TOO MUCH OF A GOOD THING: UNDERSTANDING THE RULE 1.5(a) PROHIBITION ON CLEARLY EXCESSIVE FEES

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Most Massachusetts lawyers are aware that Rules of Professional Conduct require the use of written fee agreements in nearly all instances. See Mass. R. Prof. C. 1.5(b). See also, Constance V. Vecchione, "Write It Up, Write It Down: Amendments to Mass. R. Prof. C. 1.5 Require Fee Arrangements to be in Writing,". However, many are unaware that their obligations with respect to the charging and collection of fees go beyond the execution of a written agreement or other writing that clearly spells out the charges for which the client will be responsible. Even where the client has agreed, eyes wide open, to a particular fee arrangement, the lawyer will face discipline if the resulting fees for the representation are "clearly excessive" under Rule 1.5(a). The bottom line is, a lawyer is not at complete liberty to charge whatever fee the client has agreed to pay. *Caveat venditor*!

Of course, most cases in which a client suffers sticker shock over a lawyer's bill do not present an occasion for bar discipline. The Rule 1.5(a) prohibition against charging or collecting "clearly excessive" fees is intended to apply only where the charges for a lawyer's services are manifestly unreasonable based on a variety of considerations (set forth below). Thus, the rule does not come into play merely because the lawyer's fees, as provided for in the agreement, turned out to be higher than expected or more than some other lawyers might have charged for the same services. Because Rule 1.5(a) prohibits only "clearly excessive" fees (in addition to illegal fees and unreasonable expense charges), bar counsel in most instances will direct clients who feel that their lawyers' charges were simply too high to seek relief through fee arbitration or in a civil court. It should be noted that, in those civil venues, the lawyer who is seeking payment of an invoice, or from whom the client is seeking a refund, will bear the burden of proving that the fees were properly agreed to and that they are

reasonable. Sears, Roebuck & Co. v. Goldstone & Sudalter, P.C., 128 F. 3d 10 (1st Cir. 1997); Mass. R. Prof. C. 1.5(a), comment [1A].

For bar disciplinary purposes, the determination of whether fees are "clearly excessive" requires consideration of eight largely self-explanatory factors, which are set forth in Rule 1.5(a) as follows:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

3. The fee customarily charged in the locality for similar legal services;

4. The amount involved and the results obtained;

5. The time limitations imposed by the client or by the circumstances;

6. The nature and length of the professional relationship with the client;

7. The experience, reputation, and ability of the lawyer or lawyers performing the services; and

8. Whether the fee is fixed or contingent.

The focus of the eight Rule 1.5(a) factors is on such matters as the amount, quality, complexity, and urgency of the work that was required, the relative skill and reputation of the lawyer, and the result that was achieved on the client's behalf. No mention is made of the lawyer's internal motivations, whether good or bad, in charging or collecting the fees in question. Thus, even if the lawyer had no subjective intention of overcharging the client and merely charged what he or she calculated to be due based on a signed agreement that was acceptable to the client at the time of retention, a disciplinary sanction would still be in order if the Rule 1.5(a) factors indicate that the charges were "clearly excessive." Of course, a lawyer who *knowingly* charges a client for fees that he or she did not earn can expect to be disciplined not only under Mass. R. Prof. 1.5(a) but also under Rule 8.4(c), which proscribes conduct involving "dishonesty, fraud, deceit or misrepresentation." See, e.g., Matter of Murphy, 28 Mass. Att'y Disc. R. 643 (2012) (stipulated year-and-a-day suspension for lawyer who violated Rules

1.5(a) and 8.4(c) by knowingly spending more time than was necessary on cases in order to increase his billable hours at law firm); Matter of Barach, 22 Mass. Att'y Disc. R. 43 (2006) (two-year suspension for lawyer who charged for work not performed and falsified time records, among other misconduct). See also Matter of Goldstone, 445 Mass. 551, 21 Mass. Att'y Disc. R. 288 (2005) ("Where an attorney lacks a good faith belief that he has earned and is entitled to the monies [billed to a client], such conduct constitutes conversion and misappropriation of client funds").

The leading case illustrating the application of the Rule 1.5(a) factors is Matter of Fordham, 423 Mass. 481, 12 Mass. Att'y Disc. R. 161 (1996). There, a lawyer spent 227 hours and charged the client over $50,000 in handling the defense of a first-offense OUI case in district court. Although the lawyer's $200 hourly rate was not found to be unreasonable, and although he achieved a good result and there were no issues of false billing, an analysis of the Rule 1.5(a) factors pointed to an overall fee that was clearly excessive. Key to that determination was expert testimony establishing that the fee of over $50,000 was several times greater than that which seasoned defense lawyers in Massachusetts were typically charging their clients in OUI cases.

Much of the reason for the high fees in Fordham related to the lawyer's admitted lack of experience in handling OUI cases, a deficiency that prompted him to spend numerous hours educating himself in the relevant law and procedure. In his defense, the lawyer argued that the invoices legitimately reflected the amount of time he had spent on the case and, further, that the client had been aware of his need to devote extra time in educating himself in the defense of OUI cases. However, the SJC rejected the notion that the lawyer's time in educating himself in order to be competent to handle the representation could be properly included in the client's bill: "It cannot be that an inexperienced lawyer is entitled to charge three or four times as much as an experienced lawyer for the same services." Id., 423 Mass. at 490, 12 Mass Att'y Disc. R. at 173. The lawyer's violation of Rule 1.5(a) earned him what was then known as a public censure.

