

STATE OF MICHIGAN
IN THE SUPREME COURT

LAW OFFICES OF JEFFREY SHERBOW, P.C.,

Supreme Court No. 159450

Court of Appeals No. 338997

Plaintiff- Appellee

Oakland County Circuit
Case No. 15-147488-CB

v

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

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

* * *

APPENDIX OF EXHIBITS

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STATEMENT OF THE BASIS OF JURISDICTION

On June 28, 2017, Plaintiff filed a claim of appeal with the Michigan Court of Appeals from the April 26, 2017 order of judgment from the Oakland County Circuit Court. (Appx p 019a-020a)

On January 15, 2019 the Court of Appeals reversed and remanded for a new trial in a published opinion, *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, 326 Mich App 684; 930 NW2d 416 (2019) (Appx p 001a-017a). Defendant-Appellant filed a timely motion for reconsideration, which was denied on March 5, 2019. (Appx p 018a) Defendant Subsequently filed an application for leave to appeal with this Court, pursuant to MCR 7.303(B)(1) and MCR 7.305(B)(3).

On February 5, 2020, this Honorable Court granted Defendant-Appellant's application for leave to appeal and instructed the parties to address:

(1) whether Michigan Rule of Professional Conduct (MRPC) 1.5(e) requires the client to have an attorney-client relationship with all participating lawyers; (2) if so, what are the parameters of such relationship and how is it formed; (3) which party carries the burden with respect to a contract's compliance with MRPC 1.5(e), see *Palenkas v. Beaumont Hosp.*, 432 Mich. 527, 548-550, 443 N.W.2d 354 (1989); and (4) if an attorney-client relationship with all participating lawyers is required I2.613(A); *Cox v. Bd. of Hosp. Managers for City of Flint*, 467 Mich. 1, 15, 651 N.W.2d 356 (2002).

Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC, 937 NW2d 685 (Mich, 2020).

STATEMENT OF QUESTIONS PRESENTED

1. Should some type of an attorney-client relationship be a minimum necessary predicate for a lawyer to legally and ethically refer a “client” to another attorney? Such a relationship does not need to be in the form of a formal retainer but must involve some type of consultation with the client seeking professional advice from the referring attorney.

Defendant-Appellant answers: “Yes.”

Plaintiff-Appellee answers: “No.”

Court of Appeals answered: “No.”

2. Michigan Rule of Professional Conduct 1.5(e) requires that, before an attorney agrees to split fees with another attorney from a different firm, the client must be advised of the fee-splitting arrangement and “not object.” If a client is not made aware of the fee-splitting, the contract is illegal and unenforceable as a matter of law. Did the Court of Appeals err in holding that Defendant (not the putative referring attorney) here had the burden of establishing the validity of such a contract?

Defendant-Appellant answers: “Yes.”

Plaintiff-Appellee answers: “No.”

Court of Appeals answered: “No.”

3. Assuming that an attorney-client relationship is necessary for a lawyer to make a legal and ethical referral, should the Court of Appeals judgment be reversed, and the jury verdict as to the Mervie Rice, Dorothy Dixon, and Phillip Hill cases be affirmed?

Defendant-Appellant answers: “Yes.”

I. INTRODUCTION AND SUMMARY OF ARGUMENT:

The Michigan Rules of Professional Conduct exist to guide the ethical practice of law and secure the best possible representation for clients. They are not a vehicle to secure a pecuniary profit for unscrupulous attorneys.

The Court of Appeals, in a published opinion setting new legal precedent in Michigan, held that an attorney-client relationship is not a necessary prerequisite for a lawyer to claim to legally and ethically refer a client under MRPC 1.5(e), and, thus, claim an attorney fee.

MRPC 1.5(e) permits a “division of a fee between lawyers who are not in the same firm if” “the client is advised of and does not object to the participation of all the lawyers involved.” (Emphasis added.) Here, under the Court of Appeals analysis, a “referring attorney” no longer needs a “client.” He or she can read a newspaper account of an accident, and then claim (as here) to have referred a “client” and sue for a fee. The Court of Appeals holding essentially renders MRPC 1.5(e) nugatory, allowing a referral to take place without the client being advised or consenting to the referral (here, neither occurred).

This Court should hold that, at a minimum, an attorney-client relationship is a necessary prerequisite before a lawyer can legally and ethically claim to have referred a client to another attorney. Such a relationship does not need to be in the form of a formal retainer, but must involve some type of consultation by a client who seeks

professional advice from the referring attorney. To hold otherwise allows the sort of out-and-out fraud that occurred in this case.

