohamedbhai also recognized that it would be very difficult for Newman to step away completely because she had intimate knowledge of the case. During this conversation, Mohamedbhai suggested an agreement between the two firms to divide the work on the case. Eventually the firms agreed to an 80/20 split of all fees, 80% to KLN, and 20% to RM (80/20 Agreement).

¶ 30 Mohamedbhai memorialized the terms of the agreement:

> I am writing to memorialize our agreement regarding the split of fees in the McClain case

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[4] Before January 1, 2021, the rules and model forms for contingent fee agreements were located in Chapter 23.3 of the Colorado Rules of Civil Procedure. Rule Change 2020(31), Colorado Rules of Civil Procedure (Amended and Adopted by the Court En Banc, Oct. 1, 2020), https://perma.cc/V9YW-TRK3. The rule and model forms are now part of Colo. RPC 1.5(c).

> between our two law firms. In the event that this case resolves at or before the two-day mediations likely to occur in June, or resolves from efforts that arise[] out of the mediation and before depositions commence, and assuming that RM is still representing Shaneen McClain at that time, RM will be entitled to 20% of the attorney[] fees recovered and KLN will be entitled to 80% of the attorney fees recovered. If litigation meaningfully re-commences after a failure of the mediation, as shown by the taking of any deposition, we will re-visit agreement between the law firms.

There is no evidence that McClain signed this document. Moreover, the trial produced no evidence that McClain was advised of the 80/20 Agreement or that she approved it, verbally or in writing.

¶ 31 Mediation to resolve the federal litigation occurred over three days in June 2021. Over those three days, representatives from the City of Aurora raised their settlement offer from $1 million on the first day to $10 million on the third day — the limit of Aurora's liability policy. McClain had sought to recover $23 million, or $1 million for each year of Elijah's life. KLN thought this figure might be attainable through continued negotiations.

¶ 32 Shortly after the third day of mediation, and for reasons not explained in the record, Mohamedbhai contacted lead counsel for the Aurora defendants, Peter Morales, and asked if the Aurora

defendants would be willing to settle for $15 million. Morales quickly secured authorization, and McClain, Mosley and the Estate ultimately agreed to settle for that amount.

¶ 33 McClain and Mosley negotiated over the allocation of the $15 million for the next few months. As part of the settlement agreement, the insurer issued two checks in the total amount of $15 million made payable to the Clerk of Court, United States District Court for the District of Colorado.

¶ 34 After several mediation sessions, they agreed that McClain would receive 65% of the gross settlement, or $9.75 million, and Mosley would receive 35%, or $5.25 million, with both sums subject to any applicable claims for attorney fees and costs. No portion of the settlement proceeds was allocated or distributed to the Estate.

¶ 35 The day after McClain and Mosley reached this resolution, KLN wrote to RM asserting that it was entitled to a 40% contingent fee from McClain, or $3.9 million.

F. The Attorney Fee Litigation

¶ 36 In response to KLN's demand, McClain and the Estate filed suit seeking a declaratory judgment that because KLN had been terminated for cause, it was not entitled to any fees for its work on

behalf of McClain and the Estate. Alternatively, McClain and the Estate argued that KLN was entitled, at most, to an award of fees on a quantum meruit basis.

¶ 37 KLN filed a counterclaim against McClain and the Estate. KLN asserted that it had done nothing wrong and that it was entitled to a 40% contingent fee under the CFA for all sums recovered by McClain, and that fee was to be divided between KLN and RM pursuant to the 80/20 Agreement. KLN claimed alternatively that if the CFA was unenforceable, McClain owed it a fee based on quantum meruit principles. KLN also filed a third-party complaint against RM, alleging that it was a necessary party to resolving the dispute in view of the 80/20 Agreement.

¶ 38 KLN filed an amended counterclaim and third-party complaint approximately three weeks before trial. Therein, KLN again asserted a single claim requesting a declaratory judgment. It asked for three alternative declarations:

> a. That Sheneen McClain is obligated under the [CFA] to . . . pay a 40% contingent fee from the monies she received from the settlement of the Federal Action and that 40% contingent fee be allocated between KLN and RM in accordance with [the 80/20 Agreement].

> b. That Sheneen McClain is obligated under the [RM CFA] . . . to pay a 40% contingent fee from the monies she received from the settlement of the Federal Action and that 40% contingent fee be allocated between KLN and RM in accordance with [the 80/20 Agreement].
>
> c. In the alternative, if the [CFA] and/or [RM CFA] are, for any reason, held to be unenforceable, that the amount of legal fees Sheneen McClain is obligated to pay KLN be determined in accordance with the equitable doctrine of quantum meruit.

KLN made no request for an award of fees against the Estate.

G. The District Court's Order

¶ 39 In a lengthy and thoughtful order, the district court determined that KLN had a concurrent conflict of interest in representing both McClain and Mosley, and therefore, that McClain had terminated KLN's representation for cause. But the court concluded that KLN's wrongful conduct was not so "clear and serious" that it warranted a complete forfeiture of KLN's right to any compensation for its work on behalf of McClain and the Estate.

¶ 40 The court then concluded that KLN was entitled to "the full 40% contingent fee" of the funds allocated to McClain, but that the fees would be divided between KLN and RM pursuant to the 80/20

Agreement. Thus, the district court awarded KLN $3.12 million against McClain for its work on the federal litigation.

