VARNUM LLP
ATTORNEYS AT LAW

251 North Rose Street • Fourth Floor
Kalamazoo, Michigan 49007-3823
Telephone 269 / 382-2300 • Fax 269 / 382-2382 • www.varnumlaw.com

John W. Allen
Board Certified Civil Trial Advocate (NBTA)
American Board of Trial Advocates (ABOTA)
Family Law Practice Certificate (ICLE)
Admitted in Illinois, Indiana, Michigan, Minnesota, Wisconsin and Florida

Direct: 269 / 553-3501
Mobile: 269 / 491-0056
jwallen@varnumlaw.com

April 22, 2015

Michigan Supreme Court
Clerk's Office
PO Box 30052
Lansing, MI 48909

Email: MSC_Clerk@courts.mi.gov

Re: ADM File No. 2013-38; PROPOSALS TO AMEND THE MRPC 1.5

To The Michigan Supreme Court:

I am a partner with Varnum Attorneys, LLP. In the past, I have served as Chair of the State Bar of Michigan Special Committee on Grievance, and have served as the Chair of the State Bar of Michigan Standing Committee on Professional and Judicial Ethics (the "Ethics Committee").

I also served on the ABA Ethics 2000 Advisory Committee, and chaired the Ethics and Professionalism Committee of the ABA, Trial Tort and Insurance Practice Section (TIPS) through the ABA Ethics 2000 process. Currently, I serve on the TIPS Ethics Committee, and as the TIPS Liaison to the ABA Committee on Professionalism.

This letter contains the views of me only, not those of the Firm, the State Bar of Michigan, the ABA, nor their Committees.

Thank you for the opportunity to comment regarding the above proposed Amendment to the Michigan Rules of Professional Conduct (MRPC), Rule 1.5, which would prohibit "… 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 or support, or property settlement in lieu thereof, the lawyer's success, results obtained, value added, or any factor to be applied that leaves the client unable to discern the basis or rate of the fee or the method by which the fee is to be determined."

The proposed Amendment is supported by the Michigan Attorney Grievance Commission, the State Bar of Michigan Standing Committee on Professional and Judicial Ethics, and many fine Michigan lawyers. In contrast, I oppose the amendment for the following reasons.

Under the present MRPC and pursuant to long-established Michigan case law, a lawyer is prohibited, in any matter, from entering into an agreement, or collecting, an illegal or clearly excessive fee. Eight (8) subparts of MRPC 1.5, consistently incorporated into Michigan case law, already specify a wide variety of facts which may be applied to make that determination. One of those specific criteria is "…the results obtained"; and that factor plays a material role in determining the lawyer's fees in many engagements in virtually all areas of law practice.

The use of the past tense in MRPC 1.5(a)(4) ["results obtained"] also makes clear that some elements of a permissible fee are not, and cannot, be fairly determined until after the engagement is concluded. Thus, a "results obtained" fee is not a "contingent fee". If it were that, AGC would not be proposing this amendment.

If a lawyer violates MRPC 1.5, the Michigan Attorney Grievance Commission is authorized to issue a Complaint, and if AGC can fulfill the requirements of Chapter 9 of the Michigan Court Rules, the Michigan Attorney Discipline Board is authorized to discipline the offending lawyer. For several decades, those factors and that analysis have worked well to protect clients and the public, while providing a context in which Michigan lawyers and their clients can privately agree on reasonable terms of engagement.

The proposed Amendment would be a marked departure from that history. Instead of reviewing the facts under the criteria of MRPC 1.5 to determine whether a particular fee was illegal or clearly excessive in a particular case, the AGC wants to impose a blanket prohibition as to only one area of practice - Family Law. Why is it proper to charge a "results-obtained" fee in a breach of contract case, a contract negotiation, a tax planning matter, a bankruptcy case, a real estate transaction, a real estate lease, an employment case, and an estate planning matter, but not in a divorce case? This logical flaw becomes vivid when one considers that many divorces and their settlements also involve contracts, contract negotiation, tax planning, bankruptcy, real estate transactions, real estate leases, employment issues, and estate planning.

Despite its continuing efforts to the contrary, AGC has no law- making authority. Even the court's exercise of its supervisory power over lawyers does not allow it to set fees and terms of contracts in the private marketplace. See *Goldfarb v Virginia State Bar,* 421 US 773, 95 SCt 2004, 44 LEd2d 572, 1975-1 Trade Cases P 60,355 (fee schedules set by State Bar, approved by state Supreme Court, violate the Sherman Act).

Except for contingent fees in actions for personal injury, which are governed by a specific court rule, the measure of compensation of attorneys is reserved, by Michigan statute, to the express or implied agreement of the parties. MCL 600.919(1). This is as it should be.

In America, every discussion about fees should start with the express or implied contract between the lawyer and the client. It should not be assumed that the AGC knows more than the client about the client's desires. It also should not be assumed that all clients are fools. Those two assumptions are implicit in the AGC proposed prohibition. And they are both wrong.

The AGC proposal omits that the Legislature has already spoken on this policy issue, through MCL 600.919, which categorically states that:

> "The measure of 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."

If policy-making is to be the objective, the expressed preference of elected legislators should be important. The statute makes it clear that the "agreement of the parties" is given primacy by the state's elected legislative representatives; yet, the same "agreement of the parties" escapes all but the smallest weight in the AGC analysis.

Likewise, there is little factual support for any supposed policy argument that such fee arrangements "encourage" divorce, contrary to a supposed public policy against divorce. Lawyers' fees do not much influence that, one way or the other; and there is no evidence to the contrary. The government spends a fortune in tax dollars to make divorce easier, not harder. Indeed, no one presents any empirical evidence that any significant number of clients has been or is harmed by a "results obtained" fee arrangement in any area of law practice, including Family Law. When, or if, a violation does occur, the present Rule and case law provide ample bases for relief.

Most clients are quite capable of understanding a value-based or "results obtained" fee, just as they are capable of understanding the other factors in MRPC 1.5(a). There is no empirical evidence to the contrary, and a wealth of history supports that level of client understanding. The reasons for the fee arrangement, if not intrinsically apparent, should be made "apparent to the client" as reasonably required in MRPC 1.5(a)(2). Once again, the Rules already provide the solution.

The present MRPC and Michigan case law provide ample force with which to protect that very limited number of vulnerable individuals from the few abusive lawyers. It also avoids the

extremism of a blanket prohibition against all such fee arrangements, which is much like "throwing the baby out with the bath water".

Like most prosecutors, AGC may prefer blanket prohibitions, to fact-dependent determinations. This is not necessarily because it is better for the client, but rather because it makes AGC's prosecution function much easier.

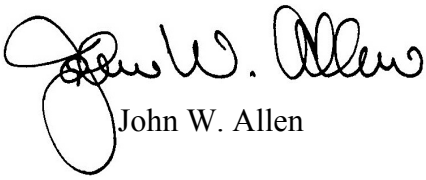
Under the AGC proposal for absolute prohibition, merely "entering the arrangement" is a violation, clear and simple, despite knowing and voluntary agreement by the client, and pristine reasonableness in all respects. In sharp contrast, under Michigan's present rule, AGC must prove that the fee is "clearly excessive," a higher burden, requiring a bit more evidence.

All of that seems a small price to pay for the preservation of the freedom of the lawyer and the client to make their own agreement - just like MCL 600.919 says it should be.

The proposed prohibition may be better for AGC, but it is not better for clients, nor for lawyers. Respectfully, the court should reject it.

God Bless America,

VARNUM



John W. Allen

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