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May 24, 2005

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CORBIN R. DAVIS
CLERK SUPREME COURT

Corbin R. Davis
Clerk of the Court
Michigan Supreme Court
Michigan Hall of Justice
925 W. Ottawa, 4th Floor
Lansing, MI 48915

Re: Proposed Amendments to the Michigan Rules of Professional Conduct and the Standards for Imposing Lawyer Sanctions

Dear Mr. Davis:

I am writing this letter in my capacity as General Counsel to the law firm of Dykema Gossett PLLC in response to the proposed amendments to the Michigan Rules of Professional Conduct ("MRPC") and the proposed Standards for Imposing Lawyer Sanctions. I appreciate and understand the tremendous amount of work that went into developing the proposed rules, and offer the following comments for the Court's consideration as it completes this process.

First, we agree with the comments of Mr. Keefe Brooks regarding the text in the preamble that states that a violation of a rule may be "evidence" of breach of the standard of care. We are concerned that the creation of a blanket rule, without attention to the particular facts of the case, will give rise to malpractice claims in those situations where there has been no injury to a client, and the violation is a technical one that has no impact on the outcome of the handling of a matter. If the violation is per se admissible, the practical effect is to undermine the language of proposed Rule 1.0.2 that states a breach of a rule does not give rise to a cause of action for damages.

Second, we believe that the Court should state that the Rules apply prospectively in order to provide a transition period. At any given date, the firm has thousands of client matters pending. Because the existing rules do not require the firm to document conflict waivers in writing, there may be a number of matters that do not fulfill the documentation requirements implemented by the new rules. It would be extremely burdensome to review each and every file to determine if it contains appropriate documentation, and then to work with clients to agree upon the appropriate documentation for those files that do not satisfy the new rules. This is particularly difficult in matters that may have been open for years with multiple attorneys involved in multiple matters. Consequently, we suggest that the Court clarify that the new rules operate prospectively only,

and do not require renegotiation of existing engagement letters or documentation of conflict waivers that were obtained under the existing rules.

Third, we urge elimination of the requirement that informed consent must be "confirmed in writing," a concept embodied in multiple rules. While it may be "best practices" to use letters to confirm client consent, it should not be required, chiefly because obtaining such written consent is beyond the attorney's control. Some clients simply will not respond to efforts to obtain written consent. These clients frequently are buried in paperwork from across the country, and have little time to worry about documenting their lawyer's files. As a result, we frequently send confirming letters, rather than letters requiring an affirmative response, or make an appropriate notation in our files. This does not mean that the consent was not given, but simply that the client had more important issues on its desk to address. In such a situation, where there was not persistent follow-up to obtain documentation of an agreement, the attorney should not be exposed to a malpractice claim or grievance, or a complete loss of attorney fees earned, simply because the paperwork was not completed documenting what everyone agrees was the "deal" at the outset of the representation.

Fourth, we view the concept of "informed consent" as ambiguous, and likely to lead to litigation between attorneys and clients over whether a particular "consent" was truly "informed." This evaluation almost always will be made in hindsight, after a client becomes dissatisfied with the results achieved in a particular matter. In contrast, the discussion between the attorney and client regarding conflict waivers occurs at the beginning of a representation, when all the twists and turns of a particular matter may not be reasonably evident to the attorney or the client. Without a true standard against which to judge whether consent is "informed," we believe that the standard is likely to be used inappropriately in after-the-fact evaluations of whether all material risks were disclosed and considered at the beginning of a representation.

With regard to specific rules, we note the following:

Rule 1.5(f)(4): We suggest that proposed Rule 1.5(f)(4) be eliminated. It is becoming increasingly common for sophisticated clients to seek to purchase a block of legal time in exchange for either a fixed fee, or a lump-sum payment that will be paid and earned regardless of the number of hours of legal services rendered. These are fully negotiated transactions with clients, and the fees may be based on reasons other than whether the lawyer sets aside a block of time, turns down other cases, or marshals law firm resources in reliance on the fee agreement. In some circumstances, the client may desire to pay a retainer simply to disqualify the firm from taking matters adverse to the client without any expectation that the resources of the firm will be marshaled to provide legal services. We suggest that subpart (f)(4) of this rule be eliminated as unnecessary and unduly restrictive, particularly given the requirement in (f)(3) that the client

must be of "sufficient intelligence, maturity and sophistication to understand the agreement and that the fee is nonrefundable."

Rule 1.6: We urge retention of the phrase "client confidences and secrets" rather than the much broader "information relating to the representation of the client." The proposed language is sufficiently broad that it encompasses all information that is obtained by an attorney "relating to" the client's representation, even though the information may not have come from the client, or the information may not otherwise be subject to the attorney-client privilege. It places a substantial burden on the attorney to obtain "informed consents" for disclosures of any information "relating to" the client's representation, instead of only that information that is generally considered to be within the scope of the attorney-client privilege as defined by Michigan law.

Rule 1.18: This proposed rule address prospective clients, and imposes new duties on attorneys. We respectfully submit that the proposed rule does not properly reflect the reality of today's practice, particularly in large law firms, and believe it should be rejected. Our firm, like many others, receives "requests for proposals" from sophisticated purchasers of legal services. These types of potential clients provide information to firms, and often seek extensive amounts of information regarding the firm's capabilities. Often these requests for proposals result in extensive interviews, which may or may not result in the firm's being "selected" to perform the legal services. If the proposed rule is adopted, it will make it difficult for Michigan firms to engage in these types of processes, as the mere participation in such "beauty contests" could result in disqualification of the firm, or in the firm's owing duties of confidentiality and loyalty identical to those owed to actual clients.

Moreover, most law firms do not track the many requests that they receive for representation that do not result in actual representation. Our firm turns down numerous matters each month because of an actual or potential conflict of interest. There is no effective way to record and monitor these many inquiries that do not result in business, let alone to incorporate them into an already complex process for reviewing and evaluating conflicts of interests with respect to those entities or persons who become actual clients of the firm.

Rule 7.3: We urge rejection of this proposed rule for several reasons. First, we do not believe that this issue presents a problem in Michigan justifying a new limit on advertising. Prior efforts to adopt rules regarding advertising have been rejected, and we believe that the status quo should not change without a compelling reason. Second, the proposed rule is too restrictive. For example, many firms provide electronic newsletters to clients and potential clients. Some of these recipients are lawyers, others are not. Depending on the subject matter, the appropriate contact could be a human resource specialist, a chief financial officer, or other employee within a corporate organization who is not a lawyer. While these communications may result in business

for the firm, calling them "advertising materials" inappropriately characterizes and arguably denigrates the communications.

Rule 7.4: We believe that part (d) of this proposed rule should be rejected. This same limitation has resulted in litigation in other states, and should not be adopted lightly here. Furthermore, the concept of certifying someone as a specialist has no meaning under Michigan law.

Finally, we are aware that the Court also is considering comments regarding the proposed Michigan Standards for Imposing Lawyer Sanctions. As a member of the Attorney Discipline Board, I have endorsed the comments submitted by the Board to the Court for consideration. The firm is particularly concerned about the elimination of the concept of "injury" in determining the type of misconduct as detailed in the Attorney Discipline Board's comments.

Thank you for your attention to these issues.

Sincerely,

DYKEMA GOSSETT PLLC

Lori McAllister, General Counsel

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