

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 05-0001**

ISSUE: What are the ethical ramifications associated with a modification of an attorney fee agreement?

DIGEST: Rule 3-300 of the Rules of Professional Conduct^{1/} does not apply to a modification of a fee agreement unless the agreement confers on the attorney an ownership, security, possessory, or other pecuniary interest adverse to the client. While rule 3-300 does not per se apply to a modification of a fee agreement after the attorney-client relationship has commenced, any modification of an existing fee agreement must be fair, reasonable, fully explained, and consented to by the client. A number of factors will determine whether modification of a fee agreement meets this standard.

**AUTHORITIES
INTERPRETED:**

Rules 3-300, 3-700, and 4-200 of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code sections 6106 and 6147.

STATEMENT OF FACTS

Fact Pattern One: Attorney represents Client, a plaintiff in pending litigation, pursuant to a written hourly fee retainer agreement. After timely payment of the first six months of invoices, which totaled \$100,000, Client fails to pay two consecutive monthly invoices. When Attorney contacts Client about the \$60,000 balance due, Client describes a deteriorating personal financial condition and an inability to pay the balance due or to continue to pay Attorney's fees. Client asks to change the hourly fee agreement to a contingency fee agreement based on a percentage of the recovery. Attorney agrees to the concept and recommends modifying the fee agreement by confirming Attorney's right to keep the \$100,000 paid by Client to date, writing off the \$60,000 balance due, and agreeing to take 25% of the net recovery. Attorney advises Client that, although the trial date is six months away, under the modified fee structure attorney may, because of the contingency factor, receive a larger fee than under the original agreement. Client accepts Attorney's recommendation, and Attorney prepares a modified fee agreement that complies with the requirements of Business and Professions Code section 6147, which both parties sign. No advice is given by Attorney to Client to consult other counsel.

Fact Pattern Two: Pursuant to a written contingency fee agreement, Attorney represents Client in a suit against an insurance company for wrongful revocation of benefits from a disability policy of insurance. The contingency agreement provides for Attorney to advance costs and to receive 33% of the net recovery if the matter settles before trial or 40% of the net recovery after commencement of trial. After months of pre-trial litigation and extensive negotiations, the insurance company offers \$500,000 in settlement. Trial is set to commence in five weeks. Attorney recommends acceptance, but Client refuses. In response, Attorney informs Client that if she will not accept the offer, he will quit, and she will have to find another attorney. Attorney's response prompts Client to accuse Attorney of pressuring her to accept an unreasonably low settlement. With trial approaching, Client requests that Attorney remain on the case. Attorney agrees on the condition that the contingency fee is increased to 40% of any settlement, and 50% of any verdict. Client reluctantly agrees and signs the modified fee agreement prepared by Attorney, which complies with Business and Professions Code section 6147. No advice is given by Attorney to Client to consult other counsel.

^{1/} Unless otherwise indicated, all rules references are to the Rules of Professional Conduct of the State Bar of California.

DISCUSSION

The law treats the negotiation of a legal services agreement between a prospective client and an attorney as an arm's-length transaction. "The confidential relation does not exist until such contract is made and in agreeing upon its terms the parties deal at arm's length." *Cooley v. Miller & Lux* (1909) 156 Cal. 510, 524 [105 P. 981]. Nonetheless, while the parties deal at arm's length, rule 4-200 prohibits an attorney from entering into an agreement for an illegal or unconscionable fee.^{2/} Rule 4-200(B) lists 11 standards to determine unconscionability, which include the amount of the fee in proportion to the value of the services performed, the amount involved and the results obtained, the nature and length of the professional relationship between the attorney and the client, and whether the client gave informed consent to the fee. In addressing the enforceability of fee agreements, California courts have stated that an attorney must deal fairly and in good faith when negotiating the fee agreement with the client. *Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App.4th 419, 430 [130 Cal.Rptr.2d 782]. An attorney is professionally obligated to ensure that the terms of the fee agreement are fair, reasonable, fully explained, and consented to by the client. *Severson & Werson v. Bolinger* (1991) 235 Cal.App.3d 1569, 1572 [1 Cal.Rptr.2d 531]. The Committee believes these standards apply to all fee agreements, original as well as modified.

