

Rule 1.5: Fees

1. Current Kentucky Rule with Official Comments:

SCR 3.130(1.5) Fees

(a) A lawyer's fee shall be reasonable. Some factors to be considered in determining the reasonableness of a fee 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 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) When the lawyer has not regularly represented the client, the basis or rate of the fee should be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(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. Such a fee must meet the requirements of Rule 1.5(a). A contingent fee agreement shall be in writing and should state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon recovery of any amount in a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and showing the remittance to the client and the method of its determination.

(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, maintenance, support, or property settlement, provided this does not apply to liquidated sums in arrearage; 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:

(1) (a) The division is in proportion to the services performed by each lawyer or,

(b) By written agreement with the client, each lawyer assumes joint responsibility for the representation; and

(2) The client is advised of and does not object to the participation of all the lawyers involved; and

(3) The total fee is reasonable.

Supreme Court Commentary

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. In a new client-lawyer relationship, however, an understanding as to the fee should 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.

Terms of Payment

[2] 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 special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

[3] 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. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Division of Fee

[4] 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 on either the basis of the proportion of services they render or by agreement between the participating lawyers if

all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved.

Disputes over Fees

[5] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. 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.

[6] Factor (3) is intended to prohibit unreasonably high fees and does not prevent a lawyer from sharing fees that are less than "customary."

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(1.5) Fees

(a) A ~~lawyer's fee~~ lawyer shall ~~be reasonable~~ not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) ~~The~~ 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~~ the likelihood, ~~if apparent to the client,~~ that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) ~~The~~ the fee customarily charged in the locality for similar legal services;
- (4) ~~The~~ the amount involved and the results obtained;
- (5) ~~The~~ the time limitations imposed by the client or by the circumstances;
- (6) ~~The~~ the nature and length of the professional relationship with the client;
- (7) ~~The~~ the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) ~~Whether~~ whether the fee is fixed or contingent.

(b) ~~When the lawyer has not regularly represented the client,~~ 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. Such a fee must meet the requirements of Rule 1.5(a). A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, 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.

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

(1) ~~Any~~ 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, maintenance, support, or property settlement in lieu thereof, provided this does not apply to liquidated sums in arrearage; or

(2) A 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:

(1) ~~(a)The~~ the division is in proportion to the services performed by each lawyer or ~~(b) by written agreement with the client,~~ each lawyer assumes joint responsibility for the representation;

(2) ~~The~~ the client ~~is advised of and does not object to the participation of all the lawyers involved~~ agrees to the arrangement and the agreement is confirmed in writing; and

(3) ~~The~~ the total fee is reasonable.

(f) A fee may be designated as a non-refundable retainer. A non-refundable retainer fee agreement shall be in a writing signed by the client evidencing the client=s informed consent, and shall state the dollar amount of the retainer, its application to the scope of the representation and the time frame in which the agreement will exist. Depending upon all of the circumstances, the client may be entitled to a return of some portion of the fee, even a non-refundable retainer.

(g) The reasonableness of a fee shall be determined at the time the agreement is entered into, during the representation, and at the conclusion of the representation.

~~Supreme Court Commentary~~ Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred 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.

Basis or Rate of Fee

~~{1}~~ [2] 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 ~~the fee~~ fees and expenses should 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.~~ Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the fee terms of the engagement 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.~~

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, 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 tax matters.

Terms of Payment

~~[2]~~ [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)~~(i). However, a fee paid in property instead of money may be subject to ~~special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property~~ the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

~~[3]~~ [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. ~~When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.~~

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

~~[4] [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 ~~on either~~ on the basis of the proportion of services they render or by agreement between the participating lawyers if all assume each lawyer assumes responsibility for the representation as a whole. ~~and In addition, the client is advised and does not object. It does not require disclosure to the client of~~ must agree to the arrangement and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved financial and ethical responsibility for the representation as if the

lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[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

[5] [9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. 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.

[6] ~~Factor (3) is intended to prohibit unreasonably high fees and does not prevent a lawyer from sharing fees that are less than "customary."~~

Advance Fee Arrangements

[10] If a lawyer collects an advance deposit on a fee or for expenses, or a flat fee for services to be performed, the lawyer must deposit the funds in the lawyer=s trust account until the fee is earned or the expense incurred, at which time the funds shall be promptly distributed. In the event the full amount that is held is not ultimately earned, or due to other factors, such as termination of the attorney-client relationship, is not reasonable, the funds must be returned to the client as provided in Rule 1.16(d).

