

**STATE OF MICHIGAN
IN THE SUPREME COURT**

LAW OFFICES OF JEFFREY SHERBOW, P.C., Supreme Court No. 159450

Plaintiff-Appellee,

Court of Appeals No. 338997

v

Oakland County Circuit Court
No. 15-147488-CB

FIEGER & FIEGER, P.C. d/b/a FIEGER,
FIEGER, KINNEY & HARRINGTON, P.C.,

Defendant-Appellant.

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PLAINTIFF-APPELLEE'S ANSWER TO APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF JURISDICTIONAL BASIS

Plaintiff-Appellant/Cross-Appellee agrees with Defendant-Appellee/Cross-Appellant's Statement of Jurisdictional Basis.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I.A. IS AN ATTORNEY-CLIENT RELATIONSHIP REQUIRED IN ORDER TO ETHICALLY REFER HIM TO ANOTHER ATTORNEY?

The trial court answered, "Yes".

The Court of Appeals answered, "No".

Plaintiff-Appellee contends the answer should be, "No".

Defendant-Appellant contends the answer should be, "Yes".

- I.B. DOES PLAINTIFF SATISFY FIEGER FIRM'S NEW DEFINITION OF "ATTORNEY-CLIENT" RELATIONSHIP?

The trial court did not address this question.

The Court of Appeals did not address this question.

Plaintiff-Appellee contends the answer should be, "Yes".

Defendant-Appellant contends the answer should be, "No".

- II. DOES DEFENDANT HAVE THE BURDEN OF PROVING THE ALLEGED ILLEGALITY OF THE CONTRACT WHERE THE JURY FOUND THAT THREE OF THE FOUR CLIENTS HAD BEEN ADVISED OF THE FEE SHARING AGREEMENT?

The trial court answered, "No".

The Court of Appeals answered, "Yes".

Plaintiff-Appellee contends the answer should be, "Yes".

Defendant-Appellant contends the answer should be, "No".

- III. IS DEFENDANT PRECLUDED FROM CHALLENGING THE VERDICT IN FAVOR OF PLAINTIFF BECAUSE IT DID NOT APPEAL FROM IT AND WHERE THE ERRORS COMMITTED BY THE TRIAL COURT DID NOT TAIN THAT VERDICT?

The trial court did not address this question.

The Court of Appeals answered, "Yes".

Plaintiff-Appellant/Cross-Appellee contends the answer should be, "Yes".

Defendant-Appellee/Cross-Appellant contends the answer should be, "No".

INTRODUCTION

FIEGER FIRM's Introduction is utterly uninformed by the fact that there was a trial and a jury verdict -- which necessarily entailed certain findings of fact relevant to this appeal. FIEGER FIRM has not cross-appealed from the trial results¹, and therefore cannot challenge the correctness of the jury's findings. *Ford Motor Co v Bendix Corp*, 83 Mich App 108, 112 (1978) (jury verdict and findings implicit therein binding, and may not be relitigated on appeal). Therefore, the parties and this Court are bound by the unappealed jury findings. *Id.* Those relevant to this appeal are as follows:

- (1) DION RICE was MR. SHERBOW's client. (I, 22, ¶1)². Therefore, even under Defendant's view of the law, MR. SHERBOW was entitled to refer him to the FIEGER FIRM. (IV, 63, 66, 69).³
- (2) DION RICE was advised of the fee splitting agreement at the July 26, 2012, meeting at FIEGER FIRM. (I, 22-23, ¶2; IV, 66).
- (3) MR. DANZIG had the authority to bind FIEGER FIRM to the referral fee agreement. (I, 23, ¶3). Therefore, the referral fee agreement constituted a binding contract.
- (4) There was no conspiracy between MR. DANZIG and MR. SHERBOW to defraud the FIEGER FIRM, because the jury was advised that it could not find apparent authority if MR. DANZIG was serving the interest of himself or MR. SHERBOW rather than FIEGER FIRM. (I, 23, ¶3; IV, 64).

¹As the Court of Appeals recognized (I, 6 n3), Defendant's Cross-Appeal in the Court of Appeals was limited to whether the trial court correctly decided Defendant's July 2016 Motion for Summary Disposition. (Defendant's Brief as Cross-Appellant: Statement of Basis of Jurisdiction, p vii; Statement of Questions Presented; I. INTRODUCTION, p 2 ["In this cross-appeal, Defendant goes back to before the trial and takes an appeal from the trial court's August 17, 2016 Opinion and Order Denying In Part Defendant's Motion for Summary Disposition."])

²Appendix references by ([volume], [page no]) are to those filed with FIEGER FIRM's Application for Leave to Appeal. Additional Appendices are denoted by capital letters.

³Jurors are presumed to have followed the trial court's instructions. *Bordeaux v Celotex Corp*, 203 Mich App 158, 164 (1994).

Consequently, this Court should reject outright the histrionic rantings of fraud and wrongdoing which permeate FIEGER FIRM's entire brief. Moreover, this Court should refuse to consider those of FIEGER FIRM's arguments which are premised on factual averments which are contradicted, or not supported, by the jury's verdict.

COUNTER-STATEMENT OF FACTS

FIEGER FIRM does not even attempt to present an account of “all material facts, both favorable and unfavorable . . . fairly stated without argument or bias”, MCR 7.212(C)(6). Some averments are demonstrably false. For example:

- The funeral at which Mr. Sherbow supposedly solicited the case (Defendant’s Application p 7) took place on July 28, 2012 (II, 96, 104), two days **after** the July 26, 2012 meeting at which DION RICE retained the FIEGER FIRM.
- MR. LINDEN was not the Personal Representative of Mr. Rice’s estate at the time FIEGER FIRM was retained (Defendant’s Application, p 9) (I, 267), and the trial court ruled that he was not a client for purposes of this case (III, 182).
- The jury found that the fee sharing agreement was disclosed at the July 27 meeting. (I, 22-23, ¶ 2; IV, 66).

That being said, there is nothing to be gained by pointing out every inaccurate or misleading averment in FIEGER FIRM’s Statement of Facts. That would still leave this Court without an accurate and coherent factual account. Accordingly, Plaintiff will fill the vacuum left by FIEGER FIRM.

Introduction

This is an action by Plaintiff, JEFFREY SHERBOW⁴, to recover a referral fee on four personal injury cases that settled for a total of \$10.5 million. Defendant, GEOFFREY FIEGER, defended his refusal to pay, *inter alia*, on the ground that his former partner, JEFFREY DANZIG, attempted to defraud him by falsely claiming that MR. SHERBOW referred the four cases to the FIEGER Firm ("THE FIRM").

⁴Technically, the parties are professional corporations. However, since both are 100% owned by their individual principals, they will be referred to as individuals or entities depending on what seems most appropriate in context.

The jury did not accept MR. FIEGER's fraud theory. However, it found in MR. SHERBOW's favor on only one of the four cases after the trial court:

- (1) Instructed the jury that MR. SHERBOW had to have had an attorney-client relationship with the tort plaintiffs before he could refer them to anyone; and
- (2) Refused to instruct the jury that Defendant had the burden of proving that the clients either objected to the referral fee, or that they were never informed of the referral fee agreement. at the time they retained THE FIRM.

The Court of Appeals reversed and remanded for a new trial on the other three cases. FIEGER FIRM appeals from that decision.

Historical Facts -- How THE FIRM Processed Incoming Referrals

Testimony as to how THE FIRM processed incoming referrals from other attorneys in 2012 came from two former partners and one current partner.

JEFFREY DANZIG worked at THE FIRM for 12½ years -- the last 2½ as a partner -- from June 2001 through January 2014. (I, 139, 197, 199 [Exhibit 17]). In 2012, MR. DANZIG controlled and administered THE FIRM's intake department. (I, 140). The department had a clerical staff of 56 people taking approximately 100 calls/day. (I, 141). It was MR. DANZIG's job to determine which cases THE FIRM would accept, and which it would refer to other attorneys in exchange for a referral fee. (Id., 141, 142).

