CHAPTER 3

GOOD BILLING PRACTICES REDUCE MALPRACTICE CLAIMS

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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 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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GOOD BILLING PRACTICES REDUCE MALPRACTICE CLAIMS

Mark J. Fucile

I. BILLING ETHICS

Note: This section originally appeared in the May 2009 Ethics & the Law column in the Bar News.

In law school, billing gets little attention. In private practice, however, billing is a mundane, but central, part of firm management. Done right, billing provides the client with a timely and accurate report of the services rendered that is consistent with the fee agreement involved. Done wrong, billing can be a flashpoint between the client and the lawyer. "Billing ethics" broadly encompasses understandable fee agreements at the outset, accurate time and expense tracking along the way and reports at the end of the billing cycle reflecting the agreed services performed. In this column, we'll look at all three. Before we do, though, it is important to note that billing ethics is not simply a concern from the perspective of avoiding regulatory discipline. Billing "done wrong" can lead to both problems with enforcing fee agreements and risks of civil liability.

Fee Agreements

RPC 1.5 generally controls whether a fee agreement must be in writing. RPC 1.5(b) strongly suggests, but does not mandate, that hourly fee agreements be in writing. RPC 1.5(c), in turn, requires that contingent fee agreements both be in writing and signed by the client. RPC 1.5(f), which was adopted last year, also requires that "flat fees" paid in advance be in writing and signed by the client if they are considered a lawyer's property immediately. Finally, fee agreements involving business transactions with a client (such as taking stock in lieu of fees) are also governed by RPC 1.8(a) and must be in writing and signed by the client. Illustrating the practical import of the writing requirement, the Supreme Court in *Barr v. Day*, 124 Wn.2d 318, 330-31, 879 P.2d 912 (1994), held that where a written fee agreement is required and none exists, the lawyer is (at most) entitled to quantum meruit recovery.

Each form of fee arrangement has additional specific requirements and both the rules and the accompanying comments involved warrant careful review. RPC 1.5(a)(9) governs the level of detail required in a fee agreement and, because it is one of the factors that goes to the baseline issue of whether the resulting fee is reasonable, applies to all fee agreements. RPC 1.5(a)(9) focuses on "whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices." What is "reasonable and fair disclosure" will vary with the circumstances. Failure to meet this standard, however, can both lead to discipline (*see, e.g., In re Vanderbeek*, 153 Wn.2d 64, 85, 101 P.3d 88 (2004) (finding a collection provision unclear)) and put enforceability at risk (*see, e.g., 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) (fact issue whether hourly rates were described sufficiently)).

One of the key reasons for having a thorough fee agreement at the outset is that it can be difficult to change them later. Although lawyers can generally bargain at arms length before an attorney-client relationship is formed, once a lawyer's fiduciary duties attach with the creation of an attorney-client relationship modifying a fee agreement in the lawyer's favor is generally only permitted (under *Perez v. Pappas*, 98 Wn.2d 835, 841, 659 P.2d 475 (1983), and *Ward v. Richards & Rossano, Inc., P.S.*, 51 Wn. App. 423, 432, 754 P.2d 120 (1988)) with client consent and additional consideration. Further, the Supreme Court held in *Valley/50th Avenue, L.L.C. v. Stewart*, 159 Wn.2d 736, 744-45, 153 P.3d 186 (2007), that taking *new* security for payment of *past* fees, which it viewed as the functional equivalent of security for a past debt rather than for future performance, invokes the heightened disclosure and consent requirements governing lawyer-client business transactions under RPC 1.8(a).

Timekeeping and Expenses

Simply put, in hourly-based billing it is critical that time be tracked and reported accurately. Again, failure to do so can both lead to discipline (*see, e.g., In re Dann*, 136 Wn.2d 67, 960 P.2d 416 (1998) (initials switched on billings from lower to higher rate lawyer) and bar recovery (*see, e.g., In re Columbia Plastics, Inc.*, 251 B.R. 580 (Bkrtcy. W.D. Wash. 2000) (word processors shown as paralegals on billings). So, too, with reimbursable expenses regardless of the billing system (*see, e.g., In re Haskell*, 136 Wn.2d 300, 307-08, 962 P.2d 813 (1998) (first class airfare reported as coach)). On expenses in particular, Comment 1 to RPC 1.5 notes that "[a] lawyer may seek reimbursement for the cost of services performed in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer." WSBA Informal Ethics Opinion 2120 (2006) cautions, however, that "[t]o avoid misunderstandings, clients should be provided with advance disclosure of specific, foreseeable categories of expenses for which they will be charged, such as on-line research."

