

SEPARATE STATEMENT OF ELIZABETH MULVEY
RE: PROPOSED AMENDMENT TO RULE 1.5(c)(8) AND (c)(9)

Some of the present proposals to amend Rule 1.5 are intended to respond to the Supreme Judicial Court's decision in *Malonis v. Harrington*, 442 Mass. 692 (2004), which involved litigation between former and successor counsel over the division of a contingent fee. The Court in *Malonis* directed the Rules Committee to "recommend to us whether rule 1.5 should be amended to identify responsibility in these circumstances with any other necessary or appropriate safeguards." The Rules Committee has struggled mightily, albeit, in my mind, with only limited success, to respond to these concerns. Unfortunately, the problem lies not in the Committee's work product, but in the constraints of existing law and the difficulty in creating bright-line rules which can be applied fairly in a wide variety of situations.

My comments are directed toward the proposals to add two new paragraphs (8) and (9) to Rule 1.5(c). The crux of the problem created by these amendments is that, as among the three involved parties (the client, the discharged lawyer, and the successor lawyer) the substantive law, especially when combined with the proposed amendments to the ethical rules, favors that member of the troika whom I believe to be the *least* deserving of protection: the discharged lawyer who has been unable to perform legal services to the client's satisfaction. The proposed formulation would create 1) an entitlement to significant compensation for the discharged lawyer, and 2) a presumption that the successor lawyer must pay that compensation, along with any costs of litigating the amount due. This formulation severely disadvantages both the client and the successor lawyer, neither of whom has an adequate way to assess his financial risk if the change in representation is effected. In fact, where a discharged lawyer has devoted significant effort to a case in which the eventual recovery is modest, Rule 1.5(c)(8) would by its literal application likely result in the entire fee being due to the discharged lawyer.

The principle of *Malonis v. Harrington* that "a client should never be made to pay twice"—a fundamentally sound principle which I heartily endorse—is logically incompatible with the equally sound principle that the successor lawyer has the right to decline responsibility to pay the discharged lawyer's fee. If the client is to pay just one reasonable fee, either the discharged lawyer must get nothing, or the new lawyer's fee must be reduced by the amount of the discharged lawyer's fee. For every case such as *Malonis*, where the first lawyer contributes significantly and substantially to the client's recovery, there are many others where the first lawyer's work does little to advance the claim—or in fact, does nothing more than to create a deep legal hole out of which the successor lawyer must dig. The long continuum between these two extremes—and in some cases, even the endpoints themselves—will be fertile ground for ancillary litigation over fee divisions.

Given that there are almost always injured personal or professional feelings on the part of the discharged lawyer, dissatisfaction with that lawyer on the part of the client, and, often, on the part of the successor lawyer as well, it is unrealistic to hope that the involved parties will be able to reach agreement easily. Even if all involved parties agree in principle that the discharged lawyer should receive some portion of the fee, the discharged lawyer, in particular, has little incentive to agree at the point representation is transferred to either a fixed amount or a fixed percentage. If, as *Malonis* proposes, the client will pay only a single reasonable fee, the

successor counsel has no conceivable way to assess his financial risk—not only to pay a share of his fee, but the cost of any fee litigation as well. The result of this uncertainty would be to make it very difficult for the client to obtain successor counsel—even where his dissatisfaction with his original lawyer was genuine and well-founded. If the “single fee” principle is to be upheld, the prerogative purportedly granted to successor counsel by Rule 1.5(c)(9) to relieve himself of liability for amounts due to the discharged lawyer is completely illusory.

Clearly, the most desirable outcome for the client is that he pay a single fee, and that he be free to change lawyers if he determines that to be in his best interests. This result can be effectuated only if there is a bright-line rule on which all involved parties can rely to assess their rights and liabilities. As stated above, I do not believe that the present proposals achieve this result, in part because *Malonis* attempts to create two bright-line rules (both reasonable and appropriate in the particular factual circumstances of that case) which would not do justice in a large variety of other cases.

Although I realize that the idea that a discharged lawyer may not be paid for work done may be anathema to lawyers used to being compensated on a more predictable basis than a contingent fee, I do not feel that it is unreasonable to create a bright-line rule that would be more faithful to the underlying principle of a contingent fee: that compensation is due **ONLY** upon recovery. A lawyer who enters into a contingent fee agreement assumes the risk that he will receive no fee for a wide variety of reasons, both within and without his control. Absent a showing that the client has discharged the lawyer in bad faith (i.e., to avoid paying a fee), or perhaps in circumstances where the lawyer has substantially performed (i.e., there is a significant outstanding offer of settlement), it is fair to hold the lawyer to the terms of the agreed contingency. This rule would eliminate any uncertainty, by requiring lawyers to bring about the contingency in order to receive a fee, while permitting clients largely unfettered choice in legal representation. Indeed, one might even argue that the desire to obtain a fee will cause the lawyers to make even greater efforts to assure their client’s satisfaction, and thus receive their agreed fee.

There is no perfect solution to this problem, which involves a number of competing interests. However, I believe that 1) any solution should favor the interests of the client (in having the freedom to obtain new counsel and in paying a single reasonable fee) above those of either lawyer, and 2) to the extent that the lawyers’ competing interests cannot be reconciled, the burden should fall upon the discharged lawyer.

Finally, in my view, the proposed Rule 1.5(c)(8) should apply only to situations where the relationship with the first lawyer is terminated by the client (with or without cause). As written, the Rule would permit a lawyer who rejects a case or withdraws from representation after performing some services to receive compensation in the event successor counsel concludes the case successfully. I feel strongly that a lawyer who has, by terminating his relationship with the client, evidenced a willingness to forego any possibility of compensation, should be held to that decision.