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CLIENT BEWARE: THE NEED FOR A MANDATORY WRITTEN FEE AGREEMENT RULE

LAWRENCE A. DUBIN*

I. Introduction

Imagine this scenario.¹ A client calls his lawyer to ask a quick question. The client is in the process of hiring a contractor to build an addition to his home. The client wants to know whether a written agreement should be entered into between the client and the contractor. The obvious answer is that any lawyer would advise the client to obtain a written agreement. If the client wonders why a handshake would not suffice, the lawyer would explain that the agreement would ensure that there is a meeting of the minds — an understanding between the parties as to exactly what services the contractor agrees to perform and what sums of money the client agrees to pay. Now assume that a different client has made an appointment with this same lawyer to discuss a legal problem. At the meeting with the client, the lawyer quotes a fee to perform certain legal services and the client accepts the terms of retention. Would it seem fair to expect the lawyer to be ethically required to enter into a written fee agreement with the client detailing the legal services to be performed and the obligation of the client to pay the legal services? Surprisingly, the answer is "no."²

Misunderstandings about legal fees are a frequent occurrence. Philip Thomas, Grievance Administrator for the Michigan Attorney Grievance Commission estimates that 85% to 90% of grievances filed by clients against their lawyers contain some allegation related to a fee dispute.³

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¹ This hypothetical factual situation was used by the author in an article published on the editorial page of the Detroit News. See Lawrence A. Dubin, Consumer Beware When Hiring a Lawyer, DETROIT NEWS, Sept. 23, 1994, at A11, restated in Lawrence A. Dubin, How the Michigan Supreme Court Can Better Protect the Public from Bad Lawyers: The Ball Is In Their Court, 73 U. DET. MERCY L. REV. 667, 680 (1996) [hereinafter Dubin, Protect the Public].

² The Model Rules of Professional Conduct states a preference for written fee agreements when the client has not been previously represented. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(b) (1983). However, the current rules do not mandate such a requirement for written fee agreements in non-contingent fee cases.

³ See Dubin, Protect the Public, supra note 1, at 681; see also CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 503 (1986) ("The desirability of a writing is suggested by occasional statistics from fee
Having served on a state-wide commission empowered to prosecute lawyers for acts of misconduct, I have read many grievances filed by clients expressing frustration and concern about the use of oral fee agreements. The typical grievance filed by a client concerning a fee dispute would read as follows:

When I hired my lawyer to handle my divorce, the lawyer quoted me a fee of $5,000. I paid the $5,000 fee in full. I never received another bill until two years later when my divorce was completed. At that time, my lawyer sent me an invoice stating that I owed $20,000 for legal services. Our oral agreement was only for $5,000, and now my lawyer is acting in an unethical manner by charging more than I agreed to pay.

A lawyer's typical answer to this grievance would read:

This emotionally unstable client forgot to mention that the $5,000 retainer only covered the first twenty-five hours of legal service. The client was informed that any other legal services would be billed at the rate of $200 per hour. Since I performed an additional one hundred hours of work that were not covered by the original retainer, the client owes me a balance of $20,000.

The problem in this hypothetical scenario is the lack of a clear fee agreement. The terms of the agreement between the lawyer and the client were never memorialized in writing, nor were they required to be. Therefore, the disciplinary authority would likely conclude that a fee dispute exists between lawyer and client rather than an ethical breach by the lawyer.

The most effective way to avoid fee disputes is to have lawyers utilize a written fee agreement at the outset of the representation. A well respected lawyer recently stated:


arbitration agencies showing that a high percentage of disputes involve unwritten fee agreements.

5. Dubin, Protect the Public, supra note 1, at 681-82.
6. Id. at 682.
7. See id. at 681 n.60, wherein former Michigan Grievance Administrator Michael Schwartz, a decade ago, advocated the need for a mandatory fee agreement:

The salutary reasons for requiring written fee agreements in contingency fee cases and wrongful death cases are equally compelling in other matters. The Commission notes that a large percentage of Requests for Investigation, which it receives are fee-related. It is suggested that the presence of written fee agreements might alleviate the situation. In any event, the existence of such written fee agreements would provide evidence of the actual fee agreed upon and would materially assist in the resolution of such requests. It is submitted that if automobile mechanics can be required to provide customers with written estimates, there is no reason for lawyers to have lower
While the risk of fee disputes is a reality of professional life, there are steps that you can take to substantially reduce that risk. Most significantly, the subject of fees should be discussed and agreed upon before you undertake to represent a client. The importance of a written fee agreement cannot be overemphasized. The constant refrain one hears from attorneys who have served on a disciplinary board or on fee arbitration panels is that most fee disputes could have been avoided had the lawyers prepared a written fee agreement at the outset clarifying the scope of services to be provided and the basis upon which fees would be charged and billed.8

Echoing this sentiment, Ann Massie Nelson, Director of Marketing and Communications at Wisconsin Lawyer's Mutual Insurance Co. further contends that a lawyer's written acknowledgement of the terms of engagement "benefits the attorney as well as the client by documenting the mutual expectations set forth in the initial attorney-client conference."9

With the widespread recognition that the use of written fee agreements would be beneficial to lawyers and clients in reducing the large number of fee disputes, the pertinent question becomes why is there no such mandatory rule?

II. Current Status of Requirement for Written Fee Agreements

The American Bar Association's Model Code of Professional Responsibility was silent on the need for written fee agreements.10 Even though no disciplinary rule formerly addressed the topic of written fee agreements, Ethical Consideration 2-19 strongly recognized that written fee agreements should be used to prevent lawyer and client misunderstandings regarding fees. Ethical Consideration 2-19 stated:

As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course would not only prevent later misunderstandings but will also work for good relations between the lawyer and the client. It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should fully explain to such persons the reasons for the particular fee arrangement he proposes.11

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10. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1980).
11. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-19 (1980). The ethical considerations of the Code of Professionally Responsibility were aspirational in nature and not intended to be
The original draft of the ABA Model Rules of Professional Conduct recognized the importance of written fee agreements by proposing a rule that would have mandated the use of written fee agreements for new clients who had not been regularly represented by the lawyer.\(^\text{12}\) However, the ABA House of Delegates rejected the mandatory nature of the proposed written fee agreement rule and elected to make it aspirational (i.e., a preference).\(^\text{13}\) The only exception is a contingency fee agreement which is required to be in writing.\(^\text{14}\)

Even though the ABA Model Rule 1.5(B) does not require written fee agreements in non-contingent fee cases, the Comment entitled "Basis or Rate of Fee" clearly articulates the strong policy that would support a mandatory written fee rule. The comment to Rule 1.5(B) states:

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 shall 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. 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 the rate of the fee is set forth.\(^\text{15}\)

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\(^\text{12}\) See Fee Agreements-Practice Guide, A.B.A./B.N.A. Law Manual Prof. Conduct 41: 111 (1995); see also Wolfram, supra note 3, at 503 n.43 (indicating that the proposed final draft of rule 1.5(b) of the Model Rules of Professional Conduct only required the basis of the rate of the legal fee to be in writing.)

