

July 1, 2015

Via email only to boomera@courts.mi.gov

Anne M. Boomer, Esq.
Administrative Counsel
Michigan Supreme Court
P O Box 30048
Lansing MI 48909-7548

re: ADM File #2013-38; proposed amendment to MRPC 1.5(d)

Dear Ms. Boomer:

The comments expressed below represent my personal opinion only. For purposes of identification, though, I would like to note that I am the current chairperson of the State Bar Standing Committee on Professional Ethics.

Proposed Alternative B, which would amend Rule 1.5(d) to authorize so-called “results-obtained” or “value added” fees in divorce cases, is incompatible with the public interest, the consumer protection policy values expressed throughout the Michigan Rules of Professional Conduct and the historic policy considerations against the charging of contingent fees in divorce or criminal cases. For these reasons, as well as for the reasons expressed by John Cameron, the prior chairperson of the Professional Ethics Committee, in his March 12, 2014, letter to the Court and the reasons set out below, I recommend that the Court reject the proposed amendment.

The family law practitioners urging adoption of the proposed amendment argue from inaccurate understandings of the current rules and of their rights under these rules:

- Rule 1.5(a)(4) does not support an argument for a right to charge a “results obtained” fee at the conclusion of a representation. Rather, the result obtained in any representation is one factor to be considered in determining the overall reasonableness of a fee; and
- Assuming that the total fee is not clearly unreasonable, the current rules permit family law practitioners to charge their clients exactly the same total fee they would charge utilizing a “results obtained” or “value added” clause. Importantly, however, the current rules better protect clients’ interests by requiring that the basis and rate of any fee be communicated to the client within a reasonable time after commencing the representation.

Rule 1.5(b). A fee agreement permitting an attorney to add an unidentified “results obtained” surcharge at the conclusion of the representation lacks this required information and, therefore, seriously undermines the client’s right to make informed decisions about the terms of the fee agreement.¹

In the Court’s consideration of whether to adopt the proposed amendment, it is also worthwhile to note the following circumstances:

- If a lawyer is able to add a surcharge at the conclusion of the representation based on “results obtained”, not only has the fee charged become contingent, but the contingency would lack the clarity and objectivity of a contingent fee charged in, for example, a personal injury matter. Unlike in a case where the attorney determines the dollar value of the “results obtained” at the conclusion of the representation, in a personal injury case, the client knows the terms of the contingency at the inception of the representation;²

- One of the key policy considerations supporting the use of contingent fees in personal injury cases is that, in return for the possibility of a large fee in the event of success, the lawyer assumes the risk of receiving no fee in the event of no recovery. If the proposed

¹Consider, for example, a divorce case in which the fee agreement provides for an hourly billing rate of \$300.00 and grants the attorney the right to charge an undetermined “results obtained” fee at the conclusion of the representation. If the attorney spends fifty hours on the representation and charges a \$5,000.00 “results obtained” fee, the total fee is \$20,000.00, not \$15,000.00, and the effective hourly rate has been increased from \$300.00 to \$400.00. Assuming that the lawyer’s level of skill and experience warrant a fee of \$400.00 per hour, the current rules permit the lawyer to set a fee of \$400.00 per hour in the fee agreement, and the lawyer is, therefore, able to earn a \$20,000.00 fee in the case. In identifying the hourly rate as \$400.00 per hour, the agreement fulfills the communication requirement of Rule 1.5(b) by enabling the client to make an informed decision about the likely costs of the representation at the time of entering into the attorney-client relationship, and it does so without any financial loss to the attorney.

²Even if the contingent aspect of a fee agreement were tied to a particular outcome in the divorce – e.g., spousal support in excess of (or less than) a specified amount – and was, therefore, predictable, the policy considerations against such fees would still be implicated. As stated by Hazard and Hodes in *The Law of Lawyering* (4th ed) §9.18, “[i]f a fee is contingent upon the lawyer obtaining a divorce for a client . . . the lawyer would arguably have a disincentive to urge the client to consider counseling or mediation or other interventions that might preserve the marriage. . . [A]t least where child custody is at issue, it seems wrong to give lawyers a financial incentive to ensure the destruction of nuclear families – even troubled nuclear families.” See also *Restatement (Third) of the Law Governing Lawyers* §35.

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amendment were to be adopted, however, family lawyers would be able to reap the benefits of a contingency without assuming the risks that in no small part justify its use;

- Divorce is almost always an emotionally intense experience that leaves the parties vulnerable during and for a substantial period of time afterward. Regardless of the good faith of the attorney representing the party – and I do not question the good faith of the proponents of the proposed amendment, many of whom I know personally and regard very highly – giving an attorney the authority to add a surcharge at such an emotionally vulnerable time in the client’s life creates a very uneven playing field that carries with it too great a risk of abuse; and

- Adoption of the proposed amendment would also have the effect of authorizing the use of “results obtained” fees in criminal cases, where such fees have historically been prohibited for reasons that remain very persuasive, as noted in Hazard and Hodes, *supra*.

For all of these reasons, I respectfully encourage the Court to reject Alternative B.

Sincerely,



Kenneth M. Mogill

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