Non-refundable Retainers

[11] A lawyer may designate a fee arrangement as a non-refundable retainer and upon receipt deposit such funds in the lawyer=s operating account. The amount of a non-refundable retainer fee must be reasonable in amount and comply with Rule 1.5.

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

(1) The proposed KRPC 1.5 is consistent with MR 1.5 with these exceptions:

(a) terminology in the current KRPC 1.5 paragraphs (c) and (d)(1) is included in the proposed Rule that does not appear in MR 1.5.

(b) “the share each lawyer will receive” is deleted from paragraph (e)(2) and Comment [7].

(c) regulation of non-refundable retainers is added in paragraph (f) and Comment [11].

(d) guidance on the timing for determining the reasonableness of a fee and the management of advance fees and expenses are added in paragraph (g) and Comment [10].

(2) Portions of the ABA Reporter’s Explanation of Changes to MR 1.5 express the Committee’s view on all other recommended changes to KRPC 1.5. They are adopted by

the Committee for purposes of explaining recommended changes and are quoted below.

- ABA Reporter's Explanation of Changes -- Model Rule 1.5

TEXT:

1. Paragraph (a): Substitute Model Code standard

The current Rule requires that a lawyer's fee be reasonable, but it does not state a corollary prohibition of a fee that is larger than reasonable. The omission thus makes it harder than necessary to impose discipline for excessive fees. The Commission substituted the language of the Model Code prohibition for the current first sentence of (a). No change in substance is intended.

2. Paragraph (a): Add explicit prohibition on unreasonable expenses

Although ethics committee opinions have assumed that lawyers are prohibited from charging unreasonable expenses, as well as unreasonable fees, the current Rule does not say so explicitly. The Commission added language clarifying the lawyer's obligation, in order both to better educate lawyers as to their duties and to facilitate the imposition of discipline, where applicable. No change in substance is intended.

4. Paragraph (b): Add scope of representation and expenses to written notice

As a practical matter, a statement about fees is rarely complete without a corresponding statement of what the lawyer is expected to do for the fee. Further, the Commission believes that issues about expenses are often at least as controversial as those about fees. Indeed, clients often do not distinguish between fees and expenses. Thus, proposed paragraph (b) includes statements about the scope of the representation and client responsibility for expenses as well as fees in the requirement of a written agreement. Changes in the basis or rate of the fee or expenses must also be communicated in writing

but not changes in the scope of the representation, which may change frequently over the course of the representation.

6. Paragraph (c): Clarify that contingent fee agreement must be signed by client

The Commission is proposing a number of revisions to the Rules that would require the lawyer to document certain communications or agreements in writing. The Commission believes that it should be clear in all instances what type of writing is required, particularly whether the writing needs to be signed by the client. Certain terms are defined in Rule 1.0, including "writing." Because there are only a few instances in which a client's signature is required, the Commission is recommending that those instances be clearly stated in the text of the Rule. Thus, while the Commission believes that paragraph (c) already requires that a contingent fee agreement be signed by the client, this requirement is now being made explicit. No change in substance is intended.

7. Paragraph (c): Additional notification regarding expenses in contingent fee agreements

Unlike the Model Code, the Model Rules permit lawyers to advance litigation expenses, with repayment contingent on the client prevailing. Nevertheless, lawyers are not required to make such repayment contingent. The Commission believes that clients may be misled without a clear statement, in the contingent fee agreement, that there are expenses for which the client will be liable whether or not the client is the prevailing party.

8. Paragraph (e): Division of fees

The Commission recommends retaining the current text of this Rule, with the sole exception that the client must agree, and the agreement must be confirmed in writing, to the participation of each lawyer, including the share of the fee that each lawyer will receive. *(Ed. Note: The Committee deleted the requirement that the client be informed of the share of the fee that each lawyer will receive.)*

COMMENT:

[1] This Comment is entirely new. It introduces paragraph (a) by stating that lawyers must charge both fees and expenses that are reasonable under the circumstances. It explains that the factors set forth in paragraphs (a)(1) through (8) are not exclusive and that not all factors will be relevant in each instance. It further states the method by which lawyers may properly charge for services performed or incurred in house, along the lines suggested in ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 93-379 (Billing for Professional Fees, Disbursements and Other Expenses).

