

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

## Formal Opinion 11-458 Changing Fee Arrangements During Representation

August 4, 2011

*Modification of an existing fee agreement is permissible under the Model Rules, but the lawyer must show that any modification was reasonable under the circumstances at the time of the modification as well as communicated to and accepted by the client. Periodic, incremental increases in a lawyer's regular hourly billing rates are generally permissible if such practice is communicated clearly to and accepted by the client at the commencement of the client-lawyer relationship and any periodic increases are reasonable under the circumstances. Modifications sought by a lawyer that change the basic nature of a fee arrangement or significantly increase the lawyer's compensation absent an unanticipated change in circumstances ordinarily will be unreasonable. Changes in fee arrangements that involve a lawyer acquiring an interest in the client's business, real estate, or other nonmonetary property will ordinarily require compliance with Rule 1.8(a).<sup>1</sup>*

Fee arrangements between lawyers and clients sometimes need to be changed. As contracts, fee agreements are governed generally by the law of contracts.<sup>2</sup> See *Restatement (Third) of The Law Governing Lawyers* § 18 cmt. c (2000) (“*Restatement*”). Contracts ordinarily may be modified by mutual consent of the parties, provided they follow the appropriate formalities. Even with client consent, however, modifications of existing fee agreements are usually suspect because of the fiduciary nature of the client-lawyer relationship. See Comment [17] to ABA Model Rule of Professional Conduct 1.8 (“relationship between lawyer and client is a fiduciary one”). “The courts are generally in accord that once the initial contract has been formed and the fiduciary relationship of client and lawyer has begun, any change in the contract will be regarded with great suspicion.” Charles W. Wolfram, *Modern Legal Ethics* § 9.2.1, at 503 (1986) (citing cases). “Thus, an agreement that is not made roughly contemporaneously with the formation of the client-lawyer relationship will have to bear an extra burden of justification.” Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering* § 8.11 at 8-26 (3d ed. 2001).

That extra burden is articulated in the *Restatement* § 18(a)(1), which provides: “if the [fee] contract or modification is made beyond a reasonable time after the lawyer has begun to represent the client in the matter ... the client may avoid it unless the lawyer shows that the contract and the circumstances of its formation were fair and reasonable to the client...”<sup>3</sup> Comment e to *Restatement* § 18 explains some of the reasons that a client might feel compelled to accept a lawyer's proposal to modify an existing fee agreement even though he would not want to agree to it: because it is burdensome to change lawyers during a representation; because the client might fear the lawyer's resentment; or because the client might believe that the proposal is meant to promote his or her interests.

The only specific reference in the Model Rules regarding changes to fee arrangements is a single sentence in Rule 1.5(b), which states: “Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.” Thus, changes in fee arrangements during representations clearly are contemplated by the Model Rules. But this single reference does not mean that lawyers are free to change existing fee arrangements simply by giving notice to clients. Other provisions of the Model Rules, particularly Rule 1.5(a), as well as Rules 1.4 and 1.8(a), are relevant to modifications of existing fee

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<sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2011. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

<sup>2</sup> Statutes and court rules in many jurisdictions also may regulate lawyer fee agreements, but this opinion addresses only issues arising under the Model Rules.

<sup>3</sup> In certain circumstances, the ethics rules may not be coextensive with applicable contract law. See Joseph M. Perillo, *The Law of Lawyers' Contracts Is Different*, 67 *Fordham L. Rev.* 443, 453 (1998). Professor Perillo argues that the *Restatement* approach differs from the majority case law with respect to the enforceability of a modified fee contract because the case law sometimes requires additional consideration for the modification to be effective, but the *Restatement* requires only that the modified fee agreement be fair and reasonable to the client in light of changed circumstances. This opinion follows the *Restatement* approach as more appropriate to the interpretation of “reasonable” under the Model Rules.

agreements, depending on the situation. The guidance offered by these rules is consistent with the concerns expressed by the commentators and reflected in the case law.

