

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

ATTORNEY GRIEVANCE
COMMISSION,

Petitioner/Appellee,
vs

PATRICIA COOPER,

Respondent/Appellant.

Docket No. 135053

Attorney Discipline Board
Case No. 06-36-GA

135053

**BRIEF ON BEHALF OF AMICI CURIAE
VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP,
AND JOHN W. ALLEN, ESQ.**

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE BASIS OF JURISDICTION

Respondent's Application for Leave to Appeal comes before this Court pursuant to MCR 9.122, which provides that a person aggrieved by a final order of discipline entered by the Attorney Discipline Board may apply for leave to the Michigan Supreme Court within 28 days after the order of discipline is entered.

This Amici Curiae Brief is filed with the Court pursuant to MCR 7.306(D) and this Court's order of July 25, 2008, granting leave to file brief amicus curiae and inviting other persons or groups interested in the determination of the issues presented in the case to move the Court for permission to file briefs amicus curiae.

STATEMENT OF QUESTIONS PRESENTED

Pursuant to this Court's order dated July 25, 2008, the issues to be addressed with regard to Respondent's Application for Leave to Appeal are limited to the following:

1. Whether the Attorney Discipline Board erred in holding that the July 29, 2002, fee agreement was ambiguous as to whether the \$4,000 minimum fee was nonrefundable;

These Amici Curiae answer, "Yes."

2. Whether the agreement or the respondent's partial retention of the minimum fee after the client terminated the relationship violated MRPC 1.5(a), MRPC 1.15(b), or MRPC 1.16(d);

These Amici Curiae answer, "No."

3. Whether the Attorney Discipline Board erred in finding the respondent guilty of violating the Rules of Professional Conduct and/or in declining to make its ruling prospective only, in light of (a) its acknowledgements that it "provided something less than coherent guidance," and that "it was only recently, and only in a [September 29, 2005] memorandum to the Michigan Supreme Court, that we expressed the view that there really is no such thing as a nonrefundable retainer," (b) the lack of record evidence that such a memorandum was provided to the respondent, and (c) the fact that "a lawyer of ordinary prudence," at the time the agreement was executed on July 29, 2002, must have been "left with a definite and firm conviction that the fee is in excess of a reasonable fee" in order for the Attorney Discipline Board to find a violation of MRPC 1.5(a).

These Amici Curiae do not address subparts (a) and (b) of this issue. With regard to subpart (c), these Amici Curiae believe that the ADB erred based on the evidence presented.

STATEMENT OF FACTS

Amici curiae counsel concur with the statement of facts set forth by Appellant.

ARGUMENT

I. STANDARD OF REVIEW.

This Court reviews a conclusion by the Attorney Discipline Board ("ADB") that an attorney has violated a rule of professional conduct for proper evidentiary support on the whole record. *Grievance Admin v Fieger*, 476 Mich 231, 240; 719 NW2d 123 (2006), *Grievance Admin v Lopatin*, 462 Mich 235, 247 fn 12; 612 NW2d 120 (2000). The Court reviews de novo "legal issues concerning the ADB's authority, construction of the rules of professional conduct, and the constitutionality of these rules." *Fieger*, 476 Mich at 240, citing *Grievance Admin v Underwood*, 462 Mich 188, 193-194; 612 NW2d 116 (2000).

II. INTRODUCTION.

Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

Morrison v. Olson, 487 US 654, 699; 108 S Ct 2597; 101 L Ed 2d 569 (1988) (Justice Scalia, Dissenting).

The Attorney Discipline Board ("ADB") and the Attorney Grievance Commission ("AGC") have assumed the power of the ultimate arbiter of the legal marketplace, determining, with no previously announced standards, what is and what is not reasonable as terms for a fee agreement between an attorney and a client in Michigan. The principle they have adopted is contrary to Michigan law of contract and of professional conduct. It is contrary to Michigan statute and violates fundamental constitutional principle. It is contrary to the common practices of

Michigan lawyers, as endorsed by the State Bar of Michigan, which have well served both lawyers and clients for years.