A. APPLICABILITY OF RULE 3-300^{3/}

Rule 3-300 mandates compliance with its requirements in two situations: when an attorney (1) enters into a business transaction with a client, or (2) acquires an ownership, possessory, security, or other pecuniary interest adverse to the client. The official comment to rule 3-300 specifies that the rule is not intended to apply to the agreement by which the client retains the attorney unless the attorney acquires one of the specified interests adverse to the client; rather, rule 4-200 governs such agreements. The comment leaves unanswered whether the modification of an existing retainer agreement is either (1) a "business transaction" within the meaning of the rule, or (2) results in the acquisition of a "pecuniary interest adverse to the client." We conclude that rule 3-300 is not applicable to the fee modifications in our two fact patterns because the modification of a fee agreement is not a "business transaction" within the meaning of rule 3-300, and neither of the fee modifications described above confers on the attorney the type of adverse interest contemplated by the rule.

1. Meaning of the Term "Business Transaction" in Rule 3-300

No California case has defined "business transaction" within the context of rule 3-300. In California State Bar Formal Opn. No. 1989-116 this Committee noted that "once created, the attorney-client relationship is arguably a 'business relationship' between attorney and client." Since that opinion was issued, however, case law in California and elsewhere has differentiated a business transaction between an attorney and a client from an agreement for the payment of money for the rendition of professional services by the attorney. "Attorneys wear different hats when they perform legal services on behalf of their clients and when they conduct business with them." *Meyhew v.*

^{2/} For a collection of cases, including California decisions, on the enforceability of attorney fee agreements between an attorney and an existing client, see Annotation, Validity and Effect of Contract for Attorney's Compensation Made After Inception of Attorney-Client Relationship (1967 and 2007 Supp.) 13 A.L.R.3d 701.

^{3/} Rule 3-300. Avoiding Interests Adverse to a Client.

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."

Benninghoff (1977) 53 Cal.App.4th 1365, 1369 [62 Cal.Rptr.2d 27]. While we find no California cases directly on point, we do find the approach of a recent out-of-state decision persuasive. In *Welsh v. Case* (Or.App. 2002) 180 Or.App. 370 [43 P.3d 445], the court noted:

Defendants cite no case, and we can find none, in which the “business transaction” at the core of this rule is the fee arrangement between the lawyer and the client. Rather, the cases apply the rule when the lawyer and a client have entered into a transaction that is unrelated substantively to the formation or structure of the lawyer-client relationship itself, for example, when a lawyer arranges to borrow money from a client, (citation omitted), lend money to a client for a business venture, (citation omitted), or receive a gift from a client, (citation omitted).^{4/}

Unlike a traditional business or financial transaction between an attorney and a client when the client may not fully appreciate the divergence of interests that may exist, a client naturally understands that in negotiating a fee, the attorney is not representing and looking after the interests of the client. The Restatement (Third) of the Law Governing Lawyers (2000), § 18, follows this approach of excluding agreements for the payment of money by clients for legal services from the special rules applicable to business and financial transactions between attorneys and clients. *Id.* at § 18, cmt. a.

