

LEGAL ETHICS OPINION 1705

CONTINGENCY FEE IN LITIGATION;
HOURLY RATES PLUS LUMP SUM TO
BE PAID BY CLIENT FOR ATTORNEY'S
AGREEMENT TO CARRY FEES
INDEFINITELY.

You have presented a hypothetical situation in which Client engaged Lawyer to represent his interests in acquiring certain real estate, which acquisition was complicated by a cloud on title, created by an unperformed contract of sale between the original owner and a developer. Lawyer filed a declaratory judgment action on behalf of Client seeking to have the contract declared null and void, to remove the cloud on title. Lawyer drafted an option agreement with Client for the acquisition of the property in which it was made clear that the acquisition was subject to the clearing of the cloud on title.

Client agreed to pay the costs advanced and hourly fees as billed. Litigation in this matter, including an appeal to the Supreme Court of Virginia, continued for five years. In addition, Lawyer had to make several appearances before county boards concerning zoning issues. Midway through the litigation, Client advised Lawyer of his inability to continue to finance the litigation as originally agreed. Client requested that Lawyer defer all fees until conclusion of the case, at which time the balance would be due in full. In addition, contingent upon Client's acquisition of the property after the cloud on title was removed, Client would pay an additional \$25,000 to Lawyer in consideration of payment not being made as originally agreed, and such an agreement was drafted and executed at Client's request. The litigation was ultimately resolved in Client's favor, and Client retained Attorney B to close on the acquisition of the property. Attorney B then advised Lawyer that the fee agreement was unethical and unconscionable and would not be paid. Attorney B has provided no explanation as to the unreasonableness of the fee or why it might be considered unethical.

Under the facts you have presented, you have asked the committee to opine as to the propriety of charging a contingent fee in litigation involving clearing a cloud on the title to real property, and whether it is proper to charge a lump sum in addition to hourly rates in return for carrying fees indefinitely. Also, you inquire whether the agreement in question gives rise to a client's obligation to pay a contingent/lump sum fee based on both results and carrying fees for an indefinite period of time.

The appropriate and controlling disciplinary rule relative to your inquiry is DR:2-105(A) which requires that a lawyer's fee be reasonable and adequately explained to the client. Also relevant to your inquiry are EC:2-19 through EC:2-22.

The central issue raised by your inquiry is whether it is ethically permissible for client and attorney to modify their original fee agreement. The committee has previously opined that all fee arrangements must be reasonable. LE Op. 1606. Moreover, the committee has observed:

[b]ecause of the unique nature of the legal contract, a determination of the reasonableness of the fee is not necessarily limited to the circumstances which existed at the time of the agreement. The occurrence of unusual or extraordinary events not contemplated by the parties at the outset of the representation may affect the ultimate reasonableness of the agreed upon fee.

Id. Thus, the committee has recognized that circumstances may change after the inception of the attorney-client relationship, necessitating changes to the fee contract. Such changes are permitted so long as they reflect a fairly negotiated agreement by the client and lawyer to modify or supplant their original understanding on fees, and are not the result of any undue influence or coercion by the lawyer. Some authorities recognize that the client may feel pressure to accept changes proposed by the lawyer to the fee arrangement, fearing that the lawyer may withdraw or render substandard services unless the client accepts the modification. See, e.g., *McConwell v. FMG of Kansas City, Inc.*, 861 P.2d 830 (Kan. Ct. App. 1993) (lawyer's threat to withdraw on eve of trial was sufficient evidence that modification of fee agreement was coerced and therefore unenforceable). Cf., *North Carolina Ethics Op. 166* (1994) (firm may seek renegotiation of fee agreement so long as firm does not abandon or threaten to abandon client in order to coerce higher fee).

In the facts you present, the committee believes it noteworthy that Client X approached the lawyer and proposed the terms for modifying the fee arrangement, citing the inability to finance the protracted litigation under the original agreement. This fact militates against a suspicion that the modification was the product of undue influence. See *Tidball v. Hetrick*, 363 N.W.2d 414 (S.D. 1985) (modification approved because client herself proposed that hourly fee contract be changed to contingent fee arrangement that would absorb client's outstanding debt to lawyer).

In addition, the conversion from an hourly based contract to a contingent fee agreement was not improper since: (1) it became the only practical means by which the client could continue to finance this protracted and complex litigation; (2) there existed an uncertainty as to the outcome of the legal matter; and (3) successful prosecution of the client's declaratory judgment and the removal of the cloud on title would produce a "res" out of which a contingent fee could be paid. EC:2-22.

Finally, the modification was reduced to writing and signed by the attorney and client. EC:2-21. The consideration supporting the additional \$25,000 fee was the lawyer's agreement to delay indefinitely the collection of the existing outstanding legal fees owed until the conclusion of the case, nearly four years later.

Based on the foregoing, the committee believes that the written modification agreement presented in your hypothetical does not violate the Virginia Code of Professional Responsibility.