¶ 41 The court followed a slightly different path to set the fee due to KLN based on the Falck settlement. As to that separate recovery, the court determined that KLN was entitled to a 40% contingent fee, but that it would need to repay McClain the following sums: (1) $22,785.10 (the difference between the actual 50% split and the eventual 65% split in McClain's favor in the federal litigation); (2) the amount Mosley owed McClain for past child support; and (3) the amount of fees McClain paid a probate attorney.

¶ 42 Finally, the court also awarded RM $780,000 from McClain's portion of the recovery in the federal litigation and $420,000 from Mosley's portion of that recovery, apparently pursuant to the 80/20 Agreement (as applied to the 40% contingent fee).

¶ 43 On appeal, McClain and the Estate first contend that the district court erred by finding that KLN's wrongful conduct was not so clear and serious that it caused a complete forfeiture of KLN's right to recover a fee for work performed on behalf of McClain and the Estate. Second, they argue that the district court erred by calculating any fee based on the 40% fee contemplated by the CFA.

McClain and the Estate also argue that KLN forfeited any right to a fee related to the Falck settlement because KLN did not have a written fee agreement with the Estate, and that the representation was impacted by the same conflicts of interest that tainted the joint representation of McClain, the Estate, and Mosley in the federal litigation. KLN urges us to affirm the district court's order.

¶ 44 Before addressing the parties' arguments, we pause briefly to provide context concerning the unique ethical considerations and corresponding requirements that impact the enforceability of contingent fee agreements in Colorado.

II. Contingent Fee Agreements in Colorado

¶ 45 The supreme court has recognized the laudable role that contingent fee agreements play in facilitating access to justice for those who might not otherwise be able to pay for legal counsel:

> The Colorado Rules of Professional Conduct . . . embrace the goal of providing equal access to justice:
>
> > A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to

> ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.
>
> To encourage attorneys to achieve this objective, the Rules of Professional Conduct permit contingency fee agreements to enable attorneys to provide representation to persons who cannot afford attorneys. Contingency fee agreements still remain subject to the requirement under the ethical rules that attorneys' fees be reasonable, as well as the specific requirements and terms contained in [Colo. RPC 1.5].

Mercantile Adjustment Bureau, L.L.C. v. Flood, 2012 CO 38, ¶ 20 (citations omitted).

A. Ethical Rules Governing Contingent Fees

¶ 46 While serving important objectives in bridging the access-to-justice gap, contingent fees also create inherent ethical tensions. Foremost, they create a situation in which the lawyer has a vested financial interest in maximizing the amount of recovery that will be subject to the percentage fee. These unique concerns can impact the judgment of even the most conscientious lawyer. To help navigate these tensions, Colo. RPC 1.5 provides strict parameters for creating an enforceable contingent fee agreement.

¶ 47 As relevant to this dispute, Rule 1.5 mandates that a contingent fee agreement must be in writing, identify the name of the lawyer(s) and client(s) who will be bound by the agreement, and be signed by those lawyer(s) and client(s). Colo. RPC 1.5(c)(1)(i), (2).

¶ 48 Regarding legal services from a lawyer other than the lawyer who is a signatory to the contingent fee agreement, Rule 1.5(c)(1)(viii) dictates that the contingent fee agreement contain

> [a] statement informing the client that if the lawyer wishes to hire a lawyer in another firm to assist in the handling of a matter ("associated counsel"), the lawyer will promptly inform the client in writing of the identity of the associated counsel, and that (A) the hiring of associated counsel will not increase the contingent fee, unless the client otherwise agrees in writing, and (B) the client has the right to disapprove the hiring of associated counsel and, if hired, to terminate the employment of associated counsel.

Relatedly, Rule 1.5(d) provides that a division of a fee between lawyers who are not in the same firm may be made only if

> (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
>
> (2) the client agrees to the arrangement, including the basis upon which the division of

> fees shall be made, and the client's agreement is confirmed in writing; and
>
> (3) the total fee is reasonable.

¶ 49 A client retains the right to terminate their lawyer at any time, for any reason. Colo. RPC 1.16 cmt. 4. Rule 1.5(c)(1)(iv) requires that the contingent fee agreement contain "[a] statement of the circumstances under which the lawyer may be entitled to compensation if the lawyer's representation concludes, by discharge, withdrawal or otherwise, before the occurrence of an event that triggers the lawyer's right to a contingent fee." Relatedly, the model contingent fee form appended to Rule 1.5 contains language in section 4 allowing the parties to specify how a reasonable attorney fee is to be calculated if the client terminates the lawyer before the contingency is satisfied "without wrongful conduct by the [l]awyer which would cause the [l]awyer to forfeit any fee." The model form allows the attorney to be paid a fee in such circumstances on a quantum meruit basis. Finally, a contingent fee agreement must substantially comply with all the provisions of Rule 1.5 to be enforceable. Colo. RPC 1.5(c)(6).

B. Case Law Regarding Enforceability of Defective Contingent Fee Agreements

¶ 50 Our appellate courts have addressed, on several occasions, when an attorney may be entitled to recover a fee notwithstanding a defective contingent fee agreement.

¶ 51 In an early case, *Brillhart v. Hudson*, 169 Colo. 329, 335, 455 P.2d 878, 881 (1969), the supreme court reviewed a claim by an attorney seeking enforcement of a percentage fee in a real estate transaction that the court characterized as essentially a broker's commission. The court concluded that the percentage fee was "grossly unreasonable" and remanded the case to determine "the amount of attorneys' fees to be awarded, if any, based upon the reasonable value of any services rendered." *Id.*

¶ 52 Three decades later, a division of this court considered the enforceability of a 20% contingency fee in a workers' compensation case after the lawyer neglected to obtain a written contingent fee agreement. *Beeson v. Indus. Claim Appeals Off.*, 942 P.2d 1314, 1315 (Colo. App. 1997). In that case, the original claim settled and the attorney collected his 20% fee from the proceeds. *Id.* But two years later, the client sued the lawyer to recover the fee. *Id.* A

division of this court held that the 20% fee was appropriate under a quantum meruit recovery. *Id.* at 1316-17.