The Attorney Discipline Board's Order and Opinion follows the Attorney Grievance Commission's view that Michigan lawyers may not enter into fee agreements in which a portion of the fee is a non-refundable, merely because the client also will be charged for time spent **above** a set number of hours. The ADB and AGC declare that a lawyer entering into such a fee agreement has acted in violation of the Michigan Rules of Professional Conduct ("MRPC"), despite this Court having, to date, **declined to adopt any rule that expressly prohibits non-refundable retainers in such circumstances.**

The record contains **no testimony** and the ADB opinion contains **no analysis** establishing that the fee retained by attorney Cooper (\$2,614.25) was "clearly excessive" by reason of the **amount** of the fee (i.e., that a reasonable lawyer charging a reasonable hourly rate could not have charged that amount). Thus, these *amici* will focus on the argument by the AGC and ADB that attorney Cooper's fee was clearly excessive **solely** because the written fee agreement, voluntarily agreed to by the prospective client and attorney Cooper, provided that no portion of the minimum fee paid by the client was refundable under any circumstances.

The ADB/AGC approach is wrong because:

- a. Nothing in the MRPC cited by the AGC or ADB (namely, MRPC 1.5(a), 1.15, 1.16) prohibits a non-refundable retainer that was not otherwise clearly excessive under the listed MRPC 1.5(a) factors;
- b. It erroneously treats a fee as being "earned" only by application of a function of time spent;
- c. The Michigan Legislature has declared (MCL 600.919) that lawyer/client fee agreements are valid, unless a rule of the Supreme Court (not the AGC or ADB) declares otherwise; and,

- d. It depends upon an illogical argument that a non-refundable retainer is permissible if the lawyer **refuses** to permit a client to receive the benefit of additional time spent by the lawyer without an additional charge, but at the same time deems a fee to be "clearly excessive" if a lawyer **allows** a client to receive the benefit of additional time without an additional charge.

This Court should reverse the Attorney Discipline Board Order. In addition, the Court should consider issuing clarifying amendments to the Michigan Rules of Professional Conduct (MRPC), the better to inform both lawyers and the public as to permissible terms for attorney engagements, and to reduce unauthorized legislation by the ADB in the future. Such amendments should allow for non-refundable retainers (as the State Bar has proposed) and recognize that fees are "earned" by means other than merely "rate times hours," something that in most instances the terms of the agreement between lawyer and client should control. In the alternative, if the conclusion is that non-refundable retainers are to be "outlawed," then that should come from this Court, in its exclusive supervisory role over lawyers (and as recognized in MCL 600.919), and not from the AGC or ADB which are assigned the tasks of implementing the Court's rules.

III. THE FEE AGREEMENT AT ISSUE UNAMBIGUOUSLY STATES THAT THE MINIMUM FEE WAS NOT REFUNDABLE.

There is no evidence to support the ADB's conclusion that the agreement was ambiguous with regard to whether the minimum fee was non-refundable. The agreement states: "No portion of the MINIMUM FEE referred to above is REFUNDABLE, to the client, under any circumstances." That sentence must be ignored to reach a conclusion that there is ambiguity in the agreement as to the non-refundability of the fee. The fact that the minimum fee would "entitle" the client to a certain amount of the attorney's time, does nothing to change the plain meaning that there is no "entitlement" to a refund.

When the fee agreement is read as a whole, there is no ambiguity. Both the provision regarding non-refundability of the minimum fee and the hourly billing arrangement have meaning

that is capable of being easily understood. In exchange for a minimum non-refundable fee, the client received:

- (1) Representation; and
- (2) Entitlement to a certain amount of time, beyond which the client would have to pay additional fees.

There is nothing about this fee arrangement that could not be readily understood by persons of ordinary intelligence. A modern analogy would be to a cell phone owner purchasing pre-paid "minutes" for a cell phone, which minutes are declared as not "rolling over," if not used. The purchaser gets cell phone service and is "entitled" to use that number of minutes, but it is plain that there is no refund for not using all of the minutes. Contrary to the ADB claim, this is not "tricky."

Whatever merit there might be to a policy argument that lawyers should not be able to enter into a fee agreement such as this, that argument cannot be based on the fallacious assertion that this agreement did not unambiguously provide for no refund of the minimum fee.

IV. THERE IS NO RULE PROHIBITING NON-REFUNDABLE RETAINERS.

The ADB opinion in this case cites no rule that prohibits non-refundable retainers. That is because there is no such rule. The present rules simply do not prohibit nonrefundable fees. Such fee arrangements could involve an issue of whether a fee is "clearly excessive," but that should include an analysis of all the multiple factors in MRPC 1.5(a).

The ADB argument really is that non-refundable retainers should not be allowed, not as a matter of present law, but instead as a matter of policy. By shifting from implementation of the rules to promulgating policy, the ADB and AGC overstepped their roles and disregarded the legislature's clear directive on the policy issue:

The measure of compensation of members of the bar is left to the express or implied agreement of the parties, subject to the regulation of the supreme court.