The State Bar Court has never applied rule 3-300 in determining whether the modification of a fee agreement was ethical. Further, no California court considering the validity of a modification of an attorney’s fee agreement has subjected the agreement to analysis under rule 3-300. As noted below in section B of this opinion, the consistent judicial approach in California has been to scrutinize the circumstances in which the modification was entered into to ensure that the modification was fair and reasonable to the client, but not treat it as a business transaction between the attorney and the client within rule 3-300.^{5/}

It is the opinion of the Committee that, for the reasons above stated, a modification of a fee agreement with a client is not a “business transaction” within the scope of rule 3-300.^{6/}

2. When Does an Attorney Acquire a Pecuniary Interest Adverse to a Client?

Rule 3-300 applies whenever attorneys “knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client.” Rule 3-300 applies to both the initial fee agreement and a modification of a fee agreement “where the member wishes to obtain an interest in client’s property in order to secure the amount of the member’s past due or future fees.” See, Discussion, paragraph 3 to rule 3-300. Neither factual scenario presented

^{4/} The “rule” the court referenced is DR 5-104(A), which provides:

A lawyer shall not enter into a business transaction with a client if they have differing interests therein and the client expects the lawyer to exercise the lawyer’s professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

^{5/} Several out-of-state decisions have stated or implied that fee modification agreements are business transactions between the attorney and the client, but they are distinguishable and, in our view, unpersuasive. They either rely on more specific language in the jurisdiction’s rules of professional conduct (*In re Hefron* (Ind. 2002) 771 N.E.2d 1157, 1162-1163) (comment [i] to Indiana’s Rule 1.8(a) expressly brings renegotiated fee agreements within the Rule)) or the underlying facts show that the attorney acquired an ownership or security interest in the client’s property pursuant to the modification. See, e.g., *Cotton v. Kronenberg* (Wash. 2002) 111 Wash.App. 258 [44 P.3d 878, 884] (the attorney renegotiated into a more favorable fee agreement with a client that gave the attorney an ownership interest in real and personal property of the client). In some cases, the relationship is simply assumed. See, *In re Discipline of Light* (N.D. 2000) 615 N.W.2d 164, 171 (although the court treated the renegotiated agreement as within the business transaction rule (rule 1.8(a)), the court did not specify or explain what made the modification a “business” transaction with the client).

^{6/} To the extent California State Bar Formal Opn. No. 1989-116 suggests that any modification of a fee agreement constitutes a business transaction between an attorney and a client to which rule 3-300 is applicable, we decline to follow it.

above involves an attorney acquiring an “ownership,” “possessory,” or “security” interest; consequently, the critical issue is the construction of the phrase “other pecuniary interest adverse to the client.” That phrase is not defined in the rules and has not been construed by the courts. All the enumerated interests (“ownership,” “possessory,” “security”) may be “acquired” by the attorney and be held adverse to the client. See, *Fletcher v. Davis* (2004) 33 Cal.4th 61, 68-69 [14 Cal.Rptr.3d 58] (an interest will be considered adverse if it is reasonably foreseeable that the interest held by the attorney could become detrimental to the client). The issue here is whether all fee modifications necessarily fall within this category.

Longstanding rules of statutory interpretation require that words and terms should be construed in connection with each other, rather than in isolation. The rules are “noscitur a sociis” and “ejusdem generis” and roughly translate as words and terms are known by the company they keep.^{7/} Under these principles, a court will adopt a restricted meaning of a listed item if acceptance of a more expansive meaning would make other items in the list unnecessary or redundant, or would otherwise make the item markedly dissimilar to the other items in the list. *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 307 [58 Cal.Rptr.2d 855]. In rule 3-300 the phrase “other pecuniary interest” is tied to and reflects the introductory set – “ownership, possessory, or security.” While “noscitur a sociis” and “ejusdem generis” are not inflexible rules of application, the Committee discerns no policy reasons why the rules should not be applied; rather, just the contrary. A broad construction of “other pecuniary interests” divorced from the introductory set would not only make the introductory set meaningless, but it would eviscerate the distinction between fee agreements and business transactions that we recognize and adopt in this opinion.