¶ 53 In *Dudding v. Norton Frickey & Associates*, 11 P.3d 441 (Colo. 2000), the supreme court recognized that when a contingent fee agreement is unenforceable, the attorney can still recover under quantum meruit provided the agreement informed the client of that possibility through a valid conversion clause. *Id.* at 443. While reaching this conclusion, however, the court noted that "[q]uantum meruit principles may limit recovery in cases where the attorney either withdraws without cause or is discharged with cause. In such a case, the attorney's misconduct *may* forfeit his right to earn a fee." *Id.* at 447-48 (emphasis added). The court ultimately held that the attorney was not entitled to a quantum meruit fee because the agreement lacked the required conversion clause. *Id.* at 449.

¶ 54 In *Mullens v. Hansel-Henderson*, 65 P.3d 992 (Colo. 2002), the court addressed a lawyer's representation of a client in a workers' compensation case pursuant to a 20% written contingent fee agreement. *Id.* at 993. The lawyer and client later orally agreed to pursue a bad faith claim for a 40% contingent fee. *Id.* at 993-94. Synthesizing the holdings in *Beeson* and *Dudding*, the court

determined that a lawyer may recover a percentage fee on a quantum meruit basis when the lawyer successfully completes the litigation, thus limiting the bar created by the absence of a conversion clause to those situations where the lawyer did not complete the agreed-upon services. *Id.* at 995.

¶ 55 The supreme court's decision in *Martinez v. Mintz Law Firm, LLC*, 2016 CO 43, is also instructive. Mintz, an attorney, entered into a contingent fee agreement with Martinez, the client, that included a valid conversion clause. *Id.* at ¶ 7. Martinez terminated Mintz's representation for cause, and Mintz filed a lien against any settlement in the case. *Id.* at ¶ 9. The court ruled that because Mintz was terminated for cause before the contingency triggering the percentage fee was satisfied, and Martinez's subsequent recovery was not based on Mintz's efforts, he was not entitled to any fee. *Id.* at ¶ 38. In reaching this conclusion, the court noted that Mintz had delayed filing suit for eleven months, named the wrong defendant, asserted invalid claims, failed to communicate with Martinez, and completed just 4.5 hours of work compared to the 350 plus hours that successor counsel devoted to the case. *Id.*

¶ 56 These authorities establish principles that are directly relevant here. First, a lawyer is not prohibited from collecting a percentage fee under a contingent fee agreement simply because the fee agreement does not completely comport with Rule 1.5. *Beeson*, 942 P.2d at 1315. Second, the contemplated percentage fee may be recoverable if the triggering contingency is accomplished before a client terminates the lawyer for cause. *Id.*; *Mullens*, 65 P.3d at 995. Third, a quantum meruit fee is not permitted when a client terminates the lawyer for cause and the fee agreement lacks a conversion clause. *Dudding*, 11 P.3d at 449. Finally, a lawyer's wrongful conduct may be so clear and serious that the lawyer loses the right to collect any fee. *Mintz*, ¶ 38. With these principles in mind, we turn to the parties' specific contentions.

III. Did the District Court Err by Concluding that KLN Did Not Forfeit the Right to a Fee?

A. Standard of Review, the Court's Conflict of Interest Finding, and the Restatement

¶ 57 The resolution of this issue presents a mixed question of fact and law. We review the district court's factual determinations for clear error and will not disturb them unless unsupported by the record. *Pinnacol Assurance v. Laughlin*, 2023 COA 9, ¶ 11. We

review the court's interpretation of the disputed contract provisions de novo. *City & Cnty. of Denver v. Monaghan Farms, Inc.*, 2023 COA 60, ¶ 22. We also review the district court's application of the determined facts to the ethical rules de novo. *See, e.g.*, *Schaden v. DIA Brewing Co.*, 2021 CO 4M, ¶ 32 (reviewing rules of civil procedure). Finally, we review de novo the district court's ultimate determination whether ethical violations caused a forfeiture of KLN's right to a quantum meruit recovery. *See E-470 Pub. Highway Auth. v. 455 Co.*, 3 P.3d 18, 22 (Colo. 2000) (articulating circumstances in which an appellate court may review de novo ultimate conclusions applying historical factual determinations to legal standards).

¶ 58 As an initial matter, the district court found, with record support, that KLN had a concurrent conflict of interest when representing both McClain and Mosley. *See* Colo. RPC 1.7(a) (subject to limited exceptions not applicable here, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest"). "A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the

representation of one or more clients will be materially limited by the lawyer's responsibilities to another client . . . ." *Id.* Given the tangible and intangible goals McClain, Mosley, and the Estate had for this litigation, the prospect for material adverse conflicts between Mosley and McClain was present from the day the parties signed the CFA. As the district court found, "Although their interests were aligned with respect to obtaining the best possible monetary recovery, the fact that any such monetary recovery would eventually need to be divided . . . made it essentially inevitable that . . . McClain and . . . Mosley would be directly adverse to one another."

¶ 59 The district court also found that McClain did not waive the concurrent conflict of interest, verbally or in writing. In addition, the court found that even if she had been asked to, McClain was not willing to waive the concurrent conflict of interest. Both these findings have record support.