MCL 600.919.

The "agreement of the parties" is thus given primacy by the state's elected legislative representatives, yet escapes all but the smallest weight in the ADB analysis. Indeed, the ADB's opinion repeatedly expresses the view that it does not matter that the parties intended (as shown by the plain statement in the fee agreement) that the minimum fee was to be nonrefundable. Because there is no rule, adopted by this Court, that prohibits a nonrefundable fee, the parties' agreement must prevail.

V. A FEE MAY BE "EARNED" AT THE INCEPTION OF THE ENGAGEMENT.

Rule 1.5(a) provides, in part: "A fee is clearly excessive where, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." But here, there was no expert testimony to the effect that the fee was "clearly excessive." The transcripts in this proceeding reveal that no lawyer testified that the fee at issue here was in excess of a reasonable fee. In fact, the Hearing Panel rejected the "clearly excessive" contention by the AGC, in the absence of any evidence to the contrary.^{1,2}

There being no basis for concluding that attorney Cooper's fee was "clearly excessive," the ADB's conclusion thus turned on whether attorney Cooper's fee was "earned." Under the cur-

¹ Appellant's position (that the AGC presented **no** expert evidence that a reasonably prudent lawyer would be left with a definite and firm conviction that \$2,614.25 was in excess of what is reasonable) appears unassailable, although such an issue is beyond the purpose of **this** brief.

² The AGC and ADB cannot dispute that some lawyers charge and some clients pay at a rate in excess of \$425 per hour for the time such lawyers expend in a representation, including divorce matters. For the 6.4 hrs shown to have been expended by attorney Cooper, that would come to \$2,720. It is no answer for the AGC to assert that **this** Fee Agreement did not provide for such a rate, because this is **not** a breach of contract case. If it were, the reply would be that the **contract** provided that the fee was \$4,000 and none was to be refunded!

rent rule, such retainers must be refunded if they are not "earned."³ The "excessive" part of a "clearly excessive" fee might be said to be "not earned" and, therefore, subject to refund. But the only basis on which to conclude that the payments at issue here were not "earned," is because the ADB says so, not because any rule states they are not earned.⁴ By concluding that the fee was not "earned," the Board could say that part of the fee should have been returned to the client. In doing so, however, the Board mischaracterized the fee agreement, misstated the text of MRPC 1.16, and departed from fundamental constitutional and legal principles.

The ADB opinion mischaracterized the fee agreement by describing it as though the agreement spoke of the fee not having been "earned" until the lawyer had expended sufficient hours (at a rate of \$195 per hour) to equal the minimum fee. ADB Opinion at p. 21 ("Here, the agreement states that the funds will be earned by the performance of legal work at a certain hourly rate.") No such statement is found in the Fee Agreement. The term "earned" is nowhere in that agreement.⁵ The actual terms of the agreement should control, not the ADB's gloss on what it thinks the agreement should have said.

³ Current MRPC 1.15 (g), added to the rule in 2005. At the time of Cooper's Fee Agreement at issue in this case, on the other hand, Rule 1.15 contained **nothing** referencing what to do with "unearned" fees. Nevertheless, Rule 1.16(d) did (and still does) require refunding of advance payment of a fee that has not been "earned." Neither MRPC 1.16(d), nor any other rule, described what made a fee "earned" or "unearned." There is no rule stating that a payment received at the onset of an engagement (and expressly agreed to be nonrefundable) was not "earned" at the time of payment. Current Rule 1.15(g), similarly, does not explain what makes a fee "earned," just that a fee can only be withdrawn from a trust account when the fee is earned.

⁴ Of course, the parties to a fee agreement might agree that a fee will not be earned until a particular service is provided, but that was not true of these parties' consensual agreement.

⁵ The ADB Opinion, at p. 10, similarly misstates the content of MRPC 1.16, describing the rule as requiring "refund of fees paid in advance upon termination of representation" The Opinion omits that part of the rule that says a refund is only required for a fee "that has not been earned."

In addition, the ADB analysis does not touch on the most critical issue: namely, **when is a fee "earned"**? Some misguided Ethics Committee opinions, as well as some ADB opinions and analyses, have contributed to a misunderstanding that a lawyer may earn a fee only by working a specific amount of time at a specific hourly rate.⁶ This just wrong, on both the law and the facts. The terms of lawyer-client engagements, as well as the operation of the real world in providing legal services, is measured by much more than simply time and hourly rate.

