

LAW OFFICES OF  
JAMES J. HARRINGTON III PLC

JAMES J. HARRINGTON III  
CHRISTOPHER J. HARRINGTON

jjh@jjharringtonlaw.com  
cjh@jjharringtonlaw.com  
www.jjharringtonlaw.com

May 5, 2015

Office of Administrative Counsel  
Michigan Supreme Court  
Hall of Justice  
P.O. Box 30052  
Lansing, MI 48909

Re: Proposed Amendment to MRPC 1.5(d)  
ADM File No. 2013-38

Dear Supreme Court Justices:

I have been a member of the Michigan Bar since 1973, and have exclusively concentrated my practice in Family Law for the last two decades. After seven years as a member of the Family Law Council, I served as Chair of the Family Law Section of the State Bar of Michigan from September 2013, through September, 2014. I held every office in the Family Law Council during my years as a Council Member, and was Chair or Co-Chair of the Court Rules & Ethics Committee for several years.

Over the last six or seven years, I have lectured on behalf of the Institute of Continuing Legal Education and the State Bar of Michigan on over fifty to sixty family law topics, which have included professional negligence, ethics, and attorney fees issues. I am a hearing panelist for the Attorney Discipline Board. I have testified as an expert witness in legal malpractice cases involving family law. The comments in this correspondence are mine. I do not speak for the AAML, the ICLE, the Family Law Section, the State Bar of Michigan, or any other entity.

**EMPIRICAL DATA & LAWYERS TROLLING & MRPC 1.5 (a)**

I have had the privilege to testify before the Michigan Supreme Court in Lansing, Michigan regarding the *anti trolling* issues presented to this Court. I think there are some parallel concerns which arose in the *anti trolling* hearings, which may bear upon the present discussion regarding MRPC 1.5(a).

Despite the fact that the State of Florida had enacted 30 day restrictions on *lawyer trolling* in personal injury cases, which were authorized and ratified in *Florida Bar v Went-For-It*, 515 U.S. 618 (1995) my perception was that this Supreme Court wished to be independently assured that there was empirical evidence and specific data regarding a significant and recurrent problem with *lawyer trolling* in family law cases prior to stepping in with a new Court Rule or MRPC.

Isn't it logical that before a new Court Rule or MRPC is established, reversing years of prior practice by highly ethical and competent attorneys in this state, that some empirical data be subject to the clear light of *fact checking* which demonstrates that a problem even exists in Michigan? Mere "feelings" are not a substitute for empirical data:

- “*It feels wrong to have results obtained be a factor in client billing ...*” is not empirical data.
- “*It feels like Divorce clients, who are consenting adults, are not capable of entering into contracts with their attorney...*” is not empirical data.
- “*It feels like Lawyers will be tempted to spend more hours on client’s case if an enhanced fee is involved...*” is not empirical data.
- “*It feels like Lawyers will be tempted to spend less hours on client’s case...*” is not empirical data.

Despite this issue having been the subject of vigorous discussion and debate for five years or longer, at this point in the discussion no proponent of Alternative A has ever submitted empirical data regarding the extent and nature of grievances, malpractice lawsuits, or clients prejudiced by *results obtained* fee agreements.

### THE “AMOUNT INVOLVED & RESULTS OBTAINED”

MRPC 1.5(a)(4) merits consideration in its entirety; not enough focus has been placed upon the first part of MRPC 1.5(A), subsection (4) which is the “amount involved”. A very small number of cases, handled by expert family law practitioners, may involve very large marital estates. These are marital estates not just totaling millions of dollars, but tens of millions of dollars !

The professional negligence policies of attorneys rarely involve coverages of more than \$1 Million per claim, or \$2 million aggregate. The attorney who handles a case which could bankrupt the attorney or the entire law firm is essentially walking a high wire without a safety net. It is most proper to consider “the amount involved” in the determination of a reasonable fee, which is precisely why that factor occurs **prior** to “results obtained” in MRPC 1.5 (a) (4).

Any reasonable fee involving a marital estate of tens of millions of dollars must logically and actuarially embrace the risk facing the attorney who has essentially placed a lifetime of his individual or law firm assets on the line for the client.

