

Raising Fee Limits:

How to Negotiate the Approval of “Scope Change”

This article was adapted from the fourth edition of the Legal Project Management Quick Reference Guide. For more information, see <http://tinyurl.com/LPMbook> or call 800-49-TRAIN.

The most challenging type of change in the terms of an engagement—what we call “scope change”—involves increasing a fee from the original estimate. Increasing the fee requires a possibly difficult conversation and raises the question of how best to approach the client in order to obtain approval for the additional work and fees. Consider this scenario:

You know it is best practice to contact the client as soon as you detect a material scope change that will increase the fee. Your client resists agreeing to scope changes that you request as they occur, saying things like “Don’t worry about it...you may find some savings in the remaining work...we’ll just settle up on all those scope change adjustments when you are done with the complete matter.”

But when you reach the end of the last three matters for this client using that suggested approach, there are serious disagreements about the fees over and above your original estimate. You end up writing off a few thousand dollars each time. Doing so affects your realization of the work and dampens your enthusiasm for doing more work for this client even though it brings you a lot of business.

Accordingly, you have decided to ask your client contact to agree to deal with scope changes and resulting fee increases *as they occur* for future matters and *not to postpone* the discussion until final billing

There are three very helpful ways to prepare for such discussions. (See also Roger Fisher, William Ury, and Bruce Patton, *Getting to*

Yes: Negotiating Agreement Without Giving In, Penguin Books, 2011.)

Best Alternative to Negotiated Arrangement (BATNA)

Start your preparation by addressing this question: *What could I do if they either don’t agree or they refuse to discuss my suggested new approach for handling scope increases as they occur?*

To answer that question, try to list every step you *could take* to meet your/the firm’s needs without the client’s agreement. Such a list would contain a range of steps from “very desirable” to “very undesirable.” That way, you can select the best one on the list as your BATNA. For example, you might come up with a list of steps that you *could take*, such as those listed below, and then analyze each one for its relative desirability based on how the *business decision* question is answered.

1. *Have your managing partner negotiate with the client contact’s boss.* **Desirability:** Could work, but to accomplish effectively, you will have to inform the client contact in advance in order to avoid a surprise, and explain your reasons for doing so. While the client contact’s reaction is hard to predict, the contact may have the final say as to where their legal business goes. **Business decision questions:** Can you risk the tension in the client relationship that would result if they agree? Can you afford to lose this client?
2. *Decide to continue without a change, accepting the write-offs as usual if they occur.* **Desirability:** It would be the easiest step to take because it would require no risk in the client relationship beyond what occurs at the end of the work on the matter

- if they again resist the additional fees associated with legitimate scope changes. You would remain at risk for those associated write-offs. **Business decision question:** Is a good client relationship here worth the possible continued write-offs?
3. *Suggest to the client contact that you can accept no further similar work from them unless they agree to this new approach.* **Desirability:** This step is the hardest. Even if they react by agreeing to adjust fee expectations from scope creep as it occurs in order to maintain access to your legal services, such an ultimatum would assuredly create stress in your relationship. But you can probably manage the stress given the increase in realization you would achieve by avoiding the write-offs. However, they could instead simply say, “Okay, goodbye.” **Business decision question:** Again, can you afford to lose this client in order to avoid future write-offs?
 4. *For their next new matter, cut corners on your thoroughness.* **Desirability:** Very undesirable. Unethical. Could lead to malpractice issues.
 5. *For their next new matter, add a 15 percent contingency in anticipation of changes in scope so that you don’t have to go back to them for approval of the associated fee increase.* **Desirability:** Could work nicely, unless they insist on seeing the task list you use to set the budget. Not likely, though, since they never have asked for that before. Plus, if you had no scope changes that equaled or exceeded the 15 percent, you could charge them less than they expected, which is good for client relationships. **Business decision question:** Can you easily defend this practice to the client and yourselves?
 6. *Urge the responsible partner in another practice area to augment their fees on the work they are doing for the same client so that, for the two matters, you don’t have to write off anything.* **Desirability:** Possible “padding?” Very undesirable. Unethical. Could lead to malpractice issues.

Based on your analysis and your internal discussions with your management/higher

level partners of the *business decision question* for each alternative, you would select one of the six steps before you try to negotiate the desired change with your client contact.

By deciding in this way what your BATNA is before trying to negotiate with your client contact, you enter the discussion knowing exactly what you will do if they won’t discuss or agree to your new preferred approach. Having the firm’s approval for your BATNA gives you enough confidence to not spend more time than it’s worth on tough negotiations.