In order for government regulation or restriction to pass constitutional muster, there must be empirical evidence that a problem exists, and that rule construction and enforcement will remediate the problem. See *Florida Bar v Went for It, Inc*, 515 US 618; 115 S Ct 2371; 132 L Ed 2d 541 (1995). The ADB's unspoken premise—that that a presumably ignorant public needs protection from a group of presumably evil lawyers,⁷ a premise for which there is no empirical evidence in this record—is misguided. Instead, the initial premise should be that clients and lawyers in Michigan are permitted to make their own contracts, restricted only by narrow and plainly understandable rules necessary for ethically acceptable and commercially functional conduct. The amounts to be paid by clients and the terms of payment, as well as the judgment as to what is

⁶ There are likely many reasons for this misunderstanding, among them this region's predominant compensation environment, based on hourly wages.

⁷ If truly evil lawyers (those who enter engagements and abandon their clients, having disposed of the retainers, so that there are no funds left for a client to engage another lawyer) are the concern, there are rules (e.g., MRPC 1.3, 1.4, 1.16) that can be used to discipline such conduct. Indeed, the current existence of other applicable rules suggests that additional rules (prohibiting nonrefundable retainers) will not stop such misconduct.

Perhaps the rule enforcers, uninfluenced by the realities of modern private law practice, seek to avoid the multi-factored test for clearly excessive fees, so that discipline rules are more easily administered. The enforcers may also see one type of lawyer problem and mistakenly cast all lawyers in the same light. If one's only tool is a hammer, then one begins to see every problem as a nail.

"clearly excessive" under MRPC 1.5, is a zone which is almost always best left exclusively to the parties to the contract, except in the most extreme of circumstances, such as where a prudent lawyer would have a firm conviction that the fee is in excess of a reasonable fee.⁸

In its analysis of Rule 1.5(a) excessiveness in the context of a nonrefundable minimum fee, the ADB also failed to acknowledge a pressing concern of private practice lawyers, which often justifies a nonrefundable fee as a condition to an initial conference or engagement: namely, the practice of a client manufacturing a disqualifying conflict by engaging a lawyer only long enough to create a conflict of interest (possibly only one meeting with a requisite amount of protected information communicated), and then terminating the engagement with a demand for refund of the retainer amount.⁹ This method can be quite effective for eliminating that lawyer as the opponent's choice of counsel.

Clients have 38,000 choices for lawyers in the Michigan marketplace. Their choices are informed by widespread advertising and marketing, protected as commercial speech. The best protections for clients against abusive lawyers' charging unjustified nonrefundable fees and for lawyers against abusive clients' seeking to deny others their choice of legal counsel are the alter-

⁸ To return to the cell phone analogy from above, the marketplace puts pressure on service providers not to require "use or lose" minutes. One provider may allow minutes to "roll over" or might even give refunds. Others will then take that into account, in competing for the customers. Similarly, if a lawyer insists on a non-refundable fee in circumstances where such is not justified, clients are free to (and presumably will) go elsewhere for legal services. Michigan has no shortage of lawyers, and other lawyers may not see the circumstances as requiring a non-refundable portion of the fee.

⁹ This point is raised here not because attorney Cooper's client sought to create a conflict in this situation, but because the ADB Opinion sought to validate the Board's broad declaration against nonrefundable retainers, without acknowledging that such could be proper other than in a "general retainer" situation. The ADB Opinion expanded beyond deciding a particular case to using its opinion as a means, in effect, to promulgate a "rule" consistent with the policy choices the ADB previously submitted to this Court.

natives offered and communicated in a free marketplace. This is not new, and it has worked well. Nonrefundable retainer fees are an important part of that free marketplace.

To conclude otherwise gives the factors of time and hourly rate an undue prominence. Ironically, under the ADB's argument and rationale, what otherwise might be a permissible "retainer," is changed into a "clearly excessive" fee, only because the lawyer did not charge the client **more** for all "hourly" work, in addition to the "general retainer" amount paid at the inception of the engagement.¹⁰ The ADB Opinion admits to the concept that some fees can be non-refundable, by describing and purporting to permit what the ADB calls a "general retainer." Thus, if attorney Cooper had required her prospective client to pay \$2,614.25 to retain Cooper (but with no credit toward time to be spent on the matter), that might have been permissible.¹¹ But if the client (as here) were to be given an **additional benefit** of not paying anything more, unless or until a certain amount of lawyer time had been expended on the matter, the ADB proclaims that the fee is "unearned" and unethical.

