To: Michigan Supreme Court Justices:

SEVEN REASONS THE MATERNA AMENDMENT IS A BAD IDEA

I read with great interest attorney Michael Materna's letter to the editor (*Michigan Lawyers Weekly*, June 20, 2011) regarding the "Materna Amendment" to the Michigan Rules of Professional Conduct (Rule 1.5) that would cap referral fees at 25 percent.

I am compelled to express my opposition to his proposal. More importantly, as a past president of MAJ, I want to address the false assumptions regarding "broker-lawyers" that apparently motivate the Materna Amendment.

First, government, including our Supreme Court, has no business interfering with the freedom of contract between two (or more) attorneys. Indeed, attorneys voluntarily engage in an arms-length transaction that reflects multiple factors including the skill, reputation, and experience of the attorneys.

Other relevant factors include the complexity of the work, status of the case at the time of referral, and the past relationship between the attorneys.

To be sure, the referral arrangement is a result of a free and voluntary agreement between sophisticated professionals. The terms of the referral relationship must occur outside the intrusion of the Court or the application of an arbitrary 25 percent cap as required by the proposed Materna Amendment.

Second, the current approach in Michigan strikes an appropriate balance between respect for the judgment of attorneys, and the importance of disclosure to clients regarding a referral relationship. The existing Rule 1.5 of the MRPC requires several essential protections for clients related to referral fees including: the disclosure of a division of the fee between two lawyers who are not in the same firm; an opportunity by any client to object to the division of the fee; and the total fee must be reasonable.

Every other state (with one exception) agrees with the wisdom of Michigan's current approach.

Third, the Materna Amendment seeks to solve a problem that does not exist. I have practiced law for over three decades, and I have never encountered a problem arising out of the division of a fee in a referral relationship.

I am unaware of any significant issue with regard to the application of the current Rule 1.5. I am confident that the members of the Bar will continue to determine the details of referral relationships without the additional unnecessary intrusion of the Supreme Court.

Fourth, we must be wary of the unintended consequences that the Materna Amendment may produce. Thousands of personal injury attorneys currently compete with each other in an intensely competitive market. Mr. Materna's successful and respected personal injury firm proves this fact.

The adoption of the Materna Amendment would undoubtedly force the advertising firms that he accuses of acting as "broker-lawyers" to simply grow through the acquisition or merger with

the firms to which they refer cases in order to avoid the impact of the 25 percent referral fee cap.

This would result in the existence of only a handful of large, dominant advertising law firms. I believe that a diverse collection of law firms benefits our profession and the public. The Amendment as proposed could have the exact opposite effect of what is intended.

Fifth, the terms of the referral fee to be shared by attorneys undoubtedly impacts the evaluation of a case by the lawyer to whom the referral is made. The higher the referral fee to be paid, the more valuable the claim must be in order to proceed. Therefore, higher referral fees act as an effective economic deterrent to the filing of less valuable, and, arguably, questionable claims.

Another unintended consequence of a low referral fee cap will be more litigation. I am not necessarily opposed to this specific outcome, but it must be considered by the Court as another possible unintended consequence.

And sixth, Rule 1.5 was intended to encourage attorneys to pass along cases to qualified lawyers. As an attorney who practices primarily workers compensation law, I see first hand how important it is for clients to receive the expertise of an attorney in this area of law. I worry that setting a cap on the referral fee will deter attorneys seeking to avoid the application of the 25 percent cap on referral fees. This concern extends to virtually every area of practice where a more experienced, specialized representation benefits the client and public.

Finally, and perhaps most importantly, the so called “broker-lawyers” that motivate the Materna Amendment do not exist in Michigan. As a recent past president of MAJ, I know the Plaintiffs’ Bar well. Michigan is fortunate to have advertising law firms that still practice law.

To be sure, the largest advertising law firms in Michigan are among the leaders of our Bar – with highly respected trial attorneys who litigate cases in courtrooms across the State. Mr. Materna alleges that these firms “don’t go to court. They never write briefs. They just don’t practice personal injury law. They really are brokers.” (*Michigan Lawyer Weekly*, May 16, 2011).

This could not be further from the truth. I urge Mr. Materna (and the Justices of our Supreme Court) to visit these law firms to see, first hand, that these are large offices handling thousands of cases for clients in every phase of litigation (pre-suit, trial, appellate, etc.). They will quickly conclude that the word “broker” is inapplicable to these law firms, and does a disservice to their practices. These firms send and receive referrals just like every other law firm, but are intensely engaged in the practice of law each and every day.

The Materna Amendment to Rule 1.5 is an unnecessary and ill-advised solution looking for a problem. No change is necessary. If it’s not broke, we should not be trying to fix it.

Sincerely,
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