

American Academy of Matrimonial Lawyers

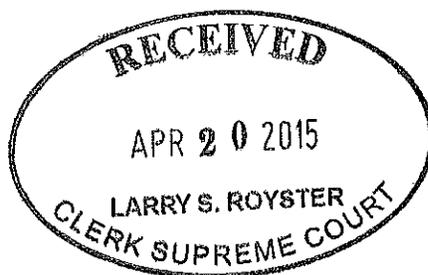
Michigan Chapter

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April 16, 2015

Mr. Corbin R. Davis
Supreme Court Clerk
P.O. Box 30052
Lansing, Michigan 48909

Re: Proposed changes to MRPC 1.5
ADM File No. 2013-38



Dear Mr. Davis:

This purpose of this letter is to inform the Michigan Supreme Court of the AMERICAN ACADEMY OF MATRIMONIAL LAWYERS' position on the current proposed changes to Michigan Rule of Professional Conduct 1.5.

In 2009, the Attorney Grievance Commission suggested a revision to MRPC 1.5 similar to the currently-proposed "Alternative A," which would prohibit "results-obtained" or "value-added" fees in divorce cases. The SBM Family Law Section, the Michigan Chapter of the American Academy of Matrimonial Lawyers, and myriad family law attorneys and professors all opposed that change in 2009, and this Court for good reason did not act on the Grievance Administrator's agenda six years ago.

Since 2009, nothing has changed to warrant a new rule now, other than perhaps the need to adopt Alternative B (which affirmatively permits "value-added" fees in divorce cases) so that this nearly-annual wringing of hands and gnashing of teeth over this issue can finally come to an end. For that reason, we believe that *if* MRPC 1.5 is to be amended at all, Alternative B should be adopted, because results-oriented fees should continue to be permitted in domestic relations cases, just as they have been for several decades.

Results-oriented fees are commonplace in nearly every field of law and long have been permitted without question in all other practice areas. There simply is no justification for singling out family law representation agreements for specific and particular restrictive regulation, particularly since the marketplace for legal services is changing, and consumers are demanding other alternatives to the hourly rate and flat fee paradigms. In almost every field of law, a lawyer who has developed an expertise in a particular area is entitled to sufficient

compensation, not only for that expertise at the outset, but also for the results delivered at the end. This is true, and continues to be true, for commercial lawyers, patent lawyers, bankruptcy lawyers, corporate counsel, and merger and acquisition attorneys. As it currently is written, MRPC 1.5(a) respects this private right of clients and businesses to contract in any fashion with any attorney practicing in any area of the law, subject simply to the requirement that the fee is reasonable according to the eight factors already set forth in the rule.

Alternative A is an effort to take control of the attorney client relationship away from the domestic relations client, apparently predicated on the assumption that that every domestic relations client is unsophisticated, has limited mental capacity to understand retainer agreements, and ought not be allowed to agree to an enhanced fee for extraordinary services. On that premise, Alternative A would handcuff clients to only two fee options: hourly and flat. An hourly fee agreement provides the client with little control over how much time the attorney devotes to the client's case. In a flat-fee arrangement, the lawyer's incentive is to estimate at the high end of the fee range, causing the client to pay more for legal services no matter the time devoted to the case or the ultimate result.

On the other hand, a results-oriented fee agreement puts the client in control of the fee determination because of the retrospective consultation that must take place between the lawyer and client, which is why results-oriented fees have long been permitted in Michigan. These types of fee arrangements are mutually agreed upon by the attorney and client at the conclusion of the case based on the outcome of the case, the complexity of the case, and the skill required to achieve the "the results obtained" in matrimonial cases, focusing on the content of the result and the extent to which the result has met the client's objectives. Results-oriented fees have the distinct advantage of perfect hindsight in setting the final fee to be charged to the client, and because the judgment as to the amount of the fee is within the subjective control of the client and the attorney, it can be more equitable than if some formulaic method is utilized. See generally, Ravdin, Linda J. and Capps, Kelly J, *Alternative Pricing of Legal Services in Domestic Relations Cases: Choices and Ethical Considerations*, FAMILY LAW QUARTERLY, Vol. 33, No. 2, Summer 1999; Fullenweider, Donn C., *Results and Contingency Fees in Matrimonial Cases*, 7 JOURNAL OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS 23 (1991); and Laura W. Morgan, *If It Walks Like a Duck, and Talks Like a Duck...: Contingency and Results Obtained Fees*, 1 DIVORCE LITIGATION 3 (Spring 1998).

