

# McLellan Law Offices, PLLC

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September 1, 2011

Mr. Corbin R. Davis, Esq.  
Supreme Court Clerk  
Michigan Supreme Court  
P.O. Box 30052  
Lansing, MI 48909

**VIA E-Mail**

*Re: ADM File No. 2010-07 (Proposed Amendment of Rule 1.5 of the Michigan Rules of Professional Conduct (MRPC))*

Dear Mr. Davis:

I write to oppose to the proposed amendment of Rule 1.5 of the MRPC for the reasons set forth in this letter.

As a practicing lawyer for more than 30 years, I do not recall ever paying or receiving a referral fee. But I support the profession and business of law that permits a wide range of agreements among lawyers. The following comments are intended to assist the Court in considering the Proposed Amendment to Rule 1.5.

## **Government Price Setting**

My experience as a lawyer has primarily been in the public policy and legislative area. Over the years, I have seen many proposals whereby the government would step in to the market for goods and services to set or limit prices. Fortunately, these proposals have generally been rejected except in the case of natural monopolies and other limited circumstances.

In the matter of ADM File No. 2010-07, the Court is considering whether to adopt government-imposed price limits on a service that is highly competitive among licensed members of the Michigan Bar. Under our Constitution, the Court has broad regulatory powers over members of the Bar.

While the Court may have inherent powers to set the prices of inter-lawyer agreements, there are many reasons why it should not.

## **A Solution In Search of a Problem**

In preparing this letter, I reviewed the already submitted comments to determine whether there was an articulated problem to which the Rule change would apply. Few proponents have submitted comments and it appears the genesis of the proposal is attorney Michael Materna's letter to the editor (Michigan Lawyers Weekly, June 20, 2011) regarding the "Materna Amendment" to Rule 1.5 that would cap referral fees at 25 percent.

No study, survey, or analysis of which I am aware has been presented to support the proposed amendment as an answer to either the problem to be addressed or the benefit to the public interest. Before this Court seeks to regulate the contractual relationship among lawyers and impose regulations, it should require a solid case to be made. There is simply no evidence of a problem to be solved by Court price setting and many good reasons why this proposed Rule should not be adopted.

### **Freedom to Contract Is Good Public Policy**

A substantial body of jurisprudence and common sense speak loudly against the adoption of the proposed amendment. In 1875, Sir George Jessel MR warned:

"[I]f there is one thing more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract." (*Printing & Numerical Registering Co. v. Sampson*, 19 Eq 462, 465 (1875)).

This Court, when considering the proposed amendment, must remain consistent in its long standing defense of economic freedom and contract. It is the firmly established precedent of the Court to protect these essential rights. "The general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts." *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 357, 51 S.Ct. 476, 75 L.Ed. 1112 (1931). In the *Rory* decision, the Court ruled that "freedom of contract has remained one of the finest axioms in the whole fabric of the social philosophy of our culture." *Rory v. Continental Ins. Co.*, 473 Mich. 457, 479, 703 N.W.2d 23 (2005).

A long line of cases further demonstrate this commitment to freedom of contract including *Terrien v. Zwit*, 467 Mich. 56, 648 N.W.2d 602 (2002), *Oosterhouse v. Brummel*, 343 Mich. 283, 72 N.W.2d 6 (1955), and *Port Huron Education Association v. Port Huron Area School District*, 452 Mich. 309, N.W.2d 228 (1996)

The fact that the Court is considering a change to its Rules, rather than a case between litigants, does not lessen the value of these precepts.

I agree with the comments of Janet Welch on behalf of the State Bar of Michigan:

Lawyers are bound by important ethical rules, and function within a business environment. The practice of allowing the legal marketplace to drive the terms of contract negotiations for the provision of legal services has worked well historically, and we are unaware of any evidence to suggest that a change would provide any benefit to the public.

### **Court-imposed Disruption of the Market for Legal Services (“Unintended Consequences”)**

Many of the trial lawyers who have commented on the proposed Rule have outlined several of the negative changes and unintended consequences of the Rule:

- This proposed rule creates a strong financial disincentive for the referring lawyer to refer a case to a specialist. This consequence is perhaps the most damaging to the general public in need of a lawyer. Lawyers should not be expected to act against their legitimate professional and financial interests. It is in the public interest that the referral relationship between attorneys and/or firms should appropriately reflect the skill, reputation and experience of the parties. Other relevant and reasonable factors might include the complexity of the work, status of the case at the time of referral, and the past relationship between the attorneys. A fixed, government-imposed fee does not serve the public interest.

A cap on the referral fee will deter referrals, and result in less expert representation – a problem for both clients, the courts and the public.

- The current Rule 1.5 of the MRPC effectively balances the interests of attorneys to practice without government interference and imposed value judgments of fairness with full disclosure to clients. The current Rule 1.5 requires the following important actions for the benefit of the client and public:
  1. The client is advised of the division of a fee between lawyers who are not in the same firm (MRPC 1.5(e)(1))
  2. The client does not object to the participation of all lawyers involved (MRPC 1.5(e)(1))
  3. The total fee is reasonable (MRPC 1.5(e)(2))
- Every state in the United States, except Florida, has adopted a rule that is identical or substantially similar to the current Rule 1.5 of the MRPC. That alone is not sufficient reason to avoid a changes in the Rules, but it suggests there should be compelling reasons to deviate from a well established policy.
- The Court should be weary of unintended consequences produced by the proposed amendment. Most notably, the large firms that this proposed amendment purportedly targets, will only expand in order to avoid the application of the 25% cap. This development will undoubtedly reduce competition among attorneys.

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- Referral fees greater than 25% are currently the norm, and any policy that reduces referral fees to 25% might remove an economic deterrent to the filing of less valuable or meritorious claims.

For these reasons, the Court should reject the proposed amendment to Rule 1.5 of the MRPC.

Sincerely,

A handwritten signature in cursive script that reads "Richard McLellan". The signature is written in black ink and is positioned above the printed name.

Richard McLellan