Pima County Bar Association
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BEFORE THE SUPREME COURT OF

THE STATE OF ARIZONA

In the Matter of	Supreme Court No. R-07-0028
PETITION TO AMEND ER 1.5 OF THE ARIZONA RULES OF PROFESSIONAL CONDUCT	**COMMENT OF THE PIMA COUNTY BAR ASSOCIATION REGARDING PETITION TO AMEND ER 1.5 OF THE ARIZONA RULES OF PROFESSIONAL CONDUCT**

The Pima County Bar Association, pursuant to Rule 28, Ariz. R. Sup. Ct., hereby files its comment regarding the Petition to Amend ER 1.5 of the Arizona Rules of Professional Conduct, filed on December 17, 2007 (hereinafter "Petition to Amend ER 1.5"). As will be discussed more fully below, the Pima County Bar Association opposes the Petition to Amend ER 1.5 for the following reasons: (1) the proposed language adds nothing to the law on fees; (2) the proposed amendment suggests new criteria to be considered or over-simplifies some of the criteria already to be used in determining the reasonableness of a fee; (3) the proposed language is vague and misleading; (4) the proposed language would create unreasonable expectations; and (5)The proposal completely ignores all the work required of an attorney after a case has been settled. The Pima County Bar Association also joins the Comment submitted by the State Bar of Arizona.

I. THE PROPOSED LANGUAGE ADDS NOTHING TO THE LAW ON FEES.

This Court has already recognized that the application of *some* fee agreements, in *some* cases may be considered excessive, in retrospect. *In re Swartz*, 141 Ariz. 266, 273 (1984). The Rules of Professional Responsibility, however, already prohibits every attorney from agreeing for, charging or collecting an excessive fee. ER 1.5(a). In considering what is reasonable, ER 1.5(a) sets for eight factors:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) the degree of risk assumed by the lawyer.

Every attorney is obligated to analyze any fee agreed for, charged and/or sought to be collected and, if necessary, reduce that fee so it is not excessive. *In re Swartz*, *supra*. The Petition to Amend ER 1.5, adds nothing to the substantive analysis already required of attorneys in Arizona. As will be seen below, however, the proposed amendment to ER 1.5 is not merely superfluous, it is inconsistent with existing law, misleading, vague and creates a significant likelihood of creating unreasonable expectations by the client.

II. THE PROPOSED AMENDMENT SUGGESTS NEW CRITERIA TO BE CONSIDERED OR OVER-SIMPLIFIES SOME OF THE CRITERIA ALREADY TO BE USED IN DETERMINING THE REASONABLENESS OF A FEE.

The proposed amendment requires that a client represented on a contingency fee must be "advised in writing that if the client's claim settles early, easily and without litigation, the lawyer's fee will not exceed the value of the representation pursuant to paragraph [a]." It appears to set forth criteria, "early, easily and without litigation" which either are not factors under ER 1.5(a) or are a gross over-simplification of just *some* of the factors to be considered. Moreover, by setting forth these new criteria specifically, but only generally referencing the proper factors to consider under ER 1.5(a), the proposed amendment would mislead clients to focus only on"early, easily and without litigation" and *de*-emphasizes the importance of the factors in ER 1.5(a). From the client's perspective these three factors would become the *only* criteria to be considered when deciding whether to challenge a fee. The result would be an explosion of disputes over fees which, when properly analyzed under ER 1.5, would not be considered excessive.

III. THE PROPOSED LANGUAGE IS VAGUE AND MISLEADING.

Use of these terms simply invites the client to become confused. Lay people, who cannot appreciate the complexities of a case or the law, are prone to misperceive cases as being resolved

"easily". Most attorneys have met a prospective client, friend or family member who is certain that his/her case is "a slam dunk" simply because the client does not understand the complexities of the law. To that client, the "slam dunk" case should be "easily" resolved. Such cases are, however, often much more complex than the client can appreciate.

IV. THE PROPOSED LANGUAGE WOULD CREATE UNREASONABLE EXPECTATIONS.

Suggesting that a fee should be reduced simply because the case settled "early" completely ignores the components that can lead to a successful, but early resolution. First, the experience, reputation, and ability of the lawyer is one such component. Requiring a fee reduction on this basis, would punish the talented and efficient attorneys who, because of his/her experience, reputation and ability, can quickly obtain a good and acceptable result for the client. Second, the language fails to recognize that a case may resolve "early" for a variety of reasons which would have no effect on the reasonableness of the fee. For instance, a case may be resolved because there is simply inadequate insurance coverage or because the client makes the decision to settle quickly, for personal reasons. In sum, simply because a case settles early, does not mean that a fee reduction should occur. Yet, this is precisely the expectation a client would have as a result of the proposed requirement.

V. THE PROPOSAL COMPLETELY IGNORES ALL THE WORK REQUIRED OF AN ATTORNEY *AFTER* A CASE HAS BEEN SETTLED.

The proposed amendment also completely ignores all the post-settlement work required of most attorneys. For instance, in the personal injury area settling a claim with the third-party defendant is only part of the representation. Once a case is settled, the attorney must turn to the analysis and resolution of all the varied claims of liens, assignments, subrogated interests and claims to reimbursement set forth in state and federal statutes and case law. This area in an evolving area of the law and, as a result, representation of the client, often requires considerable knowledge, skill and effort.

Whether and to what extent a claimed lien, assignment, subrogated interest or claim to reimbursement is valid, is often complicated by factual circumstances which vary from client to client and claimant to claimant. For example, while a health plan may claim a right of reimbursement, whether that claim is legitimate may depend on whether the plan is a bona fide ERISA plan. In determining this issue, the attorney must obtain, evaluate and compare the terms of the Plan, the

Summary Plan Description and the Plan's 5500 forms, filed with the Department of Labor. Claims by AHCCCS, or under ARS §33-931, *et seq.*, also require complex analysis to determine the validity of the claim as well as the opportunities available for compromising the claim.

Indeed, the attorneys work following a prompt settlement often eclipses the work before the settlement. A prompt settlement often-times means there was inadequate insurance to cover the damages. The ERISA, AHCCCS and/or other claims can exceed the total settlement amount. The post-settlement work of the attorney is critical in these cases, to a favorable resolution for the client. Thus, advising a client that the reasonableness of a fee will be based solely on the timing of the settlement, grossly mis-states the attorneys work, responsibility and the value of the representation.

VI. CONCLUSION.

In light of the foregoing, the Pima County Bar Association opposes the Petition to Amend ER 1.5 of the Arizona Rules of Professional Conduct, filed on December 17, 2007.

RESPECTFULLY SUBMITTED this _____ day of May, 2008.

PIMA COUNTY BAR ASSOCIATION

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DEE-DEE SAMET
President
Pima County Bar Association