[2] This Comment has been revised to refer to the new requirements set forth in paragraph (b), including a statement about the nature of the writing. The last sentence clarifies that when the service provided is brief, prompt submission of a written bill is

sufficient to meet the requirements of this Rule. The Commission is proposing to delete existing material in order to streamline the Comment in light of the material that has been added.

[3] This Comment is entirely new. It confirms that contingent fees, like other fees, are subject to the reasonableness standard of paragraph (a), including consideration of all of the factors that are relevant under the circumstances. It further refers to applicable law, which may impose limitations on contingent fees or require a lawyer to offer clients an alternative basis for the fee. (This is a revision of the last sentence in current Comment [3], revised to include an additional reference to ceilings on the percentage allowable under law.) It also refers to applicable law that may govern situations other than a contingent fee.

[4] This amendment to current Comment [2] eliminates the vague "special scrutiny" language and substitutes a cross reference to the Rule 1.8(a) requirements for business transactions with a client when a fee is to be paid in property instead of money. Rule 1.8(a) treatment is not stated in absolute terms, but the possibility is strongly suggested. The recent ABA Business Law Section report on alternative billing practices agreed that Rule 1.8(a) treatment should be given to fees paid in stock or property.

[5] The Commission proposes to delete the next to the last sentence of current Comment [3] because the statement is merely advisory, given that the requirement of offering an alternative type of fee is not stated or implied in any textual provision. If the contingent fee is reasonable, then lawyers need not offer an alternative fee nor need they inform clients that other lawyers might offer an alternative.

[6] A number of ethics committee opinions have interpreted the current Model Rule to permit contingent fees in post decree family law matters, i.e., collecting arrearages that have been reduced to judgment, because such fee arrangements do not implicate the

same policy matters that are implicated when fees are contingent upon securing a divorce or on the amount of alimony, support or property order. The Commission proposes adding this new Comment to clarify that this is the intended interpretation of paragraph (d)(1).

[7] The changes reflect the changes made to paragraph (e). The Commission proposes revising the explanation of "joint responsibility" to entail legal responsibility, including financial and ethical responsibility, as if the lawyers were associated in a partnership. This is the interpretation that has been given to the term according to ABA Informal Opinion 85-1514, as well a number of state ethics opinions.

[8] This new Comment seeks to eliminate a misunderstanding that might arise about whether the requirements of paragraph (e)(1) must be satisfied when a lawyer leaving a law firm and the firm agree to share some part of a fee to be received in the future. Technically, the future division would be between lawyers who were no longer members of the same law firm. None of the usual reasons for requiring the client's agreement to the arrangement apply to such fee divisions, however, and this Comment is intended to make that clear.

[9] The proposed change highlights that lawyers must comply with fee arbitration or mediation procedures in jurisdictions where they are mandatory.

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

(1) Terminology from the current KRPC 1.5 is carried over in paragraphs (c) and (d)(1) of the proposed Rule because the Committee considered them more comprehensive than the MR on these points. They are not inconsistent with the MR.

(2) The Committee concluded that the client's agreement confirmed in writing to a

division of fees adequately protects the client's interest. The share each lawyer will receive is properly a matter between the lawyers that does not need to be communicated to the client for any professional responsibility reasons.

(3) Non-refundable fees are a much misunderstood fee issue in Kentucky. The Committee concluded that specific guidance on their use is necessary. The proposed Rule paragraph and Comment on non-refundable fees are based on KBA Formal Ethics Opinion KBA E-380 (1995).

(4) The Committee concluded that additional guidance on management of advance fees and expenses as well as when the reasonableness of fees should be evaluated was appropriate. See paragraph (g) and Comment [10].

Dissent and Committee Response

Committee member Donald H. Combs dissents in part from the Committee's recommendation to adopt Rule 1.5(c). The dissenting opinion is inserted here for consideration by the reviewing authorities. The results of the Committee's consideration of this dissent follow the opinion.

I disagree with the Committee's proposed Rule 1.5(c) for one reason. The rule requires that a fee contingent on the outcome of the matter for which service is rendered be in writing, signed by the client. I believe this requirement imposes upon lawyers an obligation that goes beyond current contract law and the status of Kentucky's current Rule. The current Rule simply requires that the contingent fee agreement be in writing and does not require that it be signed by the client.

