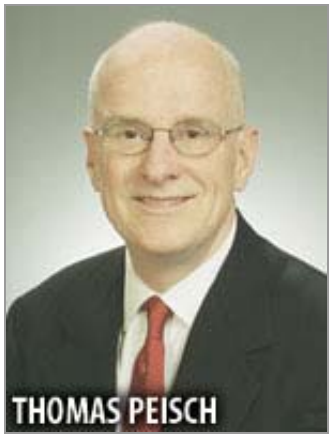
Massachusetts Lawyers Weekly **http://masslawyersweekly.com**

Rule change requiring written fee agreements poses challenges

by Thomas E. Peisch

Published: December 13th, 2012



The Supreme Judicial Court has adopted a new version of Rule 1.5 of the Rules of Professional Conduct that has serious implications for every Massachusetts lawyer.

Effective on Jan. 1, a lawyer will be subject to discipline if he does not reduce to writing the scope of virtually every engagement, as well as the basis for the fee being charged.

While many Massachusetts lawyers already do this, those who do not will have to alter their practice patterns to avoid flouting the new rule.

Although the change may seem innocuous at first blush, it has implications perhaps beyond those considered by the drafters. This article will consider the change, some of its implications, and the experience of the 10 other U.S. jurisdictions that have adopted it.

Current version of Rule 1.5

Rule 1.5(b) currently read as follows:

"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, *preferably 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 to the client." Mass. R. Prof. C. 1.5(b) (2011) (emphasis added).

Under the current version of the rule, a lawyer is required to disclose all "factors" that comprised the setting of the fee, including hourly rates, at the outset of an engagement. The goal of course is to establish an understanding as to fees and expenses "promptly." There is an exception for the "regularly represented client" as to whom such a disclosure need not be made.

The current version of Rule 1.5 articulates a preference for written disclosure of those "factors," but it specifically does *not* require a writing unless the arrangement is a contingent one. See Mass R. Prof. C. 1.5(c) (2011) (declaring that most contingent-fee arrangements must be in writing and signed by attorney and client).

As Comment 1 to Rule 1.5 observes, the desirability of a writing is rooted in a desire to "reduce[] the possibility of misunderstanding." Mass. R. Prof. C. 1.5 cmt. 1 (2011).

New version of Rule 1.5

The new version of Rule 1.5 reads as follows:

"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 requirement of a writing shall not apply to a single-session legal consultation or where the lawyer reasonably expects the total fee to be charged to the client to be less than $500. Where an indigent representation fee is imposed by a court, no fee agreement has been

entered into between the lawyer and client, and a writing is not required." Mass. R. Prof. C.1.5(b) (2013) (emphasis added).

As a result of the change, the aspirational statement in the previous version of Rule 1.5(b) will become a command that is binding on Massachusetts lawyers with disciplinary teeth to it. See Mass. R. Prof. C., Scope, ¶ 5 (2012) ("Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process."); see also *In re Lupo*, 447 Mass. 345 (2006).

Although many Massachusetts lawyers already regularly reduce fee agreements to writing, the change will require a writing at the time of the engagement "or within a reasonable time" thereafter.

The "regularly represented client" exception remains in the new version of Rule 1.5. In addition, the new version excepts "single-session legal representation" and instances in which a lawyer reasonably expects the total fee to be less than $500.

The requirement of a writing also does not apply when an "indigent representation fee is imposed by a court" or to short-term legal services provided under the auspices of a program sponsored by a nonprofit organization or court.

The SJC appears to recognize the difficulties associated with requiring written fee agreements in "lawyer-for-the-day" or similar programs, since the court has also ordered a change in the wording of Rule 6.5 to exempt those programs from compliance with the change in Rule 1.5.

Implications

At first blush, the change does not appear to be of particular consequence, especially given the aspirational tone of the previous version of Rule 1.5 and the fact that many Massachusetts lawyers already use written fee agreements of various kinds.