Initially, Rule 1.5(a) states the cardinal principle that governs all lawyer fee agreements: “A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.” Rule 1.5(a) then states the factors to be considered in determining the reasonableness of a fee to include the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. Comment [1] to Rule 1.5 provides that the factors specified in paragraph (a) are not exclusive; nor will each factor be relevant in each instance. Comment [1] also explains that Rule 1.5(a) requires that lawyers charge fees that are “reasonable under the circumstances.” This is an objective standard. *See Hazard & Hodes, The Law of Lawyering* § 8.2 at 8-6. Thus, just as with any fee agreement, Rule 1.5(a) requires that a modified fee agreement must be reasonable under the circumstances.

The reasonableness of a lawyer’s fee typically is assessed in light of the circumstances as of the time the original fee agreement was made. *See Restatement* § 34 cmt. c; ABA Comm. on Ethics & Prof’l Responsibility Formal Op. 93-373 (Apr. 16, 1993) (Contingent Fees in Civil Cases Based on the Amount of Money Saved for the Client), in *Formal and Informal Ethics Opinions 1983-1998* at 174, 179 (ABA 2000) (reasonableness of fee should be judged on “way the engagement looked” at time fee arrangement set); and Ass’n of the Bar of the City of New York Formal Op. 2000-3 (2000) (The Acceptance of Securities in a Client Company in Exchange for Legal Services to be Performed) (stock taken as legal fee should be valued at time of fee arrangement in determining reasonableness of fee). Changes in circumstances, including changes in the factors listed in Rule 1.5(a), occurring after the client-lawyer relationship was formed may cause the client, the lawyer, or both, to seek to revisit the fee arrangement. *See Virginia Legal Eth. Op. 1705* (Contingency Fee in Litigation; Hourly Rates Plus Lump Sum to Be Paid by Client for Attorney’s Agreement to Carry Fees Indefinitely) (1997) (amendment of fee agreement after changed circumstances permitted so long as fairly negotiated and not result of undue influence or coercion by lawyer). The reasonableness of a modified fee agreement should therefore be assessed in relation to the circumstances at the time of the modification.

Rule 1.5(b) provides that the scope of the representation and the basis or rate of the fee and the expenses for which the client will be responsible shall be communicated to the client, preferably, but not necessarily, in writing, before or within a reasonable time after commencement of the representation, except when the lawyer will charge a regularly represented client on the same basis or rate as previously charged. Comment [2] to Rule 1.5 notes that in a new client-lawyer relationship, an understanding as to fees and expenses must be promptly established. *See also* ABA Comm. on Ethics & Prof’l Responsibility Formal Op. 93-379 (Dec. 6, 1993) (Billing for Professional Fees, Disbursements and Other Expenses), in *Formal and Informal Ethics Opinions 1983-1998* at 216, 218 (ABA 2000) (lawyer should disclose basis for fees and any other charges to client at outset of representation).

When a modified fee agreement is proposed, Rule 1.4(b) reinforces the obligation under 1.5(b) to communicate the scope of the representation and the basis or rate of the fee and expenses to the client in a timely manner. Rule 1.4(b) provides that a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. An explanation of the lawyer’s proposed modification of a fee arrangement, including the advice that the client need not agree to pay the modified fee to have the lawyer continue the representation, is necessary to enable the client to make an informed decision about the client’s ability and willingness to pay the modified fee for continued representation.

In summary, a lawyer must show that any modification of an existing fee agreement, especially a modification sought by the lawyer, was reasonable under the circumstances at the time of the modification as required by Rule 1.5(a), and communicated and explained to the client as required by Rules 1.4 and 1.5(b). Any modification must also be accepted by the client.

In some cases, the client’s acceptance of a modified fee arrangement may be inferred from the circumstances. For example, many lawyers who bill for their services on an hourly basis routinely increase their “normal” or “regular” hourly billing rates incrementally from time to time, often on an annual basis,

without negotiating every increase separately with each client. Such billing practices, if communicated clearly to clients at the commencement of the client-lawyer relationship, generally are permissible.<sup>4</sup> The lawyer nevertheless remains responsible for showing that current clients are adequately informed of the lawyer's billing practices, that those clients have consented to those practices, and that any periodic rate increase is reasonable under the circumstances within the meaning of Rule 1.5(a). Because it is a change in the "basis or rate" of the lawyer's fee, any periodic billing rate increase must also be timely and clearly communicated to clients as required by Rules 1.4 and 1.5(b). *See also Severson & Werson v. Bolinger*, 235 Cal. App. 3d 1569, 1570 (1<sup>st</sup> Dist. 1991) (law firm cannot raise its "regular hourly rates" without first notifying client).

