

## **The Standing Advisory Committee's Proposed Rule 1.5 and Comments, including Explanations for Changes**

### **RULE 1.5 FEES**

- (a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee or collect an unreasonable amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:
- (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.
- (b) 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.
- (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Except for contingent fee arrangements concerning the collection of commercial accounts and of insurance company subrogation claims, a contingent fee agreement shall be in writing and signed in duplicate by both the lawyer and the client within a reasonable time after the making of the agreement. One such copy (and proof that the duplicate copy has been delivered or mailed to the client) shall be retained by the lawyer for a period of seven years after the conclusion of the contingent fee matter. The writing shall state:
- (1) the name and address of each client;
  - (2) the name and address of the lawyer or lawyers to be retained;

- (3) the nature of the claim, controversy, and other matters with reference to which the services are to be performed;
- (4) the contingency upon which compensation will be paid, and whether and to what extent the client is to be liable to pay compensation otherwise than from amounts collected for him or her by the lawyer;
- (5) the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer out of amounts collected, and unless the parties otherwise agree in writing, that the lawyer shall be entitled to the greater of (i) the amount of any attorney's fees awarded by the court or included in the settlement or (ii) the percentage or other formula applied to the recovery amount not including such attorney's fees;
- (6) the method by which litigation and other expenses are to be deducted from the recovery, if such expenses are to be deducted before or after the contingent fee is calculated, and if the client will be liable for such expenses whether or not the client is the prevailing party;
- (7) if the lawyer expects to be paid any fee from the representation that will not be determined on a contingency, the method by which this fee will be determined;
- (8) the lawyer's expectation, if any, of payment for expenses and reasonable attorney's fees if the attorney-client relationship is terminated before the conclusion of the case for any reason, which fees shall not ordinarily exceed the lesser of (i) the fair value of the legal services rendered by the lawyer, and (ii) the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency; and
- (9) if applicable, whether the client or the lawyer is responsible for payment of former counsel's reasonable attorney's fees and expenses. If the agreement does not include this provision, the lawyer will be responsible for payment of former counsel's reasonable attorney's fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses.

Upon conclusion of a contingent fee matter for which a writing is required under this paragraph, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination. If the client requests, or if the attorney-client relationship has terminated before the conclusion of a contingent fee matter and the lawyer claims entitlement to a fee or expenses, the lawyer shall, within a reasonable time after such request or after the termination of the representation, and in any event within twenty days after any written request from the client, provide the client with a written statement itemizing the services rendered and the expenses incurred and stating the amount claimed and the manner by which it was calculated.

- (d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if the client is notified before or at the time the client enters into a fee agreement for the matter that a division of fees will be made and consents to the joint participation in writing and the total fee is reasonable. This limitation does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

(f) The following form of contingent fee agreement may be used to satisfy the requirements of paragraph (c). The authorization of this form shall not prevent the use of other forms consistent with this rule. A lawyer who uses a form of contingent fee agreement that contains provisions that materially differ from or add to those contained in the following form shall explain those different or added provisions to the client and obtain the client's specific written consent to the use of these provisions.

### **CONTINGENT FEE AGREEMENT**

To be Executed in Duplicate

Date: \_\_\_\_\_, 20\_\_

The Client \_\_\_\_\_

(Name) (Street & Number) (City or Town)

retains the Lawyer \_\_\_\_\_

(Name) (Street & Number) (City or Town)

to perform the legal services mentioned in paragraph (1) below. The lawyer agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are:

(2) The contingency upon which compensation is to be paid is:

(3) The client is not to be liable to pay compensation or court costs and expenses of litigation, otherwise than from amounts collected for the client by the lawyer, except as follows:

(4) Compensation (including that of any associated counsel) to be paid to the lawyer by the client on the foregoing contingency shall be the following percentage of the (gross) (net) [indicate which] amount collected. [Here insert the percentages to be charged in the event of collection. These may be on a flat rate basis or in a descending scale in relation to the amount collected.] The percentage shall be applied to the amount of the recovery not including any attorney's fees awarded by a court or included in a settlement. The lawyer's compensation shall be such attorney's fees or the amount determined by the percentage

calculation described above, whichever is greater. [Modify the last two sentences as appropriate if the parties agree on some other basis for calculation.]