¶ 60 Although the concurrent conflict existed from the beginning, the extent of that conflict increased over time. In January 2020, McClain inquired of Newman who would determine how any recovery would be distributed between "a custodial parent [versus]

the absent parent" and stated that she would "be seeking another way to properly distribute the funds accordingly by accountability."

¶ 61 Tensions increased in August 2020 after the Falck settlement was distributed. In her emails to Newman in the days that followed, McClain made it clear that she was not comfortable with the Falck distribution, the suggestion that Mosley should receive 50% of any future settlement, or the way that Mosley was participating in public events intended to serve some of the intangible objectives of KLN's representation.

¶ 62 Newman testified that she attempted to limit KLN's engagement from the beginning to maximize the economic recovery of the litigation and counseled McClain and Mosley to retain separate probate counsel. But McClain disputes whether those initial discussions occurred without disputing that there were subsequent referrals to probate counsel and that McClain and Mosley eventually retained independent counsel to assist with the ultimate division of the settlement proceeds. And it is also undisputed that KLN stayed actively involved in the representation of clients who had a manifest and significant concurrent conflict of interest. Given these circumstances, the district court did not err

by concluding that KLN had a concurrent conflict of interest that justified McClain's termination of KLN's representation.

¶ 63 In addition to the concurrent conflict of interest, KLN's representation of McClain and the Estate was attended by other ethical missteps, including its failure to (1) execute a fee agreement with the Estate, (2) disclose in writing a significant conflict of interest, (3) obtain a written waiver of the conflict of interest, and (4) disclose in the fee agreement the need for additional counsel and how that expense would be paid.

¶ 64 In considering these conflicts, it is worth noting that the CFA was signed within days of Elijah's death, during the first visit between Newman, McClain, and Mosley. On the one hand, the immediacy of Elijah's death and corresponding sense of urgency may provide some context for KLN's missteps. On the other hand, given the vulnerable state McClain and Mosley were in, it was even more important that KLN be mindful of the need to remediate any oversights from the initial meeting. Such remedial steps were never taken over the course of KLN's representation of McClain.

¶ 65 Given the concurrent conflict of interest, the district court did not err by concluding that KLN engaged in wrongful conduct as the

CFA defines that term. But was that wrongful conduct so clear and serious that it warranted a complete forfeiture of the right to any fee?

¶ 66 To answer that question, the parties and the district court looked to section 37 of the Restatement (Third) of the Law Governing Lawyers (Am. L. Inst. 2000) (hereinafter Restatement), for guidance. It provides,

> A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. Considerations relevant to the question of forfeiture include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.

Id. We agree that this standard provides the proper criteria for evaluating whether a lawyer's wrongful conduct rises to a level that forfeits the lawyer's right to recover for work performed pursuant to a contingent fee agreement that has been terminated. *Cf. Mullens*, 65 P.3d at 999 n.12 (citing with approval section 37 of the Restatement). We conclude that no single factor is controlling, but that each of the factors must be examined under the totality of the

circumstances to determine whether the wrongful conduct was so clear and serious that a complete forfeiture was warranted.

B. Application

1. Timing and Gravity

¶ 67 As discussed, KLN had a concurrent conflict of interest, which was not disclosed or waived, from the outset of its engagement in this case. Moreover, KLN did not have a fee agreement with the Estate and did not disclose the need for associated counsel or how such counsel would be paid. Thus, the ethical issues associated with KLN's representation were longstanding. Nevertheless, the district court concluded that the gravity and timing of KLN's wrongful conduct was minimal because it did not prejudice McClain's ability to recover a larger percentage of the settlement proceeds.

¶ 68 While the district court property recognized that there were mitigating considerations, given the timing and significance of the conflict, we cannot characterize it as minimal and conclude the circumstances associated with this factor weigh slightly in favor of finding a forfeiture of KLN's right to charge McClain a fee for its work in the federal litigation.

2. Willfulness

¶ 69 The district court recognized that the nature and extent of the conflict seemed to "sneak up" on KLN. KLN's perception was likely clouded by its objective desire to represent all parties so that the presentation of the claims would not be compromised by attorneys heading in disparate directions. And, despite the concurrent conflict, joint representation may have helped to maximize the ultimate recovery in this case. These findings support the district court's conclusion that KLN's misconduct was not willful.

¶ 70 But we must also acknowledge the obvious point that KLN had a vested financial interest in representing all the parties because doing so would maximize the total sum from which its 40% contingent fee would be calculated. And despite the clear conflicts that existed by August 2020, KLN continued to represent all parties until McClain terminated its representation of her in January 2021.

¶ 71 We conclude the considerations involved in this factor weigh slightly, but not heavily, in favor of forfeiture.

3. The Value of the Lawyer's Work for the Client

¶ 72 By all accounts KLN provided extraordinary legal services while representing McClain and the Estate. The district court

referenced KLN's voluminous filings, legal and medical research, formal and informal discovery, and many other examples of its diligent efforts on behalf of McClain and the Estate. KLN arranged for a film company to produce a detailed video about Elijah and the circumstances leading to his death — at no cost to McClain or the Estate. KLN engaged in extensive media campaigns that brought attention to the circumstances surrounding Elijah's death. Newman also worked with state legislators to promote legislative changes that McClain sought. And as the district court colorfully and accurately observed, KLN's efforts "resulted in the largest financial settlement — by a country mile — ever obtained in a Colorado civil rights case resulting from a death."

¶ 73 Based on these findings, the district court did not err by concluding that KLN's work on behalf of McClain and the Estate was not substantially affected by the conflict of interest, and that this factor weighs heavily against forfeiture.

