Opinion No. 679, September 2018

QUESTION PRESENTED

May a lawyer renegotiate his fixed, flat fee for representing a client in litigation after the litigation is underway if the matter turns out to be greater in scope and complexity than the lawyer and client contemplated?

Statement of Facts

A Texas lawyer and his client agree in writing to a fixed, flat fee for the lawyer to represent the client in litigation. During the representation, the complexity and scope of the matter increase significantly beyond what the lawyer and client contemplated at the start of the engagement. The lawyer now wishes to renegotiate the fee arrangement.

Discussion

Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct governs fees. Flat-fee agreements are not uncommon and are contemplated in the Rule. *See* Comment 3 to Rule 1.04 ("Historically lawyers have determined what fees to charge by a variety of methods. Commonly employed are percentage fees and contingent fees (which may vary in accordance with the amount at stake or recovered), hourly rates, and flat fee arrangements, or combinations thereof.").

Rule 1.04 and its comments do not expressly address the propriety of a lawyer's renegotiating fee agreements after representation has commenced. Texas courts, however, have done so.

In *Jampole v. Matthews*, 1997 WL 414637 (Tex. App.—Houston [1st Dist.] 1997, no writ), the court summarized Texas law as follows: "An attorney and client may modify the fee agreement during the existence of the attorney-client relationship. However[,] a presumption of unfairness arises, and the attorney has the burden to show the fee modification is fair under the circumstances." *Id.* at *10 (discussing *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964) and *Robinson v. Garcia*, 804 S.W.2d 238, 248 (Tex. App.—Corpus Christi 1991), *writ denied per curiam*, 817 S.W.2d 59 (Tex. 1991)). This special scrutiny is required because the client is at a disadvantage: Changing lawyers during the representation is burdensome and "[a] client might hesitate to resist or even to suggest changes in new terms proposed by the lawyer, fearing the lawyer's resentment or believing that the proposals are meant to promote the client's good." Restatement (Third) of the Law Governing Lawyers § 18, comment e (2000). Moreover, a lawyer "usually has no justification for failing to reach a contract at the inception of the relationship or pressing need to modify an existing contract during it. The lawyer often has both the opportunity and the sophistication to propose appropriate terms before accepting a matter." *Id.*

Whether modification of an existing fee agreement is "fair under the circumstances" will depend on several factors. In negotiating an initial fee agreement, Comment 2 to Rule 1.04 discusses the relevance of the length of the relationship between the attorney and client:

> "When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. If, however, the basis or rate of fee being charged to a regularly represented client differs from the understanding that has evolved, the lawyer should so advise the client. In a new client-lawyer relationship, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, in order to identify the factors that may be taken into account in finally fixing the fee."

Similarly, the Committee concludes that longstanding client relationships should be distinguished from new lawyer-client relationships when considering whether the renegotiation of a flat-fee agreement would be "fair under the circumstances."

Consider, for example, a lawyer who represents a lender. The lawyer and the client have a flat-fee agreement under which the lawyer represents the lender in pursuing collection of delinquent promissory notes. The matters are either resolved by settlement or litigation that usually results in a summary judgment against the borrower. In one matter, however, a borrower and her lawyer file a counterclaim, asserting a class action against the lender for usury and other illegal conduct. The counterclaim alleges a

class of hundreds of borrowers, the amount in controversy is enormous, and discovery in the case is expected to include numerous depositions, the exchange of thousands of documents, and require years to complete. In such a situation, neither the lawyer nor the client could reasonably anticipate that the scope of work to be included in the flat-fee agreement would be so grossly underestimated.

Furthermore, based upon the history of their relationship, neither the lawyer nor the client expected that the lawyer's flat fee would include any work except pursuing delinquent accounts. Renegotiating the fee would therefore be "fair under the circumstances."

On the other hand, modifying a fee agreement would likely be inappropriate in a situation like this: A lawyer agrees to represent a new client who was terminated from her employment and then went to work for her former employer's competitor. Based upon the facts disclosed by and discussed with the client, the lawyer concludes that the client has a basis for pursuing a claim for wrongful termination. The lawyer agrees to represent the client in bringing such claim for a fixed, flat fee. After filing suit on the client's behalf, the employer counterclaims, alleging that the client, during her employment, breached her nondisclosure agreement and her fiduciary duties by sharing the employer's trade secrets with her new employer.

In this situation, the lawyer and client do not have a longstanding relationship that forms the basis for their expectations about the fee. Their expectations are instead based upon the existing fee agreement alone. From the client's perspective, her agreement with her lawyer was for representation concerning all aspects of her relationship with her former employer. Under the circumstances, renegotiating the fee agreement would likely not be fair to the client. Additionally, a lawyer, after making a reasonable investigation, should have anticipated that the former employer might bring such counterclaims against the client.

The fundamental nature of a flat or fixed fee is that there is risk to the lawyer that the legal work and time required may exceed what the lawyer might have earned if the lawyer instead billed by the hour. The client knows with certainty that the total fee charged, no matter how much lawyer time or effort is involved, will not exceed the fixed amount. The client's risk in a flat or fixed fee agreement is the possibility of paying more than the client would have paid under an hourly billing agreement if the lawyer is able to complete the representation is less time than originally expected. Because the lawyer is better able to anticipate the time and legal work required, the lawyer should be mindful that he knowingly assumed this risk—and should not unreasonably seek to change the fee agreement simply because the lawyer agreed to a fixed fee that, in hindsight, is no longer adequate.

The client's level of sophistication is another factor that the Committee concludes is relevant to considering whether renegotiating a fee agreement is "fair under the circumstances." As the above examples illustrate, an institutional client such as a lender is likely to have experience regarding litigation matters routinely involved in its business. An experienced client is therefore better informed about the costs associated with litigation and the fees charged for representation. By contrast, a client with little or no experience as a litigant has no such point of reference and is unlikely to know much about the potential scope of litigation or its expected costs.

This Committee previously expressed the view that Rule 1.08(a), regarding business transactions between lawyer and client, does not apply to the transaction of establishing the lawyer-client relationship. *See* Professional Ethics Committee Opinion 586 (Oct. 2008) (concluding that a lawyer may include a binding arbitration clause in a fee agreement). Likewise, the Committee concludes here that Rule 1.08(a) does not apply to renegotiating a fee agreement. Nevertheless, as the Committee also noted in Opinion 586, "[a]s a general principle, all transactions between client and lawyer should be fair and reasonable to the client." Comment 2 to Rule 1.08. Thus, any renegotiation of an existing fee agreement, although not a "business transaction with a client" within the meaning of Rule 1.08(a), must still be on terms that are fair and reasonable for the client.

A modified fee agreement is, of course, subject to Rule 1.04's prohibition against illegal or unconscionable fees. Additionally, the lawyer must be mindful, both during efforts to renegotiate a fee agreement and after renegotiation of a fee agreement, of the possibility of not being able to continue to represent the client if, under Rule 1.06(b), the representation of the client "reasonably appears to be or become adversely limited by … the lawyer's or law firm's own interests."

Conclusion

A lawyer may renegotiate his fixed, flat fee for representing a client in a litigation matter after the litigation is underway if modification of the fee agreement is fair under the circumstances. The burden of proving fairness is the lawyer's and will depend upon factors such as the length of the lawyer-client relationship, whether the reason for the renegotiation could have been anticipated at the outset of the representation, and the client's level of sophistication. Before seeking to renegotiate a fixed fee, the lawyer should be mindful of the risks that the lawyer voluntarily assumed when proposing or agreeing to that fee—including the possibility that the fixed fee might not be adequate to compensate the lawyer when compared to other fee arrangements. **TBJ**