- (5) [IF APPLICABLE] The client understands that a portion of the compensation payable to the lawyer pursuant to paragraph 4 above shall be paid to [Name of Attorney entitled to a share of compensation] and consents to this division of fees.

This agreement and its performance are subject to Rule 1.5 of the Rules of Professional Conduct adopted by the Massachusetts Supreme Judicial Court.

WE EACH HAVE READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Witnesses to signatures

(To client) \_\_\_\_\_  
(Signature of Client)

(To lawyer) \_\_\_\_\_  
(Signature of Lawyer)

(If more space is needed separate sheets may be attached and initialed.)

### **Comment**

#### ***Basis or Rate of Fee***

[1] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

[1A] Rule 1.5(a) departs from Model Rule 1.5(a) by retaining the standard of former DR 2-106(A) that a fee must be illegal or clearly excessive to constitute a violation of this rule. However, it does not affect the substantive law that fees must be reasonable to be enforceable against the client.

[1B] Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. As such, the standard differs from that for fees, as described in Comment 1A. A lawyer may seek reimbursement for the cost of services performed in-house, such as telephone

charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

[2] Rule 1.5(b) states, as the ABA Model Rule does, that the basis or rate of a fee shall be communicated “preferably in writing”. Appropriate caution and ease of proof of compliance with Rule 1.5(b) indicate that the presentation of a fee agreement to the client in writing is desirable.

[3] Contingent fees, like any other fees, are subject to the not-clearly-excessive standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is clearly excessive, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain matters. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should inform the client of alternative bases for the fee and explain their implications.

[3A] When the attorney-client relationship terminates in a contingent fee case before completion, and the lawyer makes a claim for fees or expenses, the lawyer is required to identify the fee claimed to be earned and enumerate the expenses incurred, providing supporting justification if requested. In circumstances where the lawyer is unable to identify the precise amount of the fee claimed because the matter has not been resolved, the lawyer is required to identify the amount of work performed and the basis employed for calculating the fee due.

[3B] For purposes of this rule, the factors that determine “fair value” in any particular situation include those set forth in Rule 1.5(a), as well as the circumstances of the discharge or withdrawal and the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. Unless otherwise agreed in writing, the lawyer will ordinarily not be entitled to receive a fee unless the contingency has occurred.

### ***Terms of Payment***

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to

define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

### ***Prohibited Contingent Fees***

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

### ***Division of Fee***

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee if the client has been informed in writing that a division of fees will be made. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent. See Rule 1.1.

[7A] Paragraph (e), unlike ABA Model Rule 1.5(e), does not require that the division of fees be in proportion to the services performed by each lawyer unless, with a client's written consent, each lawyer assumes joint responsibility for the representation. The Massachusetts rule does not require disclosure of the fee division that the lawyers have agreed to, but if the client requests information on the division of fees, the lawyer is required to disclose the share of each lawyer.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

### ***Disputes over Fees***

[9] In the event of a fee dispute not otherwise subject to arbitration, the lawyer should conscientiously consider submitting to mediation or an established fee arbitration service. If such procedure is required by law or agreement, the lawyer shall comply with such requirement. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure. For purposes of paragraph 1.5(f), a provision requiring that fee disputes be resolved by arbitration is a provision that differs materially from the form of contingent fee agreement set forth in this rule and is subject to the prerequisite that the lawyer explain the provision and obtain the client's consent.