4. Other Threatened or Actual Harm to the Client

¶ 74 KLN's conflict of interest was most readily apparent in the context of the apportionment of settlement funds. Because KLN was unable to assist the parties on these issues, McClain incurred

additional fees to obtain probate counsel. The conflict also left unaddressed Mosley's alleged failure to satisfy past due child support. And it led to a 50/50 allocation of the Falck settlement proceeds, rather than the 65/35 allocation that McClain and Mosley ultimately agreed upon. Nonetheless, the district court was able to fashion a remedy that compensated McClain for these losses.

¶ 75 There were also intangible costs to McClain. As the district court found, she was frustrated and angered by the public role Mosley assumed and how Mosley portrayed Elijah and his legacy. Arguably, KLN's dual allegiances inhibited its ability to control or redirect Mosley to align with McClain's objectives. But it is doubtful that, even if KLN had represented only McClain, it would have been able to advocate in a way that materially influenced Mosley's actions.

¶ 76 We conclude the considerations embodied in this factor do not weigh significantly in favor of, or against, forfeiture.

5. The Adequacy of Other Remedies

¶ 77 As addressed more fully below, we conclude that it is possible to fashion an equitable remedy that recognizes the significance of

KLN's wrongful conduct, deters such wrongful conduct in the future (by KLN and other lawyers), and still results in a fair and equitable remedy for the parties. Thus, this factor weighs heavily against complete fee forfeiture.

¶ 78 Balancing all these considerations, we conclude the district court did not err by determining that a complete forfeiture of any fee was not warranted. In reaching this conclusion, we reject McClain and the Estate's argument that our existing precedent, or nonbinding precedent from other jurisdictions, counsels a contrary conclusion.

C. Cases from Colorado and Other Jurisdictions are Distinguishable from the Case at Hand

¶ 79 McClain and the Estate lean heavily on *People v. Gilbert*, 348 P.3d 970 (Colo. O.P.D.J. 2013), which included a statement that "[f]orfeiture has been deemed appropriate in cases where a lawyer represented a client despite a conflict of interest." *Id.* at 982. But as KLN correctly notes, *Gilbert* was decided by the Office of the Presiding Disciplinary Judge, not the supreme court. Thus, it is not binding precedent. *In re Roose*, 69 P.3d 43, 48 (Colo. 2003) ("The rationale of the Hearing Board in a particular case can neither serve

as stare decisis precedent for future cases nor constitute the law of the jurisdiction."). In any event, *Gilbert* did not involve a conflict of interest, and it did not address forfeiture.

¶ 80 In a similar vein, McClain and the Estate point to *Dudding*, which also includes a statement that an attorney who is discharged with cause may forfeit the right to a fee. 11 P.3d at 447-48. But *Dudding* did not involve a conflict of interest, and the court deemed the fee forfeited because the terminated contingent fee agreement did not contain a conversion clause. *Id.* at 449.

¶ 81 Nor do the cases from other states McClain and the Estate cite lead us to a different result. By way of illustration, in *Somuah v. Flachs*, 721 A.2d 680 (Md. 1998), the attorney was terminated for cause because he failed to disclose to the client that he was not licensed to practice in the state where the suit was likely to be filed. *Id.* at 257. But the court also noted that

> where a client has a good faith basis to terminate the attorney-client relationship but there is no serious misconduct warranting forfeiture of any fee, the attorney is entitled to compensation based on the reasonable value of services rendered prior to discharge, considering as factors the reasonable value of the benefits the client obtained as a result of the services rendered prior to discharge and

> the nature and gravity of the cause that led to the attorney's discharge.

Id. at 688. Thus, rather than supporting a complete forfeiture, *Somuah* counsels against complete forfeiture under the factors embodied in section 37 of the Restatement.

¶ 82 Similarly in *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co.*, 425 P.3d 1 (Cal. 2018), the California Supreme Court applied the major components of section 37 of the Restatement as a guide for determining whether a lawyer should forfeit all or part of their fee for misconduct. *Id.* at 23. Moreover, though *Sheppard* did involve a concurrent conflict of interest, it did not involve a contingent fee, and the court did not conclude that a complete forfeiture of the fee was appropriate. *Id.* at 24-25. Thus, *Sheppard* is factually distinguishable and, to the extent that it is persuasive, actually supports the non-forfeiture conclusion the district court reached.

¶ 83 Finally, McClain and the Estate cite cases from New York and Delaware that they argue support a conclusion that the forfeiture of any fee is appropriate whenever a client terminates a lawyer for cause. But we find these authorities unpersuasive because, as

detailed in Part II, our case law and ethical rules recognize a lawyer's right to recover a fee in quantum meruit under appropriate circumstances, notwithstanding termination by the client for cause or the use of a contingent fee that does not fully conform with the applicable ethical rules.

¶ 84 For these reasons, we conclude the district court did not err by finding that KLN did not completely forfeit the right to collect a fee for work performed on behalf of McClain and the Estate. We turn next to whether the court erred by awarding KLN a 40% fee divided pursuant to the 80/20 Agreement for the work it did on the federal litigation.

IV. The District Court's Fee Award

A. Standard of Review and Relevant Case Law

¶ 85 The determination of an equitable fee when a contingent fee fails because the client justifiably terminates the lawyer's services presents a mixed question of law and fact. We review the district court's factual findings for an abuse of discretion, but we review de novo whether the district court correctly applied legal standards in fashioning an equitable remedy. *Lewis v. Lewis*, 189 P.3d 1134, 1141 (Colo. 2008); *Zeke Coffee, Inc. v. Pappas-Alstad P'ship*, 2015

COA 104, ¶ 11 ("Whether the district court has applied the correct legal standard in determining the *availability* of a particular equitable remedy is reviewed de novo. But the power to determine the *components* of such a remedy is within the court's discretion.") (citations omitted).