We see nothing in either factual scenario that suggests that the attorney in modifying the fee agreement is acquiring the type of adverse pecuniary interest that triggers the disclosure and consent obligations of rule 3-300.^{8/} For purposes of rule 3-300, an “interest” is a power to impair or liquidate the client’s property. See, *Hawk v. State Bar* (1988) 45 Cal.3d 591, 601 [247 Cal.Rptr. 599]. In each of the factual scenarios considered here, no such power or interest is conveyed. Instead, the effect of the modification is that the client has promised to pay more to the attorney; the only right obtained by the attorney is the right to collect payment, a debt, from the client. In neither scenario has the attorney obtained an interest that would allow him to collect disputed fees without judicial scrutiny.

We recognize that many attorneys have long assumed that a fee modification is subject to rule 3-300; however, we believe that assumption cannot be squared with the current language of the rule. Our position is further confirmed by the consistent practice of the California Supreme Court when addressing the issue of acquiring “a pecuniary interest adverse to a client.” In each instance when the court found such an interest, the interest in the client’s property secured the attorneys’ fees and permitted the attorney to use that interest to ensure payment of his fees without a contested judicial hearing.^{9/} When the attorney did not have that power, the court expressly declined to

^{7/} Under the rule of “noscitur a sociis” a court will adopt a restricted meaning of a listed term if acceptance of a more expansive meaning would render other items unnecessary surplusage. *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 307 [58 Cal.Rptr.2d 855]. The principle of “ejusdem generis” is related. “Ejusdem generis” provides that when a specific class of persons or things is enumerated and then followed by a general class of persons or things, the general is construed with respect to the specific. *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159 [278 Cal.Rptr. 614].

^{8/} In the first factual scenario, the attorney does modify the fee agreement to convert an hourly fee retainer to a contingent fee agreement. While a contingent fee agreement does give the attorney an interest in the client’s cause of action, such an interest is not within rule 3-300, or every contingent fee agreement would require compliance with rule 3-300, which no court has found. Rule 3-300, official comment; cf. California State Bar Formal Opn. No. 2006-170 (opining that a charging lien contained in contingency fee agreement did not bring the agreement within rule 3-300).

^{9/} The California Supreme Court has held that the following constitute the acquisition of an adverse interest under rule 3-300 or its predecessor rule 5-101: an attorney’s purchase of a note secured by a first deed of trust on property that was the subject of the litigation the attorney was engaged to pursue (*Ames v. State Bar* (1973) 8 Cal.3d 910, 920 [106 Cal.Rptr. 489]); an attorney’s acquisition of a writ of execution against property on which his client also has a right to levy (*Silver v. State Bar* (1974) 13 Cal.3d 134, 139-140 [117 Cal.Rptr. 821]); an attorney’s acquisition from the client of a note secured by a deed of trust in real property in order to secure payment of legal fees (*Hawk v. State* (continued...))

find the attorney had acquired an interest adverse to the client. *Hawk v. State Bar, supra*, 45 Cal.3d at pp. 600-601 (an unsecured promissory note that “gives an attorney only a right to proceed against the client’s assets in a contested judicial proceeding” is not an adverse pecuniary interest since it did not give the attorney an “interest in the client’s property” that could be summarily realized).^{10/} An attorney who negotiates and obtains a fee modification that does not convey such an interest to the attorney does not, by that fact alone, acquire an adverse pecuniary interest that triggers rule 3-300.^{11/}

B. A MODIFICATION OF A FEE AGREEMENT IS SUBJECT TO CLOSE SCRUTINY

The State Bar has used the term “close scrutiny” in evaluating an attorney’s conduct in seeking a fee modification. See, *In re Lindmark* (2004) 4 Cal. State Bar Ct. Rptr. 668 (a modification of a fee agreement implicates an attorney’s fiduciary duties to the client such that any modification “beneficial to the attorney will be closely scrutinized with the utmost strictness for any unfairness”).^{12/} The California Supreme Court has emphasized that the attorney bears the risk that the compensation provided by the initial fee agreement with the client is adequate for the

Bar, supra, 45 Cal.3d at pp. 593-594); an attorney’s obtaining an ownership interest in client’s property that had a value greater than agreed upon fee (*Brockway v. State Bar (1991)* 53 Cal.3d at pp. 64-65 [278 Cal.Rptr. 836]); and an attorney’s acquisition of a charging lien to secure fees earned in an hourly fee agreement (*Fletcher v. Davis, supra*, 33 Cal.4th at pp. 71-72).

