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Changing Horses in Midstream: Modifying Fee Agreements

By Mark J. Fucile
Fucile & Reising LLP

There are many reasons lawyers change fees over the course of a matter, ranging from anticipated events to simple greed. The key to making a change enforceable, however, is usually to have agreed with the client in advance on the contingencies that will trigger an increase rather than attempting to impose a change unilaterally. In this column, we'll first survey the law governing fee modifications and then turn to practical steps available at the outset of a representation to anticipate and build contingencies into a fee agreement.

General Considerations

Fee modifications weave together three areas of the law.

First, once formed, an attorney-client relationship is a fiduciary one. The Oregon Supreme Court in *Sabin v. Terrall*, 186 Or 238, 250, 206 P2d 100 (1949), explained the resulting impact on fee modifications:

“An attorney is not prohibited from contracting with his client respecting his fees, and a contract thus made after the commencement of the relation of attorney and client is not per se void, but it will, by reason of the confidential nature of the relation, be closely scrutinized by the courts.” (Citation omitted.)

Second, the RPCs impose constraints on fee changes that run in the lawyer's favor. RPC 1.5(a) prevents a lawyer from charging “an illegal or clearly excessive fee” and OSB Formal Ethics Opinion 2005-69 (at 161) finds that “[a]

fee is ‘illegal or clearly excessive’ if it exceeds the amount previously agreed on.” RPC 1.7(a)(2) addresses conflicts between a client and the lawyer’s business interest. OSB Formal Ethics Opinion 2005-97 (at 234) picks up this theme and counsels that “[a] modification of a fee agreement in a lawyer’s favor requires client consent based on an explanation of the reason for the change and its effect on the client.” The Court of Appeals in *Welsh v. Case*, 180 Or App 370, 382-83, 43 P3d 445 (2002), touched on but did not squarely address when the business transaction rule—then DR 5-104(A) and now RPC 1.8(a)—may be triggered with a fee modification. OSB Formal Ethics Opinion 2005-97 (at 234), however, concludes that one of the key elements of RPC 1.8(a) must be met with a fee modification—requiring that it “must be objectively fair.”

Third, substantive contract law also applies to fee agreements. *Eagle Industries, Inc. v. Thompson*, 321 Or 398, 404-14, 900 P2d 475 (1995), for example, includes a lengthy analysis of contract novation in the context of a fee modification. Similarly, *Varnier v. Eves*, 164 Or App 66, 72-73, 990 P2d 357 (1999), discusses the application of the parol evidence rule to an asserted oral modification of a fee agreement. General rules of contract construction of particular relevance to fee modifications include the requirement that modifications be supported by consideration and construing ambiguity against the drafter (who is almost always the lawyer).

Practical Steps

The authorities noted above don't say that lawyers may never renegotiate fees—just that any resulting modifications will be closely scrutinized and may be unenforceable if they don't meet the high bar involved. Given that risk, the practical point for anticipating and addressing possible change is in the original fee agreement. When contingencies for change are wired into the original fee agreement, they aren't "modifications." Rather, they are circumstances that were disclosed, bargained-for and supported by consideration from the outset.

Providing a mechanism for periodic hourly rate adjustments or a higher contingent fee on appeal are ready examples of monetary provisions that can be anticipated and included at the outset. Reserving an advance fee deposit for later in a case, such as 90 days before trial, is an equally ready example of a non-monetary provision that can also be included in an original agreement. The key is that these provisions were agreed upon by the client and the lawyer at the beginning of the representation rather than imposed unilaterally by the lawyer later.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal

departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.