OHIO ASSOCIATION for JUSTICE
TRIAL LAWYERS HELPING PEOPLE

655 Metro Place S., Suite 140
Dublin, OH 43017
614-341-6800

Jason Porter, Chief Operating Officer
John Van Doorn, Executive Director

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Richard A. Dove
Director
Board of Professional Conduct
Supreme Court of Ohio
65 South Front Street, Fifth Floor
Columbus, Ohio 43215-3431

RE: Comments on possible amendment to Rule 1.5

Dear Mr. Dove,

Thank you for inviting the Ohio Association of Justice ("OAJ") to provide comments on a possible amendment to Rule 1.5. Our understanding is that the Ohio Supreme Court might consider an amendment that would require attorney fee disputes to be referred to some form of mandatory mediation or arbitration. In preparing this response, OAJ has researched this issue, including analyzing the current version of the Ohio Rules of Professional Conduct ("the Rules"), researching the Model Rules and ethics/professionalism rules from other states, as well as reading the recent decisions from the Tenth District Court of Appeals (*Luper, Neidenthal & Logan v. Unifirst Corp. and Eichenberger v. Clark*).

After careful consideration, the OAJ has chosen to oppose any amendment to the Rules pertaining to fee disputes. There are a number of reasons for our opposition.

There Is No Problem That Needs To Be Fixed

First, we believe there is no existing problem that needs to be "fixed" by changing the Rule. Our research and experience indicates there are not a significant number of lawsuits being filed, either by attorneys or clients, regarding disputes over attorney's fees. There is no indication that there are more disputes now than there have been in the past.

The members of OAJ primarily represent individuals who were injured, harmed or damaged by the conduct of others. This includes individuals who have been "harmed" or "damaged" by lawyers through legal malpractice, unethical conduct or unfair practices from other lawyers. OAJ's clients often are the most vulnerable, with the least amount of resources and/or education and might be the most likely to experience unethical and/or inappropriate billing situations that could result in a legal fee dispute. After conducting an informal survey of our members, the incidence of clients who retain lawyers to help them with attorney fee disputes is incredibly small. And, for those attorneys who represent clients with attorney fee disputes (or for OAJ members who had fee disputes with their clients) most were resolved quickly without the need for any dispute resolution.

Also, our research reveals that the Model Rules do not contain any provision that would require mediation or mandatory arbitration of attorney-client fee disputes. Moreover, our research indicates that the vast majority of states do not require any such mandatory referral to mediation or arbitration. We think this is not by accident.

Further, our research of the few states that have such "arbitration" programs for fee disputes reveals that the procedures are typically voluntary. In our view, changing the Rules to insert language about voluntary arbitration is unnecessary because that right exists already. Lawyers and judges already suggest, recommend and encourage attorney fee disputes, and many other disputes, to be resolved through voluntary mediation and arbitration. Changing the Rules to suggest or require that seems unnecessary and weakens the importance of the current Rules.

Mandatory Arbitration is Unconstitutional and Unfair

Second, we believe a mandatory arbitration provision that applies to all lawyers is likely unconstitutional, or at a minimum, unfair to attorneys. We recognize the purpose of the Rules is for the benefit of the public and to instill confidence in the legal profession. We understand and respect that the Rules are designed to protect the public from unethical lawyers. However, fee disputes, at their heart, are no different than other contract disputes over payment for services. Both parties to that dispute have the constitutional right to resolve that dispute at trial pursuant to the Seventh Amendment.

Physicians and hospitals are not required to engage in mandatory mediation or arbitration regarding disputes for payment of their services. Medical providers regularly sue patients for unpaid medical bills and literally destroy their patients' financial condition. (The leading cause of personal bankruptcies in the United States is unpaid medical bills.) Patients, of course, always retain the right to contest these actions taken by medical providers. If that dispute cannot be resolved, both parties to that dispute have the constitutional right to have their dispute resolved in a court of law.

The same is true for architects, plumbers, accountants, and all other service providers that we know of. Sometimes there are fee disputes, and these disputes inevitably involve contract law. Absent pre-arranged agreements to arbitrate, these disputes are resolved in the court system.

It would be fundamentally unfair to both lawyers and their clients to compel them to arbitrate attorney fee disputes, especially when that is not required for any other fee dispute with any other professionals or service providers. More importantly, mandatory arbitration could create distrust from the public about the legal profession. From the client's perspective, a fee dispute with their own lawyer would be decided by another lawyer or panel of lawyers, rather than a judge or jury. Some clients may perceive the system as being "rigged" against them and believe the lawyers on the arbitration panel are going to side with the lawyer, rather than the client, since they are all in the same "club." Finally, many of our members represent consumers who are compelled to resolve disputes through arbitration because of an arbitration clause that is buried deep within the terms and conditions of a consumer contract. Rarely does a consumer ever benefit from compelled arbitration.