\(^\text{13}\) See Wolfram, supra note 3, at 503 n.43 (citing AMERICAN BAR ASS'N, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 40-41 (1987); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(B) (1983) ("When a lawyer has not regularly represented the client, the basis for rate of the fee shall be communicated to the client preferably in writing, before or within a reasonable time after commencing the representation.").

\(^\text{14}\) MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(C) (1983). The rule states in part: A contingent fee agreement shall be in writing 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.

Although there appears to be a consensus that mandatory written fee agreements would substantially reduce fee disputes between lawyers and clients, only Connecticut, Pennsylvania, New Jersey, and the District of Columbia mandate written fee agreements when the client has not been previously represented by the lawyer.  

III. The Michigan Experience: An Examination As To Why Lawyers Oppose a Mandatory Written Fee Rule

Michigan, like most states, does not have a mandatory written fee agreement rule. As far back as 1985, the Michigan Attorney Grievance Administrator, who represents the prosecutorial arm of Michigan's disciplinary system, advocated to the Michigan Supreme Court a need for a mandatory written fee agreement rule.  

The Michigan Supreme Court ignored the concern expressed by the Grievance Administrator a decade ago. The interest for a mandatory written fee rule was reignited in 1996 when a different Grievance Administrator proposed three alternative rules to the Michigan Supreme Court, any of which would have mandated written fee agreements between lawyers and clients. Grievance Administrator Philip Thomas' three proposals would alternatively require (1) the deletion of "preferably" from MRPC 1.5(b); (2) an amendment to MRPC 1.5(c) expressly stating that it is misconduct for a lawyer to accept retention without acquiring a written fee agreement as specified in the rule; or (3) the adoption of a new court rule outside the purview of the Michigan Rules of Conduct that would take away the right of an attorney to sue a client for unpaid attorney fees if a written fee agreement had not been properly executed.

16. See D.C. R. PROF. CONDUCT 1.5(b) ("When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation."); N.J. R. PROF. CONDUCT 1.5 (providing substantially similar language). However, rule 1.5(b) of the Connecticut Rules of Professional Conduct requires greater detail in the mandatory fee agreement:

When the lawyer has not regularly represented the client, the basis or rate of the fee, whether and to what extent the client will be responsible for any court costs and expenses of litigation, and the scope of the matters to be undertaken shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation. This paragraph shall not apply to public defenders or in situations where the lawyer will be paid by the court or a state agency.

CONN. R. PROF. CONDUCT 1.5(b); see also Jeffrey Taylor, Work In Progress: The Vermont Rules of Professional Conduct, 20 Vt. L. Rev. 901, 943 n.126 (1996) (arguing for a mandatory written fee agreement rule to alleviate the proof problems that exist in a disputed oral fee agreement lawsuit or arbitration proceeding).

17. See Dubin, Protect the Public, supra note 1, at 681 n.60. In 1985, Michigan lawyers were obliged to adhere to the Michigan Code of Professional Responsibility, which was silent concerning the need for written fee agreements. The Michigan rule was a restatement of the ABA Model Code of Professional Responsibility. See supra note 10.

18. See Dubin, Protect the Public, supra note 1, at 682-83 n.61. The Michigan Supreme Court adopted the Michigan Rules of Professional Conduct which became effective November 1, 1988. Rule 1.5(b) does not require a written fee agreement in non-contingent cases.

19. The three proposals sent to the Michigan Supreme Court by the Grievance Administrator Philip
In response to Grievance Administrator Philip Thomas' proposal, the Michigan

Thomas were:

A. AMENDMENT TO MICHIGAN RULE OF PROFESSIONAL CONDUCT 1.5(b)

The simplest method of implementation of such a requirement would be to modify Michigan Rule of Professional Conduct 1.5(b) to delete the word "preferably." The rule would then read, "When a lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing . . . ." This modification would require that lawyers who have not represented a client regularly in the past, reduce their fee agreements to writing. While this approach is simple, it leaves something to be desired because it fails to adequately address the form the written agreement is to take. Further, it limits the requirement of [the form] a written fee agreement is to take. Further, it limits the requirements of a written fee agreement to those situations where an established attorney/client relationship does not already exist.

B. AMENDMENT TO MICHIGAN RULE OF PROFESSIONAL CONDUCT 1.5(c)

The Court could also effectuate a written fee agreement requirement through an amendment to Michigan Rule of Professional Conduct 1.5(c) to state that it would be misconduct for an attorney to accept retention without having an executed written agreement. The following is a draft amendment:

All fee agreements entered into between a lawyer and a client shall be in writing. The written fee agreements must contain:

(1) All material provisions relating to the scope of the representation;
(2) Any limitations placed on the scope of the representation;
(3) Specific provisions concerning the charges for legal services and how payment is to be provided;
(4) The amount of money paid as a retainer, and,
(5) The signatures of the lawyer and client, and any third person assuming responsibility for the lawyer's fee. The agreement shall be dated. The client and any third person assuming responsibility for the fee shall be provided with a copy of the fee agreement at the time it is executed.

C. ADOPTION OF A NEW MICHIGAN COURT RULE 2.114(G)

The third means of accomplishing the implementation of a written fee agreement requirement would not result in a finding of professional misconduct, should an attorney fail to utilize a written retainer agreement. However, under this third alternative, if a written fee agreement was not executed, an attorney could not sue a client to collect an outstanding fee. An amendment to Michigan Court Rule 2.114(G) which reads as follows, could accomplish this change. MCR 2.114(G):

Any complaint filed by or on behalf of an attorney, seeking collection of outstanding attorney fees from a client, shall have attached to it a copy of the written fee agreement entered into between the attorney and client. The fee agreement shall contain the following:

(1) All material provisions relating to the scope of the representation;
(2) Any limitations placed on the scope of the representation;
(3) Specific provisions concerning the charges for legal services and how payment is to be provided;
(4) The amount of money as a retainer, and,
(5) The signatures of the lawyer and client, and any third person assuming responsibility for the lawyer's fee. The agreement shall be dated. The client and any third person assuming responsibility for the fee shall be provided with a copy of the fee agreement at the time it was executed.

In the absence of such a fee agreement, there is not right of recovery by the attorney on the claim.