MR. DANZIG chaired a committee of three attorneys who reviewed all of the cases that came into the intake department. (I, 141). Once the committee decided to accept a case, it was MR. DANZIG's job to process the relevant information and provide memos and updates to MR. FIEGER. (I, 141-42). In 2012, the committee consisted of MR. DANZIG, BOB GIROUX, and JAMES HARRINGTON. (I, 172).

By virtue of his position, MR. DANZIG had authority to sign referral agreements on behalf of THE FIRM. (I, 143, 147, 152).

During his cross-examination of MR. DANZIG, MR. FIEGER introduced an October 15, 2001, memorandum, which reads as follows:

" I have repeatedly over the years told all Attorneys that no one may accept a referral from another attorney, friend, former friend, former associated, etc., without bringing the case to me to determine if we want to take the case and invest money in it. Apparently, this in [sic] continually being ignored. As a result, I am handling it another way. . . . **if you don't have a signed document by me agreeing to accept the referral, the Firm will not pay you or the referring attorney.**"

(Exhibit TT [Appendix A]) (emphasis added).

MR. DANZIG testified -- without contradiction⁵ -- that he had authority to bind THE FIRM without MR. FIEGER's signature (I, 147, 224); that in practice there was never a policy of requiring MR. FIEGER to approve each referral in writing (I, 152; III, 166-67); and that MR. FIEGER approved every referral that MR. DANZIG ever brought into THE FIRM (I, 218). BOB GIROUX, who was also a partner at THE FIRM, corroborated that the memorandum was not followed. (II, 20-21).

MR. HARRINGTON testified that the memorandum represented THE FIRM's policy (III, 11); that he personally never deviated from it (id., 26-27); and that it was followed regularly "to the best of my knowledge" (id.). Having so testified, MR. HARRINGTON admitted that he had violated the policy on one occasion. (III, 27). He did not testify as to whether the policy applied to MR. DANZIG, MR. GIROUX, or other supervisory attorneys in THE FIRM.

⁵MR. FIEGER was not permitted to testify because he chose to participate as an attorney rather than as a witness. (Order of 1/17/17 [Appendix B]).

Historical Facts -- MR. SHERBOW's Relationship with Charles Rice

Charles Rice was a retired Detroit Police Department Sergeant. (II, 73). Years ago, MR. SHERBOW was introduced to him by a mutual friend. (II, 72-73). MR. SHERBOW would meet Mr. Rice every so often -- maybe a dozen times or so over the years -- at a diner across the street from Henry Ford Hospital. (II, 73, 74). They also spoke on the phone a few times. (II, 73). MR. SHERBOW helped out some of Mr. Rice's family members. (II, 73).

In 2011, Mr. Rice was the President of Gratiot McDougall United Community Development Corporation, an organization trying to bring affordable housing to the east side of Detroit. (II, 61). JENNIFER HATCHETT was the Executive Director. (II, 61). The organization was involved in some litigation, and Mr. Rice suggested to MS. HATCHETT that they consult "his friend, Jeffrey Sherbow". (II, 61). MR. SHERBOW was retained at a dinner table when he said, "Give me a dollar, I'll be [your] lawyer." (II, 74).

MR. SHERBOW looked over some of the corporation's contracts, as well as developer agreements and invoices, and determined that the corporation was "really getting screwed". (II, 62). In some pending litigation, Mr. Rice's corporation was being represented by attorneys with potential conflicts of interest. (II, 73-74). MR. SHERBOW consulted with Mr. Rice and MS. HATCHETT (II, 62; Plaintiff's Exhibit 1 [Appendix C]), met with the other attorneys (II, 74), and scheduled a meeting with Mr. Rice and MS. HATCHETT for July 17, 2012 (II, 62-63, 74).

That meeting never took place. Mr. Rice was killed in a motor vehicle accident in Ohio on July 13, 2012.

Historical Facts -- The Retention

On July 13, 2012, Mr. Rice was driving in Ohio with three family members in the car: DOROTHY DIXON, Mr. Rice's longtime companion; and two cousins of Charles and

DOROTHY's, PHILLIP HILL and MERVIE RICE. (I, 97-98). Mr. Rice drove off the road. (I, 97-98). He was killed; DOROTHY DIXON was rendered comatose; MS. RICE and MR. HILL were seriously injured. (I, 156-57).

On the day of the accident, Charles and DOROTHY's son, DION RICE, called MS. HATCHETT and told her about it. (II, 65; III, 114). He asked for the name of the attorney who was his father's friend. (II, 65, 66; III, 114-15). MS. HATCHETT gave DION MR. SHERBOW's number. (II, 66; III, 107). At the time, DION was looking to MR. SHERBOW as to what to do. (III, 115). MS. HATCHETT said that DION later told her that he had gotten in touch with MR. SHERBOW and set up a meeting. (II, 67).

That same day, Charles RICE's mother told his sister, DOROTHY LAWRENCE, about the accident. (II, 51). She told MS. LAWRENCE to go to Dayton to check on Charles. (II, 51). MS. LAWRENCE got to Dayton on the day of the accident, and found that Charles was dead and that the other three were in the hospital. (II, 51). She stayed in Dayton until the following Monday or Tuesday, when she returned to Detroit with DION. (II, 51-52).⁶

On the day of the accident, MS. HATCHETT called MR. SHERBOW and told him that Charles was dead and that MS. DIXON was in a coma. (II, 76, 78-79, 116; Plaintiff's Exhibit 6 [Appendix D], p 31). She said that DION wanted to talk to MR. SHERBOW. (II, 118, 121). She gave MR. SHERBOW phone numbers for DION and MS. DIXON. (II, 137).

⁶July 13, 2012, was a Friday, so MS. LAWRENCE and DION returned to Detroit on July 16 or 17.

MR. SHERBOW immediately called MR. DANZIG⁷, because it was a very serious case with a large potential exposure (I, 160; II, 76, 78), and THE FIRM had the resources to fund this type of case (II, 78-79). MR. SHERBOW was referring the cases because he did not have those resources, and it was in the clients' best interest to get them to THE FIRM. (II, 93).

When MS. HATCHETT called a second time with more details, MR. SHERBOW called MR. DANZIG again. (II, 79). MR. SHERBOW was setting up MR. DANZIG to have the victims take their cases to THE FIRM. (II, 119).

At 6:00 pm the following day, July 14, 2012, as he was on his way to Dayton, DION called MR. SHERBOW. (II, 80-81, 120-22; Appendix D, p 31). Three days later, July 17, DION called MR. SHERBOW again to arrange a meeting. (II, 81, 124; Appendix D, p 33).

MR. SHERBOW met with DION and MS. LAWRENCE later that week. (II, 54, 81; III, 108, 118-19). MR. SHERBOW got as much information as he could from DION (I, 86-87, 114-117, 168; Plaintiff's Exhibit 5 [Appendix E]), and passed it along to MR. DANZIG (I, 114, 158-59), who opened a file (I, 143, 154-55; Plaintiff's Exhibit 7 [Appendix F]).

MR. DANZIG immediately began calling MERVIE RICE at the number MR. SHERBOW had given him. (I, 165-66). MR. DANZIG updated the file the next day with information he had gotten from MS. RICE on the phone. (I, 161-62, 165-66, 169-72; II, 34, 36, 40-41; Plaintiff's Exhibit 8 [Appendix G]).

On July 20, 2012, MR. SHERBOW called MR. DANZIG to update him about scheduling a meeting with everyone. (II, 88; Appendix D, p 36). A July 26 meeting was organized and

⁷MR. SHERBOW and MR. DANZIG were friends, although not close ones. (I, 222-23; II, 93-94). Once a year, MR. SHERBOW went to MR. DANZIG's place up north for golf with six other guys. (I, 222; II, 93). Other than that, the two did not socialize (I, 222, 223; II, 94), although they did communicate regularly (I, 224).

scheduled by MR. DANZIG and MR. SHERBOW (I, 177), with information gotten from DION (II, 89), who assembled and organized everything (I, 239; II, 77).

