

CHAPTER 3A

LAW AND CONTEMPORARY ISSUES IN LITIGATING ATTORNEY FEE CLAIMS

**CHANGING HORSES IN MIDSTREAM:
MODIFYING FEE AGREEMENTS**

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MARK J. FUCILE of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark is a past chair and a current member of the Washington State Bar Association Rules of Professional Conduct Committee, is a former member of the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark was also a member of the WSBA's Special Committee for the Evaluation of the Rules of Professional Conduct that developed the new Washington RPCs adopted in 2006. He writes the quarterly Ethics & the Law column for the Washington State Bar News and the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer. Mark is a contributing author/editor for the current editions of the WSBA's *Legal Ethics Deskbook* and the OSB's *Ethical Oregon Lawyer*. He is admitted in Washington, Oregon, Idaho, Alaska and the District of Columbia. Mark received his B.S. from Lewis & Clark College and his J.D. from UCLA.

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(Reprinted from Mark's December 2010 Ethics & the Law column in the
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I. CHANGING HORSES IN MIDSTREAM:
THE ATTORNEY CLIENT PRIVILEGE WITHIN LAW FIRMS
(Reprinted from Mark's December 2010 Ethics & the Law column in the
WSBA Bar News)

Regardless of the compensation method used, lawyers often spend considerable time before taking on representations negotiating their fee agreements with clients. In most instances, the lawyer and the client reach agreements that both understand and are performed without event. Sometimes, however, lawyers later attempt to modify fee agreements in their favor. The reasons are many and range from rates increasing during the duration of the matter involved to fundamental changes in the assumptions upon which the representation was predicated. In still others, the lawyers simply conclude they didn't negotiate a very good deal at the beginning and would like a bigger piece of the "pie."

In this column, we'll first briefly survey the law governing fee modifications. We'll then turn to practical steps that can be taken in the beginning to anticipate and provide for contingencies which may develop over the course of a matter. We'll conclude with some cautionary notes about what can happen when lawyers simply try to impose unilateral modifications later.

Fee Modifications Generally

Washington's law of lawyering sets a very high bar for enforceable fee modifications. Division 1 of the Court of Appeals summarized these standards in *Ward v. Richards & Rossano, Inc., P.S.*, 51 Wn. App. 423, 428-29, 432, 754 P.2d 120 (1988):

"Review of an attorney's fee agreement renegotiated after the attorney-client relationship was established requires particular attention and scrutiny. . . Such modification is considered to be void or voidable until the attorney establishes 'that the contract with his client was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts upon which it is predicated.'

...

"A fee agreement modified to increase an attorney's compensation after the attorney is employed is unenforceable if it is not supported by new consideration."
(Citations omitted.)

Washington's rigorous approach rests on three legs. First, once formed, an attorney-client relationship is a fiduciary one as a matter of law. Second, the Rules of Professional Conduct, including RPC 1.7(a)(2), impose parallel duties when there is a conflict between the business interests of the lawyer and client. Third, fee agreements—and subsequent amendments—are subject to standard contract principles.

Ward was a contingent fee case. The standards noted, however, apply with equal measure to *all* fee agreements regardless of the particular compensation method involved. In *Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan*, 109 Wn. App. 436, 988 P.2d 467 (1999), *amended*, 109 Wn. App. 436, 33 P.3d 742 (2000), for example, Division 1 used these principles

in an hourly fee context to decide whether there had been “full revelation” necessary for an accord and satisfaction when billing rates were changed without notice to the client. Similarly, these standards apply to modifications beyond the dollar terms of a fee agreement. In *Valley/50th Ave., L.L.C. v. Stewart*, 159 Wn.2d 736, 153 P.3d 186 (2007), for example, the Supreme Court applied these principles when addressing foreclosure of a trust deed that had been added by way of modification to secure unpaid fees in an ongoing matter.

Practical Steps to Avoid Problems

Ward and its companion cases don’t say that lawyers may never renegotiate fees—just that any resulting modifications will be closely scrutinized and may be unenforceable if they don’t meet the high standards noted. Given that risk, the practical point for anticipating and addressing possible change is in the *original* fee agreement. When contingencies for change are wired into the original fee agreement, they aren’t “modifications.” Rather, they are circumstances that were disclosed, bargained-for and supported by consideration before the fiduciary duties inherent in the attorney-client relationship attached.

Providing a mechanism for periodic hourly rate adjustments or for a higher contingent fee on appeal are ready examples of monetary provisions that can be anticipated and included at the outset. Reserving an advance fee deposit for later in a case, such as 90 days before trial, is an equally ready example of a non-monetary provision that can also be included in an original agreement. The key is that these provisions were agreed by the client and the lawyer at the beginning of the representation rather than imposed unilaterally by the lawyer later.

Like all contracts, ambiguity in fee agreements is generally construed against the drafter—which is usually the lawyer. When including contingencies in a fee agreement, therefore, they need to be clear in both their scope and triggering events. Beyond formal rules of construction, lawyers also need to be sensitive to the practical consideration that a reviewing court may not cut much slack for a lawyer-drafter who failed to address an ambiguity.