### ***Form of Fee Agreement***

[10] Rule 1.5(f) provides a form of contingent fee agreement that may be used. Lawyers must explain to the client any provisions that materially differ from or add to those contained in the

form and obtain the client's specific written consent to the use of these provisions. For example, unless the lawyer and client explicitly contract otherwise in the contingent fee agreement and the client consents in writing, a lawyer who undertakes representation of a client in a contingent fee matter after the client has discharged prior counsel will be responsible for payment of former counsel's reasonable attorney's fees and expenses, as well as for the costs of resolving a dispute between the client and prior counsel over fees or expenses.

[11] When attorney's fees are awarded by a court or included in a settlement, a question arises as to the proper method of calculating a contingent fee. Rule 1.5(c)(5) and paragraph (4) of the form agreement contained in Rule 1.5(f) state the default rule, but the parties may agree on a different basis for such calculation, such as applying the percentage to the total recovery, including attorney's fees.

## **Explanations for Changes in the Rule and Comments**

### *Revisions to Rule 1.5.*

Paragraph (a) of the rule was modified to reflect a change in the ABA model rule which prohibits the collection of an unreasonable amount for expenses. Paragraph (a) does not fully conform to the corresponding provision of the ABA model rule, which also prohibits the collection of an unreasonable fee, while the current Massachusetts rule prohibits the collection of an illegal or clearly excessive fee. The committee did not recommend modifying the current rule as it relates to the fees that may not be collected, but rather added to the rule only the prohibition on the collection of an unreasonable amount for expenses.

Paragraph (b) of the rule was revised to conform it to paragraph (b) of the Model Rule. The second sentence makes it clear that changes in the basis or rate must also be communicated to the client.

In addition to minor stylistic changes in paragraph (c), clause (6) of Paragraph (c) was modified and clauses (7) through (9) and a new final sentence were added. The change in clause (6) reflects an addition to paragraph (c) of the ABA model rule. Clause (7) provides a clarification applicable when the fee arrangement includes contingent and non-contingent elements and requires the lawyer to spell out all the elements of the fee calculation.

Clauses (8) and (9) were added to address the circumstances presented in *Malonis*. Clause (8) codifies the requirement that the lawyer explain to the client that the lawyer may be entitled to compensation based on the reasonable value of services if the representation is terminated before the matter is completed. Clause (8) was also modified to reflect the result in *Liss v. Studeny* making it clear that the recovery in quantum meruit cannot ordinarily exceed the amount that would have been payable upon the occurrence of the contingency. The implication of this limitation is that if the contingent fee would have been dependent upon a recovery and the client actually recovered nothing, the lawyer would also not receive any payment in quantum meruit. In *Discipline of an Attorney*, the court also expressed doubt about an agreement that would allow the attorney to recover more than the fair value of the services rendered before termination. Clause (8) was therefore drafted to make it clear that the attorney could not ordinarily seek more than the fair value of the services rendered before termination of the services.

Clause (9) incorporates the default rule adopted by the court in *Malonis*. The committee agreed that the best way to assure that successor counsel will identify the client's potential liability for the fees of predecessor counsel is to make such fees the responsibility of successor counsel unless the client has explicitly agreed otherwise.

A new final sentence was added to paragraph (c) to provide that predecessor counsel also has an obligation to provide an itemized statement of any amounts owed within a reasonable time after the attorney-client relationship has terminated. While the committee agreed that it might be difficult for a lawyer to determine what a reasonable fee might be before the end of the matter, the committee agreed that it was in the best interest of the client to receive an estimate of the amount of a potential claim for a fee by the lawyer whose representation was terminated as soon as possible, and that benefit outweighed the difficulty the lawyer might have in determining a reasonable fee. In order to assure prompt compliance, the committee has also recommended that the statement must be provided within 20 days after a written request by a client, and the requirement was made applicable to any written request for a statement, whether it is made before or after the termination of the representation.