On July 25, the day before the meeting, MR. DANZIG generated a handwritten intake sheet for DOROTHY DIXON (Plaintiff's Exhibit 9 [Appendix H]), who was still in a coma (I, 174-75). MR. DANZIG had spoken to DION about being her guardian/conservator. (I, 175-76).

On July 26, 2012, a meeting was held at THE FIRM's offices. It was attended by MESSRS. DANZIG and SHERBOW, DION RICE, MERVIE RICE and her daughter, and Jody Lipton, Esq. (I, 177). THE FIRM referred the first-party claims to Ms. Lipton, who paid THE FIRM a referral fee. (I, 179).

MR. DANZIG took the lead at the meeting. (II, 90). He introduced everyone, including MR. SHERBOW as the attorney who had referred the case to THE FIRM. (I, 178; II, 90-91). He explained that THE FIRM would represent them; that he would be the attorney; and that MR. FIEGER would be the trial attorney. (II, 90). He also explained the referral fee arrangement with MR. SHERBOW. (I, 179).⁸ MR. DANZIG testified that no one objected to the referral fee. (III, 148).

Two retainer agreements were signed at that meeting. (II, 91). One was a retainer agreement signed by MS. RICE. (Plaintiff's Exhibit 10 [Appendix I]). The other was a retainer

⁸MERVIE RICE testified that although MR. DANZIG may have explained the referral fee, she did not recall it. (III, 65, 72). She also admitted that she did not object to it at the July 26 meeting. (III, 77-78). DION RICE at first testified that MR. DANZIG did not inform him about the referral fee (III, 112-13), but then testified that he did not remember everything that was said (III, 120).

In any event, **the jury's verdict necessarily demonstrates its finding that the referral fee was, in fact, disclosed at the July 26 meeting.** (Compare IV, 66 [client must be advised] with IV, 79 [verdict in favor of Plaintiff as to DION RICE]).

agreement signed by DION RICE on behalf of Charles' Estate. (III, 112; Plaintiff's Exhibit 11 [Appendix J]).

After signing up the clients, MR. DANZIG immediately told MR. FIEGER about the case and MR. SHERBOW's referral. (I, 195, 196, 220, 228; II, 161). MR. FIEGER had no objection. (I, 196, 197; II, 161). A few days later, MR. GIROUX spoke to MR. FIEGER on the phone concerning MR. DANZIG's working on the case referred by MR. SHERBOW. (II, 19). MR. FIEGER had no problem with the referral. (II, 19).

PHILLIP HILL was not available for the July 26 meeting. (I, 187). So MR. DANZIG and Ms. Lipton went to his apartment on August 6, 2012. (I, 187; III, 126). At that time, MR. HILL signed a retainer agreement with THE FIRM (Plaintiff's Exhibit 14 [Appendix K]). He recalled MR. DANZIG explaining how the fees would be charged. (III, 126).

However, he and MR. DANZIG gave conflicting testimony as to whether MR. DANZIG advised him of MR. SHERBOW's referral fee. MR. DANZIG testified that he gave a complete explanation. (I, 187). MR. HILL denied that. (III, 126).

MS. DIXON testified that she was in a coma for two months after the accident. (III, 89). **She confirmed that DION had retained THE FIRM on her behalf** (III, 88, 92), as Defendant conceded in its opening statement (I, 125, 128), as MR. DANZIG (III, 143-44) and MR. SHERBOW (II, 77, 95) recognized at the time, and as the judge recognized at trial (IV, 173). She first learned of THE FIRM's retention a year and a half after the accident, when DION told her that he had retained THE FIRM. (III, 88).

On August 2, 2012, MR. DANZIG wrote a letter to MR. SHERBOW (Plaintiff's Exhibit 12 [Appendix L]), confirming MR. SHERBOW's entitlement to a one-third referral fee on the MERVIC RICE case. (I, 126-27, 181-82). On August 15, 2012, MR. DANZIG sent MR.

SHERBOW a second letter (Plaintiff's Exhibit 15 [Appendix M]) on behalf of THE FIRM, confirming his entitlement to a one-third attorney fee on the other three cases. (I, 129, 184-85).

As the case progressed, local counsel in Ohio wanted more than the 10% of the fee to which he had agreed. (I, 191). MR. DANZIG discussed the matter with MR. SHERBOW, who agreed to reduce his share of the fee from 33^{1/3} to 20%. (II, 98). On January 2, 2014, MR. DANZIG sent MR. SHERBOW a letter (Plaintiff's Exhibit 16 [Appendix N]) confirming the new fee split. (I, 130; II, 158).

MR. DANZIG left THE FIRM in January 2014. (I, 148, 193; Plaintiff's Exhibit 17).

Historical Facts -- The Settlement and the Disavowal of the Referral Fee Agreement

When MR. DANZIG left the firm, MR. SHERBOW became concerned about his fee, given THE FIRM's history on such matters. (II, 43, 110). MR FIEGER did not like paying referral fees. (I, 170). At the time, MR. SHERBOW had a case with MR. GIROUX, who assured MR. SHERBOW on several occasions that he would get paid. (II, 28, 101-02).

In 2015, MR. SHERBOW learned from MS. DIXON that THE FIRM had obtained a favorable outcome on liability, that the demand was \$20 million, and that there was an \$11 million insurance policy. (II, 100). Accordingly, on February 20, 2015, MR. SHERBOW wrote to MR. FIEGER and to local Ohio counsel reminding them of his entitlement to a referral fee. (II, 99-100; Plaintiff's Exhibit 18 [Appendix O]).

In closing argument, MR. FIEGER admitted what he did in response:

"As -- after we settled the case, he wrote a letter saying -- in February, saying where's my money. And, of course, at that time, **my first duty is to say to my clients**, as we're going to settle this case, I have to divide up the fees. Let's -- I have to -- **I've received a letter from Mr. Sherbow**, and I've looked back in the file now, **and I see two letters from Mr. Danzig saying Mr. Sherbow referred the case**. And they go, what, who's Mr. Sherbow -- who's Mr. Sherbow? Well, of course, he's the man who referred your case. He was -- he -- **you're his client**. They go, what? He's not my attorney. I never hired him. . . .

"**So I said, well, you know what, he's placed a lien down in Ohio on your money.**^{9]} So they had to write letters. Says confirm I retained your office directly. . . . This is what they testified to. **I never retained an attorney by the name of Jeff Sherbow.** I have no relation whatsoever with Sherbow. He did not refer my case to you. Dion Rice, same thing. I did not refer you. Mervie Rice, same thing. Dorothy Dixon, same thing, **'cuz he had filed a lien on their money** in Ohio even though he's not an Ohio lawyer."

(IV, 41-42) (emphasis added).

On March 31, 2015, MR. FIEGER wrote the following letter to MR. SHERBOW:

"Dear Mr. Sherbow;

"A very troubling problem has arisen with the cases I had been handling in Dayton, Ohio.

"I was originally informed by Mr. Danzig that you referred the cases to us. I have now confirmed that you did not, and that any representations to the contrary are untrue.

"Indeed, my office was initially directly contacted by Ms. Rice within 4 days of the accident. You obviously didn't refer her case, she doesn't even know you. Neither does Mr. Hill, nor Mr. Dixon. Indeed, even Dion Rice told you at his father's funeral that he had contacted our offices.

"What prompted you and Mr. Danzig to think you could claim a referral fee? I remain.

"Very truly yours,
"Geoffrey Fieger"

(II, 102-03; Plaintiff's Exhibit 19 [Appendix P]).

On April 15, 2015, MR. FIEGER wrote a second letter to MR. SHERBOW:

"Dear Mr. Sherbow:

"Several weeks ago, I wrote to you asking that you contact me to explain how you made the apparent 'claim' that you referred the four 'Rice' cases to my office. You never contacted me.

⁹MR. SHERBOW had filed an attorney lien in the Ohio court (Appendix V) only on the attorney fees in order to protect his fee. (II, 106). He withdrew it after MR. FIEGER violated the lien by taking all the money. (II, 113-14).