Matter of Rafferty, 26 Mass. Att'y Disc. R. 538 (2010), presents another instance in which a lawyer's hourly fees, however accurately they may have been calculated, vastly exceeded what the client should have been charged, resulting in a violation of Rule 1.5(a). In Rafferty, the lawyer billed more than $700,000 for his representation of the plaintiff in a pair of common law whistleblower cases. The Board of Bar Overseers and the Supreme Judicial Court found that the lawyer, in order to satisfy his client's "zealous interest" in litigating against two former employers, engaged in a "hopelessly excessive" discovery campaign that proved to be of no value to the client. Applying Rule 1.5(a) factors, the hearing committee concluded that the time, labor, and skills required to handle the case were not unusual, even if there had been some degree of novelty and uncertainty as to the legal issues involved. Although the committee considered the lawyer's hourly rate to be reasonable, the accumulation of hourly charges in relation to the client's likely recovery was not. To the contrary, the committee found that the hourly fees the client had incurred as a result of the lawyer's aggressive pursuit of discovery "destroyed the economic viability of the cases," which ultimately settled (through successor counsel) for a total of just $40,000. The lawyer received a four-month suspension for charging a clearly excessive fee and for other violations relative to his handling of the case, with reinstatement contingent upon his participation in fee arbitration and timely satisfaction of any resulting award to the client. (Similarly, in Matter of Murray, 24 Mass. Att'y Disc. R. 483 (2008), the disciplinary sanction included a requirement that the lawyer repay $57,700 he had overcharged his client. "[W]hen an attorney collects an unwarranted and excessive fee in plain violation of his fee agreement with his clients, an order of repayment represents neither damages nor a fee award; it is restitution." Id. at 495.)

Both Fordham and Rafferty illustrate how a disciplinary sanction for excessive fees can result even where the lawyer has charged a reasonable hourly rate, agreed to in a writing signed by the client, and the lawyer's invoices accurately reflect the time spent on the case. Even where those conditions are all met, under Rule 1.5(a), the lawyer must ensure that the overall fee for which the client will be held

responsible is not out of proportion to the needs of the case, the amount of money or other interests at stake, and what other lawyers would charge for the representation, among other considerations.

Rule 1.5(a) violations can also occur simply as a result of a lawyer's charging an unreasonably high hourly rate. One situation in which this may occur is where a lawyer charges his or her usual hourly rate as an attorney for time spent in performing administrative tasks requiring no professional expertise. For example, in Matter of Harbeck, 23 Mass. Att'y Disc. R. 262 (2007) a lawyer acting under a power of attorney for two elderly sisters violated Rule 1.5(a) by charging her usual hourly rate as a lawyer for non-legal tasks such as paying bills, arranging for health and personal care, and even cleaning her clients' home. On the basis of this and other misconduct in connection with the representation, as well as the lawyer's prior disciplinary history, the Supreme Judicial Court accepted her resignation from the bar as a disciplinary sanction. See also, Matter of Kliger, 18 Mass. Att'y Disc. R. 350 (2002) (public reprimand for lawyer who charged probate estate at his regular legal rate of $200 per hour for services that were mostly non-legal in nature).

Probate cases account for an unusually large share of disciplinary sanctions under Rule 1.5(a), perhaps due to the greater scrutiny a probate lawyer's bills may receive when the approval of or assent to an account is being sought from a court or estate beneficiaries. For example, in Matter of Palmer, 413 Mass. 33, 8 Mass. Att'y Disc. R. 185 (1992), a lawyer who served as both executor and estate counsel received a public reprimand for charging twice the reasonable value of the services provided, among other misconduct. See also Matter of Tierney, 28 Mass. Att'y Disc. R. 850 (2012) (public reprimand for lawyer who charged clearly excessive fee while serving as administratrix of an estate that was not unduly complicated); Matter of an Attorney, 29 Mass. Att'y Disc. R. 727 (2013) (admonition for lawyer who, without improper financial motive, worked twice as many hours in probating a decedent's estate than should have been necessary, but who made restitution in the form of a settlement with the

beneficiaries). See also, Dorothy Anderson, "How to Comply with the Rules of Professional Conduct While Probating Estates," https:/ / www.massbbo.org/Ethics.

The Rule 1.5(a) prohibition on the charging and collection of clearly excessive fees is not limited to hourly fee cases. Whether the lawyer's compensation is based on the number of hours spent on the case, a percentage of the recovery, or an agreed-upon flat fee, a disciplinary sanction will result if it is found to be "clearly excessive." Of course, the type of fee arrangement agreed to by the lawyer and client may be relevant in determining whether the fee is clearly excessive. In fact, as set forth above, one of the eight factors set forth in Rule 1.5(a) is "whether the fee is fixed or contingent."

An example of a clearly excessive *contingent* fee can be found in Matter of Saia, 19 Mass Att'y Disc. R. 380 (2003). There, a lawyer received a public reprimand for charging a contingent fee of 25 percent of the gross amount of certain death benefits his client received on account of the death of her estranged husband. Because there was no question as to the client's entitlement to the benefits, the Board of Bar Overseers concluded that there was no true contingency and therefore the amount of the lawyer's claimed fee was clearly excessive.

Regardless of the type of fee arrangement involved, the care taken in the drafting of the fee agreement, and the scrupulousness displayed by the lawyer in recording his or her time, discipline will result if the fees are found to be clearly excessive under Mass. R. Prof. C. 1.5(a). In order to avoid such a result, lawyers should undertake every representation with a realistic understanding of the worth of the case and the scope of the work required and, from there, exercise sound judgment in choosing the strategies and tactics best suited to meet the client's goals. Above all, lawyers should strive to be fair, understanding that clients expect good value for their money regardless of the nature and complexity of the case.