The revisions on paragraph (e) are intended to bring the rule into compliance with *Saggese*. Although *Saggese* held that the client be informed of the division of fees at the time of the referral, the committee's experience with referrals indicates that in many cases the referring lawyer does not enter into a fee arrangement with the client. Rather, the lawyer who will be handling the matter will enter into a fee arrangement with the client. Paragraph (e) would require that the client be notified before or at the time the client enters into a fee arrangement, since that is the time at which the client makes a decision on fees, which may be later than the time of the referral when there may be no discussion of fees with the client. The committee understands that requiring the disclosure to be made at or before the time the fee agreement is entered into may shift the responsibility to disclose the fee sharing to the attorney handling the matter in many cases, but as long as the client is notified of a division at or before the time when the client agrees to a fee arrangement on the matter, the client's interests are adequately protected.

The final sentence added to paragraph (f) is intended to implement the holding of *Discipline of an Attorney*. After careful consideration, the committee concluded that it was not advisable to specify in detail how to document the client's written consent to the use of the provisions. Other provisions of the rules require the lawyer to obtain the client's consent, but without specifying in detail how such consent must be documented. The committee recognizes that specifying a model form of agreement for contingent fee engagements is unique in the rules, but nevertheless was reluctant to spell out one or more particular ways to document the consent, any one of which could be subject to misuse. The committee therefore expects lawyers to adopt procedures that will withstand criticism that they were insufficient to document the client's consent to the use of the non-standard provisions.

Paragraph (5) was added to the form of model contingent fee agreement in Rule 1.5(f) to implement the provisions of paragraph (e) of the rule.

*Revisions to the Comments.*

The revision in Comment 1 addresses the addition of the prohibition in Rule 1.5(a) against collecting an unreasonable amount for expenses. New comment 1B notes that the standard for what is prohibited in the collection of expenses (unreasonable expenses) differs from the standard for fees (illegal or clearly excessive). The first and third sentences are taken from ABA Model Comment 1 which provides some guidance on expense recovery.

Proposed Comment 3 was added by the ABA model comments, except for the last sentence which was retained from the current Comment 3. The first two sentences were modified to reflect the not-clearly-excessive standard for fees in Rule 1.5(a). The rest of current Comment 3 was moved to Comment 5 in the ABA model comments and in proposed Comment 5.

Proposed Comment 3A is intended to provide further guidance on compliance with the last sentence of Rule 1.5(c)

Proposed Comment 3B was added to provide guidance on the factors that would be applied to determine the fair value of a lawyer's services when the representation terminates before the conclusion of the matter. The comment identifies not only the factors set forth in Rule 1.5(a), but also identifies as an appropriate factor the circumstances of the termination. The last sentence was intended to confirm that in the absence of an agreement to the contrary the lawyer would not receive any fee if the contingency (typically, some recovery by the client) does not occur.

Proposed Comment 4 is current Comment 2, modified to conform to ABA Model Comment 4.

Proposed Comment 6 is ABA Comment 6 providing clarification on the prohibition in Rule 1.5(d) against contingent fees in domestic relations matters. Current Comment 6 was discarded as an outdated reference to the earlier rules.

The revisions in proposed Comment 7 reflect the revisions in the rule relating to the division of fees.

Comment 7A was modified by deleting references to the prior rules which are no longer useful.

Proposed Comment 8 is a new Model Comment that clarifies the limits in Rule 1.5(e).

Proposed Comment 9 is current Comment 5 incorporating a clarifying phrase in the first sentence and adding a new second sentence based on the initial sentence of ABA Model Comment 9 that was rewritten for clarity. The final sentence was added to Comment 9 to confirm, consistent with the findings in *Discipline of an Attorney*, that an arbitration provision is permitted in a fee agreement but that it is a provision that differs materially from the model agreement and therefore requires the lawyer to explain it and obtain the client's consent to its use.

Proposed Comment 10 replaces current Comment 7 and reflects the incorporation of the changes in Rule 1.5(c) as a result of *Malonis*.

Comment 11 is current Comment 8 renumbered.