"Instead, today I learned that you had improperly filed a false 'lien' with the Ohio court. I have been informed that your actions may be contrary to the Rules of Professional Responsibility in Ohio. They may also be contrary to the Rules in Michigan, and other pertinent statutes.

"I possess overwhelming evidence that you never 'referred' any of the Rice cases to our offices. In fact, the only 'client' you ever met was Dion Rice, however, he is not a party, and he contacted our offices before you met him at his father's funeral.

"You have never been admitted pro hoc vice in the Ohio case. You have never been an attorney of record in the case. Your improper filing constitutes an improper attempt to interfere with the settlement.

"In short, you have no claim against any of the proceeds of this case. You may think you have a contract claim against my firm, however, if you go down that road it will be extremely perilous for you.

"If you do not take immediate steps to withdraw your false, scandalous and improper pleading in the Ohio court, both myself, Mr. Intilli, and my clients will take further action against you.

"Sincerely,
"Geoffrey Fieger"

(II, 105; Plaintiff's Exhibit 28 [Appendix Q]).

MR. SHERBOW responded two days later:

"Dear Mr. Fieger:

"I did in fact receive your correspondence with was dated March 31, 2015 as well as your correspondence dated April 15, 2015.

"I also had received correspondence from your firm regarding this matter on August 2, 2012 as well as January 2, 2014. I did reach out to you back on February 20, 2015, and did not have a response from your office.

"In order to refresh your memory, I attach the correspondence from August 2, 2012, January 2, 2014, as well as my letter of February 15, 2015.

"I also do acknowledge that I filed the attorney lien in Ohio, although I have certainly not sought to practice in Ohio, so I question the need to proceed Pro Hoc Vice.

"In any event, I would take issue with your references that I have no claim to the fees in this matter pursuant to the correspondence from your partner as referenced.

"I would not think that you would impugn the integrity of your partner, Jeffrey Danzig as his integrity is beyond reproach. I initiated bringing Dion Rice to Jeffrey Danzig. I had a relationship with the decedent Charles Rice that predated his death by at least two years.

"In any event, I have reached out to you. I understand that Mr. Danzig had reached out to you this past week and discussed these matters with you. I also would like to do so and if appropriate have Mr. Danzig, yourself and I meet at a mutually convenient time. I do not relish a dispute and would rather sit down as professionals and discuss this matter.

"I would also include and reference Michigan Rules of Professional Conduct, Rule 1.15 called Safe Keeping Properties, specifically 'C' which is quoted as follows . . . (c),

"When two or more persons (one of whom may be the lawyer) claim interest in the property, it shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute."

"As a result of my attorney lien, it certainly would not affect the balance of the distribution to the clients nor for that matter to Mr. Intilli.

"In any event, I certainly would like the opportunity to discuss this matter with you at your convenience. My cell phone is (248) 880-0022.

"I look forward to hearing from you. I remain . . .

"Very truly yours,
"Jeffrey Sherbow"

(II, 105; Plaintiff's Exhibit 29 [Appendix R]).

MR. FIEGER eventually drafted four identical letters (Plaintiff's Exhibits 20-23 [Appendix S]), and four substantially identical affidavits (Plaintiff's Exhibits 31-34 [Appendix T]) that he told his clients he needed them to sign. (III, 78). All were to the effect that MR. SHERBOW was not their attorney, that they did not want him to get a referral fee, and that he did not refer them to THE FIRM.

The Litigation -- Pre-Trial Proceedings

MR. SHERBOW filed his Complaint on June 10, 2015. (Docket Sheet, p 16). As the case developed, MR. FIEGER's defenses were that: (1) MR. DANZIG falsely claimed that MR. SHERBOW referred the cases; and (2) the referral fee agreement was unenforceable as contrary to public policy because it did not comply with the following Rule of Professional Conduct:

"(e) A division of a fee between lawyers who are not in the same firm may be made only if:

"(1) **The client is advised of and does not object to the participation of all the lawyers involved;** and

"(2) The total fee is reasonable."

MRPC 1.5(e) (emphasis added).

On July 1, 2016, in an effort to narrow the issues for trial, Plaintiff filed a Motion for Partial Summary Disposition, positing the following propositions:

- (1) As a matter of law, because MR. DANZIG was an ostensible agent of THE FIRM, the letters signed by MR. DANZIG created a prima facie contractual obligation by THE FIRM to pay Plaintiff 20% of the net attorney fee;
- (2) Defendant had the burden of proof on its Affirmative Defense of illegality of contract; and
- (3) The only issue to be tried was whether the clients were advised of the division of fees when they retained THE FIRM.

(7/1/16 Motion for Partial Summary Disposition and Brief in Support).

In its August 17, 2016, Opinion and Order (Appendix U), the trial court made several significant rulings:

- (1) MR. SHERBOW did **not** have to have an attorney-client relationship with the people he referred to THE FIRM in order to be entitled to a referral fee. (Appendix U, p 3-4).

- (2) "If Plaintiff . . . performed the service of bringing the clients to Defendant, who received the benefit of representing four valuable tort cases -- [t]his is adequate consideration." (Id., p 4).
- (3) "Based on the plain language of [MCR 2.111(F)(3)(a)], the Court finds that Defendant's claim that the fee-sharing agreement is void as a matter of public policy **is an affirmative defense, on which, Defendant carries the burden [of proof].**" (Id., p 7) (emphasis added).
- (4) As to whether, under MRPC 1.5(e), the client must object at the time the client retains the referred attorney (as Plaintiff maintained), as opposed to at the time of payment (as Defendant argued), the trial court ruled:

"Initially, the Court notes that there is no explicit temporal element to MRPC 1.5(e). **But if the Court were to accept Defendant's approach, then the representing attorney could use his or her months -- or years -- long relationship with the client to influence said client to object at the last moment -- thereby avoiding paying any agreed referral fee long after the referring attorney lived up to his or her end of the bargain. That doesn't make sense.**

"Rather, **the Court finds that any objection must be raised by the time the referring attorney completes his or her bargained-for exchange -- bringing the client to the representing attorney.** This is complete when the client executes the retainer agreement with the representing attorney." (Appendix U, p 8) (emphasis added).

The Litigation -- The Trial¹⁰

Beginning with its opening statement (I, 115-16, 122), Defendant made it a central theme of the defense that none of the four clients had ever retained MR. SHERBOW as their attorney. (I, 166, 189; II, 132-33; III, 64, 90, 124). Despite its pre-trial ruling that an attorney-client relationship was not necessary to entitle Plaintiff to an attorney fee (Appendix U, p 3-4), the trial court allowed Defendant to elicit testimony on that issue, saying that it would deal with the issue in the instructions. (II, 132).

¹⁰The testimony on which the foregoing historical factual account is premised will not be repeated here.

When the time came, the trial court instructed the jury, over Plaintiff's objection (III, 171, 174-81), that Plaintiff had to prove that the four tort plaintiffs were MR. SHERBOW's clients before he referred them to THE FIRM. (IV, 63, 69).

In closing argument, Defendant made that a central theme of the defense:

"The Judge will instruct you -- **the first question that you'll be asked and then the case will be over -- on the verdict form is were any of the following clients of Jeffrey Sherbow:** Mervie Rice, was she a client of his? Dion Rice, on behalf of Charles Rice, was he a client? He said I called Mr. Fieger. I've retained Mr. Fieger. Phillip Hill, was he a client? They've never even met. And Dorothy Dixon, was she a client? Those are the first four questions. **If you answer no, the case is over.**

"Here's the definition of a client. The judge will instruct you on the law. The definition of a client is a person or entity that employs a professional for advice or help in that professional's line of work. **Not one person employed Mr. Sherbow.** And it -- by the way -- it's not even his line of work. That's it -- that's it, that's the definition of a client, and that's --"

(IV, 33) (emphasis added).

Again despite a previous ruling to the contrary (Appendix U, p 7), the trial court refused to instruct the jury that Defendant had the burden of proving that the referral agreement violated MRPC 1.5(e). (III, 190).

