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May 21, 2015

Honorable Robert P. Young, Jr.
Chief Justice
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

**RE: ADM File No. 2013-38
Proposed Amendment of Rule 1.5 of the Michigan Rules of
Professional Conduct**

Dear Chief Justice Young:

The Attorney Grievance Commission would like to express its position with respect to the proposed amendment of Rule 1.5 of the Michigan Rules of Professional Conduct. The Commission supports Alternative A, which explicitly prohibits "success," "results obtained" and "value added" fees in divorce cases. The Court's adoption of Alternative A would clarify that the prohibition against contingent fees in divorce cases encompasses every fee, whatever the nomenclature, which is based on the value of the alimony, support or property awarded to the client. Alternative A is consistent with Michigan's longstanding public policy disfavoring fee agreements between attorneys and their clients that are entered into during a representation.

A contingent fee contract, as defined by the American Law Institute, is "one providing for a fee, the size or payment of which is conditioned on some measure of the client's success." Restatement (Third) – The Law Governing Lawyers ¶135 (comment a). Every fee denominated as "success," "results obtained" or "value added" falls within that definition because each of them is conditioned on some measure of the client's success; they are contingent in all but name and should be prohibited in divorce cases under Rule 1.5(d).

The contingent nature of an enhanced fee is inarguable, and cannot be finessed, as claimed by proponents for enhanced fees in divorce cases, simply on the strength of the "results obtained" language of Rule 1.5(a)(4). If this were so, then the same reasoning would permit the use of enhanced fees in criminal

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cases. The claim that the “results obtained” language of paragraph (a)(4) provides a safe harbor for enhanced fees in divorce cases fundamentally misconstrues Rule 1.5.

Court rules are interpreted by the same principles which govern the interpretation of statutes. *Haliw v City of Sterling Heights*, 471 Mich 700 (2005). It is a well-settled rule of interpretation that “where a statute contains a general provision and a specific provision, the specific provision controls.” *Duffy v Michigan Department of Natural Resources*, 490 Mich 198, 215 (2011).

The subject of Rule 1.5 is fees. Paragraph (a) addresses illegal or clearly excessive fees, and, in subparagraphs (a)(1) through (a)(8), the eight factors are listed that may be considered in determining the reasonableness of a fee. The “amount involved and results obtained” is the factor listed in subparagraph (a)(4). Paragraph (a) is a general provision that applies to all legal matters.

Paragraph (d) addresses the impropriety of a contingent fee in certain matters. Paragraph (d) is a specific provision that applies only to criminal and domestic relations matters. As the specific provision, it is paragraph (d) which must serve as the frame of reference for analyzing whether or not enhanced fees in divorce cases are ethical. Given that “success,” “results obtained” and “value added” fees are the functional equivalents of a contingent fee, the prohibitory language of paragraph (d) necessarily concludes the analysis.

Critics of Alternative A also argue that it would interfere with the contractual freedom of clients and their lawyers. However, it is the proponents of enhanced fees in divorce cases who seek to change established principles of contract law.

An enhanced fee is a contract negotiated during a legal representation between people who already are in a fiduciary relationship. It is not the product of an arms-length transaction. Such contracts typically have been subject to “special scrutiny” in light of the relative advantage held by the lawyer in those circumstances. Restatement (Third) – Law Governing Lawyers ¶18 (comment e). Special scrutiny is appropriate because the client:

might accept such a contract because it is burdensome to change lawyers during a representation. A client might hesitate to resist or even to suggest changes in new terms proposed by the lawyer, fearing the lawyer’s resentment or believing that the proposals are meant to promote the client’s good. *Id.*

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A lawyer, on the other hand:

usually has no justification for failing to reach a contract at the inception of the relationship or pressing need to modify an existing contract during it. The lawyer often has the opportunity and the sophistication to propose appropriate terms before accepting the matter. A lawyer is also required to give the client at least minimal information about the fee at the outset." *Id.*

Michigan has long taken the same approach to fee agreements which are reached after an attorney-client relationship has begun. The rationale for this approach can be found in *Coveney v Pattullo*, 130 Mich 275, 280-81 (1902):

The relation of an attorney to his client is one of trust and confidence, in which influence is of necessity acquired. The law does not incapacitate him from contracting with, or from becoming the recipient of the bounty of, the client. It does, however, command that all his transactions with the client shall be anxiously and jealously scrutinized, that the client may be protected from his overweening confidence, and from the influence or ascendancy which the relation generates.

Standing, as the parties do, in a relation of confidence, which gives the attorney or solicitor an advantage over the client, the burden of proof lies on the attorney or solicitor; and, to support the contract made while the relation existed, he must show the fairness of the transaction and the adequacy of the consideration.

What consideration can there be for an enhanced fee in a divorce case? Proponents for enhanced fees suggest that the concept encourages efficiency in the lawyer's representation. However, even without paying an enhanced fee, a client is already entitled to be represented competently, MRPC 1.1, and with reasonable diligence, dedication and zeal. MRPC 1.3. A lawyer's discharge of existing obligations in conformity with the Rules of Professional conduct can hardly be deemed adequate consideration in support of an enhanced fee.

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The Court's decision should be guided by the Comment to MRPC 1.0, which reminds us 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." There may be a place for enhanced fees as to other legal matters, but that type of fee agreement does not belong in divorce cases. The prohibition against contingent fees in divorce cases should apply with equal force to enhanced fees.

Sincerely,

Attorney Grievance Commission