^{10/} The court distinguished a secured interest from an unsecured interest:

Hulland indicates a disapproval of fee agreements that allow the attorney to collect disputed fees without judicial scrutiny, as the note secured by deed of trust with a power of sale does. An unsecured promissory note, by contrast, gives an attorney only a right to proceed against the client’s assets in a contested judicial proceeding at which the client may dispute the indebtedness. The note allows the attorney to obtain a judgment, and to seek to enforce the judgment against the client’s assets, if any. It does not give the attorney a present interest in the client’s property, which the attorney can summarily realize.

Hawk v. State Bar, supra, 45 Cal.3d at pp. 600-601.

^{11/} In Formal Opinion 1994-135 this Committee concluded that rule 3-300 applied to a modification of a contingency fee agreement that provided for front-loaded receipt of attorneys’ fees in connection with a structured settlement to be paid out over the client’s life. This conclusion was based upon the possibility that such a modification could inhibit a client’s ability to settle or limit a client’s settlement options. We believe the factual scenario in 1994-135 is distinguishable from the factual scenarios in this opinion, which do not affect the timing of the payment of fees, and that the opinion therefore does not conflict with our conclusion. To the extent, however, that there is language in 1994-135 that can be interpreted as concluding that rule 3-300 applies to every modification of a fee agreement, we disavow those comments.

^{12/} The Restatement (Third) of the Law Governing Lawyers (2000), § 18, adopts a similar approach:

Client-lawyer fee contracts entered into after the matter in question is under way are subject to special scrutiny. A client might accept such a contract because it is burdensome to change lawyers during a representation. A client might hesitate to resist or even to suggest changes in new terms proposed by the lawyer, fearing the lawyer’s resentment or believing that the proposals are meant to promote the client’s good. A lawyer, on the other hand, usually has no justification for failing to reach a contract at the inception of the relationship or pressing need to modify an existing contract during it. The lawyer often has both the opportunity and the sophistication to propose appropriate terms before accepting the matter.

Id. § 18, cmt. e. (citation omitted).

retention.^{13/} We construe these precedents as supporting the use of a close scrutiny test when evaluating the fairness and reasonableness of a modification of a fee agreement. We also remind attorneys that, in addition, an attorney's use of duress and coercion to induce a client to enter into a modified fee agreement may constitute "moral turpitude" warranting discipline pursuant to Business and Professions Code section 6106. See, *In the Matter of Shalant* (2005) 4 Cal. State Bar Ct. Rptr. 829.

In an effort to assist California attorneys in determining whether a fee modification would be deemed fair and reasonable, the Committee suggests the following guidelines:

1. A modification requested by the client is more likely to be considered fair and reasonable than a modification requested by the attorney.
2. A modification designed to address an expansion of the services being provided is more likely to be considered fair and reasonable than a modification obtained by an attorney without a change in the services originally contracted for by the client.
3. A modification sought by the attorney at a critical juncture in the representation, when the client does not have adequate time to consider the modification proposed by the attorney, is less likely to be considered fair and reasonable than a modification obtained when the client has the opportunity to deliberate whether to agree to the modification. *In the Matter of Shalant, supra*, 4 Cal. State Bar Ct. Rptr. 829.
4. A modification that benefits the client in some substantial way is more likely to be considered fair and reasonable than a modification that simply relieves the client from the task of securing new counsel. *In re Lindmark, supra*, 4 Cal. State Bar Ct. Rptr. 668.
5. A modification that results from a client's difficulty or inability to fulfill the obligations assumed in the initial retainer agreement and is responsive to the client's financial distress is more likely to be considered fair and reasonable than a modification dictated by an attorney's unilateral demand. See, note 14, *infra*.
6. A modification that is sought under circumstances that suggest the attorney is retaliating against the client for the client's exercise of a right held by the client (e.g., the decision whether to accept a settlement proposal) is less likely to be considered fair and reasonable than a modification that is not triggered by the client's exercise of his/her rights.
7. If the attorney has mentioned withdrawal as a consequence of failing to agree to a modification of the fee agreement and the client thereafter agrees to a modification, whether the modification is fair and reasonable will be influenced by whether the attorney's withdrawal would have been reasonably