Billing Forms

Whether providing the client with a monthly bill or a concluding contingent fee summary, only items within the scope of the fee agreement can be included (*see, e.g., In re Marshall*, 160 Wn.2d 317, 332-33, 157 P.3d 859 (2007) (contract lawyer time improperly included when not within agreement) and should be clear enough so that the client can make that determination (*see* RPC 1.5(b); *see, e.g., Simburg, Ketter, Sheppard & Purdy, LLP v. Olshan*). The need for scrupulous accuracy, of course, applies with equal measure to the billing statements the client receives (*see, e.g., In re Dann*, *In re Haskell*). In instances where a third party will be paying the bill, care also needs to be taken not to disclose confidential information in the billing entries (*see* WSBA Formal Ethics Op. 195 (1999)).

Comment 10 to RPC 1.5 notes that the requirement that fees and expenses be "reasonable" and the accompanying factors outlined in RPC 1.5(a) apply to "[e]very fee agreed to, charged, or collected" regardless of the compensation agreement used. The nine factors listed in RPC 1.5(a) range from the difficulty of the project to the skill of the lawyer to the terms of the fee agreement. Comment 1 to RPC 1.5 counsels both that the nine factors listed are not exclusive and that not all of the factors will apply in any given instance.

As with the other aspects of billing discussed, the risks involved with an unreasonable fee include (*see, e.g., In re DeRuiz*, 152 Wn.2d 558, 575, 99 P.3d 881 (2004) ("flat fee" unreasonable when unearned) *but are not limited* to regulatory discipline. In *Holmes v. Loveless*, 122 Wn. App. 470, 94 P.3d 338 (2004), for example, the Court of Appeals held that the "reasonableness" requirement extends over the life of a fee agreement and can even outlive the services performed when, as was the case in *Holmes*, continuing payment obligations from an investment in lieu of cash fees eventually became unenforceable as unreasonable. Further, when a fee agreement is voided on policy grounds for violation of the RPCs, the lawyer or firm may, but need not, receive quantum meruit recovery instead. The Supreme Court in *Ross v. Scannell*, 97 Wn.2d 598, 610, 647 P.2d 1004 (1982), found that the trial court has discretion to award nothing and in *Eriks v. Denver*, 118 Wn.2d 451, 462-63, 824 P.2d 1207 (1992), held that a trial court also had discretion to require disgorgement of fees already paid. Similarly, in *Cotton v. Kronenberg*, 111 Wn. App. 258, 269-272, 44 P.3d 878 (2002), the Court of Appeals found that a lawyer had breached his fiduciary duty to a client for charging a fee that was unreasonable in several respects. *Eriks* and *Cotton* also noted that the Supreme Court held in *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984), that the Consumer Protection Act (with its treble damages and attorney fee remedies) applies to the business aspects of law practice, including billing: "how the price of legal services is determined, billed and collected[.]"

Summing Up

For lawyers in private practice, billing is an essential part of the business side of running a firm. Billing is also an area where disputes can arise with clients and, if they do, lawyers are subject to close scrutiny flowing from the fiduciary duties that apply along with their purely contractual obligations. It pays, therefore, in both a monetary and a practical sense, to devote the same care to billing that lawyers bring to their legal work itself.

II. CHANGING HORSES IN MIDSTREAM: MODIFYING FEE AGREEMENTS

Note: This section originally appeared in the December 2010 Ethics & the Law column in the 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.

III. LAWYER BEWARE: THE CONSUMER PROTECTION ACT

Note: This section originally appeared in the February 2012 Ethics & the Law column in the Bar News.

Since the Washington Supreme Court's decision in *Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163 (1984), the business aspects of law practice have been subject to the Consumer Protection Act, RCW Chapter 19.86. The CPA generally prohibits "unfair or deceptive acts or practices" in "trade or commerce" under RCW 19.86.020. Economic tensions between lawyers and their clients in recent times—particularly billing and collection disputes—have sharpened the focus of the CPA on law firms. In this column, we'll first briefly survey the elements of a CPA claim and then turn to its particular application to the business of practicing law. Before we do, though, it is important to note at the outset that the CPA is "another" remedy for clients (current and former) in disputes with their lawyers—not an "exclusive" one.

The CPA Generally

As originally enacted in 1961, the CPA addressed deceptive business practices and was enforced by the Attorney General through injunctions and civil penalties. That aspect of the CPA continues, but of more practical import for law firms, a private right of action for damages now codified at RCW 19.86.090 was added in 1970. RCW 19.86.090 also includes treble damages (to $25,000) and attorney fees.

