Changing Fee Agreements Revisited

There's a new ABA Formal Ethics Opinion[1] on the ethical considerations involved in midstream changes to a fee agreement with a client, and there are some observations made in the opinion that merit attention.

We examined ER 1.5(b)[2] previously,[3] and the fact that changes in fee agreements during representation are clearly contemplated by the rule's terms. But, as pointed out in the ABA opinion, the single reference to "changes in the basis or rate of the fee or expenses" in ER 1.5(b) does not mean that lawyers are free to change their arrangements by simply giving notice to their clients.

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Attempts by lawyers to change the nature of their fee agreements are generally "regarded with great suspicion,"[4] and there are many reasons recognized by the authorities[5] why a client may feel pressed and compelled to accept such a proposal; for example, it is generally quite a nuisance to change lawyers, especially in continuing litigation, and/or the client might fear her lawyer's resentment in being denied a larger fee. In view of this, the ABA opinion emphasizes that it is imperative that a lawyer contemplating proposing a "lawyer advantaged" fee adjustment keep an eye on ER 1.4(b), the rule providing that a lawyer shall explain a matter to the client "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[6] In the present context, an explanation of the proposed fee modification is generally considered to be necessary to allow the client to make an informed decision about whether to accept it. In Arizona, ER 1.5(b) also requires that any changes in the basis of rate of a fee be communicated to the client in writing.

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It is important to note here that the client should be advised that she need not agree to the proposal in order to have the lawyer continue the representation, and it has been held to be improper for a lawyer to threaten to withdraw if the client does not agree to an increase in the amount of the lawyer's fee.[7]

A lawyer needs to be able to demonstrate that any modification of an existing fee agreement, especially one proposed by the lawyer, was reasonable under the circumstances at the time of the modification, results in a fee that is not unreasonable as required by ER 1.5(a), and was proposed, communicated and explained to the client as required by ERs 1.4 and 1.5.[8]

Last, and certainly not least, if the modification proposed by the lawyer is simply to better secure the payment of an unmodified fee, it still counts not only as a change in the basis of the fee, but will probably be considered a business transaction with a client as well, and subject to the provisions of ER 1.8(a). Examples would be taking a deed of trust to a client's real estate or a security interest in a client's personal property in order to secure a fee. The ABA opinion simply states that such an arrangement, wherever it is entered into, is a business transaction, and cites to ABA Formal Opinion 02-427 (Contractual Security Interest Obtained by a Lawyer to Secure Payment of a Fee) (2002) for support.

In the previous column, it was pointed out that some authorities view any fee modification as a "business transaction." The ABA opinion does not take this position, however, and the issue may be one of degree: If the fee modification is a minor revision, no "business transaction" will be found. But beware the major change, such as converting an hourly rate to a contingent fee, or vice versa. ER 1.8(a) requires that (1) the terms of the transaction be fair and reasonable to the client and fully disclosed and transmitted in writing; (2) the client be advised in writing of the desirability of seeking and given time to seek the advice of independent counsel; and (3) the client give informed consent to the essential terms of the deal and the lawyer's role in the transaction, in writing, signed by the client.

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endnotes

1. ABA Formal Op. 11-458 (Changing Fee Arrangements During Representation) (Aug. 4, 2011).
2. Rule 42, ARIZ.R.S.CT.
3. *See Take Care When Changing Fee Agreements,* ARIZ. ATT'Y (Sept. 2005), at 8. For a recent update to ER 1.5(b), *see* Patricia Sallen, *Fees and Client-Trust Accounts: Rule Changes for 2012,* ARIZ. ATT'Y (Jan. 2012), at 18.
4. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.2.1 (1986), at 503.
5. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18, cmt. e.
6. *See* David Dodge, *What You Don't Tell a Client Can Get You in Real Trouble,* ARIZ. ATT'Y (May 2001), at 20.
7. *See McConwell v. FMG of Kansas City, Inc.,* 861 P.2d 830, 842-43 (Kan. Ct. App. 1993) (lawyer's threat to withdraw just before trial sufficient duress to render new fee agreement unenforceable).
8. GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING § 8.11 (3d ed., 2003 Supp.).