^{13/} *Grossman v. State Bar* (1983) 34 Cal.3d 73, 78 [192 Cal.Rptr. 397] ("Under a fixed fee contract, an attorney may not take compensation over the fixed fee without the client's consent to a renegotiated fee agreement . . . even if the work becomes more onerous than originally anticipated") (citations omitted); cf. *Reynolds v. Sorosis Fruit Co.* (1901) 133 Cal. 625, 628 [66 P. 21] ("The fact that plaintiff [attorney] made a bad bargain, and was compelled to do more than four hundred dollars worth of labor, cannot relieve him of his contract. He is precisely in the same position that any other party would be, who, having made a contract for a certain sum to do a certain thing, finds by experience that the sum is not adequate compensation") (brackets added). In *Hawk v. State Bar* (1988) 45 Cal.3d 591 [247 Cal.Rptr. 599], which involved a business transaction between an attorney and a client, the court did use "strict scrutiny" language in quite broad terms:

In *Ritter*, we rejected the argument that failure to give the clients time to seek independent counsel is a mere technical violation, emphasizing the fiduciary nature of the relationship: 'All dealings between an attorney and his client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for any unfairness.'

Id. at p. 598 (citing *Ritter v. State Bar* (1985) 40 Cal.3d 595, 602 [221 Cal.Rptr. 134]).

justified in the circumstances and whether the attorney had indicated in connection with the threatened withdrawal that the attorney would provide all services necessary to prevent any reasonably foreseeable prejudice to the rights of the client as required by rule 3-700(A)(2). *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 915 [26 Cal.Rptr. 554].

8. A fee modification entered into between an attorney and a sophisticated client, or a client represented by independent counsel, is more likely to be deemed fair and reasonable than a modification entered into between an attorney and an unsophisticated or unrepresented client. Rule 4-200(B)(2).

C. APPLICATION OF THE CLOSE SCRUTINY STANDARD TO FACT SCENARIOS

In Pattern One above, Client has fallen behind in payments under an hourly fee agreement, and has requested that Attorney modify the terms of the representation. In that fact situation, Client requests Attorney to convert to a contingency agreement due to Client's present inability to pay fees on an hourly basis. The modification made by Attorney in that situation is an accommodation to Client's needs in which Attorney may ultimately obtain greater compensation under the contingency agreement, but will give up any further right to hourly compensation. While Client surrenders a portion of the anticipated recovery, Client also gains relief from the current balance due and future hourly fees that Client cannot pay and Attorney assumes some of the financial risk of the litigation. There is a give and take that equalizes the positions of the parties and advances the goals of Client in a fair and reasonable manner; moreover, the possibility that Attorney may receive a higher fee as a result of the modification is explained to Client. Further, with trial still six months off, a contingency fee plus the \$100,000 already paid is not, under our factual scenarios, unconscionable. Both parties part with and receive appropriate consideration, and the attorney-client relationship continues, which is Client's goal. In this situation, the Committee believes Attorney has acted ethically and has not engaged in overreaching vis à vis Client.^{14/} The modified fee agreement is fair and reasonable and has been fully explained and consented to by Client.

