



ETHICS ALERT

Uncertain Ethics Requirements for Attorney Fee Modifications Counsel Compliance with Rule 3-300 when Modifying a Fee Agreement

*Committee on Professional Responsibility and Conduct
(June, 2009)*

Attorney fee agreements with clients are often modified during the course of the attorney-client relationship, as a result of changed circumstances in a matter, the needs desires of the parties, or a number of other reasons. Given the economic turmoil of the times, such modifications may occur with increased frequency. While attorneys are free to bargain for the terms of their engagements at arms length before the commencement of the relationship, there is a quantum change in the attorney's ability to bargain once the fiduciary duties of counsel are assumed.

One controversial and unsettled issue concerns whether an attorney must comply with rule 3-300 of the California Rules of Professional Conduct ("CRPC") which concerns, among other things, business transactions with clients and a lawyer's acquisition of adverse pecuniary interests.^{1/}

Rule 3-300 does not expressly address fee agreements or modification of fee agreements. The Official Discussion to rule 3-300 carves out fee agreements by which the attorney is "retained,"^{2/} but it leaves uncertain whether this excludes subsequent modifications after the attorney is already "retained." Reflective of this uncertainty, respected ethics scholars and professional responsibility committees of bar associations all across the state have expressed opinions on both sides of the issue as to whether an attorney must comply with rule 3-300 in connection with modifications to the financial terms of an existing fee agreement.

^{1/} Rule 3-300 states: "A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied: (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and (C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition."

^{2/} The Discussion section of rule 3-300 states: "Rule 3-300 is not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security or other pecuniary interest adverse to the client."

Last year the State Bar of California’s Standing Committee on Professional Responsibility and Conduct (“COPRAC”) issued [Proposed Formal Opinion Interim No. 05-0001 \(“Proposed Opinion”\)](#) which concluded that CRPC Rule 3-300 does not per se apply to a modification of a fee agreement after the attorney-client relationship has commenced. Nonetheless, the Proposed Opinion concluded that any modification of an existing fee agreement will be subject to “close scrutiny” to determine if it is fair, reasonable, fully explained and consented to by the client. Rule 3-300 would go one step further requiring the attorney to advise the client in writing that he or she may wish to consult independent counsel and give the client a reasonable opportunity to do so.

The Proposed Opinion generated numerous [written comments](#)^{3/} both in support and in opposition and ultimately was not approved by the Board of Governor’s Committee on Regulations, Admissions and Discipline.

Given the history of the Proposed Opinion, and pending further clarification from the courts and the issuance of the revised CRPC after the work of the Rules Revision Commission is complete, the prudent attorney will be best served by complying with all aspects of rule 3-300 when modifying a fee agreement with an existing client.

^{3/} This link provides the written comments considered by the State Bar in response to the request for public comment.

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