



NEGLIGENCE LAW SECTION

August 1, 2011

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Supreme Court Clerk
P.O. Box 30052
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Re: ADM File No. 2010-07
Proposed Amendment of Rule 1.5 of the Michigan Rules
of Professional Conduct (MRPC)

Dear Supreme Court Clerk:

The Negligence Law Section Council of the Michigan State Bar Association unanimously opposes the Proposed Amendment of Rule 1.5 of the Michigan Rules of Professional Conduct, and urges the Supreme Court to reject this unnecessary change.

The Negligence Law Section is among the largest sections of the Michigan State Bar, and represents the attorney population that will be most directly impacted by this proposal. The Negligence Section Council is comprised of equal numbers of plaintiff and defense litigators, and therefore we provide the most balanced and considered voice of any negligence lawyer organization.

The Negligence Section has voted unanimously to oppose the proposed amendment of Rule 1.5. The membership is a group of highly experienced and respected practitioners, and not a single member can articulate a meaningful problem with the current rule concerning referral fees between attorneys: It serves the public well by making certain that the best specialists are handling the cases; and it provides a firm economic foundation for attorneys to specialize and therefore serve the legal consumer at a much higher level.

1. **The Proposed Amendment is an Unnecessary Intrusion upon the Right To Freely Contract.** The attorney referral contract is the product of a free, voluntary negotiation between sophisticated professionals. As such, the terms of the referral relationship should occur freely and outside the intrusion of the Court or the application of an arbitrary 25% cap as required by the proposed amendment. Because clients are unaffected by their attorneys' referral fee arrangement (i.e., the fee they pay is not affected), limiting the division of the fee among the lawyers will not protect the public.

This Court has a long history of protecting the sanctity of the freedom of contract in our state. In the *Rory* decision, the Court observed 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), quoting, Kessler, *Contracts of Adhesion – Some Thoughts about Freedom of Contract*, 43 Colum. L. R. 629 (1943). The *Rory* decision is perhaps the best example of the Court's defense of freedom of contract and respect for individuals' ability to "freely arrange their affairs via contract." The Court noted that "the general [rule of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreement voluntarily and fairly made shall be held valid and enforced in the courts." *Id.* at 468. After all, who is more competent to negotiate the division of legal fees than lawyers?

In *Rory* this Court enforced the literal language of an automobile insurance policy against a consumer. An automobile insurance policy is essentially an adhesion contract where a consumer has no ability to negotiate the language of the contract. In an attorney referral contract, both sides are sophisticated professionals who always have the ability to negotiate the agreement. It makes less sense to provide intrusive governmental "protections" to a legal professional when such a protection is not afforded an auto insurance consumer with no bargaining power whatsoever.

Beyond *Rory*, in case after case, Michigan jurisprudence has aggressively protected the freedom of contract. The Court has held 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. *Zahn v. Kroger Co. of Michigan*, 483 Mich. 34 (2009), 764 N.W.2d 207 (2009), *Terrien v. Zwit*, 467 Mich. 56, 71, 648 N.W.2d 602 (2002), quoting *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 357, 51 S.Ct. 476, 75 L.Ed. 1112 (1931). This Court celebrates the "fundamental policy of freedom of contract" under which "parties are generally free to agree to whatever specific rules they like." *Port Huron Ed. Ass'n v. Port Huron Area School Dist.*, 452 Mich. 309, 319, 550 N.W.2d 228 (1996).

2. **The Current Rule 1.5 Works.** Rule 1.5 of the MRPC has effectively addressed referral fees for decades. It strikes an appropriate balance between respect for the judgment of attorneys and the importance of disclosure to (and acceptance by) clients regarding the referral relationship. Rule 1.5 of the MRPC already requires several essential protections for clients related to referral fees including: 1) The disclosure of a division of the fee between two lawyers who are not in the same firm, 2) The client is provided an opportunity to object to the division of the fee, and 3) The total fee must be reasonable. Forty-nine of the fifty states agree with the wisdom of Michigan's current approach.

This Proposal provides a solution where no problem exists. The proposed amendment of Rule 1.5 invites the Court to intervene in the ability of professionals to freely contract among themselves. For decades, and without controversy or issue, attorneys in Michigan have voluntarily managed referral relationships in a manner that reflects consideration of the skill, reputation and experience of each attorney. 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. .

3. **The Current Rule 1.5 Encourages Diversity of Practice and Competition.** The Court must be wary of the unintended consequences that the proposed amendment may produce. In Michigan, thousands of attorneys currently compete with each other in an intensely competitive market. The referral fee is an important competitive tool that should be available to all attorneys in their effort to build relationships between each other. The proposed amendment would eliminate this ability to compete on the basis of the referral fee. As a result, smaller, specialized firms that may offer larger referral fees will undoubtedly suffer. A diverse collection of law firms benefits our profession and the public.

4. **The Public Will Be Harmed By The Proposed Amendment as Less Qualified Lawyers Will Not Refer Cases To Better Qualified Specialists.** The current Rule encourages attorneys to pass along cases to the most qualified lawyers. Of course, this is an important public policy objective. Limiting referral fees will deter less-qualified attorneys from referring cases to specialists that will achieve a far better outcome for the client. This concern extends to every area of practice where more experienced, specialized representation benefits the client and public.

5. **The Proposed Amendment Will Unnecessarily Upset the Economy Lawyers Have Worked in for Decades.** Attorneys and law firms, large and small, have relied upon professional referrals through business relationships for decades. This system has served the public well, and is the fundamental source of business for thousands of lawyers. The Proposed Amendment will unnecessarily upset the underpinnings of this system, which has operated without meaningful complaint for decades. Doubtless, many attorneys' practices will suffer dramatically, and, in fact, may well not survive. A law firm is like any other business, and this means jobs will disappear under the Proposed Amendment.

5. **The Proposed Amendment will Clutter the Courts and Burden Judges.** The proposed Rule 1.5(f) requires courts to approve any referral fee in excess of the 25% cap. The proposed Rule 1.5(f) asks judges to consider whether a larger referral fee is warranted "as a reflection of the referring attorney's substantial input of time or cost, [or] assumption of risk." The application of this provision by judges will only frustrate courts with an ambiguous, time consuming adjudicative responsibility.

The Negligence Section of the State Bar believes that the proposed amendment offends the freedom of contract among professionals, ignores the fact that the present rule has worked without meaningful complaint for decades, and introduces new problems outlined in this comment. For these reasons the Court should reject the Proposed Amendment.

Finally, the Negligence Section does not offer an alternative proposal for consideration by the Court given the absence of problems related to the current rule.

Very truly yours,



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