Dubin, Protect the Public, supra note 1, at 682-83 n.61.
Supreme Court informed the President of the State Bar of Michigan that the court was contemplating the publication of a proposed rule for comments. The rule would be based upon one of Mr. Thomas' proposed amendments in requiring a written fee agreement when a previously established lawyer-client relationship did not exist.20

The court invited the State Bar of Michigan's members to state their reactions to the possibility of the court's publication of such a proposed rule.21 The State Bar of Michigan then referred the issue of mandatory written fee agreements to its Committee on Professional and Judicial Ethics which subsequently concluded that mandatory written fee agreements should not be the basis of a disciplinary rule.22 Nevertheless, the Michigan Supreme Court did publish a proposed rule change which would mandate a written fee agreement unless a client-lawyer relationship already existed.23

The legal press in Michigan has covered the debate of the proposed rule change regarding mandatory written fees.24 A survey of Michigan lawyers clearly established a strong sentiment against the proposed mandatory written fee rule. Eighty-one percent of the attorneys responding to a newspaper poll opposed the suggested Supreme Court Rule.25 Most of the lawyer's negative responses in the poll stem from an emotional response to the issue rather than a well-articulated legal position. The responses also suggest that lawyers are more concerned about their perceived best interests than the public's best interests.26

The Michigan experience is significant irrespective of what the Michigan Supreme Court ultimately does. Michigan proves that most lawyers view a mandatory written fee rule with suspicion and fear.27 Many lawyers are concerned

20. See Dubin, Protect the Public, supra note 1, at 684 n.62.
21. See id. at 684 n.63.
22. See id. at 684 n.64.
26. See id. The survey asked the question: "Whether the Michigan Supreme Court should adopt an attorney ethics rule that would require all fee agreements to be in writing where the lawyer has not regularly represented the client." Id. Some of the responses to the survey question included:
"This proposed rule is not to serve the public, nor is it to serve the legal community. It is to serve the attorney discipline board. That should not be the motivation for a rule."
"Making the failure to put fee agreements in writing an ethics violation will give unethical clients one more angle in a word in avoiding paying their bills — if you sue me for the money I owe you, I will file a grievance against you."
"As Lincoln said, a written fee agreement lets the client know he has an attorney and lets the attorney know he has a client. Every lawyer should use them. Lawyers should also eat their vegetables and floss daily. But should the Supreme Court mandate this behavior?"
"A kindergarten attempt to denigrate the practice of law by the inexperienced." Id.
"We do not need more rules that make the practice of law so increasingly difficult and fraught with peril that good lawyers are driven from the practice." Id.
27. Against the sentiment of most lawyers, another committee of the State Bar of Michigan (Standing Committee on Grievance) went on record as supporting the concept of mandatory written fee
that such a mandatory rule would create an imbalance of power in favor of the client by permitting clients to file grievances and to have a greater ability to contest fee disputes. Hence, the need to rationally examine the arguments that favor a mandatory written fee agreement rule becomes essential. This examination should welcome the input from voices within the legal profession as well as outside of it. Without the input of non-lawyers, vested interests may prevent lawyers from recommending a rule that would be in the public's best interest. Ultimately, the supreme court of every state should act independently of the organized bar in deciding whether the public's interest demands a mandatory written fee agreement rule.

IV. The Arguments for Mandatory Fee Agreements

A. Special Responsibilities of a Self-Policing Profession

The legal profession is primarily responsible for its own regulation.28 The courts bear the ultimate responsibility in regulating the legal profession.29 The independence of the legal profession from government control helps to ensure that the legal profession can work toward maintaining a proper functioning government even when government must be challenged.30 Hence, the Preamble of the ABA Model Rules of Professional Conduct states: "The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interest concerns of the bar."31

The public benefit of mandatory written fee agreements should outweigh any concerns the legal profession might have in protecting the interest of lawyers. A mandatory written fee rule would substantially reduce the high incidence of fee disputes linked to oral agreements. This benefit should negate lawyers' parochial concerns about facing disciplinary charges for a failure to implement a written fee agreement even when competent legal services have otherwise been rendered.

agreements. In its 1997 Annual Activities Statement, the Committee stated:

[T]he Michigan Supreme Court has published for comment proposed amendments to MRPC 1.5 and MCR 8.121 concerning the concept of mandatory written fee agreements. The Attorney Grievance Administrator has for a long time advocated the use of written fee agreements as a method of protecting both the public and attorneys. The Committee has discussed and debated the concept of mandatory written fee agreements for a number of years. Although the Committee has had difficulty over the years reaching consensus on this issue, on the one occasion when the issue was actually put to a vote, the Committee voted by a seven to two margin to endorse the concept of mandatory written fee agreements. It should be noted, however, that a number of Committee members felt and still feel strongly that written fee agreements should not be made a mandatory part of the Court Rules nor the Michigan Rules of Professional Conduct.

STATE BAR OF MICHIGAN STANDING COMM. ON GRIEVANCE, 1997 ANNUAL ACTIVITIES STATEMENT.

29. See id.
30. See id.
An ABA Task Force on Lawyer Business Ethics concluded that, irrespective of the applicable rules, written fee agreements should be used for all representation. The Task Force stated: "The best way to avoid misunderstandings between a lawyer and client, and to further their mutual interest . . . is to have full and frank discussions about a writing memorializing the understanding." 

The benefits to the public from having a mandatory written fee rule should outweigh every opposing argument offered by the legal profession unless the legal profession can meet the burden of showing that the absence of such a rule is in the public's best interest. The legal profession has not yet met this burden.

B. The Lawyer as Fiduciary

The cornerstone of the client-lawyer relationship is the lawyer's duty of complete and undivided loyalty to the client's interest. The fiduciary responsibility of a lawyer co-exists with the business aspect of the relationship. The fiduciary obligations of the lawyer become more meaningful when examined from the client's perspective.

Lawyers not only represent sophisticated clients in complex legal or business matters but also unsophisticated clients with more common needs such as buying a house, drafting a will, defending against criminal prosecution, or pursuing a tort claim. The typical client must tell the lawyer highly personal and intimate information. The client is forced into a position of having to trust the lawyer before the lawyer has had an opportunity to actually earn that trust.

The client's need to trust the lawyer coupled with the client's inability to evaluate the lawyer's trustworthiness creates an opportunity for the lawyer to easily exploit the client. This dynamic was recognized by Dr. Andrew Watson, Professor of Law and Psychiatry at the University of Michigan: "The client . . . places himself entirely in the hands of the lawyer and must trust that his best interests will be protected by him." The vulnerability of the client or the trust reposed in the

33. Id.
34. See L. Ray Patterson, Legal Ethics and the Lawyer's Duty of Loyalty, 29 EMORY L.J. 909, 909 (1980). In Kukla v. Perry, 105 N.W.2d 176 (Mich. 1960), the court in examining a transaction between a lawyer and client stated: "The attorney not only has duties of care and professional skill, but he must also conduct himself in a spirit of loyalty to his client, assuming a position of the highest trust and confidence. His position is not one 'measured by the rule of dealing at arm's length.'" Id. at 316 (quoting Rippey v. Wilson, 280 Mich. 233, 243 (1937)).
35. In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Supreme Court confronted the issue of whether the "Learned Profession" defense could exempt a state bar association from engaging in "trader commerce" within the scope of the Sherman Act. See id. at 779. In Goldfarb, the Virginia Bar Association promulgated a minimum fee schedule for its members. In finding a violation of Federal Antitrust Laws, the court rejected the "Learned Profession" defense in stating: "It is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect . . . ." Id. at 788.
37. See id.
lawyer by the client serve as the underpinnings for the establishment of a fiduciary duty of a lawyer toward a client.39

Professor Charles Wolfram reiterates the lawyer's fiduciary duty to a client from the client's perspective:

