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May 29, 2015

Justices, Michigan Supreme Court
Attn: Larry Royster, Clerk
Hall of Justice
P.O. Box 30052
Lansing, Michigan 48909

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

Dear Chief Justice Young and Esteemed Justices of the Court:

We write to you to urge this Court to reject the currently-proposed “Alternative A” amendment to Michigan Rule of Professional Conduct 1.5(d), which would prohibit “results-obtained” or “value-added” fees in divorce cases. 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.

With good reason, this Court two years ago flatly rejected the Grievance Commission’s request for an injunction against the use of results-based fees in domestic relations matters. *In re Fryhoff*, 495 Mich. 890, 838 N.W.2d 873 (2013). This Court instead invited the Grievance Commission to submit a proposal to amend the Michigan Rules of Professional Conduct to clarify “... whether the use of a ‘results obtained’ or ‘value added’ provision in the calculation of attorney fees in a divorce case makes the fee ‘contingent’ and thus impermissible under MRPC 1.5(d), and if so, whether the rules should be amended to permit such fee provisions under certain conditions.” *Id.*

Since that ruling, the Grievance Commission stubbornly has tried to shoehorn results-based fee into the contingent category, focusing solely on the results-obtained language in MRPC 1.5(a)(4), as if that were the only factor upon which results-based fees are based. While the results obtained, as identified in 1.5(a)(4), are a *single* factor, the results are not the *sole* factor, nor are they the determinative one. Rather, the client might consider any or all of the *eight* separate elements of MRPC 1.5(a), including the time and labor required, the novelty and difficulty of the questions involved, the skill required to perform the legal services, the likelihood that representation of this particular client might preclude other work (a common occurrence in the domestic relations field, where myriad conflicts often arise), the fee customarily charged in the locale, the time limitations imposed by the client or circumstances, the nature and length of the professional relationship, the experience, reputation and ability of the lawyer, and whether the fee is fixed. As this Court is well aware, “[t]he words of a statute provide the most reliable

evidence of the Legislature's intent, and as far as possible, effect should be given to every phrase, clause, and word in a statute.” *Peterson v Magna*, 484 Mich 300, 307 (2009) (emphasis added).

MRPC 1.5(d) prohibits contingent fees in a domestic relations case to prevent an attorney from having an interest in preventing divorcing spouses from reconciling.

Public policy is interested in maintaining the family relation. The interests of society require that those relations shall not be lightly severed, and that families shall not be broken up for inadequate causes or from unworthy motives; and where differences have arisen which threaten disruption, public welfare and the good of society demand a reconciliation, if practicable or possible. Contracts like the one in question tend directly to prevent such reconciliation, and, if legal and valid, tend directly to bring around alienation of husband and wife by offering a strong inducement, amounting to a premium, to induce and advise the dissolution of the marriage ties as a method of obtaining relief from real or fancied grievances which otherwise would pass unnoticed.

Jordan v Westerman, 62 Mich 170, 180 (1886).¹ However, in the 129 years since *Jordan*, it has become difficult at best – if not entirely absurd – to support the proposition that lawyers’ fee contracts are the reason that spouses divorce, rather than reconciling.² Equally absurd is the notion that by limiting domestic relations fee contracts to hourly or flat-fee billing, the divorce rate will plummet, and unsophisticated domestic relations clients will be saved from having the right to hire counsel of his or her own choosing (when, for example, a particular lawyer otherwise might not be willing to become involved in a matter for a nominal hourly or flat fee).

Results-oriented attorney fees in matrimonial cases are not our creation, nor are they new to Michigan or American domestic relations law or practice. They originated as a response to the well-recognized problems in hourly billing practices. A straight hourly billing system is insensitive to whether time is spent efficiently. It rewards an inefficient attorney with more billable hours and thus more income. With hourly billing, because attorneys bill clients solely on

¹ This sole premise for prohibiting contingent fees in domestic relations matters has continued to be advanced, even in this century. “The rationale behind MRPC 1.5(d) contingent fee prohibition in domestic relations matters stems from the premise that if a lawyer were permitted to charge a contingent fee on the amount recovered for a client in a divorce case, the lawyer would be less inclined to counsel the client regarding reconciliation.” *RI-221*. Likewise, “[a]s stated in *RI-28* and *RI-127* the primary concern in the use of contingent fees in domestic relations matters is that if a fee is made contingent upon the lawyer obtaining a divorce for clients, the lawyer would have no incentive to help bring the parties to a settlement that might preserve the marriage.” *RI-204*.