MRPC 1.5 long has recognized that not all legal work can or should be valued solely by the amount of time expended by the lawyer. In fact, the amount of time spent is only a part of one of the eight factors to be considered when determining a reasonable fee. MRPC 1.5(a)(1). Another of the eight factors, MRPC 1.5(a)(4), specifies "the results obtained" for the client as a separate and distinct element to consider in arriving at a reasonable total fee for the lawyer's services. In family law cases, negotiations and trials are extremely demanding, encompass innumerable issues, and are fraught with risk to the attorney, regardless of the amount of time that is spent. In many of those circumstances, the appropriate measure of the lawyer's value is not mere hours. For example, in a matter where a client's prior counsel has been unsuccessful in concluding a case, that client's interests may be best served by retaining expert counsel to step in at a late stage of the litigation. An informed client who is willing to contract for an enhanced fee

in those circumstances – when a particular lawyer otherwise might not be willing to become involved in a matter with an urgent and narrow timeframe – is best served by this arrangement, and there simply is no reason why that client should be precluded from freely entering into exactly such a contract.

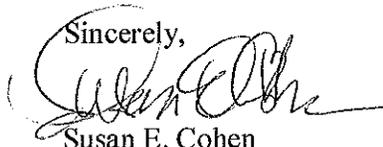
In almost every area of law, this state’s jurisprudence emphatically has respected and upheld the freedom of private, competent adults to enter into binding contracts on terms that the contracting parties decide are in their own best interests:

“The general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.” *Twin City, supra* [283 US] at 356; see also *Port Huron EdAss’n v Port Huron Area School Dist*, 452 Mich 309, 319; 550 NW2d 228 (1996), quoting *Dept of Navy v Federal Labor Relations Authority*, 295 US App DC 239, 248; 962 F2d 48 (1992) (discussing the “fundamental policy of freedom of contract” under which “parties are generally free to agree to whatever specific rules they like”).

Terrien v Zwit, 467 Mich 56, 71-72; 648 NW2d 602 (2002) (emphasis added). The freedom of contract principle applies with equal force to retainer agreements under the specific provisions of MCL § 600.919(1), which provides that “[t]he measure of the compensation of members of the bar is left to the express or implied agreement of the parties subject to the regulation of the supreme court.” Since the current rule already requires that a fee be reasonable, there is no reason to adopt a new rule limiting the right of a family law client and attorney to discuss and agree upon the fee to be paid by the client, based in part upon the result achieved by the lawyer.

Just like the AGC’s 2009 suggested change to MRPC 1.5, Alternative A is a poor solution in search of a problem. The AGC never has been flooded with masses of grievances about value-added fees in divorce cases brought by aggrieved, unsophisticated clients who have been duped by their cunning attorneys. Instead, the vast majority of fee disputes in divorce cases emanate from lawyers spending excessive amounts of time on matters, rather than on fees related to results achieved.

Results-oriented fees serve the best interests of public, the bar, and the courts of this state. There is no more reasonable, ethical way to charge a client for legal services provided than to give the client a say in how much should be paid, based on the results obtained from the client’s perspective, rather than based entirely on the amount of time spent by the lawyer from the law firm’s perspective. This Court therefore should reject Alternative A because results-oriented fees benefit clients by compensating lawyers for their efforts bring the most value to the client, as determined by the client, which is especially important in family law matters.

Sincerely,

Susan E. Cohen
President