Take Care When Changing Fee Agreements

ER 1.5(b)[1] now provides that the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible *must* be communicated to every client, *in writing,* before or within a reasonable time the case or matter is commenced. The rule also provides that "any changes in the basis or rate of the fee or expenses shall also be communicated in writing."

That final sentence implies that it is perfectly ethical to change your fee after the start of a case as long as you notify the client. Unfortunately, it is not quite as easy as that and, unless done properly, attempting to change "the deal" against a client's wishes may get you in trouble.[2]

It is generally accepted that the initial negotiations toward a fee agreement are not considered "business transactions" with a client, prohibited by ER 1.8(a).[3] But once a fee agreement is made and representation undertaken, modifications to the fee arrangements can be considered business transactions.[4] They are also subject to special scrutiny by the courts to make sure the client is being treated fairly[5] and may be entirely ineffective unless the requirements of ER 1.8(a)(1)(3) are complied with.[6] Thus, in a Massachusetts case,[7] a law firm was prevented from awarding itself a "bonus" not provided for in the fee agreement when the result of a tax refund case was better than expected. And, in a New York case,[8] the lawyers were unable to charge a flat fee arrangement when the case got more complicated (and more time consuming) than originally contemplated.[9]

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Neither of these cases was decided on the basis that the lawyer had attempted to engage in a prohibited "business transaction" with a client, but they do point out the wisdom of having provisions put in fee agreements that will protect you in the event of unforeseen situations in which the case turns out to require more time and effort than originally contemplated, or in which you and the client can agree on a bonus in the event the recovery is larger than originally expected.

In short, if a modification to the fee agreement was originally provided for under certain conditions, and the conditions in fact occur, a court will be hard-pressed to find a reason, ethical or otherwise, not to honor it. In any event, however, ER 1.5 requires that whatever the arrangement, the fee ultimately agreed to, charged or collected may not be "unreasonable," based on the factors set forth in ER 1.5(a).

What are the rules if the client assents to a modification of the fee agreement?

Do not worry about the situation in which your client runs out of money just before the trial and you agree to wait until after the case is over before billing again. Or where you reduce your fees because of other work the client has brought to you since the start of your representation. Or where you increase your hourly rate for a longstanding client by $10 an hour. Nobody is ever going to fault you in those situations.

Do worry about any situation in which the client can later complain that the fee modification was coerced or the result of overreaching. Take, for example, where the new agreement is reluctantly signed by the client as trial approaches, or at a point where to change lawyers might be overly expensive for the client or encourage the opponent to become more aggressive. The only safe way to approach any substantial "lawyer-advantaged" fee modification is to consider it a "business transaction" with a client and make sure it complies with the requirements of ER 1.8(a).[10] If you do not so consider it, some court may do it for you when the client later attempts to rescind it. AZAT

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endnotes

1. Rule 42, ARIZ.R.S.CT.
2. In *In re Hefron,* 771 N.E. 2d 1157 (Ind. 2002), a lawyer was suspended for six months for misleading a court into modifying a fee agreement, done without the client's knowledge. This looks more like a case of deceit than overreaching.
3. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §18 (Lawyer–Client Contracts), at comment a (section does not apply to the payment for legal services in money by clients).
4. Richmond, *Changing Fee Agreements During Representation: What Are the Rules?* 15 PROF. LAW. 2 (No. 3, 2004).
5. *See*, e.g., *Perez v. Pappas,* 659 P.2d 475 (Wash. Ct. App. 1983); Opinion 9301, Professional Responsibility Committee, Chicago Bar Association (midstream modifications to fee agreements are presumptively fraudulent); 7 AM. JUR. 2d *Attorneys at Law* § 269 (1997); Anno, *Validity and Effect of Contract for Attorneys' Compensation Made After Inception of Attorney-Client Relationship,* 13 A.L.R. 3d 701 (1967).
6. These subparts provide that a lawyer shall not enter into a business transaction with a client unless (1) the transaction and its terms are fair and reasonable to the client and are fully disclosed in writing to the client in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking independent legal counsel and is given a reasonable opportunity to do so; and (3) the client gives its informed consent, in a writing signed by the client, to the essential terms of the transaction, including whether the lawyer is representing the client in the transaction.
7. *Beatty v. NP Corp.,* 581 N.E. 2d 1311 (Mass. Ct. App. 1991).
8. *Heller, Horowitz & Feit, P.C. v. Stage II Apparel Corp.,* 704 N.Y.S. 2d 240 (App. Div. 2000).
9. In Arizona, a case might have been made that continued representation would have resulted in "an unreasonable financial burden on the lawyer," one of ER 1.16(b)'s criteria for optional withdrawal.
10. Richmond, *supra* note 4, at 20.