Michigan has long 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[.]” *Devich v Dick*, 177 Mich 173, 178; 143 NW 56 (1913). “It is not essential to such relation that any fee be paid, promised, or charged” or that the attorney was never formally retained. *Id* at 179. In order to protect the interests of the public, Michigan law *should minimally require* that a legal consultation (i.e. a nascent attorney-client relationship) be a simple prerequisite to claim a “referral” under the Michigan Rules of Professional Conduct. Otherwise, there is no protection against the type of predatory conduct demonstrated in this case.

The Court of Appeals opinion, holding that no relationship of any kind is necessary to claim a referral from one attorney to another is radical and opens the floodgate to the type of predatory and unethical conduct seen in this case: where an attorney “called dibs” on a case, without ever meeting the clients and without the clients’ knowledge or consent. This is the wrong direction to take Michigan law, and “provides a roadmap for unethical attorneys.” *In re Mardigian Estate*, 502 Mich 154, 204; 917 NW2d 325, 354 (2018) (opinion in favor of reversal). In the words of Chief Justice McCormack, “We owe the public better.” *Id.* at 342.

II. STATEMENT OF FACTS

This is a dispute between Defendant Fieger & Fieger, P.C. (“the Fieger firm”) and Plaintiff Sherbow,¹ who claims a share in attorney fees from Fieger for “clients” he never met, who never retained him, and who were never “referred” by him. The Fieger firm represented four individuals in litigation arising from an automobile collision. Sherbow claims that he is owed a “referral fee” from each of those four cases.

At about 1:00 a.m. on July 13, 2012, four Michigan relatives were involved in an automobile collision in Dayton, Ohio. Charles Rice (“Mr. Rice”) lost his life; Dorothy Dixon (“Dixon”) suffered injuries so severe that she was comatose for weeks; Philip Hill (“Hill”) and Mervie Rice (“Mervie”) also suffered significant injuries. The Estate of Charles Rice, Ms. Dixon, Mr. Hill and Mervie are Fieger’s “clients” in the underlying cases. The four clients all individually retained the Fieger firm to represent them in the personal injury lawsuits. With about \$500,000 in advanced costs and hundreds of hours of legal work, the Fieger firm obtained substantial recoveries for each of the four separate clients.

Sherbow later claimed that he had “referred” the clients to the Fieger firm and was owed a “referral fee” on the cases. As will be explained in the following sections, based upon the unchallenged testimony of the clients and Sherbow himself, the facts are

¹ Plaintiff is a corporation with a single founding and practicing attorney, Jeffrey Sherbow. For simplicity, the term “Sherbow” is used to refer to both Mr. Sherbow individually and to the Plaintiff Professional Corporation.

undisputed that the clients independently retained the Fieger firm and had no relationship with Sherbow whatsoever.

a. Sherbow Hears about the Collision, Imposes Himself and “Stakes his Claim” on the cases

Sherbow learned about the Ohio collision on July 13, 2012, when he received a phone call from Jennifer Hatchett, a third party who is unrelated to any of the clients.² Sherbow testified that, after hearing this news, he first “immediately then called Danzig[.]”³ Jeff Danzig [the confederate], a long time friend of Sherbow, was an attorney at the Fieger firm at the time.⁴ Sherbow and Mr. Danzig had been friends for over fifteen years; Sherbow went on annual golfing trips with Mr. Danzig and stayed at Mr. Danzig’s property “up north.”⁵ Sherbow also had a business relationship with Mr. Danzig, and Mr. Danzig had personally made substantial money from Sherbow’s referrals over the years.⁶ Sherbow’s claims arise out of several letters that Danzig then wrote to him, claiming to confirm a nonexistent “referral” (of clients that Sherbow did not have or even know). This “confirmation” letter was a fraud, since Sherbow did not know the clients.⁷

² Trial Transcript Volume II, February 28, 2017, p. 76; Appx p 320a.

³ Id.

⁴ Trial Transcript Volume I, February 27, 2017, p. 178; Appx p 210a.

⁵ Id. at 190-191; Appx p 222a-223a.

⁶ Id.

⁷ Letter Contract from Danzig, Appx p 737a.