Whatever their resources, clients have a right to assume that a lawyer who undertakes to listen to them and to render legal assistance can be trusted with information and with the responsibility of handling the client's matter in the client's best interest. The trust concept is reflected in the phrase, which courts often repeat, to the effect that the relationship between lawyer and client is one of "trust and confidence."40

What happens when a prospective client comes into a lawyer's office to discuss the possibility of retaining the lawyer for a legal representation? Is the bargaining power between lawyer and client equal? Is arriving at an agreed upon fee purely a matter of arms-length contract negotiations between equal parties? Will a vulnerable client or one who reposes trust in a lawyer at the outset of the relationship be able to understand that the fee agreement needs to be actively negotiated with the lawyer? Some lawyers argue that the decision to use or not use a written fee agreement is simply a matter of contract — not ethics. For example, Thomas Keinbaum, past president of the State Bar of Michigan, argued against a mandatory written fee agreement rule, stating that the "disciplinary system is not the place to determine the terms of a contract between a lawyer and client."41 While Keinbaum concedes that a compelling reason could justify having an ethics rule which mandates lawyers to "do something specific" like have written fee agreements, he believes the advocates of such a rule have not met this burden.42 Keinbaum acknowledges that the main policy supporting written fee agreements "is that you want to make sure there's no misunderstanding."43

The use of a written fee agreement would promote the lawyer as both fiduciary and business person at the time of agreeing upon the fees. Perhaps the real underlying fear of Keinbaum and other lawyers concerning written fee agreements is clearly expressed by Nancy Wonch, Committee Chair of the State Bar of Michigan's Committee on Professional and Judiciary Ethics which evaluated the Michigan Supreme Court's proposed mandatory fee rule for the State Bar of Michigan. She stated "that (a mandatory written fee rule) would make the lack of a written fee agreement the basis of an ethics violation even if the client didn't complain."44 Hence, there is a clash of interest between the public and the legal profession. Lawyers fear grievances will be filed against them for violation of what amounts to a mere technicality - failing to comply with a mandatory written fee

40. WOLFRAM, supra note 3, at 147 (quoting Clancy v. State Bar of Cal., 454 P.2d 325, 336 (Cal. 1969)).
41. McBrien, Noncompliance, supra note 3, at 40.
42. Id. at 40.
43. Id.
44. Id.
agreement rule. This fear ignores the fact that a mandatory written fee rule would help the public in preventing many misunderstandings about legal fees between lawyers and clients.

Clients are at a significant disadvantage when negotiating fee agreements with lawyers because they generally lack sufficient knowledge or information to be able to effectively negotiate the fee demands of a lawyer. The lawyer's fiduciary obligation should require lawyers to ensure that vulnerable and/or trusting clients clearly understand the financial obligations they will incur by hiring the services of a lawyer. Hence, the lawyer's duty to communicate about the terms of retention with a client can only have meaning if an agreement is memorialized in a writing.

C. Reduction in Fee Disputes — and Related Issues

The organized bar has taken a duplicitous position when it comes to fee disputes between lawyers and clients. The bar encourages lawyers to resolve the disputes through arbitration or mediation rather than court action, but does not advocate a mandatory written fee agreement rule which would help to prevent the dispute from occurring in the first place. Most fee disputes would not occur if a written fee agreement defined the scope of services to be performed and the basis upon which the legal fees will be computed. Not only would the public be protected by having written fee agreements, such agreements would also protect the honest attorney who accurately represented the basis for the charged legal fees to a client and who now faces an allegation of improper or excessive fees. In fact, written fee agreements protect both lawyers and clients.

D. Inherent Conflict of Interest

When setting a fee, the interests of lawyers and clients become divergent. A lawyer may want to charge the client the highest fee that the market will bear. A client may want to pay the lowest fee for the best available legal services. The agreement for legal fees to be paid by the client to the lawyer represents a business transaction between lawyer and client, although the lawyer still must act in conformity with the ethical demands imposed upon the legal profession.

ABA Model Rules of Professional Conduct Rule 1.8(a) recognizes the inherent conflict that exists when a lawyer enters into a business transaction with a client. Rather than treating such a transaction as one at arm's length, the lawyer is

45. See Wolfram, supra note 3, at 514.
46. See Model Rules of Professional Conduct Rule 1.4(b) (1983). The rule states: "A lawyer shall explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Id.
47. See supra note 11. Rule 1.5, comment 5 of the Model Rules of Professional Conduct, titled "Disputes Over Fees," states: "If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure by the bar, the lawyer shall conscientiously consider submitting to it." Model Rules of Professional Conduct Rule 1.5 cmt. 5 (1983). For a similar statement of aspirational guidance, see Model Code of Professional Responsibility E.C. 2-23 (1980).
48. See supra note 2; Sheridan, supra note 8, at 3.
49. See supra note 32.
prohibited from doing business with a client unless, among other things, the transaction is fair and fully disclosed in writing to the client.\textsuperscript{50}

Just as the comment to Model Rule 1.8 states that "[a]s a general principle, all transactions between lawyer and client should be fair and reasonable to the client,"\textsuperscript{51} this principle of fairness to resolve the conflict of interest dilemma should require all fee agreements between lawyers and clients to be in writing.\textsuperscript{52}

\textbf{E. Improvement of the Legal Profession's Image}

In April 1997, a "Statewide Opinion Survey About Lawyers and the Legal Profession" was commissioned by the State Bar of Michigan.\textsuperscript{53} This study found that 52\% questioned had positive attitudes about lawyers while 48\% had negative or neutral attitudes.\textsuperscript{54} However, only 30\% of people believe that most lawyers are honest while 23\% felt few lawyers are honest.\textsuperscript{55} 65\% of those questions stated that lawyers were overpriced while 46\% felt lawyers were greedy.\textsuperscript{56} Of those surveyed who had previously used lawyers, 49\% said that written fee agreements were used and 51\% said they were not.\textsuperscript{57}

Mandatory use of written fee agreements would cause clients to appreciate dealing with professionals who act in a business-like manner.\textsuperscript{58} Trust between lawyers and clients will be furthered concerning the business aspect of the lawyer-client relationship by using written fee agreements. The writing requirement would force both lawyers and clients to discuss such issues as billing method; estimate of

\textsuperscript{50} \textbf{Model Rules of Professional Conduct Rule 1.8(a) (1983).} The rule states:
A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
(1) The transaction and terms on which the lawyer acquired the interest are fair and reasonable to the client and are fully disclosed and transmitted to the client in a manner which can be reasonably understood by the client;
(2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
(3) The client consents in writing thereto.

\textit{Id.}

\textsuperscript{51} \textbf{Model Rules of Professional Conduct Rule 1.8 cmt. (1983).}

\textsuperscript{52} See Robert H. Aronson, An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed, 61 WASH. L. REV. 823, 828-29 (1986). The author states that it is perplexing that a writing is not required with respect to non contingent fee agreements since Model Rule 1.8(a) requires written consent to a business transaction between lawyer and client to be in writing. See id. at 829. No compelling reason could be discerned to justify a departure from the need for a written agreement of legal fees which is an area which causes most of the bitter disputes between lawyers and clients.