Use Objective, External Criteria

In the event that your client contact agrees to discuss/negotiate with you about this new approach, the following question can help you prepare to be persuasive: *What documents or events can I refer to that my contact would find authoritative and thus help make my case and de-polarize our discussion?*

The idea here is to introduce some external criteria separate from your assertions and your client contact’s assertions. In other words, it takes the “me-versus-you” element down a notch.

Some possibilities are:

- Refer to the language in the *engagement letter/statement of work* that covers what has been agreed to regarding the process for encountering increased scope of work. If the engagement letter has such language, then referring to it in this circumstance can be accepted as a reminder of what was earlier agreed to. Your contact is put in the position of honoring a prior agreement rather than making a new concession.
- Refer to a *relevant precedent*. If there has ever in the past been a matter for which they agreed to scope change fee increases as they occurred during the work on their matter, remind them of it, in specifics. Again, you are asking them to honor precedent instead of making a new concession.

- ❑ Refer to their written *statement of objectives* for the matter if one exists. Describe your rationale for the importance/necessity of the out-of-scope work in reaching the client's objective, and/or how much more difficult it would be to reach the client's objective without it. Such external criteria invite the client to see it in terms of reaching their objective, rather than just protecting your fee.
- ❑ Invoke the *external standard of fairness* by asking "How is that fair?" Be prepared to explain why you think your approach is fairer for all, such as "You would get the chance to approve or deny the work before more time is incurred—and you can evaluate the value of the increased work as the need for it arises more effectively than you can at the end of the engagement."
- ❑ Refer to industry standards, regulations, or laws if the matter has issues where compliance with them is relevant, such as for:
 - Financial ratios
 - Facility maintenance
 - Architecture
 - Valuing closely held companies
 - Laws governing the issue (*e.g.*, tenant rights, *etc.*)

Work from Their Interests, Not Their Positions

Before entering the discussion or meeting with your client contact to propose this new approach, try answering this question as a way to get at their *true* interests that may be driving their position of resistance. Prepare too to ask yourself this question during your discussion if they seem to be resisting your proposed new approach: *If they were to say yes to address increased fees for scope changes as they are identified, what would my contact's concerns or fears be beyond a desire to minimize spending? How could I address those?*

Consider this essential difference between "positions" and "interests" in order to understand why focusing on your contact's interests

will usually be more productive than focusing just on their positions. Here is the difference in this situation:

Their position: A "position" is what they want, as in the aforesaid "Don't worry about it... you may find some savings in the remaining work... we'll just settle up on all those scope change adjustments when you are done with the complete matter."

Consider their position as the tip of the iceberg. You need to get beneath the surface to learn what's driving their position/want.

Their interest: An "interest" is the reason why they want their position. Here are a number of such possible reasons, each of which you can try to address in ways also described below:

1. *They feel that they have the upper hand if they wait to discuss fees for scope changes after you have already incurred the time to perform the extra work. After all, they have the power to just say yes or no to any or all of the additional fees you incurred.* In the past, you have given in, so that is what they have been taught as the likely outcome. Could be addressed this way: Describe very clearly what their approach has cost your firm in write-offs. Appeal to their fairness. If a reasonable standard of fairness does not appeal to them, you may want to reassess the desirability of keeping this client.
2. *They don't want to be nicked and dimed with several smallish fee increases.* Could be addressed this way: Because this interest is quite understandable, suggest agreeing to a threshold dollar amount of scope change fees that must be reached before you come to them with a request for approval. For example, a \$5,000 threshold would mean that you would aggregate four instances requiring scope increase fees of \$800, \$1,200, \$2,400, and \$800 into one discussion of \$5,200. This approach avoids the nickel and dime perception and allows for discussion of all fee changes to occur more closely to

when they are first identified rather than waiting to the end of the entire matter.

3. *They have committed to this year's legal spend to their management and must stick with it. Could be addressed this way:* You could ask, "Can I track any scope increases and submit them to you next calendar quarter? That way you can include them in your placeholder for that quarter's work and we will eventually get paid for the extra work we did."

By knowing the client contact's interests, you increase the likelihood of coming up with an approach that addresses their interests and satisfies yours as well. Remember: One of the best ways to learn your client contact's actual

interests is to ask the question: *If you were to say yes to assume increased fees for scope changes as they are identified, what would your concerns or fears be beyond your desire to minimize spending? How could I address those?* ■

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