### FAMILY LAW “CONTRACTS” ARE ROUTINELY APPROVED BY THE APPELLATE COURTS (*ALLARD v ALLARD*)

The ability of clients to contract regarding Family Law matters is routinely affirmed by Michigan appellate courts. Interestingly, no one from the AGC ever filed *amicus* briefs regarding the statutory and common law protections afforded spouses which are *cannibalized* in pre nuptial agreements. Consider the most recent **published** case of *Allard v Allard*, \_\_\_ Mich App \_\_\_, issued December 18, 2014 (Docket No. 308194).

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<sup>1</sup>. “*Results obtained*” is explicitly set forth as a specific factor in determining a reasonable fee in MRPC 1.5 (A) (4).

A review of the *Allard* decision reveals what a “consenting adult”<sup>2</sup> contractually waived in her pre-nuptial agreement, signed about ten days before the wedding:

- The right to claim spousal support.
- The right to claim dower or homestead rights.
- The right to claim appreciation on premarital assets during the marriage.
- The statutory right to “invade” separate property, per MCL 552.23, based upon her “need”.
- The statutory right to “invade” separate property, per MCL 552.401, based upon “contribution” or “commingling”.

As an individual family law practitioner who represents the “non-monied” spouse in an estimated 60% of my cases, I find *Allard* deeply troubling<sup>3</sup>. Notwithstanding, is it disingenuous for the Court of Appeals to uphold an unrepresented client’s right to contractually waive protections built into Michigan law, but those same clients are not capable of hiring and retaining skilled legal counsel to assist them assert those rights, and consider the *results obtained* in establishing a mutually agreeable fee? Isn’t this particularly egregious, given that some future attorney will (hopefully) undertake the formidable task of reversing the *Allard* decision and restoring the statutory protections of §23 and §401 to a future non-monied spouse, but the *result obtained* cannot be a factor in establishing the attorney fee?

Clients signing written “*amount involved and the results obtained*” agreements have the full protection of the *Michigan Rules of Professional Conduct* insuring that any fee must be “reasonable”. Contrast this with an “unreasonable” pre nuptial agreement.

An “unreasonable” prenuptial agreements is still an enforceable and binding legal contract. Only a substantively or procedurally *unconscionable* pre nuptial agreement can be successfully attacked, because of the sanctity vested in clients to sign contracts about their divorce.

### SUPPORT FOR “ALTERNATIVE B”

I strongly support Alternative B.

I oppose “doing nothing”.

I was a member of the Family Law Council when the *TIMOTHY FRYHOFF* matter came to the fore. The Family Law Council successfully advocated for the protections of (1) a written agreement for a results obtained fee arrangement, and (2) the requirement of **both** attorney and client consent.

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<sup>2</sup>. Mrs. Allard was not represented by counsel in the pre nuptial agreements process.

<sup>3</sup>. Prior to *Allard* there were only two kinds of property in Michigan divorce cases: “separate” and “marital” property. Since *Allard*, there is a third kind of property, which I would call “super separate property” — property protected by a pre marital agreement bought and paid for by a financially well endowed spouse which end runs the statutory protections under Michigan law.

Those are vital protections for clients, and “doing nothing” as some have suggested, would strip those safeguards from the proposed Alternative B.

Others have suggested simply amending the Commentary to MRPC 1.5. While creative, this approach leaves open to future interpretation and debate whether “results obtained” can be ethically considered in a written agreement with client.

### **SHOULD THE AMOUNT OF THE *ENHANCED FEE* BE IN WRITING?**

Emphasizing that I speak only for myself, and not for any other group, I have no problem with a further client protection, which is for “Alternative B” to require that the dollar amount of the ultimate agreed upon fee between attorney and client, be set forth in writing !