Finally, the trial court refused to use Plaintiff's proposed Form of Verdict (Appendix W), which made clear that the time for objecting to the referral fee was at the time the client retained Defendant (id., Nos. 2a., 3a., 4a., 5a.).

The jury returned a verdict finding that only DION RICE, on behalf of the Estate of Charles Rice, was a client of MR. SHERBOW; that MR. SHERBOW properly referred the Estate's case to Defendant; and that MR. DANZIG did have actual or apparent authority to bind THE FIRM. (I, 23; IV, 79).

The Litigation -- Post-Trial Proceedings

On April 26, 2017, the trial court entered an Order of Judgment (Appendix Y), awarding Plaintiff \$93,333.33.¹¹

On May 17, 2017, Plaintiff filed a Motion for JNOV (Appendix Z). Therein, Plaintiff argued that it was uncontested that DION RICE appeared on behalf of his mother, DOROTHY DIXON, at the July 26, 2012, meeting. In light of the jury's finding that DION was a client of MR. SHERBOW's, and that he was properly advised of the referral fee agreement (IV, 66), Plaintiff was entitled to a verdict in his favor as to the fee for MS. DIXON's claim. (Appendix Z).

The trial court's ruling on that motion was as follows:

"THE COURT: Okay, thank you. At the time of the alleged referrals, Charles Rice was dead; Dion Rice was his living heir. Dorothy Dixon was not dead. **So legally Dion and -- and Dion Rice had not been appointed her guardian or conservator. Ergo, she was on her own.** I understand that she was in -- she may -- she may -- I mean the testimony, is not really -- **she may or may not have been incapacitated.** She testified very clearly that she wanted nothing to do with Mr. Sherbow as her -- as her lawyer.

"So I think that the instruction as given was correct. I don't think the verdict was against the great weight of the evidence. Nor do I think that viewing the evidence in the light most favorable to the nonmoving party -- er, I do think that viewing the evidence light most favorable to the nonmoving party that everything legally was correct in this matter. And so, therefore, the Motion for Judgment Notwithstanding the Verdict is denied."

(6/7/17 Tr, 5-6) (emphasis added).

An order to that effect was entered that day. (Order Denying Motion for Judgment Notwithstanding the Verdict).

¹¹The Order of Judgment also found that Defendant was entitled to Offer of Judgment Sanctions, MCR 2.405. (Appendix Y, ¶3). However, the parties agreed that enforcement of those sanctions would depend upon the outcome of Plaintiff's appeal. (11/28/17 Order as to Offer of Judgment Sanctions and Plaintiff's Motion to Tax Costs).

The Appeal¹²

Plaintiff appealed to the Michigan Court of Appeals, raising the following issues:

- (1) Plaintiff was entitled to JNOV on DOROTHY DIXON's claim. (Plaintiff's Brief on Appeal, Issue I.).
- (2) The trial court committed reversal error by instructing the jury that MR. SHERBOW could not refer the clients to the firm unless he had an attorney-client relationship with them before doing so. (Plaintiff's Brief on Appeal, Issue II.).
- (3) Defendant had the burden of proving its affirmative defense that the referral fee agreement was illegal. (Plaintiff's Brief on Appeal, Issue III.A.).
- (4) Evidence of the clients' post-settlement objections was irrelevant because objections to the fee-sharing agreement must be made at the time the client retained THE FIRM. (Plaintiff's Brief on Appeal, Issue III.B.).
- (5) Plaintiff was also entitled to a JNOV on the claim of MERVIE RICE. (Plaintiff's Brief on Appeal, Issue IV.).

On January 15, 2019, the Court of Appeals issued a published opinion authored by Judge Riordan, and subscribed by Judge Shapiro and Chief Judge Murray. Therein, the panel held:

- (1) MRPC 1.5(e) does not require that the client affirmatively assent to the fee-sharing agreement. The Rule only requires that the client not object. (I, 6).
- (2) The client's objection must be made at the time the client is informed of the agreement, not after the case is resolved. (I, 11).
- (3) However, evidence of later objections is relevant, because they make it more likely that the client was not advised of the agreement. (Id.).
- (4) Defendant had the burden of proving that the agreement violated MRPC 1.5(e); the trial court committed reversible error by instructing the jury otherwise. (I, 12).

¹²Defendant cross-appealed, but limited its challenges to the trial court's rulings on its Motion for Summary Disposition. Defendant did not challenge any rulings made at trial.

- (5) Rule 1.5(e) did not require that MR. SHERBOW have had an attorney-client relationship with the persons he referred to the firm; the trial court erred by instructing the jury otherwise. (I, 14-15).
- (6) Plaintiff was not entitled to JNOV on MS. DIXON's claim, because after she came out of her coma, she had the right to refuse to ratify DION's failure to object to the referral fee agreement. (I, 17).
- (7) The issue as to a JNOV in favor of Plaintiff on MERVIE RICE's claim was not preserved for appeal. (I, 17-18).

The panel vacated the jury's verdict on the first two questions on the verdict form as to MERVIE RICE, MS. DIXON, and PHILIP HILL, leaving intact the jury's finding that MR. DANZIG had the apparent authority to bind THE FIRM, and its verdict as to Estate of Charles Rice. The case was remanded for further proceedings. (Id., p 17).¹³

¹³Plaintiff's Application for Leave to Appeal to this Court is from the third, sixth, and seventh holdings.

I. MRPC 1.5(e) DOES NOT REQUIRE AN ATTORNEY TO HAVE AN ATTORNEY-CLIENT RELATIONSHIP WITH A PERSON IN ORDER TO ETHICALLY REFER HIM TO ANOTHER ATTORNEY. IN ANY EVENT, PLAINTIFF IN FACT HAD THE RELATIONSHIP WITH THE REFERRED CLIENTS WHICH DEFENDANT WOULD REQUIRE. (Defendant's Issue III. b).

FIEGER FIRM is not entitled to relief on this issue for two independent and alternative reasons. One is that MRPC 1.5(e) does not require that the referring attorney have an attorney-client relationship with the person referred. The other is that even if the rule advocated by FIEGER FIRM were applied, Plaintiff would satisfy it.

A. AN ATTORNEY-CLIENT RELATIONSHIP IS NOT REQUIRED.

In the following discussion, Plaintiff will first set forth the correct analysis of this issue. In the context thereby provided, he will expose the flaws in Defendant's argument.

The Correct Analysis

The ethical rule under discussion reads as follows:

"(e) A division of a fee between lawyers who are not in the same firm may be made only if:

"(1) The client is advised of and does not object to the participation of all the lawyers involved; and

"(2) The total fee is reasonable."

MRPC 1.5(e).

The definition of "client" given by the trial court was as follows:

"The definition of a client is a person or entity that employs a professional for advice or help in that professional's line of work, especially one in whose interest a lawyer acts by giving advice, appearing in court or handling the matter." (IV, 63).

The essence of the relationship is that the attorney renders advice and assistance. It necessarily follows that a retainer agreement contemplates the attorney acting in a case on the

client's behalf. *Black's Law Dictionary* (7th ed), p 1317. Thus, a retainer agreement would obligate the attorney to perform services on the case.¹⁴

However, the rationale for allowing pure referral fees is to encourage attorneys not to perform services which could be better handled by another attorney:

"To require actual participation in a case before a fee may be earned discourages some lawyers from referring cases they know could be better handled by another. This is not in the interest of the client or the lawyer. Currently, referring lawyers are sometimes given make-work tasks after referral to "earn" a fee. This practice does not encourage the efficient delivery of legal services and may drive up legal fees. **The public is best served by encouraging lawyers to refer matters to those more skilled in a particular area by permitting them to earn a referral fee so long as there is full disclosure to the client** and responsibility is maintained by the referring lawyer."