It is important to note that clients are already protected by the Rules and Ohio law. To be sure, the Rules prohibit attorneys from charging excessive fees. Attorneys who attempt to charge a clearly excessive fee can be subject to discipline. This remains unchanged. The Supreme Court has issued a number of decisions defining what constitutes an excessive fee.

We can see no legitimate reason why attorneys, attempting to collect their fees, should be subjected to a pre-suit requirement to mediate or worse, mandatory binding arbitration—when other businesses or professions have no such rule. Likewise, clients who wish to sue their attorney ought not to be forced to mediate or arbitrate when they would otherwise not be required to do so with any other service provider.

Unique Burdens Placed Upon Contingency Fee Agreements

Third, any proposed Rule change or amendment would, in our view, impose a burden on attorneys who charge contingent fees. The members of the OAJ often work on a contingent-fee basis and are paid only if they recover compensation for the client. Some of these fees are set by statute, such as in workers' compensation and social security disability cases. Additionally, most creditor rights' (debt collection) attorneys work on contingent fees. Some specialty practitioners, such as eminent domain and tax appeal advocates, charge contingent fees. Typically, special counsel hired by the Ohio Attorney General's office works on contingency fees. We have even seen a movement by large or sophisticated commercial clients and insurance companies who are looking to reduce the amount paid for legal fees, to engage in contingency fee agreements.

A contingent fee transfers risk of loss onto the attorney. The attorney assumes the risk that he or she will expend their time and provide legal services with the hope of a recovery for the client. These attorneys often also front the expenses of such cases, further adding to the risk carried by the attorney. The "reward" in this risk-reward arrangement is the attorney's hope the eventual fee will be at least as much, or greater than, the fee the lawyer would have earned if the lawyer were charging by the hour. Attorneys who maintain a practice based upon contingency fees can continue to provide legal services in this manner only if they can collect more than a typically hourly rate on some contingency fee cases. This is because every lawyer who works on a contingency fee basis will work on cases where they will receive no fee at all or receive a fee that is dramatically disproportionately smaller than the amount of time and resources spent on the case. That is how the system works: you win some, you lose some.

Clients benefit from these fee arrangements. Most personal injury clients do not have the financial ability to pay attorneys by the hour to prosecute their cases. Indeed, the contingent-fee model is what enables most plaintiffs to have meaningful access to the civil justice system. Also, some clients *can* pay, but *do not want* to pay. They actively seek the attorney's willingness to accept no fee until a result is achieved.

The Rules require that contingent fee agreements be in writing and signed by both client and attorney. The Rules also require that the fee agreement specify the contingent event (usually a recovery of money) and the method of calculating the fee (usually a percentage). Because of this, contingent fees should not be the subject of dispute: either the contingent event occurred, or it did not. If the event occurred, the attorney is entitled to the fee. Otherwise, the attorney is not.

Yet, on rare occasion, a client attempts to avoid the obligation to pay the contingent fee. Ohio's courts have uniformly protected and enforced these fee agreements. Not only do courts uphold these fee agreements as a matter of contract law, the courts also apply equitable lien rights in favor of the attorney's fee in such cases.

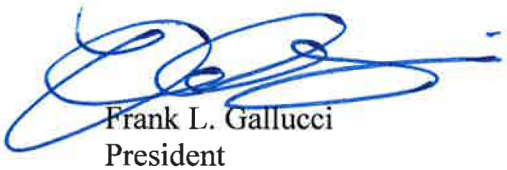
Any requirement that mandates extra-judicial mediation or arbitration will unfairly lengthen the time necessary to judicially enforce contingent-fee agreements on the very rare occasion in which clients contest the fee. Further, such a mechanism *may actually invite* clients to contest contingent fees. Worse still, such mechanisms by their nature would invite arbitrators or mediators – especially those who do not regularly use contingency fee agreements – to incorrectly impose their own negative views of contingency fee agreements or pressure attorneys to reduce their contracted fees. Such practices would weaken contingent-fee arrangements in general. Also, any Rule that forces a procedure for "fee disputes" will necessarily change the risk-reward nature of the contingent-fee contract by adding an additional "risk" for the lawyer to carry. Not only would the attorney have to take the risk of loss, the attorney would also have to take the risk of success at a mandatory arbitration with a client who later refuses to pay the contingent fee.

We believe it is important that attorneys have the ability to enforce contingent-fee agreements using the court system. We oppose any rule change that would create a procedural impediment to this.

Conclusion

OAJ opposes any Rule change that requires or suggests mediation or arbitration for attorney fee disputes. There is no existing problem that needs to be fixed by a change to the Rules. Not only is a change in the Rules unnecessary, such an amendment would violate the Constitution and inevitably cause more problems than it solves. The system works the way it is now. If lawyers and clients have a fee dispute that cannot be resolved, they can resolve that dispute like any other contract dispute by filing a lawsuit or by agreeing to resolve the matter through mediation and arbitration. OAJ respectfully urges the Panel not to make any changes to the Rule relating to attorney fee disputes.

Sincerely,



Frank L. Gallucci
President