FAQs: Mass. R. Prof. C. 1.5(b) and Written Fee Arrangements

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Effective January 1, 2013, amendments to Mass. R. Prof. C. 1.5(b) made it mandatory in most circumstances that a lawyer communicate the scope of the representation and basis or rate of the fee and expenses to a client in writing. See "Write It Up, Write It Down: Amendments to Mass. R. Prof. C. 1.5(b) Require Fee Arrangements to be in Writing," http://www.mass.gov/obcbbo/WriteItUp.pdf. In an attempt to answer publicly some of the most common queries we have received in the past few months, the Office of Bar Counsel has prepared this list of frequently asked questions. The list may be updated as additional questions arise.

1. **Is prior written notice required when the written fee arrangement already provides that hourly fees may be raised periodically or can the first monthly bill in which the increased fees are applied simply reflect the change?**

   In accordance with the last sentence of Rule 1.5(b)(1), the client must be expressly notified in writing before the fee increase takes effect. An email or simple letter a month ahead of the rate increase is sufficient.

2. **How specific do the written fee arrangements need to be about the "basis or rate" of expenses? For example, do clients have to be told the cost per page for copying?**

   If the client is to be charged for out-of-pocket expenses, it is sufficient to say that the client is responsible for those expenses. If the expenses charged to the client do not reflect the actual out-of-pocket expenses, such as for copying, the fee agreement must specify how expenses are to be calculated. The charges must always be reasonable. See comment 1B.

3. **Apart from contingent fee cases that have always required written fee agreements, must the lawyer have written fee arrangements for ongoing representations that commenced before January 1, 2013?**

   No, the requirement that all fee arrangements be written is not retroactive. The predecessor version of the rule did, however, require that the basis or rate of the fee be communicated to the client before or within a reasonable time after the representation commenced. If the lawyer has not communicated the basis of the fee and expenses, the lawyer should communicate that information in writing at

the earliest possible opportunity. And confirming the fee arrangements in writing is always a good idea.

4. **When, if ever, is it necessary to provide a written fee agreement to a "regularly represented client," and who or what is considered to be a "regularly represented" client?**

A lawyer is not required to provide to "regularly represented clients" a written fee agreement so long as the client is being charged "on the same basis or rate." A client is "regularly represented" if the client has been represented by the lawyer at least a few times in the recent past and an understanding has developed as to how the client will be billed. Of course, there is no harm in providing a written fee agreement to a regularly represented client.

5. **Does Rule 1.5(b)(1) require that the scope of the representation or the basis or rate of expenses be in writing if the client is not being charged a fee for the legal services?**

Rule 1.5(b)(2) provides that the requirement of a writing does not apply where the lawyer reasonably expects the total fee charged to the client to be less than $500. It follows that if the client is not being charged any fee, no writing is required. This exception applies to pro bono representation by private attorneys, as well as to government-funded legal service providers. Again, however, a written confirmation of the scope of the undertaking and/or the fact that the client is responsible for expenses is often the wiser choice.

6. **When a lawyer is engaged by an insurer to represent an insured, does the lawyer need to have a written fee agreement or send an engagement letter to the insured, given that the insurer is paying the fee?**

The law in Massachusetts appears to be that the lawyer represents both the insurer and the insured. *McCourt v. FPC Properties, Inc.*, 386 Mass. 145, 145-146 (1982); *Imperiali v. Pica*, 338 Mass. 494, 499 (1959). As to the insured, see question 5 above; because the insured is not being charged a fee, there is no requirement under Rule 1.5(b) that the arrangement be in writing. If there is to be any limitation on the objectives of the representation, however, and especially where the lawyer is representing the insured under a reservation of rights by the insurer, the lawyer may nonetheless be required by Rule 1.2(c) to obtain the insured's informed consent to the scope of the representation and, as always, it would be prudent to obtain the consent in writing.

As to the insurer, if it is a regularly represented client retaining the attorney's services on the same basis or rate, the attorney is not required to have a written fee agreement or to send an engagement letter to the insurer. Otherwise, the requirements of Rule 1.5(b) are applicable to the insurer.

7. **How specific does an attorney need to be in describing the scope of the representation?**

A brief statement describing the legal claims that the lawyer intends to handle should suffice. Mass. R. Prof. C. 1.2(c), however, requires the client's consent if the objectives of the representation are to be limited. The lawyer must keep in mind that the client may not be aware of all the available remedies and may not understand that the lawyer is confining the scope of the representation to only one or a few of the available remedies.

For example, an attorney retained to pursue a worker's compensation claim who does not intend to investigate potential third-party tort claims or social security claims must disclose that the scope of the representation excludes those services. Similarly, an attorney who is engaged to represent a client in a criminal case on a flat-fee basis, and who intends for the fee to cover only district court proceedings, must clarify the scope of the representation in the agreement. Other issues as to the scope of the representation that arise in domestic relations matters, immigration cases, and other areas of law, also need to be set forth in the written fee arrangement. See also Mass. R. Prof. C. 1.4(b), which requires a lawyer to give sufficient information so that the client may make an informed decision about the representation.