

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**

LOGISTICS

▶ **Materials**

▶ **Questions**

FEE MODIFICATIONS GENERALLY

Sabin v. Terrall,

186 Or 238, 206 P2d 100 (1949) (citation omitted)

“An attorney is not prohibited from contracting with his client respecting his fees, and a contract thus made after the commencement of the relation of attorney and client is not per se void, but it will, by reason of the confidential nature of the relation, be closely scrutinized by the courts.”

FEE MODIFICATIONS GENERALLY

- ▶ **Fiduciary duties**
- ▶ **RPCs: 1.5(a) & 1.7(a)(2)
(& possibly 1.8(a))**
- ▶ **Contract law**

FEE MODIFICATIONS

GENERALLY

- ▶ **Hourly Fees**
- ▶ **Contingent Fees**
- ▶ **Flat Fees**

FEE MODIFICATIONS FIDUCIARY DUTIES

KAO v. Ferguson,

315 Or 135, 142, 843 P2d 442 (1992)

“Whether the lawyer breached a professional duty may be a relevant factor and some (though certainly not all) aspects of a lawyer’s duty to a client are described by the disciplinary rules. For that reason, the disciplinary rules may, to some extent, illuminate a court’s inquiry into whether a lawyer’s fee should be reduced to reflect a breach of a duty . . .”

FEE MODIFICATIONS FIDUCIARY DUTIES

KAO v. Ferguson,

315 Or 135, 144, 843 P2d 442 (1992)

“In the determination whether a lawyer breached a fiduciary duty to a client, the court may consider the standard of conduct prescribed by the disciplinary rules . . . But, it is the breach of fiduciary duty owed to a client, rather than a violation of a disciplinary rule, that may result in a reduction or loss of a fee.”

FEE MODIFICATIONS

RPC 1.5(a)

Formal Ethics Opinion 2005-69

(at 161) (2005)

“Oregon RPC 1.5(a) prevents a lawyer from ‘enter[ing] into an agreement for, charg[ing] or collect[ing] an illegal or clearly excessive fee . . . A fee is ‘illegal or clearly excessive’ if it exceeds the amount previously agreed on . . . Absent a valid amendment to the substantive terms of the fee agreement, Lawyer may not receive more than the previously agreed-on fee[.]”

FEE MODIFICATIONS

RPC 1.7(a)(2)

Formal Ethics Opinion 2005-97

(at 234) (2005)

“A modification of a fee agreement in the lawyer’s favor requires client consent based on an explanation of the reason for the change and its effect on the client.”

FEE MODIFICATIONS **(Possibly) RPC 1.8(a)**

Welsh v. Case,

180 Or App 370, 382-83, 43 P3d 445 (2002)
(Waffling under the old “DRs”)

ABA Formal Ethics Op. 11-458 **(at 3) (2011)**

“A lawyer seeking new or additional security for payment under an existing fee agreement also must comply with Rule 1.8(a).”

FEE MODIFICATIONS

CONTRACT LAW

Eagle Industries v. Thompson,

321 Or 398, 404-14, 900 P2d 475 (1995)

Extensive discussion and application of contract principles to attorney fee agreement

FEE MODIFICATIONS

CONTRACT LAW

Varner v. Eves,

164 Or App 66, 72-73, 990 P2d 357 (1999)

“We next decide whether the oral promise was inconsistent with the fee agreement; if so, it is barred from consideration by the parol evidence rule.”

FEE MODIFICATIONS APPLICATION

Mayfly Group, Inc. v. Ruiz,

241 Or App 77, 80-81, 250 P3d 360 (2011)

(citations omitted) (discussing general rule)

“The general rule is that an agreement may not be enforced if it is illegal . . . [w]hen the alleged illegality is based on the violation of a statute, the question of the contract’s enforceability is one of legislative intent.”

FEE MODIFICATIONS APPLICATION

Bechler v. Macaluso,

2010 WL 2034635 at *11 (D Or May 14, 2010)

(voiding attorney fee agreement)

“Defendants are not entitled to recovery of any fees or costs under the Agreement . . . Defendants may allege quantum meruit[.]”

PRACTICAL STEPS TO AVOID PROBLEMS LATER

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

PRACTICAL STEPS TO AVOID PROBLEMS LATER

- ▶ ***Example in hourly context:***
Mechanism to change rates

- ▶ ***Example in contingent context:***
Different % on appeal

PRACTICAL STEPS TO AVOID PROBLEMS LATER

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

(“UNFORTUNATE”) CONSEQUENCES

- ▶ **Breach of fiduciary duty**
- ▶ **Violation of the RPCs**

(“UNFORTUNATE”) CONSEQUENCES

- ▶ **“The Shield”:
Avoiding payment**
- ▶ **“The Sword”:
Fee disgorgement**

BEYOND OREGON

- ▶ *Ward v. Richards & Rossano, Inc.*,
51 Wn App 423, 754 P2d 120 (1988)
- ▶ **ABA Formal Ethics Opinion 11-458:
“Changing Fee Arrangements During
Representation”**

SUMMING UP

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

QUESTIONS?