Holstein v Grossman, 246 Ill App 3d 719; 616 NE2d 1224, 1234 (1993) (emphasis added).¹⁵ It is for that reason that a number of states do not require a referring attorney to perform any work on the referred case. *E.g.*, *Ryder v Farmland Mutual Ins Co*, 248 Kan 352; 807 P2d 109, 116 (1991); *Corcoran v Northeast Illinois Regional Commuter Railroad Corp*, 345 Ill App 3d 449; 803 NE2d 87, 90 (2003); *Ravich, Koster, Tobin, Oleckna, Reitman & Greenstein v Gourvitz*, 287 NJ Super 533; 671 A2d 613, 615 (1996).

It was those considerations that led the Supreme Court of Kansas to specifically reject the interpretation of Rule 1.5(e) advocated by FIEGER FIRM. In *Ryder, supra*, as in the instant case, a post-settlement referral fee dispute arose between the referring firm and the receiving firm. 807 P2d at 111. In the ensuing litigation, the trial court granted summary disposition in

¹⁴As will be discussed below, Defendant has modified its position so as not to require that an attorney consulted on a matter actually work on it, or be retained. That formulation of "attorney-client relationship" will be applied below to the facts of this case.

¹⁵Unlike MRPC 1.5(e), the Illinois rule also requires that the referring attorney assume legal responsibility for the conduct of the receiving attorney. *Id.* at 1233.

favor of the receiving firm, using the precise argument advanced by Defendant and adopted by the trial court in the instant case:

"The threshold question for the trial court was whether FW&G had a client to refer. The trial court reasoned that, if FW&G did not have a client to refer, there could be no contract for a referral fee. The trial court found that an attorney-client relationship can only be created by contract. Based on Geeting's deposition testimony taken in the federal court action, the trial court found FW&G never had a contract with Ryder. The trial court then found, as a matter of law, that neither FW&G or any member of the firm is entitled to a attorney fees generated by the *Ryder* settlement."

Id. at 115.

The Kansas rule governing referral fees was **identical** to MRPC 1.5(e). 807 P2d at 116.

In applying it to the case before it, the Kansas Supreme Court squarely rejected the lower court's reasoning:

"MRPC 1.5(g) lists two requirements for a division of a fee between lawyers: (1) the *client* is advised and does not object; and (2) the total fee is reasonable. **The word 'client' could refer either to the status of the litigant with regard to the referring attorney or with regard to the attorney to whom the matter is referred.** If it refers to the relationship with regard to the referring attorney, the rule mandates an attorney-client relationship with the referring attorney. It is clear that the litigant would be a client of the attorney to whom the matter is referred. **We adopt what we believe to be the logical interpretation, that 'client' refers to the status of the litigant with the attorney to whom the matter is referred.**

"**Under this construction of the rule and the facts of this case,** although it would be preferable, **MRPC 1.5(g) does not require that the referring attorney have an attorney-client relationship with the person referred.** Of course, the attorney accepting the referral may impose such a requirement before agreeing to pay a referral fee. This referral relationship between counsel is a matter of contract between attorneys.

"Our primary concern is for the client. The ultimate objective is to assure the finest representation possible for a client."

Id. at 117 (italics in original) (emphasis added). *See also Robert L. Crill, Inc v Bond*, 76 SW3d 411, 420-21 (Tex App 2001).

In the instant case, the Court of Appeals correctly recognized that requiring attorneys to assume responsibility for a case would encourage them to engage in billable work to ensure that an attorney-client relationship would be recognized. (I, 13). The panel also recognized the danger to the client of an attorney, who is unfamiliar with an area of law, not making an immediate referral without being aware of the possible danger of delay. (Id.)

Finally, in an observation particularly appropriate in the instant case, the panel noted:

“In fact, allowing defendant to misconstrue the rule and then use it to void a contract into which it willingly entered would be a plain misapplication of the MRPC in general. To wit, in the preamble to the MRPC, in the section regarding the scope of the rules, the drafters warned that ‘the purposes of the rules can be subverted when they are invoked by opposing parties as procedural weapons.’”

(I, 13-14).

Defendant’s Defective Arguments

Much of Defendant’s discussion consists of unremarkable citations to authorities acknowledging that the purpose of Rule 1.5(e) is to protect and further the client’s interests. On that point, all can agree. But FIEGER FIRM’s argument that the Rule imposes the requirement of a prior attorney-client relationship is bereft of legal or conceptual support.

FIEGER FIRM correctly recognizes that MRPC 1.5(e) is ambiguous as to whether the term "client" refers to the status of the litigant vis-a-vis the referring attorney or the receiving attorney. However, rather than undertaking any reasoned analysis of the issue, FIEGER FIRM attempts to manufacture support for its position by misciting several authorities.

First, FIEGER FIRM cites MRPC 1.1(a):

"A lawyer shall provide competent representation to a client. A lawyer shall not:

"(a) Handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it;"

FIEGER FIRM cites this Rule as evidence of a "public policy" imposing an ethical obligation to "**partner with** other lawyers". (Defendant's Application, p 22) (emphasis added).

On its face, Rule 1.1(a) is utterly irrelevant to the issue under discussion. It merely articulates the attorney's obligation if he opts to retain the case rather than refer it. It says absolutely nothing about requiring an attorney-client relationship as a prerequisite to referring a case rather than retaining it.

Next, FIEGER FIRM cites RI-158. That Opinion is also irrelevant to the issue under discussion. All that it does is place restrictions on what an attorney can require as a condition of referring an **existing client** to another attorney for representation in an area other than the one in which the attorney is currently representing the client. The factual predicate to the opinion makes that clear:

"After providing legal representation relating to various business affairs, the lawyer is requested by the client to provide advice in a domestic relations dispute (divorce). The lawyer does not regularly practice in the domestic relations field but is prepared to refer the client to another lawyer competent to provide such representation."

Indeed, the Opinion makes clear that it does not address the referral of **non-clients** in tort cases:

"There is currently considerable concern with reference to the payment of referral fees in tort cases, particularly where a law firm engages in heavy 'marketing' (advertising, etc.), with the intent to do nothing on the new matters except to refer them to various tort practitioners. This opinion does not address the question of whether or not such activities qualify for a referral fee."

Here, again, FIEGER FIRM cites a source which says absolutely nothing about the issue under discussion.

Nor does FIEGER FIRM offer any conceptual support for its additional requirement for a referral. At no point does FIEGER FIRM explain how such a requirement furthers the client's

interests in obtaining timely, competent representation. All that we get as “analysis” is the following:

“MRPC 1.5(e) must logically be interpreted such that the word ‘client’ apply to both the referring and receiving attorneys. To hold otherwise is the height of absurdity.”

(Defendant’s Application, p 22). We are not told why that is so.

To be fair, FIEGER FIRM does posit alleged “evils” of not imposing its additional requirement for a referral. In addition to its baseless calumny of Plaintiff — which was expressly rejected by the jury¹⁶ — FIEGER FIRM posits the following parade of horrors:

“Under the Court of Appeals analysis, a referring attorney does not need a ‘client.’ He or she can read a newspaper account of an accident, and then claim to have referred a ‘client.’”

* * * *

“The Court of Appeals decision opens the door to unethical and predatory conduct by less scrupulous members of the bar: open the newspaper and start claiming to have ‘referred’ an injured person to another firm.”

(Defendant’s Application, p 1, 4).

In so arguing, FIEGER FIRM overlooks the fact that a fee-sharing agreement is a contract between the referring attorney and the receiving firm. FIEGER FIRM does not explain how an attorney who reads about an accident in a newspaper, and who has no relationship with the client, will convince a firm to split its contingent fee with him.

In the instant case, Plaintiff is suing because FIEGER FIRM — through its authorized agent, MR. DANZIG — **did** agree to pay Plaintiff a referral fee.¹⁷ The fact that FIEGER FIRM

¹⁶ The jury expressly found that DION RICE was Plaintiff’s client, and was lawfully referred by Plaintiff, (I, 22-23; IV 63, 66, 69).

¹⁷ In so finding, the jury necessarily rejected FIEGER FIRM’s scurrilous fantasy of a conspiracy between MR DANZIG and Plaintiff. (I, 23; IV, 64).

had to concoct such a far-fetched scenario to support its argument speaks volumes as to the utter lack of merit in its position.