² “In the United States, researchers estimate that 40%–50% of all first marriages will end in divorce or permanent separation. The risk of divorce is even higher for second marriages, about 60%.” Alan J. Hawkins, Ph.D. and Tamara A. Fackrell, J.D., *Should I Keep Trying To Work It Out: A Guidebook For Individuals And Couples At The Crossroads Of Divorce (And Before)*, Produced on behalf of the Utah Commission on Marriage, Salt Lake City, Utah, October 2009. Attorney fee contracts are not among any of the factors identified as the causes for divorce.

the basis of the number of hours worked (and regardless of the result for the client), it is in the economic interest of an attorney to work as many hours as possible on each case. Furthermore, straight hourly billing encourages work by multiple, and potentially superfluous, attorneys. This type of arrangement conflicts with a client's interest in having his or her matter resolved well in the shortest amount of time.

As one commentator has aptly noted, "1,000 plodding hours may be far less productive than one imaginative, brilliant hour." Straight hourly billing also means the entire risk of the cost of litigation falls on the client even though the attorney may be in a better position than the client to control the course of the litigation.

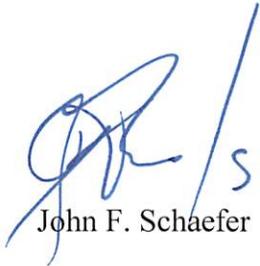
Michigan has long favored the right of people to freely enter into contracts. Alternative A is blanket restriction on that freedom, particularly for a client who might value a quick, quiet and efficient resolution of a divorce proceeding, or the tenacity of an attorney who is able to stand up against an overbearing, powerful spouse, achieving a result that even the client did not think possible.

Equally troubling are the potential risks to the attorney handling complex, high-dollar matters which cannot be offset simply by hourly time charges. Practitioners handling high asset cases cannot obtain enough malpractice coverage to protect themselves fully in these disputes. Why shouldn't that extra risk be the subject of a results-based fee? Or the attorney voluntarily placing himself or herself in the crosshairs of a powerful ex-spouse, who takes the task of rallying potential new clients not to hire that attorney, or tries to subject that attorney to liability beyond the divorce case itself? That extra risk should be taken into account when determining a fair fee, which MRPC 1.5 already contemplates. Alternative A should not be adopted to undo those modest protections for the lawyers that take on these difficult and stressful cases.

Intended or otherwise, Alternative A's elimination of the results-based fee will severely impair the ability of the non-powered spouse to effectively obtain his or her fair share in a divorce proceeding. Often, these disadvantaged spouses do not have access to money or other professionals (like accountants, estate attorneys, financial planners, etc.) to assemble a competent team during the divorce process. MRCP 1.5 allows for the consideration of these other factors in determining the reasonableness of the fees, beyond simply measuring the time spent.

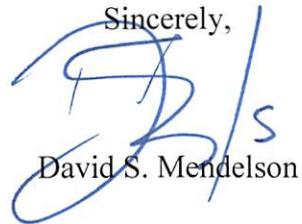
The AGC never has been flooded with masses of grievances about value-added fees in divorce cases brought by aggrieved, unsophisticated clients who have been duped by their cunning attorneys. Instead, the vast majority of fee disputes in divorce cases emanate from lawyers spending excessive amounts of time on matters, rather than on fees related to results achieved. In its zeal to eliminate the results-based fee, the Commission cannot point to any harm that these fees cause, in large part because these retrospective fees are discussed with *and in the discretion of* the client, after the client has had an opportunity to see the result of the lawyer's work. It is hard to imagine a fee that could be more fair to client than seeing what was done before deciding how much to pay for it.

For these reasons, this Court 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.



John F. Schaefer

Sincerely,



David S. Mendelson



B. Andrew Rifkin