\textsuperscript{53} The survey was conducted from February 21-25, 1997, by Dr. Charles Atkin of Communication Research Institute. A total of 470 random callers, representing a cross section of society, participated in the survey.


\textsuperscript{55} See id. at 6.

\textsuperscript{56} See id. at 8.

\textsuperscript{57} See id. at 11.

\textsuperscript{58} See Nelson, supra note 9, at 56.
total fees and expenses; amount of retainer and what it covers; and when fees are
to be paid and the consequences of failure to pay fees.59

For every fee dispute that can be avoided as a result of requiring a written fee
agreement, the public's possible perception about lawyers will be more favorable.
The legal profession will not simply be gaining public support through a public
relations ploy, but also will be earning the trust of those members of the public who
have been diligently served by lawyers.

F. Removing An Inequity Faced by Clients

When a dispute arises over legal fees, the lawyer is in the advantageous position
of being able to sue the client for fees or defend an action brought by the client
without having to hire an attorney. The client, however, will have to retain and pay
for a second lawyer to represent the client's interest against the first lawyer. The
absence of a written fee agreement rule continues to magnify the inherent inequality
that exists between lawyers and clients during the time period in which a legal fee
is being agreed upon.

G. Rule of Fairness

Requiring that a client be informed by a lawyer in writing about how a legal fee
will be computed for services to be rendered at the outset of the representation
would be a fair and reasonable rule. If a lawyer engaged the services of a house
painter to perform painting services around the lawyer's home, the lawyer as a
consumer would want a written estimate of the services to be performed by the
painter. The potential clients of lawyers are entitled to as much protection in
coming to a complete understanding of legal fees as a consumer of services offered
by house painters.

H. Written Mandatory Fee Requirement Comports with Other Ethics Rules

The American Bar Association's Model Rules of Professional Conduct were not
meant to be interpreted in a vacuum. Any new proposal must comport and be
harmonious with other provisions of the ABA Model Rules of Professional
Conduct.60 The intent of a mandatory fee agreement proposal is certainly in
harmony with the Model Rule's overall goal of protecting the client.61 Indeed, a
stronger case for mandatory fee agreements is made when other pertinent provisions
within the ABA Model Rules of Professional Conduct are examined.

59. See id.
60. The preamble to the Model Rules of Professional Conduct states, in part, that these are "Rules
of Reason. They should be interpreted with reference to the purposes of legal representation and the law
61. The preamble to the Model Rules of Professional Conduct further states, in part, that "the
profession has a responsibility to assure that its regulations are conceived in the public interest and not
in furtherance of parochial or self-interested concerns of the bar." MODEL RULES OF PROFESSIONAL
CONDUCT preamble (1983).
1. Model Rule 1.4

The rule most strongly consistent with mandatory written fee agreements is Rule 1.4. It requires that a lawyer communicate with a client regarding the status of a matter. The duty to communicate is satisfied when the client has an adequate basis of information to make a reasonably informed decision. There is no rational reason as to why Model Rule 1.4 should not include the duty to communicate lawyer fees. In fact, a rational and compelling argument could be made that knowing the "status of a matter" includes the client having a clear understanding of the fee basis of the representation. Therefore, the attorney would have a duty to communicate the fee basis to the extent that the client can make reasonable decisions. Because an oral estimate is more likely than not an unsatisfactory basis for the client's financial decisions, it could be convincingly argued that Model Rule 1.4 mandates in most instances that attorney fees be memorialized in a written agreement.

Attorney's fees are a springboard for many other important client decisions. A simple oral recitation of the attorney's fees would provide little guidance as to the potential ultimate cost of the representation. Without a written estimate, the client is deprived of the opportunity to contact other lawyers about competitive rates. Alternatively, in light of a written fee agreement, the client may inaccurately decide that the price of legal services are too high to pursue the claim. Because of the rising costs associated with litigating cases, many clients choose to settle even though they believe they have the meritorious position. In order for clients to make salient decisions about the objectives they want to pursue, they need to be able to calculate anticipated attorney fees. This information will allow clients not only to make decisions regarding their representation, but also to make these decisions in a cost effective manner.

Another example illustrating the connection between client communication and attorney fees is a client's preference or input as to whether to use on-line research or traditional case digest research. The client should have access to the hourly rate for computer generated legal research as compared to an attorney's hourly rate. By being able to understand these comparative rates and the advantages and disadvantages of each, the client can determine or at least express a preference for the most economical way to conduct legal research.

Determining whether or not to settle or which method of legal research to use are merely two examples of client decisions that may be predicated in part on a clear understanding of lawyer's fees. By their very nature, oral agreements are conducive to misunderstandings. The old adage "put it in writing" is certainly applicable.

62. Model Rules of Professional Conduct Rule 1.4 (1983). The rule provides: "Communication... (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. ... (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Id.

63. ABA Formal Opinion 93-379 opines that a lawyer's duty to disclose not only the basis of the fee but any other charges to the client (e.g., photocopying, computer searches) at the outset of the representation. See ABA Formal Op. 93-379 (1993).
Therefore, to facilitate truly informed client decisions in accordance with the spirit of Model Rule 1.4, a fee agreement should be in writing.

2. Model Rule 1.8

Model Rule 1.8 is also on point. It prohibits attorneys from engaging in business transactions with a client unless the terms of the transaction are fully disclosed in writing to the client. Model Rule 1.8 also mandates that the lawyer obtain consent from the client where the attorney will acquire "an ownership, possessory, security or other pecuniary interests adverse to a client." Essentially, the relationship between the client and the attorney is a business transaction for fiduciary legal services. Because an attorney will naturally have his own financial interest at stake, the attorney has an adverse interest to the client during the representation. Therefore, under Model Rule 1.8, the attorney's fees should be required to be fully disclosed in writing.

3. Model Rule 1.2(a)

Model Rule 1.2 defines the scope of the representation. Under Model Rule 1.2, the client is responsible for defining the scope, whereas the attorney determines after consultation with the client the means to accomplish the client's goals.

Model Rule 1.2 ties in Model Rule 1.4 because the client needs to be reasonably informed in order to be able to determine the objectives of the representation. Determining the parameters of the representation requires a client to clearly analyze the financial repercussions of the representation. Cost considerations are also an important factor when determining the reasonably available means that should be utilized to reach the intended objectives. Thus, Model Rule 1.2 also evidences the important need for an accurate assessment of the lawyer's fees to be effectively communicated to the client. Hence, the information concerning fees must be reduced to a writing.

64. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8. The rule provides:

Conflict of Interest: Prohibited Transactions
(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
   (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in transmitted in writing to the client in a manner which can be reasonably understood by the client;
   (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
   (3) the client consents in writing thereto.

Id. The comment to Model Rule 1.8(a) states, in part: "[A]s a general principle, all transactions between client and lawyer should be fair and reasonable to the client." Id. Rule 1.8 cmt.

65. Rule 1.2(a), entitled "Scope of Representation," states in part: "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983).

