speaking of ethics

By Hope C. Todd

Fee Agreements and New Rules

Mick Wiggins

When this column is published, the recently amended D.C. Rules of Professional Conduct will have been in effect for a month.

Anthony Epstein, former vice chair of the D.C. Bar Rules of Professional Conduct Review Committee, compares the recent amendments to "a 50,000-mile checkup on a car: the car is basically working fine and has a lot of miles left on it, but it needs a tuneup, a little body work, and a few parts replaced and upgraded."

This is not to imply that D.C. lawyers should fail to take the changes seriously. Indeed, as discussed in a feature article in this issue of *Washington Lawyer* (see page 30), one ignores the amendments at one's own peril. Although the article provides a good starting point for getting a handle on many of the changes, nothing replaces reading them for yourself. The new rules can be found at www.dcbar.org/newrules.

In light of recent changes, now is a good time to conduct an ethical tuneup of your fee agreement practices, to make sure those practices comply with new requirements found in the rules, as well as continuing obligations.

Rule 1.5 governs fees in the District of Columbia. Fees charged by lawyers in the District may be hourly, fixed, or flat, or, in civil cases, contingent. The cornerstone of the rule is that fees must be reasonable.[1] In the District most fee agreements must be reduced to writing.[2] The only exception is that in noncontingent fee matters, where a lawyer has regularly represented a client, a written communication is not *required* by the rule.[3]

The circumstances in which a written communication is required have not changed; what has changed is the information that is required to be in writing. Rule 1.5(b) now requires that "when the lawyer has not regularly represented the client,"[4] the following information shall be communicated to the client, in writing, before or within a reasonable period after commencing the representation: (1) the basis or rate of the fee, (2) the scope of the lawyer's representation, and (3) the expenses for which the client will be responsible. Requirements 2 and 3 are new to the rule.

It is no secret that a client's misunderstanding about what a lawyer agreed to do for him or her and how much that work was going to cost, is at the heart of many fee disputes, malpractice lawsuits, and Bar complaints. On more than one occasion the D.C. Bar Legal Ethics Committee has been asked to provide guidance on the interpretation and application of Rule 1.5.[5] In Opinion 238 (1993) the committee advised that a writing pursuant to Rule 1.5(b) must adequately inform the client of the basis or rate of the fee, and that a fixed fee agreement must include those reasonably foreseeable services that are necessary to provide competent representation. In Opinion 267 (1996) the committee further opined that a lawyer violates the rules when the lawyer informs the client that he or she bills on a time basis, and then calculates the fee by reference to factors other than time, for example, by including an additional unexplained administrative charge.

The committee has also consistently reaffirmed the guiding principle that the attorney bears the responsibility for seeing that there is no misunderstanding as to fee arrangements.[6] The new requirements to Rule 1.5(b) no doubt aim to ensure that the lawyer and the client have the same understanding not only of the fee, but also of the scope of services to be provided by the lawyer and those expenses for which the client is responsible.

Though not specifically defined by Rule 1.5(b), the scope of the lawyer's representation would reasonably include the purpose of the representation, or the legal matter that the lawyer agrees to handle for the client, and those services that the lawyer agrees to undertake for the client.[7]

For example, if a lawyer agrees to prepare a simple will for a client for a fixed fee, that understanding must be reduced to writing and communicated to the client. If a lawyer agrees to represent a client in a mediation for an employment discrimination claim before the Equal Employment Opportunity Commission (EEOC), that information must be included in a written communication to the client. If the fee for the representation will be calculated on an hourly basis and the client will be responsible for additional expenses such as copying costs, mailing costs, and long-distance phone charges, then the hourly billing rate and expenses must also be in writing.

In the EEOC matter, because the scope of the representation does not include the lawyer's agreement to file a lawsuit if the mediation is unsuccessful, the client must give informed consent to the limit of the representation.[8] At minimum, the client should understand the implications of needing to obtain other counsel, including possible additional expenses and statutory time constraints, if the client decides to file a lawsuit at the conclusion of the agency proceedings.

Rule 1.5(c) continues to require that *all* contingent fee agreements be in writing and that the written agreement include very specific information about the method of calculation as set forth in the rule. The new requirement is that the contingent fee agreement must now include whether the client will be liable for expenses regardless of the outcome of a matter.