¶ 86 "Quantum meruit is a theory of contract recovery that invokes an implied contract when the parties either have no express contract or have abrogated it." *Dudding*, 11 P.3d at 444. "Quantum meruit strikes the appropriate balance by gauging the equities and ensuring that the party receiving the benefit of the bargain pays a reasonable sum for that benefit." *Id.* at 445. "To recover in quantum meruit, a plaintiff must demonstrate that: (1) at plaintiff's expense; (2) defendant received a benefit; (3) under circumstances that would make it unjust for defendant to retain the benefit without paying." *Id.*

B. Analysis

¶ 87 Applying these principles, the district court determined that McClain received a benefit — a portion of the $15 million settlement of the federal litigation — at KLN's expense, and that it would be unjust to allow McClain to retain the benefit without paying for it.

The district court determined that KLN should receive a "40% contingent fee on . . . McClain's portion of the settlement" from the federal litigation, and that the fee should be split with RM according to the 80/20 Agreement. The district court did not award KLN any fees against the Estate based on the federal litigation.

¶ 88 Obviously, the evidentiary foundation for the 80/20 split is the 80/20 Agreement between RM and KLN. But the evidentiary basis for the first component of the fee award — the 40% contingent fee — is unclear. The district court must have relied on either the CFA, the RM CFA, the 80/20 Agreement, or some type of industry standard for civil rights litigation. But whichever of these analytic paths the court took, we conclude the awarded 40% contingent fee cannot stand as a matter of law.

1. KLN's CFA

¶ 89 Recall that a contingent fee agreement is not enforceable unless it is signed by the lawyer and the client. Colo. RPC 1.5(c)(1)(2). Although McClain signed the CFA, she terminated KLN's representation for good cause before the case was resolved. Paragraph 13 of the CFA provided that "[c]lients are not liable to pay compensation otherwise than from amounts collected for clients

by law firm." Thus, as to McClain, the CFA was terminated with good cause before the contingency triggering the 40% fee was achieved.

¶ 90 As to the Estate, it was not a party to the CFA, it received no portion of the settlement proceeds, and the district court awarded no fees against it.

¶ 91 We have already concluded that KLN's conduct was wrongful. The degree of wrongful behavior was far greater than the omission of a technical term or the failure to reduce an otherwise abiding contingent fee agreement to writing. Under these circumstances, it would be inconsistent with the policies underlying the ethical rules governing contingent fee agreements to conclude that the agreement was terminable for cause, and yet the full 40% contingent fee was nevertheless recoverable under the conversion clause. Thus, the CFA cannot provide a legal basis for the 40% contingent fee awarded by the court.

2. The RM CFA

¶ 92 The RM CFA is similarly unavailable as a means of justifying the 40% contingent fee award to KLN. Though not directly addressed by the parties or the district court, we have serious

doubt whether KLN has standing to enforce the RM CFA. *See, e.g.*, *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004) ("In order for a court to have jurisdiction over a dispute, the plaintiff must have standing to bring the case."); *Weld Air & Water v. Colo. Oil & Gas Conservation Comm'n*, 2019 COA 86, ¶ 10 ("Because 'standing involves a consideration of whether a plaintiff has asserted a legal basis on which a claim for relief can be predicated, the question of standing must be determined prior to a decision on the merits.'" (quoting *Hickenlooper v. Freedom from Religion Found., Inc.*, 2014 CO 77, ¶ 7)). Although KLN requested the entry of a declaratory judgment stating that it should recover a 40% contingent fee under the RM CFA, it stated no viable legal theory explaining why it was entitled to enforce that agreement. It was not a named party in the RM CFA, and it did not sign it. Thus, to the extent it is attempting to state a claim that it was entitled to enforce the agreement as a party, the claim fails.

¶ 93 Nor did KLN assert a claim for enforcement of the RM CFA as a third-party beneficiary. Such a claim would have been futile in any event because there is no indication that the RM CFA was intended to benefit KLN, whether from the express terms of the

agreement or the surrounding circumstances. *See, e.g.*, *Harwig v. Downey*, 56 P.3d 1220, 1221 (Colo. App. 2002) (A person not a party to an express contract may bring an action to enforce the contract provided the parties intended the agreement to benefit that party, but the intended benefit "must be apparent from the terms of the agreement, the surrounding circumstances, or both."). In any event, we question whether a third-party beneficiary theory could be invoked to circumvent the express mandates of Colo. RPC 1.5.

¶ 94 Because KLN asserted no claim that would allow it to enforce the RM CFA, and it was not a party to that contract, the RM CFA could not provide the legal basis for an award of a 40% contingent fee to KLN.

3. The 80/20 Agreement

¶ 95 The district court expressly ruled that the 80/20 Agreement was enforceable. It did so even though there was no evidence that McClain approved the 80/20 Agreement. The court reasoned it was enforceable because RM was representing McClain and "it was incumbent upon RM to have a discussion regarding the potential claims of KLN" upon the execution of the RM CFA. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 487 (2019) (When successor

counsel from one firm replaces predecessor counsel from another firm "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"). In addition, the court noted that the email communications between RM and KLN about the 80/20 Agreement did not indicate that RM lacked authority to enter into the agreement. From these observations, the court reasoned that Mohamedbhai, acting as the agent of McClain, had the apparent authority to bind McClain to the 80/20 Agreement. *See State Farm Mut. Auto. Ins. Co. v. Johnson*, 2017 CO 68, ¶ 20 ("An agent has apparent authority to affect a principal's relations with a third party when the third party reasonably believes, based on the principal's manifestations, that the agent has authority to act on behalf of the principal.").