The Supreme Court outlined five elements for a CPA claim brought as a private action in *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986): (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) which affects the public interest; (4) injury to the plaintiff's business or property; and (5) a causal link between the unfair or deceptive practice and the injury sustained.

The Supreme Court noted in *Hangman Ridge* (105 Wn.2d at 785) and reiterated more recently in *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009), that a claimant "need not show the act in question was intended to deceive, only that it had the capacity to deceive a substantial portion of the public." The Supreme Court observed in *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 75, 170 P.3d 10 (2007), that "'[k]nowing failure to reveal something of material importance is "deceptive" within the CPA.'" Although many CPA cases focus on deceptive acts, it is important to underscore in the law practice context that "unfair" practices are also prohibited.

Applied to Law Practice

The Supreme Court in *Short* found that the "entrepreneurial aspects of the practice of law" fall within "trade or commerce" under the CPA and further defined those business aspects of law practice (103 Wn.2d at 61) as "how the price of legal services is determined, billed, and collected and the way a law firm obtains, retains, and dismisses clients." By contrast, *Short* left issues relating to the quality of legal services to the realm of negligence law rather than the CPA.

Notwithstanding *Short*, claimants in many circumstances had difficulty with the "public interest" element because they were dealing with essentially private agreements. As *Short* put it (103 Wn.2d at 56): "A breach of a private contract affecting no one but the parties to the contract . . . is not an act or practice affecting the public interest." In *Bertelsen v. Harris*, 459 F. Supp.2d 1055, 1063 (E.D. Wash. 2006), for example, the court dismissed a CPA claim against a law firm on this ground in a dispute over a fee agreement. In 2009, however, the Legislature amended the CPA to add RCW 19.86.093(3) so that a claimant can now meet the "public interest" element by showing that the unfair or deceptive act at issue "(a) [i]njured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons." Even before the 2009 amendments, *Hangman Ridge* (105 Wn.2d at 790) noted that the "public interest" element could be satisfied if the defendant advertized to the general public. With the advent of law firm web sites, lawyers often not only advertize to the general public but in many instances feature statements that walk directly into the CPA along the lines of "we charge fair prices."

Client Acquisition. The Supreme Court in *Eriks v. Denver*, 118 Wn.2d 451, 465, 824 P.2d 1207 (1992), held that a lawyer would violate the CPA if the lawyer failed to disclose conflicts "for the purpose of obtaining clients or increasing profits." In *Eriks*, the lawyer was working for the promoters of a tax shelter at the same time he took on potential investors in the tax shelter as clients. The former investor clients argued that they would not have hired Eriks had they known he was working for the tax shelter promoters. Although the Supreme Court found that disputed issues of material fact precluded the summary judgment, it also held that the determination of whether particular conduct was driven by "entrepreneurial purposes" is a question of fact. In other words, a jury gets to decide the lawyer's motive.

Billing. Improper billing practices have long been a staple of disciplinary cases, ranging from "initial switching" on bills to misrepresent who did the work (*In re Dann*, 136 Wn.2d 67, 77, 960 P.2d 416 (1998)), to falsifying expenses (*In re Haskell*, 136 Wn.2d 300, 307-12, 962 P.2d 813 (1998)), to including work outside the scope of the fee agreement (*In re Marshall*, 160 Wn.2d 317, 335, 157 P.3d 859 (2007)). In other contexts (*see, e.g., Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d at 78-83), the Supreme Court has concluded that deceptive billing practices violate the CPA and that payment alone may be sufficient evidence of injury.

Firms that include standardized "billing practices" as addenda to fee agreements need to make sure both that the "standard practices" comport with the RPCs and that their actual bills mirror their agreements. By labeling them as "standard," firms effectively invite the conclusion that the "public interest" element of the CPA has been met because they are using them with all of their clients. Similarly, firms that routinely take stock in lieu of fees and advertise that fact on their web sites need to meet the high bar for disclosure under RPC 1.8(a) or may face a CPA claim layered in with other remedies if a dispute results. In *Cotton v. Kronenberg*, 111 Wn. App. 258, 273-74, 44 P.3d 878 (2002), for example, the Court of Appeals found that other disciplinary complaints about a lawyer's fee practices were relevant to show that the "public interest" was invoked for purposes of the CPA in a dispute over property taken in lieu of fees. Further, firms that allocate overhead expenses, such as computerized legal research or similar items purchased in bulk, should carefully review Comment 1 to RPC 1.5 and WSBA Ethics Advisory Opinion

2120, both of which discuss the critical need for any allocated charges to reasonably approximate actual costs incurred. The very fact of allocation across an entire client base suggests that any improprieties are also allocated across that same client base in a way that invites application of the CPA.