However, on closer review and consideration of the experience in other states, a number of issues are presented and some cautionary words are appropriate.

• Should lawyers be subject to professional discipline for failing to reduce fee understandings to writing? Otherwise stated, should the limited resources of bar counsel's office be used to impose discipline when the lack of a writing may be due to simple neglect or inadvertence?

Many lawyers believe that the rules relating to fees and the maintenance of operating a client's funds accounts are already overly burdensome, and there are concerns about giving bar counsel another weapon in an already imposing arsenal.

A canvas of some of the reported decisions in other states imposing discipline for a violation shows that these cases typically involved other, more serious disciplinary infractions. See, e.g., *People v. Lindemann*, 93 P.3d 1125 (Colo. 2004) (disbarring attorney for a number of ethical violations including failure to communicate fees in writing); *In re Rosenthal*, 33 A.3d 518 (N.J. 2012) (subjecting attorney to suspension after seven ethical infractions); *In re Disciplinary Proceedings Against Goldstein*, 681 N.W.2d 891 (Wisc. 2004) (upholding suspension of attorney who failed to establish adequate fee arrangements). However, this is no assurance that bar counsel will not decide to prosecute standalone violations.

• Will the change permit unscrupulous clients to avoid responsibility for legal fees in the event there is no writing? At least two decisions in other states have held that clients remained liable under a quantum meruit theory when a written fee agreement was required but not provided. See *Rudolph v. Bello*, 2008 WL 2491912 (N.J. Super. Ct. App. Div. June 24, 2008); *Gates & Assocs. v. Magaro,* No. 03-6247, 2007 WL 5770064 (Pa. Com. Pl. Sept. 16, 2007).

It would appear logical to extend the law permitting quantum meruit recovery in unwritten contingent-fee disputes, but again there is no assurance of this. See *Mulhern v. Roach*, 398 Mass. 18 (1986) (lawyer entitled to quantum meruit recovery where no written contingent-fee agreement existed).

• What is a "reasonable time" within which the writing must be generated? The full extent of client engagements frequently takes weeks or months to develop, and there may be uncertainty as to when the full scope of the engagement is determined. See *Starkey, Kelly, Blaney & White v. Nicolaysen,* 796 A.2d 238 (N.J. 2002) (three-month delay in tendering a writing unreasonable).

The only guidance provided on this issue is that the writing should be given "before any substantial services are rendered." Mass. R. Prof. C. 1.5 cmt. 2 (2013).

• What happens if the engagement changes? Must a new writing be generated?

• Does the new rule require discussion or acknowledgment of retainer payments as part of the fee agreement?

• Who decides the question of which clients can be considered "regularly represented?"

• In non-contingent-fee situations, should the client be asked to sign the writing accepting its terms? The new version of Rule 1.5 does not appear to require that, and many lawyers are reluctant to ask clients for a signature, especially when the relationship is a new one.

• Does an electronic communication to the client comply with the new rule? It could appear that G.L.c. 110G, §7 (2004) would permit an electronic communication, but the new rule does not expressly say so.

• Is a lawyer required to demonstrate that the client has received the writing? How will a dispute of such a nature be resolved?

• How will the exceptions for "single-session" consultations be applied? For example, is a series of email exchanges or telephone calls, followed by one in-person meeting, still a "single-session" consultation?

Conclusion

As the foregoing demonstrates, the new version of Rule 1.5 may be more complicated in its administration and enforcement than contemplated. While Massachusetts lawyers will have no alternative to compliance, it remains to be seen whether the goals of the amended rule will be achieved in practice.

Thomas E. Peisch is a partner at Conn, Kavanaugh, Rosenthal, Peisch & Ford in Boston, where he advises lawyers and law firms on liability and ethical issues. He is a former member of the Board of Bar Overseers and was its vice chairman in 2004.

Complete URL: **http://masslawyersweekly.com/2012/12/13/rule-change-requiring-written-fee-agreements-poses-challenges/**