¶ 96 KLN notes that McClain did not appeal this conclusion. From that fact, KLN argues that the district court's finding that the 80/20 Agreement was enforceable is binding on appeal. But even if we were to accept, without deciding, that argument, it does not get KLN to the conclusion it urges.

¶ 97 First, the district court did not hold that the 80/20 Agreement allowed KLN to enforce the RM CFA. Rather, it held that the 80/20 Agreement was "the most equitable basis upon which the 40% fee under the KLN and RM contingent fee agreements should be divided." And consistent with the absence of a viable claim by RM or McClain to enforce the RM CFA, the district court did not determine that a contingent fee was due from McClain to RM. To the contrary, the court "*assume[d]* that RM intends to retain the residual of its 40% contingent fee, that is, the gross fee less any amounts to which this court conclude[s] KLN is entitled." (Emphasis added.) Because neither RM nor McClain asserted a claim under the RM CFA and McClain had paid no fee, the court's assumption has neither evidentiary nor legal support.[5]

¶ 98 Based on the undisputed evidence, we conclude that the 80/20 Agreement did not provide a vehicle for KLN to enforce the RM CFA against McClain.

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[5] In the opening brief, McClain noted that the "undisputed evidence was that [she] had not yet made a decision with regard to the payment of fees to RM, nor had RM received any fees from [her] as of the date of trial." In its answer brief, KLN did not contest these facts.

4. "Industry Standard" Under Quantum Meruit

¶ 99 As an alternative to the enforcement of the two contingent fee agreements, KLN contends that the district court properly awarded it a 40% fee based on a quantum meruit theory. Noting that quantum meruit is grounded in equity, KLN argues that the court appropriately exercised its discretion by concluding that a 40% fee should be awarded because it reflects industry standards for plaintiffs' civil rights work. Pointing to *Mullens* and *Beeson*, KLN reasons that the use of industry standard percentages is appropriate because our appellate courts have allowed an amount equal to the original contingent fee to be collected, consistent with industry standards, even though the fee agreements did not comply with Colo. RPC 1.5. We are not persuaded.

¶ 100 First, in both *Beeson* and *Mullens*, aside from the failure to obtain a written fee agreement, there was no suggestion that the attorneys had engaged in any wrongful conduct. In contrast, KLN's representation of McClain, the Estate, and Mosley was tainted by a concurrent conflict of interest. This conflict led to KLN's good-cause termination by McClain. And unlike the circumstances in *Beeson* and *Mullens*, the termination occurred before KLN satisfied the

contingency that triggered the 40% fee — the client's collection of funds from the federal litigation. Given the factual and legal circumstances of this dispute, we conclude that neither *Beeson* nor *Mullens* supports awarding a 40% fee to KLN.

¶ 101 We also conclude that the award of a 40% fee would be inconsistent with the language of the CFA. By its terms, the conversion clause applies if the client terminates the law firm before the contingency triggering the 40% fee is satisfied. The clause then directs the court to determine the fee based upon the complexity of the work, the time and skill the firm devoted to the case, and the results achieved for the client. It caps the amount of the award at a total sum that does not exceed the fee that would have been recovered had the terms of the CFA been satisfied.

¶ 102 These factors are grounded in the traditional lodestar analysis that is used as the starting point to determine a lawyer's reasonable fee, rather than a percentage fee typically associated with an enforceable contingent fee agreement. *See, e.g.*, *Payan v. Nash Finch Co.*, 2012 COA 135M, ¶ 18 ("The lodestar amount represents the number of hours reasonably expended on the case, multiplied

by a reasonable hourly rate."); *see also* Colo. RPC 1.5(a)(1)-(8) (describing the factors used to determine a reasonable fee).

¶ 103 Finally, imposing a 40% fee using a quantum meruit rubric would effectively impose the 40% contingent fee of the unenforceable CFA. We cannot sanction such an end run around the ethical rules governing contingent fee agreements.

¶ 104 For these reasons, we reverse that portion of the district court's judgment awarding KLN and RM a 40% fee from the proceeds of the federal lawsuit, whether characterized as a contingent fee or otherwise, and the monetary awards based on those allocations.

5. The Appropriate Quantum Meruit Award

¶ 105 KLN's recovery on quantum meruit principles should be based on a lodestar analysis as applied to the hours KLN expended on the case before McClain terminated its representation of her on January 27, 2021. This allows KLN to recover the reasonable value of its services to McClain but prohibits it from recovering fees from her for any work it did after she terminated its services based on the concurrent conflict of interest.

¶ 106 The district court found, with record support, that KLN incurred fees in the amount of $1,433,420 before its termination. McClain and the Estate note that KLN did not maintain contemporaneous time records, and thus, the time it devoted to this case was recreated from various sources. Generally, recreated fee statements are disfavored, but they are not irrelevant as a matter of law. *Law Offs. of J.E. Losavio v. Law Firm of Michael W. McDivitt, P.C.*, 865 P.2d 934, 937 (Colo. App. 1993). And, as KLN notes, McClain did not present expert testimony suggesting that the time KLN devoted, or the hourly rate associated with that time, was unreasonable. Moreover, McClain presented no evidence that the work provided by KLN during this time was unproductive or unrelated to the representation. Thus, we conclude that the $1,433,420 represents the lodestar value of the services KLN provided to McClain before its termination.

