

August 28, 2011

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

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

Dear Mr. Davis:

The Michigan Association for Justice (MAJ) opposes the Proposed Amendment of Rule 1.5 of the Michigan Rules of Professional Conduct, and urges the Supreme Court to reject this change. The Michigan Association for Justice agrees with, and adopts, the objections and comments submitted by the Negligence Law Section Council of the Michigan State Bar Association, but we write separately to emphasize and add a few points.

The Michigan Association for Justice consists of, and represents, attorneys throughout this State who receive and pay referral fees. Many of our members do both: refer clients whose matters fall outside their expertise to other lawyers, while receiving referrals of clients with legal issues that are appropriate for their practice.

The use of attorney referrals has been widespread in Michigan for many years. Over those years, the current rule has served both the legal community and the citizens who access it, without any problems that necessitate changing the current system. Currently, the division of fees between attorneys is not limited in amount or percentage. Instead, the market place is allowed to determine an appropriate distribution between the attorney who identifies a client and the attorney who does the work. This is not very different from the division between partners and associates in many of the larger corporate firms, each with their own system of allocating fee income between associates or partners who work on a matter, and partners or associates who bring the client to the firm. However, referral fees between attorneys who are not professionally associated through a firm must be disclosed to the client. Presumably, this restriction is designed to prevent a client from paying, even indirectly, an attorney that the client would not have retained in the first place.

This current rule protects the client's interest in making the client aware of the referral fee, and permitting the client to object, but still preserves the principle of Michigan jurisprudence, that parties should have freedom of contract.

The vast majority of Michigan attorneys who work on a contingent fee basis, and pay or receive referrals fees, operate small businesses. The Michigan Supreme Court has long recognized and enforced the ability of individuals and businesses to freely enter into contracts on whatever terms they choose. In *Terrien v Zwit*, 467 Mich. 56, 648 N.W.2d 602 (2002), the Court, citing previous decisions, stated that “[t]he 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,” citing *Twin City Pipe Line Co. v Harding Glass Co.*, 283 U.S. 353, 356, 51 S.Ct. 476, 476, (1931); see also *Port Huron Ed. Ass’n v. Port Huron Area School Dist.*, 452 Mich 309, 319, 550 N.W. 2d 228 (1996), quoting *Dep’t. of Navy v. Federal Labor Relations Authority*, 295 U.S. App DC 239, 248, 962 F.2d 48 (1992) (discussing the “fundamental policy of freedom of contract” under which “parties are generally free to agree to whatever specific rules they like”).

In addition, in *Terrien*, this Court also stated “absent some specific basis for finding them unlawful, courts cannot disregard private contracts and covenants in order to advance a particular social good. 467 Mich 56, 648 N.W. 2d 602, 611, citing *Johnson v Detroit GH & MR Co.*, 245 Mich 65, 73-74, 222 N.W. 325 (1928).

The ability of parties to enter into contracts on agreed upon terms was further reinforced by this Court in *Rory v Continental Insurance Co.*, in which it was restated that “[c]ourts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract. *Rory*, 473 Mich. 457, 468, 703 N.W.2d 23 (2005).

Attorneys entering into a referral relationship are able to negotiate terms that serve each of their business interests---an attorney taking a case on referral will not agree to a referral fee that he or she would project to be too high to enable him or her to litigate the case without making a profit. The attorneys involved are in the best position to determine on a case by case basis whether the referral fee to be paid or obtained suits their individual business interests. This is why referral fees are commonly adjusted to reflect the invested expenses by each party, the risk in undertaking the matter, the amount of time the case will take to complete, and the complexity of the matter. Imposing an artificial cap does not allow attorneys to freely contract on terms they believe are fair and reasonable for their respective business interests.

While we have not seen identified a problem that would justify interfering with the contractual basis underlying the current system, we do believe that this proposed change would be a disservice to the interests of the legal consumer. In our State, which does not certify sub-specialties of attorneys, it is often the trusted legal professional who knows who is best qualified to handle a particular matter, whether the issue is one governed by family law, criminal law, or the myriad sub-specialties within the field of personal injury. Adopting a cap on referral fees will naturally reduce the number of referrals that are made, and encourage attorneys who would not normally venture into

unfamiliar legal territory to do so. Thus, it is likely that the change will limit the legal consumer's access to referrals to specialists.

Finally, the added language in proposed Rule 1.5(c) and (e)(1) is likely to lead to confusion, as it is not limited to specifically a referral fee. It is worded more broadly and appears to apply to all sharing of fees, such as if an attorney consults with another attorney outside his or her firm on an issue in the case, which may relate to probate, tax, ethics, an appeal, or any other specialized issue with which the original attorney seeks assistance. The proposed language in this rule would require the original attorney to place the amount to be paid in the contingent fee agreement. This would not only be unworkable as it would call for revising the contingency fee agreement as the matter progressed and issues developed calling for outside consultation, but it likely provides the client with unnecessary involvement in the day to day management of a case—such as the situation where an attorney wants to consult with an outside specialist on an ethics issue, or an appeal issue prior to presenting the final recommendation to a client. Certainly the client is going to approve any disclosure of confidential information to another attorney, but to ask the client to approve the amount to be spent in writing (in the contingency fee agreement) is unnecessary and burdensome. An attorney should be able to appropriately share his or her portion of the contingency fee that the client has agreed to—whether that be in the form of a referral fee or in consulting with other counsel.

For the reasons set forth above, as well as the reasons contained in the response submitted by the State Bar Negligence Section, we urge this Court to maintain Rule 1.5 in its present form.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Behm". The signature is fluid and cursive, with the first name "Michael" written in a larger, more prominent script than the last name "Behm".

Michael J. Behm,  
President, Michigan Association for Justice