Contrast this situation with the facts described in Pattern Two. There, Client has not asked for a modification. She has simply rejected a settlement offer. Attorney has reacted negatively to Client's decision and threatened to withdraw unless Client agrees to increase his percentage of any recovery. Attorney is not doing any more for Client than Attorney originally agreed to do, but is extracting a greater share of the recovery. In these circumstances, the modification is not an accommodation of Client's needs, but rather, an exertion of pressure by Attorney to alter the fee agreement to his advantage, under threat of withdrawal and in the face of the assertion of a right reserved to Client to accept or reject a settlement.^{15/} Under these circumstances, absent a continuance of the trial date and other accommodation, the threatened withdrawal is likely to violate rule 3-700(A), which requires an attorney to take reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. Obtaining a modification under these circumstances would breach an attorney's ethical and fiduciary obligations to the client. In addition, the resulting fee would likely be considered unconscionable for two independent reasons: first, the circumstances and timing of the threat to withdraw render Client's consent insufficiently voluntary to constitute "informed consent;"^{16/} and second, the increased fee is not warranted by the circumstances. See, American Bar Association Formal Opinion 04-432 (pressures, stress, and anxiety resulting from incarceration make it unlikely that consent provided by incarcerated client will be sufficiently genuine and voluntary to constitute "informed consent"); *Bushman v. State Bar* (1974) 11 Cal.3d 558, 563 [113 Cal.Rptr. 904] (agreement that results in payment "so exorbitant and wholly disproportionate. . . as to shock the conscience," would be unconscionable). Obtaining a modification under these circumstances may also violate Business and Professions Code section 6106, which prohibits acts involving moral

^{14/} *Tidball v. Hetrick* (S.D. 1985) 363 N.W.2d 414, 417-418 (client difficulties in meeting obligations under initial fee agreement was a significant factor in treating modification as fair and reasonable).

^{15/} *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 399, 404 [212 Cal.Rptr. 151] ("law is well settled that an attorney must be specifically authorized to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise settlement of pending litigation."); see rule 3-510 (attorney must promptly communicate written settlement offer to client in civil matter and all offers made to client in criminal matters); Business and Professions Code section 6103.5 (attorney must communicate written offer of settlement to client).

^{16/} Rule 4-200(B)(11).

turpitude. See, *In the Matter of Shalant, supra*, 4 Cal. State Bar Ct. Rptr. at p. 837 (attorney's conduct in pressuring a client into a modified fee agreement, shortly before client's deposition, constituted act of moral turpitude warranting discipline).

Ramirez v. Sturdevant, supra, 21 Cal.App.4th 904, is not contrary to our conclusion. In *Ramirez*, the court found a modification of a fee agreement to be valid and enforceable even though the attorney had threatened to withdraw from the representation if the client did not agree to an increased fee. *Ramirez* is distinguishable because, in exchange for an increased fee, the attorney agreed to provide additional services beyond those contemplated by the initial agreement; moreover, the attorney's withdrawal could have been accomplished without prejudicing the client's interests because the attorney agreed to prepare and file necessary papers to protect the client prior to withdrawing from the representation. *Id.* at p. 915.

Based on the foregoing, it is the Committee's view that the fee modification in Pattern Two is unfair and unreasonable under the close scrutiny standard. Moreover, we believe the attorney in Pattern Two has breached the ethical obligation not to charge an unconscionable fee under rule 4-200 and could be subject to discipline for moral turpitude.

CONCLUSION

We conclude that rule 3-300 does not apply to a modification of a fee agreement regardless of the circumstances in which the modification is sought and obtained, unless the modification conveys to the attorney an interest specified in rule 3-300. Considering the factors described above, we conclude that rule 3-300 is not applicable to the modifications described in the above factual scenarios.

A modification of an existing fee agreement is, however, subject to close scrutiny to determine whether it is fair and reasonable and has been fully explained and consented to by the client. In determining whether a modification is ethical, all the facts and circumstances surrounding the modification, including among others, the reason for, timing and financial impact of the modification on the attorney and the client, must be considered.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibility, or any member of the State Bar.