

Law Offices

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September 1, 2011

Corbin Davis, Clerk  
Michigan Supreme Court  
P.O. Box 30052  
Lansing, Michigan 48909

**Re: ADM File No. 2010-07 Commentary**

Dear Clerk Davis:

By copy of this letter, I would like to provide commentary in opposition to the Proposed Amendment of Rule 1.5 of the Michigan Rules of Professional Conduct as set forth in the May 3, 2011, Order referenced under ADM File No. 2010-07. Per that Order, it is my understanding that these comments are to be directed to your attention.

As a matter of background, I have been practicing since 1982. I have a very active personal injury practice and I practice in a small three-attorney office. Well over 50% of my case load is generated from referrals from other attorneys. I have generally paid attorneys referral fees of one-third of my fee, but in many situations will pay referral fees significantly higher than one-third.

I have served on the MAJ Board on two different occasions. I currently sit as an officer on the Council for the State Bar of Michigan's Negligence Section. I will be Chair of that Council in the 2012-2013 fiscal year. These comments are being made by me personally, though, and not on behalf of the Negligence Section.

I would like to preface these comments with one other background fact. I do not receive any referrals from any lawyers who do any substantial advertising and who would be potentially considered to be "case brokers" (I understand that the amendment has been proposed to address a perceived problem with "case brokers"). I receive all of my referrals from lawyers with whom I have established relationships over my 28-year career.

There are a number of specific concerns that I have pertaining to the proposed amendment and the way that it's written. Each will be addressed separately below.

**MRCP 1.5(c): REQUIRING THE AMOUNT OR THE PERCENTAGE OF THE FEE TO BE IN THE FEE AGREEMENT**

The amendment to Subsection (c) of MRPC 1.5 states that the Fee Agreement “. . . shall state the amount of percentage of fees to be divided or shared among or between lawyers who are not in the same firm.” This particular provision is sometimes difficult to comply with in practice. The contingent fee agreement that my office uses with our clients contains a paragraph that specifically identifies cases wherein the client came to us through a referring attorney and indicates that the client is aware of the fact and is aware that the attorney will be paid a percentage of the fee. In many cases, though, that percentage is not determined until the case actually concludes. Many factors come into play in determining what percentage of the fee should be paid to the referring attorney, including the amount of work that the referring attorney put in prior to sending the case over, the amount of time and effort that it took for us to close the case and the size of recovery. It is therefore not possible to in all cases predict what the percentage fee will be and include that in the fee agreement.

**MRPC 1.5(f): 25% LIMITATION**

**Why Limit the Ability of Two Lawyers to Enter Into a Private Agreement That in No Way Affects the Client**

The size of a referral fee paid to a lawyer is a matter of contract between the handling attorney and the referring attorney. The percentage of the fee paid to the referring attorney in no way affects the client as the client will be paying what is usually the standard one-third contingency fee. There is no good reason for the court to regulate these private transactions.

**The Proposed Amendment Could Potentially Hurt Clients**

As a general proposition, experienced attorneys specializing in personal injury cases will obtain higher recoveries for their clients than lawyers who handle very few personal injury matters. Thus, clients benefit from encouraging lawyers without experience in the personal injury field to refer cases to lawyers who are experienced in that field. The lower the potential referral fee, the greater the disincentive created for non-personal injury attorneys to attempt to resolve the case themselves to maximize their own fee.

This would be especially true in the larger cases. Take for example a trucking accident case with good liability and substantial damages where the client goes to see a criminal lawyer with whom they have had prior contacts. The criminal lawyer can settle the case for \$1.5 million and charge a \$500,000.00 fee. That lawyer is aware that they could refer the case to an experienced personal injury lawyer who in all probability will increase the recovery significantly to the client for, as an example, \$3 million. If that criminal lawyer is limited to a 25% referral fee and is not able to negotiate a higher referral fee with the personal injury lawyer then the criminal lawyer is faced with a dilemma: Should the lawyer keep the case, settle it and generate a \$500,000.00 fee with the client only netting \$1 million, or should the lawyer refer it to a personal injury specialist where the maximum fee that they could recover is \$250,000.00 although the client recovers \$2 million? The court should not enact a rule which could have this type of impact on clients.

### **The Proposed Amendment Unfairly Impacts Referring Attorneys**

In any type of law practice, there is a significant value associated with a lawyer's ability to generate clientele. In larger hourly corporate firms, these individuals are known as "rainmakers". Whether they generate their work through goodwill, public speaking, reputation, social contacts or advertising in Crain's, corporate lawyers who can bring files into the office are very valuable and highly paid (sharing in the fees), whether they do any significant legal work or not. This is why former prominent politicians, judges or lawyer/business executives are often courted by large firms after they retire. There is no limitation on what these attorneys are paid and therefore they receive and the firms pay salaries at market value.

Why should a referring attorney in a personal injury case be limited when the corporate attorneys are not? Take for example a personal injury case wherein a very large fee is almost a certainty. The relationship with that client has substantial economic value. The relationship was created by the lawyer through either goodwill, reputation, public speaking or advertising. Why should the lawyer be limited to a 25% referral fee as opposed to discussing the case with various personal injury lawyers and negotiating a market value referral fee?

### **The Proposed Amendment Unfairly Affects Smaller Firms**

Small law firms outsource various functions rather than having individuals on staff perform those functions. For example, our firm outsources appellate work and probate work, whereas larger personal injury firms have lawyers on their staff that perform these functions. Why shouldn't small firms such as ours be able to outsource the rainmaking/case generating function as well, without limitations?

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Let's take for example a criminal lawyer who through reputation and goodwill generates a significant number of personal injury cases. A small firm like ours would hope to compete for that person's referral business by offering higher referral fees than some of our competitors. We are not big enough to hire that person and put them on staff though. A larger personal injury firm would be able to actually put the person on staff, pay them a salary, cover their overhead and agree to pay them higher referral fee percentages as they would not be bound by the 25% limitation in the proposed amendment. We can't compete with the larger firm with the proposed amendment. This isn't fair.

### Why 25%?

Traditionally, personal injury attorneys have paid referring attorneys a standard referral fee of one-third unless an exceptional situation occurs. There is no rationale underlying reducing this traditional one-third referral fee to 25%.

### MCRP 1.5(f): REQUIRING COURT APPROVAL

The proposed amendment in its current form requires court approval for any referral fee paid in excess of 25% IN Section 1.5(f). This could add a significant burden to the dockets of our already overtaxed judiciary. Many cases are settled pre-suit. It is very common for a referring attorney to order medical records and attempt to settle the case before the case is actually referred to someone who specializes in personal injury. In those cases, it is not uncommon to pay the referring lawyer a higher referral fee than if the case went through significant litigation. The way the Rule is currently written, attorneys would then have to file a separate action to seek the court's approval for paying the higher fee. Additionally, when cases are settled while in suit, there is currently no need for a settlement approval hearing unless the case involves a wrongful death matter or a claim filed on behalf of a minor. Again, seeking approval of a higher referral fee would require an additional hearing which the courts currently do not have to deal with.

Thank you for the opportunity to provide these comments.

Very truly yours,

WAUN & PARILLO, PLLC

By:  Thomas W. Waun

TWW/dag