¶ 107 KLN argues that we should reject a lodestar analysis in favor of the district court's 40% contingent fee award, noting that the district court emphasized the complexity of the legal services provided, the favorable result achieved, and that McClain twice agreed to a 40% contingency fee. But aside from its reliance on

these facts to justify the 40% fee, KLN does not explain how these facts would justify an increase from the lodestar amount. McClain, on the other hand, points to no evidence that would justify a reduction of the lodestar amount through application of the Colo. RPC 1.5(a)(1)-(8) factors. Absent such evidence and argument, we conclude that KLN is entitled to a quantum meruit award of $1,433,420 from the settlement proceeds ultimately awarded to McClain.

¶ 108 In reversing the district court's fee award, and awarding KLN $1,433,420 from McClain's portion of the settlement proceeds, it is important to emphasize several issues we are not deciding. There were no viable claims asserted in this case concerning any fees due KLN or RM for their work on behalf of Mosley. Thus, we enter no orders concerning any fees that Mosley paid or may owe KLN or RM. Second, there was no viable claim asserted to determine the amount of attorney fees that McClain may owe to RM. Thus, we enter no orders concerning any fees that McClain paid or may owe RM.

V. The Falck Settlement

¶ 109 We turn now to McClain's contention that the district court erred by awarding KLN a 40% contingent fee from the Falck settlement rather than deeming its right to collect a fee forfeited or subject to quantum meruit principles because KLN never obtained a signed, written contingent fee agreement with the Estate.

A. Standard of Review and Applicable Law

¶ 110 This issue largely hinges on the application of undisputed facts to the applicable ethical laws and probate statutes, both of which are questions of law that we review de novo. *Schaden*, ¶ 1; *E-470*, 3 P.3d at 22.

¶ 111 "The duties and powers of a personal representative commence upon his or her appointment. The powers of a personal representative relate back in time to give acts by the person appointed that are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter." § 15-12-701, C.R.S. 2023. "A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative." *Id.*

B. Analysis

¶ 112 McClain and Mosley both signed the CFA in their individual capacities. But the agreement did not identify the Estate, which had not yet been formed, as a client. The Estate was formed in October 2019, and McClain and Mosley were appointed as co-personal representatives at that time.

¶ 113 The Falck settlement occurred in early August 2020, five months before McClain terminated KLN. At the disbursement meeting, McClain and Mosley each signed a disbursement schedule, which allocated a 40% contingent fee — in the amount of $140,000 — to KLN. The net proceeds, after satisfaction of KLN's fees and medical liens, were distributed equally between McClain and Mosley.

¶ 114 McClain argues that, because the CFA does not name the Estate as a client, it violated Colo. RPC 1.5 and is therefore unenforceable. That is true, but it does not follow that KLN forfeited its right to a fee from the Falck settlement for two reasons.

¶ 115 First, McClain's contention that there is no support in the law for an attorney collecting a contingent fee from a client who did not sign a contingent fee agreement is incorrect. As previously

discussed, in both *Beeson* and *Mullens*, there was no written contingent fee agreement between the client and the attorney for the disputed work. But in both cases, as with the Falck settlement, the attorney successfully completed the representation. And while McClain later terminated KLN for cause, that occurred months after all the parties agreed to and finalized the Falck settlement.

¶ 116 Moreover, the district court buttressed its decision based on the relation back doctrine. *See* § 15-12-701; *see also Hill v. Martinez*, 87 F. Supp. 2d 1115, 1123 (D. Colo. 2000) (finding that the plaintiffs' appointment as representatives of the estate retroactively applied to their filing of an amended complaint, rendering it valid). We perceive no error in the district court's application of the relation back doctrine here.

¶ 117 The potential conflict of interest between McClain and Mosley was present from the time KLN undertook the representation in September 2019. But, as the district court found, the conflict remained relatively latent until after the Falck settlement was distributed. Moreover, the district court found that McClain expressly approved the equal distribution of the settlement proceeds because it would help get Mosley "back on his feet." Thus,

we conclude that the Falck engagement was not tainted by the wrongful conduct to a degree that prevented an award of the contemplated contingent fee to KLN for the federal litigation.

¶ 118 Nevertheless, the district court exercised its equitable powers to impose certain adjustments to the fee paid to KLN under the Falck settlement. The court deducted the $22,785.10 difference between the 50% disbursement made to McClain and the 65% split that McClain negotiated in the federal litigation, and the amount of fees McClain paid to probate counsel, which was later stipulated to be $10,497.50.[6] KLN does not challenge these adjustments on appeal, so we do not address them further.

VI. Disposition

¶ 119 We affirm the district court's judgment holding that KLN did not forfeit its right to receive any fee from McClain. We reverse that portion of the judgment awarding attorney fees in favor of KLN and RM. We award attorney fees in favor of KLN and against McClain in the amount of $1,433,420 for KLN's work on behalf of McClain in

[6] The court also ordered a deduction to reflect any child support payments that Mosley owed, but the parties later stipulated that the child support obligation had been resolved.

the federal litigation. Finally, we affirm the district court's award to KLN of attorney fees in the amount of $140,000 for the Falck litigation, less the deductions totaling $33,282.60. Because the $140,000 fee was previously distributed to KLN, the $33,282.60 deduction must be subtracted from KLN's fee award against McClain. After deduction, the total judgment in favor of KLN and against McClain is $1,400,137.40.

JUDGE FOX and JUDGE MOULTRIE concur.