Consequences

Cotton v. Kronenberg, 111 Wn. App. 258, 44 P.3d 878 (2002), is an extreme but useful example of the range of consequences possible when a lawyer falls short of the standards discussed. The lawyer in *Cotton* took on a criminal case at an hourly rate, with the fee secured by land and a trailer the client owned. A few days later, however, the lawyer changed the agreement to a flat fee and took the land and the trailer in exchange. There was no new consideration for the amendment. The lawyer was later disqualified after he paid the prosecution’s key witness for his silence and bought the witness a one-way ticket out of town (both apparently unbeknownst to the client). Despite his disqualification, the lawyer refused to refund the fee. The client sued. Following cross-motions for summary judgment, the case went to Division 1 of the Court of Appeals.

The Court of Appeals found that the lawyer’s modification breached his fiduciary duty to the client and violated the RPCs. It also noted the lack of new consideration. As a result, the Court of Appeals held that the modification was unenforceable. It also concluded that the trial

court had the discretion to direct the lawyer to return all fees collected under the circumstances rather than allowing the lawyer to retain a portion under quantum meruit (*see generally Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992) on fee disgorgement). Because the agreement involved the business aspects of the lawyer's practice, the client also brought a Consumer Protection Act claim against the lawyer (*see generally Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163 (1984) on CPA claims relating to law practice) and sought fees in the refund litigation under the CPA. Although the Court of Appeals found that fact issues precluded summary judgment on that claim, it did not reject the legal basis for that potential additional remedy and remanded the CPA claim for further proceedings. The lawyer was eventually disbarred for the witness-tampering in the underlying criminal case (*In re Kronenberg*, 155 Wn.2d 184, 117 P.3d 1134 (2005)).

Not every fee modification will involve *Cotton's* toxic stew. *Cotton* does, however, offer a stark example of the range of remedies potentially available to clients when fee modifications are disputed. Those remedies, moreover, are equally available to a client contesting a fee collection action by a lawyer as they are in the context of a lawsuit by a client against the lawyer.

Summing Up

Fee issues can become flashpoints in an attorney-client relationship. The simplest way to avoid potential problems from modifications is to incorporate likely contingencies into the original fee agreement using terms that are clear in their scope and triggering events.

II. PRESENTATION SLIDES

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Law and Contemporary Issues in
Litigating Attorney Fee Claims

**CHANGING HORSES IN MIDSTREAM:
MODIFYING FEE AGREEMENTS**

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INTRODUCTION

1. Fee Modifications Generally
2. Practical Steps to Avoid Problems Later
3. Consequences

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LOGISTICS

- ▶ Materials
- ▶ Questions

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**FEE MODIFICATIONS
GENERALLY**

Ward v. Richards & Rossano, Inc., P.S.,
51 Wn. App. 423, 428-29, 432 (1988)

"Review of an attorney's fee agreement renegotiated after the attorney-client relationship was established requires particular attention and scrutiny. . . Such a modification is considered to be void or voidable until the attorney establishes "that the contract with his client was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts upon which it is predicated."


"A fee agreement modified to increase an attorney's compensation after the attorney is employed is unenforceable if it is not supported by new consideration."

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**FEE MODIFICATIONS
GENERALLY**


- ▶ **Fiduciary duties**
- ▶ **RPCs: 1.7(a)(2) & 1.8(a)**
- ▶ **Contract law**

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**FEE MODIFICATIONS
GENERALLY**

- ▶ **Contingent Fees**
Ward v. Richards & Rossano
- ▶ **Hourly Fees**
Simburg v. Olshan
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Valley/50th Ave. v. Stewart

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**PRACTICAL STEPS
TO AVOID PROBLEMS LATER**


- ▶ **Original v. Modification**
- ▶ **Build contingencies in at the outset**

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**PRACTICAL STEPS
TO AVOID PROBLEMS LATER**


- ▶ *Example in hourly context:*
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**PRACTICAL STEPS
TO AVOID PROBLEMS LATER**


- ▶ *Avoid Ambiguity:*
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(“UNFORTUNATE”)
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- ▶ Breach of fiduciary duty
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(“UNFORTUNATE”)
CONSEQUENCES


- ▶ “The Shield”:
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- ▶ “The Sword”:
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(“UNFORTUNATE”)
CONSEQUENCES


- ▶ CPA & the business aspects of
law practice
- ▶ Counterclaims for malpractice &
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BEYOND WASHINGTON


- ▶ ABA Formal Ethics Opinion 11-458:
“Changing Fee Arrangements
During Representation”
- ▶ ABA Formal Ethics Opinion 02-427:
“Contractual Security Interest to
Secure Payment of a Fee”

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SUMMING UP

- ▶ Think about the likely contingencies that may occur over the course of the representation
- ▶ Build likely contingencies into the original fee agreement

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QUESTIONS?

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