66. See supra note 63.
4. Model Rule 1.1

Model Rule 1.1 mandates that a lawyer "provide competent representation to a client." Under a broad definition of competence, it could be argued that Model Rule 1.1 should require written fee agreements. The Comment to Model Rule 1.1 states that competence includes the "use of methods and procedures meeting the standards of competent practitioners." It also includes "adequate preparation." Competence may be difficult to clearly define but certainly the opposite of competence is neglect. An attorney neglects his client by failing to carry out his or her assumed legal obligations to a client. Under Model Rule 1.5, one such obligation is to inform the client of the basis for the calculation of the fee. When an attorney fails to adequately inform the client of this fact, the attorney has neglected an important obligation owed the client. Extending this reasoning further, it could be argued that a practitioner who desires to employ competent procedures and be adequately prepared must incorporate written fee agreements into his or her practice.

5. Model Rule 8.4

Model Rule 8.4 prohibits an attorney from engaging in "conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." When a client is shocked upon discovering the attorney's bill, the blame may be on the attorney for having failed to adequately disclose the basis of the fee. The attorney's lack of or inadequate communication in fact may border on deceit or misrepresentation. To avoid any allegations of dishonesty or misrepresentation, the cautious attorney should solidify the fee arrangement into a written contract.

6. Model Rule 2.1

Model Rule 2.1 provides that an attorney may refer to "moral, economic, social and political factors that may be relevant to the client's situation" when rendering advice. An obvious fact to every lawyer is that economic factors heavily influence people in the decisions they make. Although a client may believe she has a strong case, it still may not be in her financial interests to pursue litigation. Model Rule 2.1, therefore, inherently promotes the requirement for written fee agreements.


68. The rule states: "Misconduct . . . It is professional misconduct for a lawyer to: 'engage in conduct involving dishonesty, fraud, deceit or misrepresentation.'" Model Rules of Professional Conduct Rule 8.4(c) (1983).

69. Rule 2.1 provides: "Advisor . . . In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." Model Rules of Professional Conduct Rule 2.1 (1983).
V. Arguments Against a Mandatory Written Fee Agreement Rule

It should be stated at the outset that there is no compelling argument that has been raised against the requirement for written fee agreements. However, the following considerations are offered in an attempt to present the counterarguments to a mandatory written fee agreement rule.

A. Little Practical Effect

Even if Model Rule 1.5(b) required a written fee agreement, the fee agreement could still lack specificity. Model Rule 1.5(b) only requires that an hourly or transactional rate be quoted. If the American Bar Association is concerned with clients truly understanding the basis of the fee, it should demand a more detailed calculation of the fee. An hourly rate alone also would not enable a client to comparison rate shop. One attorney may charge less, but take longer to complete the work. One attorney's rate may include all costs and expenses, whereas another's rate does not. Another problem with a contractual fee arrangement occurs when an attorney uses a less detailed fee schedule. The client is then in a position to later claim that she did not agree to pay for the unspecified services. A bare-boned fee agreement as required by Model Rule 1.5(b) creates almost as many potential misunderstandings as an oral agreement. Therefore, some may argue that the adoption of a Model Rule merely requiring a written fee agreement would not meet its goal of minimizing the number of fee disputes.

B. Written Fee Agreement Creates Inflexibility

The written contractual nature of a fee agreement may make both client and attorney apprehensive. An attorney may spend a significant amount of time analyzing the agreement before being willing to commence the performance of the actual legal services. Likewise, a client may feel the need for another attorney to analyze the fee agreement.

Problems also result when an attorney does not want to bill on an hourly rate. The use of a flat fee or a hybrid fee requires some estimate as to the hours the attorney will spend on the case. Since not all transactions require the same amount of time to complete, a lawyer may not always be able to determine which cases will involve more work at the outset of the representation.

A written fee agreement that must be prepared at or shortly after the initial consultation, therefore, may not reflect a fair fee for handling the representation. Attorneys would fear being locked into a fee at an unfair remunerative rate. The result of attorneys bearing this risk could promote a pricing scheme where some clients overpaid for the legal services and others underpaid.

C. Client Intimidation

Clients could potentially be intimidated by detailed fee agreements, especially those that are clothed as formidable retainer agreements. However, this obstacle is easily overcome by using a plain English engagement letter explaining the fees in simple terms. The natural reluctance to discuss financial matters so early in the
representation is like a trip to the dentist — painful but necessary to prevent problems further down the road.

D. Fear of Professional Discipline

Lawyers fear the disciplinary authorities being able to prosecute lawyers for the act of misconduct concerning whether a written fee agreement was obtained. Lawyers view this danger as an example of overregulation of the legal profession. 70

E. Increase the Cost of Legal Services

On small matters that lawyers handle for clients, requiring the lawyer to expend the time necessary to draft a written fee agreement could increase the ultimate cost of the legal services to the client and hence be self-defeating.

VI. Experience of Those States That Have a Mandatory Written Fee Agreement Rule

For those few states that have adopted a mandatory written fee agreement requirement, the rules have not always been a panacea. At times, it may simply change how the parties frame their issues. Undoubtedly, an important contributing factor in making a mandatory written fee agreement rule successful is having sanctions for rule violations. The experience of these minority jurisdictions can serve as a road map to help determine the most effective type rule that the American Bar Association can adopt in the Model Rules of Professional Conduct requiring a written fee agreement.

A. Disputes Arising as to Whether a Written Fee Agreement Has Been Created

Because a written fee agreement is mandated, an attorney seeking to recover for her services must allege that such an agreement was created. This requirement leads to cases such as Wolk, Neuman, & Maziarz v. Turano, 71 where the dispute was over whether a letter written by the plaintiff law firm constituted a valid written fee agreement even though the client never signed the letter. Ultimately, the court held that the services were performed absent a valid contract because the defendant client had never consented to the fee agreement, nor had the fees been explained to the defendant.

In some cases, the lack of a written fee agreement may be an indicator that a fee agreement was never formed in the first place. In Desarbo & Reichert, P.C.

70. See McBrien, Noncompliance, supra note 3, at 40.
71. No. 528505, 1996 WL 434307 (Conn. Super. Ct., July 11, 1996). In this case, plaintiff law firm represented Laura Turano in a defense matter where plaintiffs were seeking a prejudgment remedy. Plaintiff law firm then sued Ms. Turano for $16,083 for the performance of 125 hours of legal work at the rate of $185 per hour. Since the court found that there had been no fee agreement between lawyer and client, the court found the law firm to be entitled to receive $10,387.50 based upon a quantum meruit theory. See id. at *2.
v. Cardow, the plaintiff law firm argued that an oral contract for legal fees should be enforced despite the lack of a written agreement. The court held that it was unnecessary to decide whether an oral contract could be enforced because there was no contract at all. Rather, the plaintiff had erroneously assumed that the defendant client had accepted their legal services.

B. Recovery on Quantum Meruit Theory Allowed

When a court finds there was no valid fee agreement, it may still award legal fees pursuant to a quantum meruit theory. On one hand, it would seem unfair to allow an attorney to collect the entire legal fee after failing to comply with the mandatory written fee agreement rule. On the other hand, it would also be unfair to permit a client to be unjustly enriched by receiving the benefit of the attorney's services without payment. Hence, some courts reach a comfortable middle ground by awarding fees to the attorney, but the court calculates the amount of those fees based upon a quantum meruit theory, which means the reasonable value of the services rendered.