Sherbow candidly admitted that, after hearing about the collision from Ms. Hatchett, his first phone call was to Mr. Danzig; he acknowledged that “this was a very - very serious case, potential great exposure[.]” In fact, as part of a scheme, Sherbow called Danzig to stake his “claim” on cases that he had absolutely no relationship to, and to make sure that Danzig acknowledged, in writing, that the cases “w[ere] related to me.”⁸ At that point, Sherbow had had no contact with any of the “clients.” Nevertheless, this is the point in time when he claims that his “referral” of the cases to the Fieger firm took place. Sherbow relates everything thereafter back to his first contact with Danzig, falsely asserting that he was the attorney responsible for “bringing the cases to the Fieger firm.”

After contacting Danzig and staking his “referral claim,” Sherbow began to try to solicit the cases by making direct contact with Dion Rice (the son of decedent Charles Rice) and interposing himself at the Rice funeral. Sherbow solicited Dion by calling him directly.⁹ Dion testified that he did not know Sherbow personally, but knew that his father had known Mr. Sherbow in the past.¹⁰

Dion testified that, in that initial phone conversation with Sherbow, Sherbow introduced himself to Dion as his “dad’s friend” and offered help in finding a lawyer, etc.¹¹ Dion never asked or agreed to retain Sherbow, and told Sherbow that he would

⁸ Trial Transcript Volume II, February 28, 2017, p. 76; Appx p 320a.

⁹ Id. at 121-122; Appx p 365a-366a.

¹⁰ Trial Transcript Volume III, March 2, 2017, p. 107; Appx p 543a.

¹¹ Id. at 108; Appx p 544a.

find out what other members of his family were doing and get back to Sherbow.¹² Dion never told Sherbow that he wanted to retain him, never asked for his help in finding a lawyer, and did not give Sherbow any authority to “refer” his father’s case to another attorney (or claim a “referral” fee).¹³

At that point, Sherbow did not back off; he continued to solicit Dion, following up with more phone calls and a visit to Dion’s home.¹⁴ Sherbow told Dion that he “knew a couple of guys down at Fieger’s;” Dion responded that the family was already retaining the Fieger firm.¹⁵ Dion also told Sherbow that he had previously contacted the Fieger firm when Sherbow went to visit Dion at his home, days after the accident.¹⁶

Despite being informed that his services were not requested or wanted, Sherbow nevertheless continued to interject himself into the matter. He again contacted Danzig, and had Danzig invite him to a client meeting at the Fieger firm on July 26, 2012.¹⁷ At this point, Mervie Rice had contacted the Fieger firm to retain it, and a meeting with her was set up. This meeting included Dion, Mervie, Danzig, Sherbow, and two lawyers from separate law firms: Jody Lipton (who was asked to represent the survivors for first-party no-fault benefits) and Howard Linden (who was retained by the Fieger firm to act as Personal Representative of the Estate of Charles Rice). Mervie and Dion did

¹² Id.

¹³ Id. at 111; Appx p 547a.

¹⁴ Id. at 108; Appx p 544a.

¹⁵ Id. at 108-109; 111; Appx p 544a-545a; 547a.

¹⁶ Id. at 121-122; Appx p 557a-558a.

¹⁷ Trial Transcript Volume II, February 28, 2017, p. 87; Appx p 331a.

not request Sherbow's attendance at the Fieger firm meeting: Sherbow's attendance at the Fieger firm meeting was not at Dion's request¹⁸; Mervie Rice had never even spoken with Sherbow or met him; she did not know him.¹⁹

Thereafter, after years of litigation, the Fieger firm secured a substantial settlement for the clients. Upon learning of the settlement, Sherbow claimed a referral fee. After reviewing documents with the firm, and speaking with the clients, the Fieger firm confirmed that the clients each independently hired the Fieger firm, that there was no "referral" by Sherbow, that Sherbow was not entitled to a referral fee, and that his claims were unsupported.

b. Sherbow filed suit in Oakland County Circuit Court claiming that he was entitled to attorney fees, and the case proceeded to a jury trial.

Based on his initial phone call to Danzig, the subsequent unsolicited conversation with Dion, attendance at the July 26 meeting at the Fieger firm, and (especially) Danzig's letters, Sherbow claimed that he was owed a referral fee for all four of the clients' cases. He filed suit on June 10, 2015 in Oakland County Circuit Court.

The Fieger firm's defense was based on MRPC 1.5(e), which mandates that:

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

¹⁸ Trial Transcript Volume III, March 2, 2017, p. 111-112; Appx p 547a-548a.

¹⁹ Id. at 64; Appx p 500a.

