

New ABA Formal Opinion Allows Counsel to "Change Horses Midstream"

September 21, 2011 by [Gary A. Bresee](#)

What if a client requests that the lawyer switch from being compensated by the hour to accepting a contingency fee instead? How would the lawyer avoid any conflicts, fulfill her duties of disclosure and avoid any other ethical violations to make that change, and how would this be done in a way to maximize its enforceability?

The American Bar Association (ABA) issued a new formal opinion ([11-458, Changing Fee Arrangements During Representation, Aug. 4, 2011](#)) which may help answer that question. 11-458 clarifies the circumstances wherein a lawyer may modify an existing fee agreement during the representation, or "change horses midstream."

Generally, modifications of fee arrangements are permissible under the Model Rules, but the lawyer must show any modification was (1) reasonable under the circumstances [ABA Model Rule 1.5(a), hereinafter "Rule"], (2) communicated and explained to the client [Rule 1.4 and 1.5(b)], and (3) accepted by the client.

Being a contract between two parties, fee arrangements are generally governed by simple rules of contract law. However, counsel has special burdens due to the lawyer's fiduciary duty to the client. Thus, any changes in the arrangement will be initially regarded as suspect, and lawyers are not free to change the existing relationship by only giving notice to the client. First and foremost, the new arrangement must be fair and reasonable for the client in light of the circumstances, under Rule 1.5(a).

- For example, many firms increase their hourly billing rates annually without negotiating every rate increase with the client. If clearly communicated to the client this may be permissible, so long as (1) the client is informed, (2) the client consents, and (3) the increase is reasonable under the circumstances;
- A lawyer and client also may agree to change an hourly fee agreement to a contingent fee agreement, or vice-versa, provided that the lawyer complies with Rule 1.5(c) (requirements for a contingent fee agreement include a writing signed by the client);
- However, a lawyer may not unilaterally impose a "success fee" on a client, in essence altering the arrangement from an hourly rate to a contingency fee, without the client's informed consent; and
- An attorney may request new security for a fee, provided that Rule 1.8(a) is complied with (disclosure and consent requirements of doing business with a current client).

Consequently, it is possible to change horses midstream, but the jump from one horse to the other should be done carefully, and with both eyes wide open.