B. PLAINTIFF SATISFIES FIEGER FIRM'S NEW DEFINITION OF "ATTORNEY-CLIENT" RELATIONSHIP.

Also telling is that FIEGER FIRM's definition of an "attorney-client" relationship has morphed as the appeal has progressed. In the trial court, FIEGER FIRM argued that Plaintiff's efforts did not create an attorney-client relationship, because he was never retained:

"Sherbow's efforts to gather information, and his attendance at a meeting, do not permit a referral fee from the recovery of persons who were never 'clients' to be 'referred'."

* * * *

"The Fieger Firm's clients had not even talked to Sherbow or even met him, did not even know he existed, **and never retained him.**"

(Defendant's Motion for Summary Disposition: Brief in Support, p 9, 11) (emphasis added).

On appeal, Defendant dropped the requirement that an attorney be retained, and argued that all that is required is that an attorney advise and help a client to find competent representation:

"While the scope of the representation may be narrow (simply advising a client about competent counsel and providing a referral), a relationship does exist."

* * * *

"Michigan has recognized for over a century that an attorney-client relationship attaches when a client 'consults with an attorney in his professional capacity, with view of obtaining professional advice or assistance.'... **'it is not essential** to such relation that any fee be paid, promised, or charged' or **that the attorney was never formally retained.**"

* * * *

"MRPC 1.2(b) allows a lawyer to ethically limit the scope of representation. There is nothing prohibiting a referring attorney from limiting the scope of

his representation simply to advising and helping the client find competent representation.”

(Defendant’s Application, p 24, 26-27, 28) (emphasis added). That concession is fatal to Defendant’s position on this issue for two reasons.

The first is that “advising and helping” a person to find competent representation — without formally being retained — is what attorneys currently do as a matter of course. (Appendix Z). That being so, Defendant’s proposed requirement is superfluous, because it would not alter the current practice.

The second reason is that Defendant effectively concedes that all four of the referrals were Plaintiff’s clients under Defendant’s definition. The unspoken premise to Defendant’s argument is that a face-to-face meeting is necessary to render a person a client. Defendant makes that argument because it suits its purposes in the instant case, in that DION was the only person that MR. SHERBOW had direct contact with prior to the July 26, 2012, meeting at which FIEGER FIRM was retained.

However, Defendant fails to appreciate the importance of a fact that it concedes — that DION was acting on behalf of all four clients when he contacted Plaintiff:

“**Dion** did not agree to have Sherbow become involved in any manner, and **clearly told Sherbow that he would determine what other members of his family were doing** before getting back to Sherbow.”

(Defendant’s Application, p 29) (last emphasis in original) (other emphasis added).

The first phrase of the sentence should be discounted totally, because the jury found that DION was Plaintiff’s client. (I, 22). So the question is whether DION’s status as a client extended to the other family members. A sister state case which is directly on point says that it did.

In *Robert L Crill, Inc v Bond*, 76 SW3d 411 (Text App 2001), one Gayle Leach called attorney Monte Bond concerning her comatose sister, Cathy Wright, who had suffered some abuse at a healthcare facility. Because Bond did not handle personal injury matters, he telephoned Burke, an attorney at Crill, Inc, to determine whether that firm would be interested in pursuing the matter. *Id.* at 415.

Burke contacted Patricia McCain, Wright's mother and primary caregiver, and arranged a meeting. Crill, Inc, and Burke agreed to represent McCain and the Wright family. Bond and Burke agreed that Bond would received 1/3 of the contingent fee as a referral fee. *Id.* at 415.

In the ensuing fee dispute, Crill, Inc, argued that Bond was not a "forwarding attorney", because he did not have an attorney-client relationship with McCain, the referred client, in that he talked only with Leach and never to McCain. *Id.* at 420. The trial court ruled in favor of Bond.

The Texas Court of Appeals affirmed, in terms fully applicable to the instant case:

"Appellants cite no authority for their contention that 'Bond could not become a forwarding attorney in the absence of a professional relationship giving rise to an attorney-client privilege.' Consequently, we conclude the contention is inadequately briefed and presents nothing for review. . . . Nevertheless, we further observe there is evidence from which the court could have concluded that **McCain relied on the assistance of her daughter, Leach, to secure representation and that, in effect, Leach was a client representative. . . . Assuming without deciding that it was necessary for Bond to communicate directly with the client before he referred the matter, we conclude that under these circumstances Bond's conference with Leach qualifies.**"

Id. at 421 (emphasis added).

In the instant case, as Defendant recognizes, DION contacted Plaintiff on behalf of his father's estate, his mother, MERVIE RICE and PHILLIP HILL. That being so, Plaintiff consulted and advised all four, thereby rendering them "clients" under the definition advanced by Defendant.

In sum, Rule 1.5(e) does not require that the person referred be a client of the referring attorney. Moreover, even if Defendant's superfluous definition of "client" is accepted, Plaintiff satisfies its requirement.

II. DEFENDANT HAS THE BURDEN OF PROVING THE ALLEGED ILLEGALITY OF THE CONTRACT. IN ANY EVENT, THE JURY FOUND THAT THREE OF THE FOUR CLIENTS HAD BEEN ADVISED OF THE FEE SHARING AGREEMENT. (Defendant's Issue III. c).

Defendant's presentation on this issue is quite diffuse in that it raises four separate arguments:

- (1) Plaintiff never had a client to refer.
- (2) The clients were never advised of the fee-sharing agreement.
- (3) A client's mere silence is not enough to render a fee-sharing agreement enforceable.
- (4) Plaintiff had the burden of proving its compliance with MRPC 1.5(e).

Plaintiff will address those arguments seriatim.

Plaintiff had four clients to refer.

FIEGER FIRM's averment that Plaintiff had no clients to refer is demonstrably false. The jury's verdict — from which FIEGER FIRM has never appealed — expressly found that DION was Plaintiff's client. (IV, 79; Appendix X). Furthermore, Plaintiff has demonstrated above that by virtue of DION's interaction with Plaintiff, all four of the tort plaintiffs had attorney-client relationships with Plaintiff when he referred them. *Robert L Crill, Inc v Bond, supra*.

The jury found that three of the four clients were advised of the fee-sharing agreement.

In finding that DION was lawfully referred to FIEGER FIRM, the jury necessarily found that the agreement was disclosed at the July 26, 2012, meeting. (IV, 66, 69). This Court and the parties are bound by that finding. *Ford Motor Co v Bendix Corp*, 83 Mich App 108, 112 (1978). Therefore, it is a fact that DION (who represented both his father's estate and his mother) and MERVIE RICE were informed of the agreement. Whether PHILLIP HILL was also informed is a question of fact. (I, 187; III, 126).

Affirmative assent is not required by MRPC 1.5(e).

Defendant avers, without explanation, that "Michigan State Bar Ethics Opinion RI-234 ... counsels that silence alone cannot suffice". (Defendant's Application, p 34). That characterization of the Ethics Opinion is almost sanctionably inaccurate.

The opinion addresses whether the size of the referring attorney's portion of the fee must be reasonable. The opinion concludes that MRPC 1.5(e)'s requirement of reasonableness does not apply to the agreement between the attorneys. (RI-234, p 2).

The opinion eight times references the fact that the agreement is valid if the client "does not object". It says absolutely nothing about affirmative assent. Defendant has abandoned this issue by failing to support or analyze its position. *Degeorge v Warheit*, 276 Mich App 587, 600-01 (2007); *Schellenberg v Michigan Lodge No. 2225 Order of Elks*, 228 Mich App 20, 49 (1998).

Moreover, the language of Rule 1.5(e) will not support Defendant's position. Principles of statutory construction apply to interpreting MRPCs. *In re L.O.C.*, 319 Mich App 476, 480 (2017); *In re Petition of Attorney General for Investigative Subpoenas*, 274 Mich App 696, 698 (2007). The text of the Rule reads as follows:

"(e) A division of a fee between lawyers who are not in the same firm may be made only if:

"(1) The client is advised of and **does not object** to the participation of all the lawyers involved; and

"(2) The total fee is reasonable."