C. Sanctions for Failure to Form a Written Fee Agreement

The penalties for a failure to reduce a fee agreement to writing vary greatly. Some courts refuse to award attorney's fees pursuant to an agreement that is not in writing. In Freccia & Plotkin v. Castro, the court held that where there was no written agreement, "it would violate public policy for the plaintiffs to recover fees based upon an agreement which violates Rule 1.5(c) of the Rules of Professional Conduct." Instead, an attorney has to pursue a claim under quantum meruit.

Attorneys are also subject to professional discipline for failing to utilize written fee agreements. In In re Williams, an attorney who did not produce a written

73. See id at *3.
74. See id. This case involved defendant Cardow contacting Mass Mutual Insurance Company about estate planning information. An employee of the insurance company who conducted seminars for the public in estate planning and offered free consultations with attorneys set up an appointment between a member of plaintiff law firm and defendant. Defendant was informed by the insurance company employee that the attorney consultation was free unless and until the attorney was hired by defendant.
76. See supra note 14 and accompanying text.
78. Id. at *2.
agreement in a contingency case was issued an informal admonition.\textsuperscript{80} In \textit{Hartford/New Britain Judicial District \textit{v.} Millstein},\textsuperscript{81} the attorney's failure to employ a written fee agreement, which was coupled with other egregious conduct, resulted in the court disbarring him from the practice of law.\textsuperscript{82}

The problem a court may encounter in enforcing a Rule 1.5 mandatory written fee agreement rule was elucidated in \textit{Desarbo, Jensen \& Reichert, P.C. \textit{v.} Bozzuto's Carting Co.}\textsuperscript{83} In that case, the defendant client refused to pay the bill of an attorney who had performed significant estate planning for the client. The defendant claimed the fees were unconscionable because the total amount was not reasonable and the fee agreement had not been reduced to writing.\textsuperscript{84} Nevertheless, the court held that a contract had been formed despite the lack of writing.\textsuperscript{85} Furthermore, it refused to invalidate the attorney's fees for failure to provide a written fee agreement.\textsuperscript{86} In so doing, the court stated: "The word 'shall' that appears in 1.5(b) does not automatically create a mandatory duty . . . . When statutory language prescribes what is to be done but contains no penalty for noncompliance the matter is considered to be one of convenience or directory. The court concludes that Rule 1.5(b) is such a measure."\textsuperscript{87} Given the \textit{Bozzuto's Carting} court's watered-down interpretation of Rule 1.5, a tough stance on attorney fees appears to be needed to enforce compliance with the rule.

\textbf{D. Other Possible Claims}

Sometimes, dissatisfied clients have been forced to become creative in order to obtain a satisfactory remedy. \textit{Desarbo \& Reichert \textit{v.} Cardow}\textsuperscript{88} is also noteworthy because it demonstrates one such creative approach. After being sued for not paying his attorney's fees, the defendant client in \textit{Desarbo \& Reichert} counter-claimed against the plaintiff. He alleged that the law firm's conduct in pursuing the claim for fees was an unfair trade practice in violation of the Connecticut Unfair Trade Practice Act (CUTPA). The court held that the law firm had violated CUTPA because it made allegations which the firm knew had no basis in fact.\textsuperscript{89} The court expressly held that it was not deciding whether a Rule 1.5(b) violation could constitute an unfair trade practice.\textsuperscript{90} Nonetheless, it has left this possible allegation open for future claims.

\textsuperscript{80} See id. at 327.
\textsuperscript{82} See id. at *1, *5.
\textsuperscript{84} See id. at *4.
\textsuperscript{85} See id. at *7.
\textsuperscript{86} See id. at *5.
\textsuperscript{87} Id. (citations omitted).
\textsuperscript{89} See id. at *5.
\textsuperscript{90} See id. at *6.
VII. Analysis of Different Types of Rules and Recommendations for ABA Model Rule of Professional Conduct 1.5(b)

A. Model Rule 1.5(b) (Adopted in Pennsylvania, New Jersey, and D.C.)

Model Rule 1.5(b) provides: "When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation." 91

The ABA Model Rule mandating written fee agreements would certainly be a positive start. However, the only real change is that "preferably" has been deleted from the phrase "in writing." Therefore, any problems with the original provision, such as the lack of sanctions, still remain. One gaping deficiency in this type of Rule is the specification requirements for the basis of the fee. The requirements of the written fee agreement are so minimal that they are easily satisfied with a very general and vague disclosure. The rule in effect would be a definite improvement but would not solve many of the problems that exist with the current requirement that the agreement be "preferably in writing." Even the Comment to the rule does not correct the deficiency in stating that, "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 estimate amount." 92

Mere compliance with this Rule by providing an hourly rate may still not give the client the necessary information to make informed decisions concerning the representation. An hourly rate in and of itself may be meaningless to a client. Without discussion of the amount of time it will take to complete the services, the attorney will not adequately portray as a reasonable estimate the final bill. Also, a client should be made aware of varying rates for attorneys and non-lawyers within the law firm. Furthermore, the client must be informed if he or she is responsible for additional costs and expenses. Another problem with the Model Rule stems from its exemption of regularly represented clients. On the surface, this appears to be a sensible provision. Common sense dictates that unsophisticated clients who only turn to an attorney when one is needed will be more vulnerable and susceptible to unfair billing or inadequate explanations. A client who is regularly represented should generally possess more sophistication or, at a minimum, some familiarity with respect to the legal fees. Ongoing clients will have established an already existing relationship with their attorney. This fact alone will put them in a better position to negotiate if a dispute arises. Also, they have more bargaining power in setting the terms of billing for subsequent matters. Consequently, they may be more active in disputing bills and negotiating for better rates.

91. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(b) (1983).
92. Id. Rule 1.5(b) cmt.
The fallacy in reasoning that all regularly represented clients do not need written fee agreements was exposed in *Ginberg v. Tauber* 93. In *Ginberg*, the plaintiff attorney had represented the defendant client over a ten-year period. Initially, Ginberg brought two claims which subsequently resulted in two trials and two appeals. 94 Ginberg had also represented the defendant in at least five other transactions. After the defendant client settled the case, the attorney brought an action seeking to recover $3,750,000 in attorney fees pursuant to a quantum meruit theory. 95 The parties had never entered into a written fee agreement, yet the attorney claimed that they had an "understanding" that the fee would be based on the judgment received by his client in the appeals case. 96

*Ginberg* evidences that misunderstandings over attorney fees can result even with a regularly represented client. By disproving the assumption that clients who are sophisticated will have the knowledge to understand ambiguous fee agreements, it shows the need for regularly represented clients to also be covered by Rule 1.5. *Ginberg* also demonstrates that a client in an ongoing representation may be as susceptible to placing blind faith in the attorney as a new client. In *Ginberg*, the defendant, a real estate developer who held a number of multimillion dollar properties, testified that although none of the attorney's fee bills he had previously received from Ginberg stated the number of hours Ginberg had spent on the matter at issue, he trusted Ginberg, and never had any reason to question the amount of the fee. 97

*Ginberg* is an example of a case where the fees from prior representations provides no basis for the client to understand the fees in subsequent representations. In *Ginberg*, the disputed fees were a result of complex litigation spanning over a ten-year period. Earlier fees were the consequence of finite transactions.