**“An attorney and client may consent in writing to an “enhanced fee” in a case, which may take into consideration the results obtained for a client, provided that such a fee is “reasonable” considering all the factors set forth in MRPC 1.5(a) and agreed to by attorney and client, AND THE SPECIFIC AMOUNT OF THE FEE IS AGREED IN WRITING BETWEEN ATTORNEY AND CLIENT PRIOR TO PAYMENT.**

### **DRAFTING ISSUES WITH “ALTERNATIVE A” ?**

While we can logically deduce what the Attorney Grievance Commission is attempting to accomplish with Alternative A, the text is legally and logically deficient. Consider:

- Use of the word “contingent” is problematic. Is “contingent” a term of art, meaning that a fixed percentage, only, is within the ambit of “contingent” ?
- Or, is “contingent” to be interpreted in a wider, broader, generic context meaning that MRPC 1.5 (a) is essentially re-written, and a lawyers “success” (or, perhaps just as important, a lawyers “failure”) is deleted from MRPC 1.5 (a) as a factor in setting a fair and reasonable fee?
- What does “property settlement in lieu thereof” mean?
- What does “...any factor that leaves the client unable to discern” mean? Is this a totally subjective test, going to client state of mind, which is certain to generate litigation? What if a client refuses to “discern” how the fee was calculated?
- When does a client have to be able to “discern” the basis or the rate or the method by which the fee is calculated? At the beginning of the case? In the middle? At the end?

### **THE LAW OF “UNINTENDED CONSEQUENCES”.**

Will adoption of ALTERNATIVE A eliminate large fees in multi-million dollar divorce cases? Hardly. However, the “unintended consequence” may well be larger fees, determined on a “going

forward” basis at the inception of the litigation, which may ultimately penalize the client in the end. And, if a client feels “penalized”, wouldn’t we reasonably expect that this will encourage litigation and increase AGC involvement?

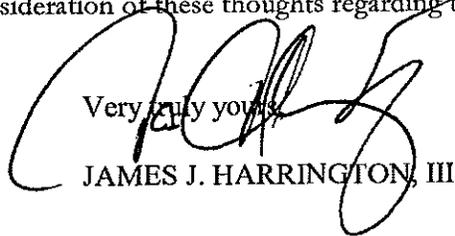
Let’s consider a hypothetical arising out of a multi million dollar case, which might generate a \$50,000 additional fee agreed to by attorney and client, and one of many factors involves “results obtained” at the conclusion of a case. Is it more fair to contract with the client for this fee at the onset of the litigation (but wait for the conclusion of the case to be paid)? Is it more fair to client to have an enforceable contractual fee, when (for example purposes only) the attorney did not exert the time, effort, experience, or skill necessary to produce a successful result for client?

Last but not least, consider a case like *Allard v Allard*, involving a challenge to applicability of multiple Michigan statutes involving separate property. Wouldn’t it be more in the nature of a “contingent fee” for the attorney to charge a fixed fee up front (but, because of client’s financial inability, be paid at the conclusion of the case) than it is for the attorney and client to mutually agree (hopefully, in writing, as suggested above) that extraordinary results have been achieved, resulting from the attorney’s unique skills and efforts, and that a “reasonable fee” be mutually agreed upon at the conclusion of the case reflecting these efforts and the attorney’s skills.

A final thought: no attorney supporting ALTERNATIVE B, advocates for elimination of (1) through (7) of MRPC 1.5. In fact, there are actually 13<sup>4</sup> factors contained in (1) through (7) which can and should be applicable all determinations of a “reasonable” fee. Proponents of ALTERNATIVE A would erase “results obtained” from MRPC 1.5, which is nonsensical. If an attorney does a shoddy job for a client, can’t that bear upon a “reasonable fee” ?

Opponents of ALTERNATIVE B have focused solely upon the second part of Factor 4 (“...results obtained”) and argue that the proponents of ALTERNATIVE B believe that this should be the sole basis for determination of a reasonable fee. This shrewd, but transparent, ploy should be rejected. The entirety of MRPC 1.5 (a) (1) - (7) (and all 13 factors therein) should survive intact, and be read together, and in conjunction with, ALTERNATIVE B.

Thank you for your consideration of these thoughts regarding this most important issue.

Very truly yours,  
  
JAMES J. HARRINGTON, III

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<sup>4</sup>. (1) time and labor required (2) the novelty and difficulty of the questions involved (3) the skill required to perform the legal service properly (4) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer (5) the fee customarily charged in the locality for customary services (6) the amount involved (7) the results obtained (8) the time limits imposed by the client (9) ...or by the circumstances (10) the nature of the professional relationship with the client (11) the length of the professional relationship with the client (12) the experience and reputation...of the lawyer performing the services (13) the...ability of the lawyer performing the services.