Collections. The federal district court in Seattle noted pungently in *Lang v. Gordon*, No. C10-819RSL, 2011 WL 62141 at *3 (W.D. Wash. Jan. 6, 2011) (unpublished), that "lawyers who are acting as debt collectors are engaging in the entrepreneurial aspects of law rather than practicing law." Accordingly, firms need to take special care when corresponding with clients (current or former) in an effort to collect a bill to ensure that the statements made in their "dunning letters" are accurate. If they are not, the firm may have opened itself to a counterclaim under the CPA that may quickly deflate the economic value of the bill it was seeking to collect.

Summing Up

The economic hard times of the recent past have put the business aspects of law practice front and center in many attorney-client relationships. Prudent law firm risk management counsels careful review of those practices from client intake to billing to collections—together with how a firm advertizes its business practices on the web. Firms may otherwise find themselves facing a CPA claim with its enhanced damages and attorney fee remedies.

IV. PRESENTATION SLIDES

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GOOD BILLING PRACTICES
REDUCE MALPRACTICE CLAIMS

WSBA
Less Risky Business:
Proactive Malpractice Risk-Reduction Techniques
October 5, 2012
Seattle

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OVERVIEW

1. Block Billing
2. Transparency in Billing
3. Modifying Fee Agreements

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LOGISTICS

- Materials
- Questions

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BLOCK BILLING

1. What is it?
2. Is it prohibited by the RPCs?
3. What are the consequences?

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BLOCK BILLING: WHAT IS IT?

"I know it when I see it…."

Telephone call from Mr. Jones; edit motion; review documents; conference call with experts; outline direct examination of Dr. Smith; prepare jury instructions; assemble exhibits; draft precautionary notice of appeal

TOTAL: 14.7 hours

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BLOCK BILLING: IS IT PROHIBITED?

- Not by the RPCs, but…
- Many courts have fee petition guidelines that reject block billing
- Many clients also have billing guidelines that reject block billing

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BLOCK BILLING: CONSEQUENCES

- Can be a flashpoint
- All fees must be "reasonable" under RPC 1.5 and related court standards
- As a practical matter, block billing can make it harder to show that your fees were "reasonable"

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TRANSPARENCY IN BILLING

1. Timekeeping & Expenses
2. Billing Consistent with Fee Agreement
3. Consequences

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TRANSPARENCY IN BILLING: TIMEKEEPING & EXPENSES

- Timekeeping:
  In re Dann,
  136 Wn.2d 67, 960 P.2d 416 (1998)
- Expenses:
  In re Haskell,
  136 Wn.2d 300, 962 P.2d 813 (1998)

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TRANSPARENCY IN BILLING: CONSISTENCY

- *In re Marshall,*
  160 Wn.2d 317, 157 P.3d 859 (2007)

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TRANSPARENCY IN BILLING: CONSEQUENCES

- Regulatory Discipline
- Civil Claims for Breach of Fiduciary Duty
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FEE MODIFICATION

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

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FEE MODIFICATION: 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 MODIFICATION: GENERALLY

- Fiduciary duties
- RPCs: 1.7(a)(2) & 1.8(a) & WSBA Advisory Op 2209 (2012)
- Contract law

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FEE MODIFICATION: GENERALLY

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

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FEE MODIFICATION:
PRACTICAL STEPS
TO AVOID PROBLEMS LATER

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

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FEE MODIFICATION:
PRACTICAL STEPS
TO AVOID PROBLEMS LATER

- *Example in hourly context:*
  Mechanism to change rates
- *Example in contingent context:*
  Different % on appeal

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FEE MODIFICATION:
PRACTICAL STEPS
TO AVOID PROBLEMS LATER

- *Avoid Ambiguity:*
  Contract construed against drafter
- *Avoid Ambiguity:*
  Don't look for help from courts

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FEE MODIFICATION:
CONSEQUENCES

- Breach of fiduciary duty
- Violation of the RPCs

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FEE MODIFICATION:
CONSEQUENCES

- "The Shield": Avoiding payment
- "The Sword": Fee disgorgement

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FEE MODIFICATION:
CONSEQUENCES

- CPA & the business aspects of law practice
- Counterclaims for malpractice & breach of fiduciary duty

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FEE MODIFICATION:
BEYOND WASHINGTON

- **ABA Formal Ethics Opinion 11-458:** "Changing Fee Arrangements During Representation"
- **ABA Formal Ethics Opinion 02-427:** "Contractual Security Interest Obtained by a Lawyer to Secure Payment of a Fee"

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FEE MODIFICATION:
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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