In general, *Ginberg* illustrates that ongoing representations do not preclude fee misunderstandings from arising in the absence of a fee contract. The underlying policy behind requiring written attorney fee agreements is to minimize the impact of disputes over attorney's fees. This concern is not *per se* obviated simply because the client has previously been regularly represented by the lawyer.

Model Rule 1.5(b) also fails to make an obvious exception for public defenders. Because there is no fee exchanged between the client and the attorney, there is no need for a fee agreement. Similarly, attorneys who are funded by other state agencies should be exempted from the rule.

One clause of Model Rule 1.5(b) that could be argued as a strength or weakness is the reasonable time requirement. The rule leaves too much room for interpreting what constitutes a reasonable time to communicate the written fee. However, a strict deadline would hurt attorneys who discover in subsequent meetings that the scope of the representation is greater than originally anticipated. Also, in some

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94. See id. at 545-46.
95. See id. at 544.
96. Id. at 543.
97. See id. at 546.
exigent circumstances, a written fee agreement may not be feasible within a tight time frame.

B. Connecticut - Rule 1.5 Fees

Connecticut Rules of Professional Conduct Rule 1.5 provides:

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee, whether and to what extent the client will be responsible for any court costs and expenses of litigation, and the scope of the matter to be undertaken shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation. This paragraph shall not apply to public defenders or in situations where the lawyer will be paid by the court or a state agency.98

The Connecticut rule attempts to correct some of the deficiencies of Model Rule 1.5. First, the plain language of the rule provides guidance as to the content of the fee agreements. Not only must the basis of the fee be disclosed, but also the scope of the representation and additional costs and expenses billable to the client. The rule also exempts public defenders and state agency attorneys. However, the Connecticut rule still is deficient by exempting regularly represented clients and failing to create penalties for noncompliance.

C. Guam — Rule 9216

Guam Rule 9216, entitled "When Written Fee Agreements Are Required for Attorneys," provides:

(a) In representing a client, an attorney shall have a written fee agreement which is signed by the client if:

(1) The contemplated fee is in excess of $500, or
(2) An appearance is required or reasonably contemplated before any court or agency by the attorney, or
(3) The fee is contingent.

(b) Such fee agreements shall be in clear and concise language and shall clearly spell out the general nature of the work to be done by the attorney and the financial obligation of the client to pay for such work. In uncontested matters, it shall spell out the financial obligations if the matter becomes contested. If the fee is based on an hourly rate, the hourly rate shall be stated.

(c) An attorney shall have his or her client sign such a fee agreement within forty-eight (48) hours of the time the attorney is retained unless that is impossible because the client is outside of Guam or incarcerated or otherwise unavailable, in which case a fee agreement shall be signed at the earliest possible time.

98. CONN. RULES OF PROFESSIONAL CONDUCT Rule 1.5(b) (1996).
(d) Within ninety (90) days of this section becoming law, the Ethics Committee of the Guam Bar Association shall publish various model fee agreements and make the same available to Bar Association members of use or modification, but use of such model forms shall not be mandatory as long as the form used complies with this section.

(e) In the absence of a required fee agreement with the client, claims for attorneys' fees incurred before a fee agreement was signed shall be unenforceable.

(f) Any attorney who is representing clients without written fee agreements on the effective date of this section shall have sixty (60) days to obtain such written fee agreements.

(g) Nothing herein shall prevent the parties from amending any fee agreement, nor shall it prevent an attorney raising his or her hourly rates upon thirty (30) days notice to the client if such right is reserved in the agreement.

(h) An attorney may withdraw from representation of his or her client when the court finds at a hearing after notice to the client that such client has failed to meet the financial obligations set out in the written fee agreement.99

Without a doubt, the strictest rule regarding written fee agreements was enacted in Guam. The rule mandates written fee agreements in three situations, whereas most states now only require a written fee agreement in contingency cases. The rule addresses many of the Model Rule's deficiencies. First, regularly represented clients are not expressly exempted. Since most ongoing relationships will involve fees in excess of $500, the attorney will be required to form a written fee agreement. Second, the rule mandates written fee agreements where there will be a court appearance. This provision will protect clients involved in litigation who are concerned about retaining their attorney on appeal at a similar rate.

The real distinguishing feature of Guam's rule is its bite. It is the only rule that goes beyond mere aspirations and provides clients with a real remedy — claims for fees are unenforceable in the absence of a written fee agreement. For cases where the absence of a written fee agreement occurred prior to the adoption of the rule, lawyers are allowed sixty days to obtain the necessary agreement. Furthermore, lawyers are required to have their clients sign a fee agreement within fortyeight hours of retention of the attorney. Of course this rule is subject to exceptions for exigent circumstances.

The Guam rule is not without faults. Like its predecessor rules, it does not provide complete specificity as to the contents of the fee agreement. Also, the Guam rule is perhaps too strict in mandating that the written fee agreement must be formed within forty-eight hours. The problem is that some agreements would have to be changed after further facts are elicited from the client. However, the rule does permit attorney and client to amend fee agreements. Therefore, forty-

eight hours may be too short a time period. Although some would argue that the Guam rule is too harsh by precluding attorneys from recovering without a written fee agreement, Guam has at least provided a way to enforce the rules.

D. Proposed Amendment to Model Rule of Professional Conduct 1.5(c)

In view of the deficiencies exhibited in ABA Model Rule 1.5(b), the ABA should not amend its existing rule by simply deleting "preferably." Rather, the ABA should adopt a proposed amendment to 1.5(c) that would provide a substantive basis for calculating attorney's fees and drafting a fee agreement. In order to effectuate true remedies for violations of the mandatory fee agreement, the ABA should also adopt the Guam rule that would preclude an attorney from suing his client to recover fees. Finally, as with the Guam rule, a minimum threshold of fees should be excluded from the application of the mandatory written fee rule so as to assist lawyers in representing clients on minor matters that do not warrant the protection of a written fee agreement.

By following these suggestions, the ABA would have an effective mandatory written fee agreement rule that could serve as a model for other states. Violation of the rule would give rise to a prosecution for misconduct by the disciplinary authorities of the jurisdiction in which the lawyer is practicing law. Most importantly, such a mandatory written fee agreement rule would serve to protect the best interests of the public and the legal profession.

100. See Dubin, Protect the Public, supra note 1, at 680-85.
101. See supra note 19 (setting forth the requirements, in proposal B, for a written fee agreement that may provide adequate disclosure to a client). In addition, expenses chargeable to the client should be stated in the agreement.
102. See supra note 19 (presenting the specifics of the Guam Rule in proposal C).