Finally, Rule 1.5(e) continues to require that a division of a fee between lawyers not in the same law firm meets the stringent requirements set forth in the rule.[9]

The amended rules' new requirements are likely a part of most fee agreements as a matter of sound practice management. They must now also be a part of most fee agreements as a matter of ethics.

Notes

1 Rule 1.5(a) lists factors to be considered in determining the reasonableness of a fee, but the list is "not exhaustive." *See* D.C. Bar Legal Ethics Op. 300 (2000) (examining an acceptance of corporate ownership interest in lieu of legal fees). Any fee that is prohibited by law is per se unreasonable. Rule 1.5(f).

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Hearing Committee Members Sought

The Board on Professional Responsibility (BPR) of the D.C. Court of Appeals is seeking D.C. Bar members for volunteer service on one of its 12 hearing committees. Those committees hear lawyer discipline cases and draft reports to the BPR with findings of fact and recommended conclusions of law.

Hearing committee members are appointed periodically by the Board on Professional Responsibility and are eligible to serve two consecutive three-year terms.

For more information, contact Elizabeth J. Branda, Esquire, Executive Attorney, Board on Professional Responsibility, 409 E Street NW, Building B, Room 208 Washington, DC 20001, 202-638-4290.

Change of Address

To expedite your change of address for all Bar and section mailings, complete this form and return it to the D.C. Bar Member Service Center at 1250 H Street NW, Sixth Floor, Washington, DC 20005-5937. You may also return this form via fax to 202-626-3497, Attn: Member Service Center.

You are required, by rule of court, to file with the secretary of the District of Columbia Bar any changes to your address within 30 days.

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FIRM/COMPANY NAME

STREET

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TELEPHONE — FAX — E-MAIL ADDRESS

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boda has been promoted to of counsel... **Jennifer Alpha** and **Jaime Lee** have been named partner at Reno & Cavanaugh, PLLC... **Howard J. Ross** has joined Shulman, Rogers, Gandal, Pordy & Ecker, P.A. as shareholder... **Kirstin Gulling** has joined Silber, Perlman, Sigman & Tilev, P.A. as of counsel... **Raymond Shepherd III** has joined Venable LLP as partner... **Lee Crowell** has joined the Virginia Department of Environmental Quality in Richmond as groundwater compliance and enforcement specialist... **Eric Andreas, Leslie Curran, Scott Delacourt, Eve Reed, Rod Thomas**, and **Josh S. Turner** have been named partner at Wiley Rein & Fielding LLP.

D.C. Bar members in good standing are welcome to submit announcements for this column. When making a submission, please include name, position, organization, and address. Julie Reynolds can be reached by e-mail at jreynolds@dcbar.org.

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2 Although Rule 1.5(b) imposes only a unilateral writing communicated from the lawyer to the client, the purpose of the written communication is to create an understanding between the client and the lawyer of the fee arrangement. *See* Rule 1.5 cmts. 1–3.

3 In all representations, a written fee agreement is desirable. In D.C. Bar Legal Ethics Opinion 310 (2001) the Legal Ethics Committee maintained that "the importance of having a written arrangement cannot be overstressed."

4 Comment 1 to Rule 1.5 explains that the reason a written communication is not required for those clients a lawyer has regularly represented, is that ordinarily an understanding of the basis or rate of the fee will have evolved between the lawyer and the client.

5 *See* D.C. Bar Legal Ethics Ops. 238 (1993), 262 (1995), 267 (1996), 300 (2000), 310 (2001).

6 *Id.* Op. 4 (1975); *see also id.* Ops. 25 (1976), 29 (1977), 267 (1996).

7 Rule 1.2(c) provides that "[a] lawyer may limit the objective of the representation if the client gives informed consent." Comment 4 to Rule 1.2 contains new language cross-referencing 1.5(b): "Rule 1.5(b) requires a lawyer to communicate the scope of the lawyer's representation when the lawyer establishes a new lawyer–client relationship, and it is generally prudent for the lawyer to explain in writing any limits on the objectives or scope of the lawyer's services."

8 *See* Rule 1.2(c) & cmt. 4. *Informed consent* is defined at Rule 1.0(e).

9 Rule 1.5(e)(3) now requires that the client give informed consent to the arrangement. The District of Columbia Court of Appeals has strictly enforced the written disclosure requirements of Rule 1.5(e). *See In re Bell*, 716 A.2d 205 (D.C. 1998); *In re Confidential*, 670 A.2d 1343 (D.C. 1996).

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