Obviously, it is without question that it is better for both the attorney and the client if the

contingent fee agreement is signed by the client. However, based upon the practicalities of an everyday practice in rural Kentucky, and my own personal experiences, this requirement can and will be overly burdensome in several situations, and the rule will be used to prevent attorneys from collecting contingency fees which they have, in fact, earned.

There are several different types of cases in which it may be very difficult to obtain the signature of a client; for example, (i) class action cases; (ii) condemnation cases which involve land owned in heirship by numerous relatives and their spouses, whose identity and whereabouts may be unknown; (iii) cases involving minor children, persons of unsound mind or other disabilities; and, (iv) any other type of litigation in which a "fund" is created through the lawyer's efforts.

On the other hand, assuming the lawyer has performed the services without a signed agreement, and a dispute arises about whether there is a contingent fee and the amount being charged, this ethical rule will be used, in any litigation, to argue that the lawyer is not entitled to the contingent fee, even though the law of contracts would not impose the requirement of a signature by the client for the collection of the fee. And, if the lawyer pursues the contingency fee without a signed agreement, and proves he is entitled to it, as a matter of contract, the lawyer will, nevertheless, face discipline for violation of this ethical rule.

In fact, it is more common, in everyday commerce, that the terms of the sale of services are not in a contract signed by the party to be charged. To the contrary, engagement letters, invoices, and statements are commonly used to establish the terms and conditions of the fee to be charged. Engagement letters have been widely used for many years by accountants, investment bankers, engineers, and other professions and service providers. The Section of Business Law of the ABA studied law firm policies on engagement letters, and in 1999, the ABA published "Documenting the Attorney-Client Relationship", utilizing

information obtained from numerous law firms on their use and content of engagement letters at that time. That study found that engagement letters by law firms was a fairly recent phenomenon. The work explains the practical value of using engagement letters, and provides forms and content for engagement letters. At that time, the ABA Model Rules only required a written agreement concerning fees at Rule 1.5(c). And, the comments to that version of Rule 1.5(c) suggested that furnishing the client with a simple memo or copy of the lawyer's customary fee schedule would be sufficient to meet the requirements of that rule. However, the study concluded that an engagement letter was more preferable in serving the function of setting forth the method of determining the fee, describing the scope of the services to be rendered, identifying the client, and memorializing any other terms of the engagement.

It should be remembered that Rule 1.5(a) requires attorney fees to be reasonable, and provides the factors to be considered. And, Rule 1.5(b) sets out the requirements for communicating the particulars of the fee arrangement to the client. And, it is my position that the existing version of Rule 1.5(c) is sufficient to protect the interest of the client, and that to require the signature of the client, in certain cases, is overly burdensome and will be used to prevent attorneys from collecting contingency fees which have been earned.

Committee Consideration of the Dissent to its Recommendation: The Committee understands that the dissent goes only to the inclusion of the language "signed by the client" in paragraph (c). The ABA Reporter's Explanation of Changes quoted above explains this new language as follows:

The Commission is proposing a number of revisions to the Rules that would require the lawyer to document certain communications or agreements in writing. The Commission believes that it should be clear in all instances what type of writing is required, particularly whether the writing needs to be signed

by the client. Certain terms are defined in Rule 1.0, including "writing." Because there are only a few instances in which a client's signature is required, the Commission is recommending that those instances be clearly stated in the text of the Rule. Thus, while the Commission believes that paragraph (c) already requires that a contingent fee agreement be signed by the client, this requirement is now being made explicit. No change in substance is intended.

The Committee agrees with this interpretation of paragraph (c). Moreover the Committee concluded that a requirement that clients sign contingent fee agreements is warranted by frequent client complaints about contingency fees and the severe criticism of abusive contingency fee agreements by respected ethics experts. The Committee is unaware of any Kentucky authority that holds that a contingency fee agreement cannot be enforced contractually if it does not comply with the KRPC. Some states have nullified contingency fee agreements that violate ethics rules, but others have allowed the agreement to be enforced even though the lawyer was subject to disciplinary action.

Approved by the Court with the deletion of proposed 1.5 (g). Order 2009-05 eff 7-15-09.