Write It Up, Write It Down:
Amendments to Mass. R. Prof. C. 1.5 Require Fee Arrangements to be in Writing

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On January 1, 2013, a major change by the Supreme Judicial Court to Mass. R. Prof. C. 1.5(b) will take effect. The rule as revised makes 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. The section as amended provides:

> (b)(1) Except as provided in paragraph (b)(2), the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.

The proposed amendments to Rules 1.5 and 6.5 were drafted by the Court's Standing Advisory Committee on the Rules of Professional Conduct at the request of the Court in response to a recommendation made by its Ad Hoc Committee to Study Mandatory Fee Arbitration. The Ad Hoc Committee ultimately advocated against mandatory fee arbitration at the option of the client but did suggest that Rule 1.5 be amended to require a written fee agreement.

Rule 1.5 was last amended effective March 15, 2011. The changes at that time were wide-ranging, particularly as concerned contingent fees agreement. For a discussion of those revisions, see “Fees and Feasibility,” http://www.mass.gov/obcbbo/Fees2011.htm .

Both before and after the 2011 amendments, Rule 1.5, in paragraph (c), has always required that contingent fee agreements be written. However, although paragraph (b) provided that the scope and basis or rate of other types of fee arrangements had to be communicated to clients at or near the outset of the representation, the rule prior to this most recent amendment stated only that communications in those instances should "preferably" be in writing. Now, as of January 2013, a written communication to a client concerning fees is no longer a choice; it is compulsory unless one of the narrow exceptions applies and it pertains both to the original fee arrangement and to any modifications while the representation is ongoing.

New comment 2 to the rule elaborates on what is required in the communication, stating that "a simple memorandum or copy of the lawyer's customary fee schedule is sufficient if the scope of the representation and the basis or rate of the fee is set forth." The smarter course, however, is that attorneys should not rely on letters or memos but instead obtain fee agreements signed in duplicate by both attorney and client. A fully executed fee agreement is the only safe way to avoid disagreements over whether the writing required by the rule was provided to the client. The comment further notes that the lawyer ordinarily should provide the written fee statement to the client before any substantial services are rendered.

Section (b)(2) of the amended rule provides for two exceptions to the mandate of a writing. These are: 1) a single-session legal consultation and 2) when the lawyer reasonably expects that the total fee to the client will be under $500. This section also specifies that, where an indigent representation fee is imposed by a court, a writing is not

required because no fee agreement has been entered into between a lawyer and a client. Additionally, Mass. R. Prof. C. 6.5, concerning non-profit and court-annexed limited legal services programs, has been amended to make clear in subsection (a)(1) that lawyers providing short-term limited legal services under the auspices of these programs are not subject to Rule 1.5(b).

Whether the writing memorializing the arrangement is a fee agreement executed by both parties or takes the form of a letter or memorandum from the attorney to the client, it must encompass the scope of the representation and the basis or rate of both the fee and expenses. As to scope, in addition to describing the services to be provided, the agreement should also specify, if relevant, the limitations on the services, such as when prosecuting an appeal is excluded from the representation or when identified additional avenues of potential relief will not be pursued. Note, of course, that Mass. R. Prof. C. 1.2(c) requires that the lawyer obtain the client's consent after consultation to limits on the objectives. As to fees, the writing must state, for instance, whether the $2500 paid by the client is a flat fee or a retainer against hourly charges and, if the latter, at what hourly rate. It must also describe how expenses will be billed.

It is critical that fee arrangements be documented carefully. As is the case with all contracts, ambiguities in the fee arrangement will be construed against the drafter (here, the attorney), including matters unstated. *Restatement (Third) of the Law Governing Lawyers*, § 18, comment h; *Matter of Kerlinsky*, 406 Mass. 67 (1989); *Beatty v. NP Corp.*, 31 Mass.App.Ct. 606 (1991); and *Grace & Nino, Inc. v. Orlando*, 411 Mass. App. Ct. 111

(citing *Kerlinsky* in construing an "obscurity" in a contingent fee agreement against the attorneys who drafted it).

Implementation of the new amendments to Rule 1.5 should go a long way toward preventing disputes between lawyers and clients as to the terms of their fee arrangements. The Office of Bar Counsel is available, as always, to answer questions as we move towards the January 1 effective date of the rule change and after the rule takes effect.