A lawyer might reasonably conclude that entering into a particular engagement is not "worth it" to the lawyer (including taking into account such factors as: being disqualified from representing others in the matter; being disqualified from representing others against that very same client in other unrelated matters; or having to deal with attorneys in the community that

¹⁰ This rationale also might be classified under the bromide "no good deed will go unpunished."

¹¹ This assumes that Cooper could justify such a general retainer under MRPC 1.5(a). Here, despite the AGC's—and ADB's—skeptical view, Ms. Cooper clearly articulated bases for such a retainer and the Hearing Panel accepted such bases, including the potential harm to Ms. Cooper's future practice by undertaking what may be seen as an unpopular representation adverse to another Macomb county lawyer. The ADB rejected those bases, without the benefit of a single lawyer testifying that a reasonably prudent lawyer **must** have reached a definite and firm conviction that the ultimate fee charged was unreasonable. Such evidence is required by MRPC 1.5.

have become adverse parties), unless the fee will be of a sufficient amount. The deciding factor in whether to undertake a representation is not required to depend on charging a client a higher hourly rate. Assurance that the fee will meet a minimum total amount, in order to justify the aggravation and consequence of being engaged in the matter at all, is and should be a legitimate factor in determining whether to undertake a representation.

Like other attempts at mandating lawyer price controls, this would be not only foolish, but also illegal, under multiple state and federal statutes prohibiting such practices in the commercial marketplace. See *Goldfarb v Virginia State Bar*, 421 US 773; 95 S Ct 2004; 44 L Ed 2d 572 (1975), in which the Virginia bar was held by the U.S. Supreme Court to have violated anti-trust statutes with its fee schedule, and was assessed large penalties. That case clinched the doom of all fee schedules, mandatory or advisory. It stands as a beacon illuminating the wisdom of the marketplace.

Likewise, the claim that "No lawyer is worth \$[insert any number, no matter how high]," is the product of hubris not well-supported by the American economic experience. In almost all instances, the marketplace is much better equipped to make those judgments. Neither the ADB, nor the AGC, should engage in such activities.

VI. THE PRESENT RULES PERMIT NON-REFUNDABLE RETAINERS.

The present rules permit both nonrefundable fees, as well as later discretionary refunding or credit.¹² MRPC 1.5(a) is crystal clear that any ONE of the factors in 1.5(a) may, alone, supply

¹² The Supreme Court proposal (ADM 2003-62) attempts to authorize a lump sum or non-refundable fee, but adds conditions which are neither permissible under the law, nor likely in fact. Under the Supreme Court version, proposed MRPC 1.5(f)(4) would borrow from the terms of a misguided informal ethics opinion: in order for such a fee to be "earned," it would be mandatory that the lawyer "in fact . . . turns down other cases, and marshals law firm resources in reliance on the fee agreement." This would require an after-the-fact determination which is not only impossible, but also is inconsistent with MRPC 1.5(a)(2), which requires only a "likelihood" that other employment will be precluded. If other existing engagements are "in fact" dis-

the basis for a reasonable fee. One of those factors, "(2) the likelihood, if apparent to the client, that the acceptance of particular employment will preclude other employment by the lawyer," is in itself sufficient to charge a permissible fee, regardless of the number of clock hours worked. Likewise, the lawyer always retains the right to credit, reduce, or adjust a final fee, simply as a matter of right, or as specifically authorized (but not required) by MRPC 1.5(a) (i.e., "(4) . . . the results obtained"), frequently based on facts ("results") which could not be known at the inception of the engagement.

Therefore, a fee arrangement for a nonrefundable fee, immediately "earned" by the lawyer at the moment of engagement, but subject to the lawyer's discretion to return part or all of it (or credit it as to other earned fees in the future), is not only permissible, but also affirmatively endorsed, by MRPC 1.5(a).

VII. THE ADB AND THE AGC HAVE EXCEEDED THEIR AUTHORITY.

If nonrefundable fee arrangements are to be prohibited, then MRPC 1.5(a)(2) or (4), or both, need material revision, if not deletion. The ADB, however, does not propose any amendment to MRPC 1.5(a) either to prohibit such fee arrangements. If, on the other hand, such arrangements are to be permitted (or more accurately, continue to be permitted, as the terms of the current rules clearly do), the ADB does not propose any language by which the Michigan Supreme Court might clarify that conclusion, or provide an analysis for enforcement. The power to

regarded or terminated to obtain a lump sum fee in the new engagement, the lawyer may be violating the anti-"hot potato" principle of conflicts of interest in MRPC 1.7. Likewise, "in fact" marshaling law firm resources does not reasonably occur until after the inception of the engagement, at which time the non-refundable retainer fee would have already been "earned."