MRPC 1.5(e) (emphasis added).

Statutes are to be interpreted according to the ordinary meaning of their terms. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720 (2005). The operative term in the

Rule is "object". When a statute does not define a term, resort to dictionary definitions is appropriate. *Nastal, supra* at 723.

"If you object to something, you **express your dislike** or disapproval of it."

* * * *

"to **put forward an objection** or objections"

* * * *

"to . . . **express disapproval** or dislike."

* * * *

"to **state as an objection**"

* * * *

"to **raise or state an objection** to; present an argument"

www.collinsdictionary.com (emphasis added).

"to . . . **express** opposition, dislike, or disapproval"

www.dictionary.cambridge.org (emphasis added).

"to **offer** a reason or **argument** in opposition.

"to **express** . . . disapproval . . ."

* * * *

"**to state, claim, or cite** in opposition; **put forward** in objection"

www.dictionary.com (emphasis added).

"**Say something** to express one's opposition to or disagreement with something"

www.oxforddictionaries.com (emphasis added).

It is evident that "to object" is to say something to express disapproval. Hence, contrary to Defendant's argument, to not object is to not say something, i.e., to remain silent.

That interpretation is also supported by comparison of the language of MRPC 1.5(e) with other states' requirements that the client affirmatively assent to the agreement. *E.g.*, *Margonlin v Shemaria*, 85 Cal App 4th 891; 102 Cal Rptr 502, 507-08 (2000); *Holstein v Grossman*, 246 Ill App 3d 719; 616 NE2d 1224, 1233-34 (1993); *Saggese v Kelly*, 445 Mass 434; 837 NE2d 699, 701 n 4 (2005). This Court could have required such affirmative assent, but did not.

In sum, all that the Rule requires is that the client not object to the fee-splitting agreement. Because, for purposes of this appeal, Defendant conceded that no one objected at the July 26, 2012, meeting, as to the claims represented by DION RICE (his mother's and his father's estate's [I, 92, 128; II, 77, 95; III, 143-44; IV, 173]), and MERVIE RICE admitted that she did not object (III, 77-78), the only question as to those claims is whether the clients were informed of the agreement. As the jury found, they were so advised. (IV, 66, 79).

FIEGER FIRM had the burden of proving that MRPC 1.5(e) was not satisfied.

At the outset, the Court should note that at no point does FIEGER FIRM even acknowledge — much less challenge — the Court of Appeals' holding that Defendant's argument that the fee-sharing agreement was void as against public policy constituted an affirmative defense, as defined by MCR 7.211(F)(3)(a)-(b). (I, 11). Nor does Defendant challenge the proposition that the party asserting an affirmative defense must prove it. (I, 11-12 and n 5). That being so, Defendant has failed to show that the Court of Appeals' reasoning was erroneous. Moreover, the Court of Appeals' holding is fully supported by the relevant case law.

The pertinent Court Rule defines an affirmative defense as including "that an instrument or transaction is void". MCR 2.111(F)(3)(a). A claim that a fee agreement violated the MRPC constitutes a defense that the contract is unenforceable as against public policy and, therefore, void. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 60 (2003); *Evans & Luptak, PLC v*

Lizza, 251 Mich App 187, 196 (2000). The Court of Appeals has held that such a claim is an affirmative defense. *Metro Services Organization v City of Detroit*, unpublished per curiam opinion of the Court of Appeals, rel'd 2/1/11 (Nos. 292052, 292588) (Appendix AA), p 5¹⁸. Accordingly, Defendant had the burden of proving that MRPC 1.5(e) was not complied with.

The decisions cited by Defendant do not support its position.

Morad v Cabadas, unpublished per curiam opinion of the Court of Appeals, rel'd 1/11/05 (No. 245976), held nothing more than that an equitable claim of unjust enrichment cannot be imposed where there is an express, albeit unenforceable, contract covering the same subject matter. Contrary to FIEGER FIRM's assertion, "the precise issue presented here" was neither presented, nor examined, nor decided in that case.

Kosinski v Mason, unpublished per curiam opinion of the Court of Appeals, rel'd 11/27/01 (No. 224658), does contain language indicating that the plaintiff had the burden of showing that the client was aware of the referral fee agreement. *Id.*, p 2. However, the burden of proof issue apparently was not in dispute, because the panel did not acknowledge or address any arguments on the issue.

¹⁸*Metro Services* is the only Michigan case that the undersigned attorney of counsel could find which squarely holds that a public policy violation constitutes an affirmative defense on which the defendant has the burden of proof. *Id.*, p 2, 5. MCR 7.215(C)(1). That holding is in accord with sister state authority. *Eaton v Brock*, 124 Cal App 2d 10; 268 P2d 58, 60 (1954); *Benson v BH Morgan & Co*, 26 Ill App 22, 25 (1887); *Stebbins v Leowolf*, 57 Mass 137, 143 (1849); *Feldman v Gamble*, 26 NJ Eq 494, 495-96 (1875); *Strausberg v Laurel Healthcare Providers, LLC*, 304 P3d 409, 418 (NM 2013); *Cantleberry v Holbrook*, 2013 WL 3280023 (Ohio App 2013), p 6 (Appendix BB); *JW Ripy & Son v Art Wall Paper Mills*. 41 Okla 20, 136 P 1080, 1082 (Okla 1913); *Daley Mack Sales, Inc v Klink*, 26 Pa D&C 3d 341, 347 (Pa Common Pleas 1982); *Hermitage House Square, LP v England*, 929 SW2d 356, 359 (Tenn App 1996); *Gill v Smith*, 233 SW2d 223, 226 (1950); *Hughes v Shaw*, 147 Va 409; 137 SE 370, 370-71 (1927); *Wilder v Nolte*, 195 Wash 1; 79 P2d 682, 687 (1938); *Thatcher v Darr*, 27 Wyo 452; 199 P 938, 945-46 (1921).

Moreover, the ultimate burden of proof was not even germane to the outcome. Once the defendant provided the affidavit that the client had not been advised, the plaintiff's failure to submit contrary evidence mandated that summary disposition be granted -- regardless of the ultimate burden of proof. MCR 2.116(G)(4).

In sum, the Court of Appeals correctly held that FIEGER FIRM had the burden of proving the alleged illegality of the fee-sharing agreement.

III. DEFENDANT IS PRECLUDED FROM CHALLENGING THE VERDICT IN FAVOR OF PLAINTIFF BECAUSE IT DID NOT APPEAL FROM IT. IN ANY EVENT, THE ERRORS COMMITTED BY THE TRIAL COURT DID NOT TAIN THAT VERDICT. (Defendant's Issue III.d.).

FIEGER FIRM's argument on this issue is pure sophistry.

First, Defendant has no standing to request reversal as to a verdict which it did not appeal.

As the Court of Appeals noted, Defendant's appeal was limited to the trial court's opinion and order concerning summary disposition. (I, 6 n 3). Defendant's appeal did not include any challenge to anything having to do with the trial. Therefore, Defendant is not entitled to any relief from the jury's verdict. *See Robertson v Local 26, Amalgamated Transit Union*, 91 Mich App 429, 432-33 (1979) (failure to properly seek review of proposed order barred appeal therefrom).

Second, there is nothing inconsistent in the Court of Appeals' holding. The panel found instructional error as to the burden of proof, and as to the necessity for the referred person to be a client. (Vol. I, p 11-13). Neither of those errors require reversal of the jury's finding that MR. SHERBOW had an attorney-client relationship with DION on behalf of Charles' Estate, and that he legally referred that claim to Defendant. (Id., p 3).

However, the verdicts as to the other three claims were fatally infected by the error, because the jury found that they were not clients, and (possibly) that Plaintiff did not carry its burden of proving that they were informed of the agreement. (Id., p 14-15). There was, therefore, nothing inconsistent in the Court's disposition of the case.

RELIEF REQUESTED

This Court should deny Defendant's Application for Leave to Appeal for lack of merit in the grounds presented, thereby affirmatively endorsing the Court of Appeals' holdings on the issues herein discussed.

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