Except as provided above in regard to periodic rate increases, and absent an unanticipated change in circumstances, attempts by a lawyer to change a fee arrangement to increase the lawyer's compensation are likely to be found unreasonable and unenforceable. For example, a lawyer who has regularly represented a client on an hourly basis at an agreed rate may not unilaterally impose a "success fee" or premium, even after an advantageous result for the client. *See Beatty v. NP Corp.*, 581 N.E.2d 1311, 1315 (Mass. App. 1991) (firm not entitled to recover premium for "highly successful" result that it added to agreed hourly fees without client's consent).<sup>5</sup> Nor may a lawyer threaten to withdraw if the client does not agree to increase the fee. *See, e.g., McConwell v. FMG of Kansas City, Inc.*, 861 P.2d 830 (Kan. Ct. App. 1993) (lawyer's threat to withdraw just before trial sufficient duress to render new fee agreement unenforceable).

Rule 1.5(c) permits contingent fee agreements in most civil matters, provided certain procedural requirements are met, including the requirement that the agreement be expressed in a writing signed by the client. Comment [3] to Rule 1.5 notes that contingent fees, like any other fees, are subject to the reasonableness standard of Rule 1.5(a). There may well be situations where changing an hourly fee arrangement to a contingent fee, or vice versa, is mutually beneficial to the lawyer and the client. If a lawyer and client agree to convert an hourly fee agreement to a contingent fee arrangement, the procedural requirements of Rule 1.5(c) must be followed; the ramifications of the change must be explained to the client as required by Rule 1.4; and the resulting fee must be reasonable under the circumstances, as explained in Comment [3] to Rule 1.5.

Changes in existing fee arrangements that involve a lawyer's acquiring an interest in the client's business, real estate, or other nonmonetary property normally will require compliance with Rule 1.8(a), the general rule regarding business transactions with clients or other situations in which a lawyer knowingly acquires an ownership, possessory, security or other pecuniary interest that may be adverse to a client. Although Comment [1] to Rule 1.8 notes that the rule does not apply to ordinary fee arrangements, which are governed by Rule 1.5, the comment further states that the requirements of the rule "must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as all or part of a fee." Comment [4] to Rule 1.5 also notes that a fee paid in property instead of money may be subject to Rule 1.8(a) because such fees often have the essential qualities of a business transaction with a client. *See, e.g., ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 00-418* (July 7, 2000) (Acquiring Ownership in a Client in Connection with Performing Legal Services) (lawyer acquiring stock of client corporation in lieu of or in addition to cash fee for services enters into business transaction with client and must comply with Rule 1.8(a); only circumstances reasonably ascertainable at time of transaction should be considered when assessing fairness and reasonableness of transaction).

A lawyer seeking new or additional security for payment under an existing fee agreement also must comply with Rule 1.8(a). Comment [16] to Rule 1.8 advises that when a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in litigation (*e.g.*, a contingent fee agreement), such an acquisition is a business or financial transaction with a client and is governed by the requirements of Rule 1.8(a). *See, e.g., ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 02-427* (Contractual Security Interest Obtained by a Lawyer to Secure Payment of a Fee) (2002) (lawyer acquiring contractual security interest in client property to secure payment of overdue fee in ongoing matter must comply with Rule 1.8(a)). When it applies, Rule 1.8(a) requires that: (1) the terms of

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<sup>4</sup> Similarly, the lawyer might include a provision in the engagement agreement that if the nature or scope of the representation changes, the client agrees that the fee arrangement may be re-examined.

<sup>5</sup> However, a client and lawyer may mutually agree on a "success fee" in circumstances where the client is adequately informed and the client has an ability to choose whether to pay the requested success fee.

the transaction are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client; (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel; and (3) the client gives informed consent to the essential terms of the transaction and the lawyer's role in the transaction in a writing signed by the client. Compliance with Rule 1.8(a) is appropriate in such situations to protect clients from potential overreaching by lawyers. When the client takes advantage of the advice to consult independent counsel, it also provides an opportunity for a neutral evaluation of the reasonableness of a fee that may be paid or secured by nonmonetary property.

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**AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5310

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