The Staff Comment to the proposed Rule states that 1.5 sub-paragraph f was added specifically to allow lawyers, under specified conditions (1) through (4) to charge a nonrefundable fee that is fully earned when received, even though the lawyer may perform no additional work. But, as currently proposed by the Supreme Court, 1.5(f) would not accomplish that goal.

amend a statute, such as MCL 600.919, belongs exclusively to the legislature. The power to promulgate and amend the MRPC lies exclusively with the Supreme Court, and its authority under Const. 1963, art. 6, § 5 and MCL 600.904 (as well as the final phrase of MCL 600.919), giving this Court the duty and responsibility to regulate and discipline the members of the bar of this state. *Lopatin, supra*, p. 241. The AGC should not attempt to amend the law or promulgate a new rule by its enforcement discretion and the ADB should not attempt to do so by its opinions and orders issued under MCR Chapter 9.

VIII. PROPOSED CLARIFYING RULE.

Clarifying additions to MRPC 1.5 have previously been proposed by this Court. (See ADM File No. 2003-62, Proposed New Rules of Michigan Rules of Professional Conduct.) Such proposals have also been made by the State Bar of Michigan ("SBM") and by these *amici*. See Exhibit 1 (Comments submitted to the Court by these *amici* on May 24, 2005, in connection with ADM File No. 2003-62), and Exhibits 2 and 3 (State Bar of Michigan Representative Assembly Report to the Michigan Supreme Court on AO 2003-62 (MRPC) and AO 2002-29 (MSILS)).

Specifically, these *amici* previously proposed the following addition to Rule 1.5:

(g) Consideration of all Factors. In determining a reasonable fee, the time devoted to the representation and customary rate of fee need not be the sole or controlling factors. All factors set forth in this rule should be considered, and may be applied, in justification of a fee higher or lower than that which would result from application of only the time and rate factors.

(h) Enforceability of Fee Contracts. Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreements, unless found to be illegal, obtained through methods not in compliance with these Rules, prohibited by this Rule, or clearly excessive as defined by this Rule.¹³

¹³ The sources for this proposal are MCL 600.919 and the Rules Regulating the Florida Bar, Rule 4-1.5. Much of the wording is taken from Florida Rule of Professional Conduct 4-1.5, where it has operated successfully and without adverse effect for several years.

If this proposal were adopted in Michigan, it would serve to reduce markedly the burden on disciplinary authorities and courts when fee disputes arise. Reference to the express contract terms, entered into by competent persons, would quickly end the dispute, without the need for expensive, complex proceedings, expert witnesses, and appeals like this one.

The proposal would also place a premium upon express fee agreements between lawyers and clients, without specifically requiring "written" agreements for every engagement. Thus, the amendment would encourage what is generally regarded as a good practice, but what many also appropriately regard to be unsuitable and impractical as a mandatory rule for all engagements. The amendment would mandate a consideration of each, and all, factors of MRPC 1.5(a), not just time and rate, in determining a reasonable fee.

The "non-refundable fee" concept has been endorsed by the SBM.¹⁴ See Exhibit 2 and 3. Most clients are quite capable of understanding a nonrefundable fee, and the reasons for it, which, if not already apparent, should be made, "apparent to the client" as reasonably required in MRPC 1.5(a)(2).

These *amici curiae* strongly urge the Court to consider and adopt these proposals.

¹⁴ The specific language proposed by the Representative Assembly Report is: "A lawyer and a client may agree to a lump sum or nonrefundable fee arrangement that is earned by the lawyer at the time of engagement or at the time of the agreement, provided that the fee agreement is in writing, signed by the client, and states that the fee is nonrefundable." (Exhibit 3.)

CONCLUSION

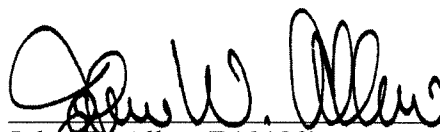
For the reasons set forth above, these *amici curiae* respectfully request that the Court grant Respondent's Application for Leave to Appeal and reverse the order of discipline entered by the Attorney Discipline Board. *Amici* further request that this Court consider and adopt clarifying amendments to the Michigan Rules of Professional Conduct.

Respectfully submitted,

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Dated: September 5, 2008

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