- (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.

Defendant argued that, under MRPC 1.5(e), both the referring and receiving lawyers must have a “client,” i.e. have an attorney-client relationship with the client, in order to be entitled to a share of attorney fees. In simple terms, an attorney must first have a “client” in order to refer that client’s case to a second attorney.

Defendant also maintained that MRPC 1.5(e) places the burden of establishing that the client was advised of and does not object to the participation of other attorneys on the attorney claiming a referral fee, as this is a prerequisite to establishing the existence of a valid contract in the first place. Defendant argued that, because Sherbow did not have an attorney-client relationship (or any relationship) with the clients, he did not have the ability to (and in fact did not) refer the cases, or to claim a referral fee. Moreover, since Sherbow had never spoken to with the clients, he could not have advised them of any referral.

Sherbow, on the other hand, argued that a lawyer does not need a “client” in order to refer a case to other attorneys and claim a referral fee. He also maintained that, in light of Danzig’s letter, it was Defendant’s burden of proof to establish the client’s knowledge and lack of objection, as an affirmative defense.

After years of litigation, the case proceeded to a full trial on the merits in February 2017. Sherbow had a full and fair opportunity to present his case to the jury.

There was conflicting testimony from Sherbow and Danzig, all of which was presented to the jury for its consideration.

c. Sherbow admitted at trial that he did not have a relationship with the clients.

Sherbow admitted at trial that he did not have *any* relationship with any of the clients. Sherbow admitted that he never met Dorothy Dixon until the fall of 2014, years after the Fieger firm had filed suit and began representing her for the auto collision.²⁰ Sherbow admitted that he never met with or spoken to client Phillip Hill until years after the auto collision litigation was over and the current fee dispute began, when Mr. Hill's deposition was taken in this referral fee case.²¹ Sherbow admitted that he did not meet Mervie Rice until the July 26, 2012 meeting.²² Even at that time, he did not communicate directly with her, and Mervie testified that she had never sought out Sherbow, but had retained the Fieger firm directly.²³ Sherbow admitted that he never met with or consulted with Howard Linden, the duly appointed personal representative of the Estate of Charles Rice.²⁴

²⁰ Trial Transcript Volume II, February 28, 2017, p. 75; Appx p 319a.

²¹ Id.

²² Id.

²³ Trial Transcript Volume III, March 2, 2017, p. 63-64; Appx p 499a-500a.

²⁴ Trial Transcript Volume II, February 28, 2017, p. 145-147; Appx p 389a-391a.

Howard Linden testified that, as the personal representative of the Estate of Charles Rice, he was the “client.”²⁵ Linden further testified that there was never any discussion of any “referral” at the meeting, and that he did not consent to any.²⁶ Mr. Linden was never told that the case was “referred” by Sherbow, or that Sherbow would be sharing a fee with the Fieger Firm.²⁷ Mr. Linden did not consent or agree to Sherbow sharing attorney fees with the Fieger firm.²⁸

Despite overwhelming proofs and Sherbow’s own admissions that he never had any contact (or relationship) with the clients, Sherbow still claimed that he was owed a referral fee. Sherbow asserted that his entitlement to the fees was based upon his unsolicited communications with Dion, his tag-along to the July 26 meeting at the Fieger firm, and his letters from his longtime friend Mr. Danzig. Any type of attorney-client relationship, communication with the clients, or consent by them was deemed unnecessary.

²⁵ February 17, 2017 De Bene Esse Deposition of Howard Linden, pg 14; Appx p 635a. It was stipulated on the record that, starting on page 43 at line 21 through page 51, line 12 of the deposition would not be (and was not) shown to the jury. Trial Transcript Vol. III, p. 59; Appx p 495a.

²⁶ Id.

²⁷ Id. at 21-22; Appx p 457a-458a.

²⁸ Id. at 23; Appx p 459a.

d. The clients testified that they did not know Sherbow and did not consent for him to refer their cases or share a fee.

Mervie Rice had no idea who Sherbow was until after this fee dispute arose, and was surprised to learn that Sherbow was claiming to have “referred” her case to the Fieger Firm.²⁹ Mervie testified that she independently called the Fieger firm after seeing Mr. Fieger’s commercial on television.³⁰ Fieger firm intake documents and notes taken by a receptionist were admitted as exhibits at trial, and support Mervie’s testimony that she independently called the Fieger firm on July 17, 2012 to retain the firm for representation.³¹ Sherbow had nothing to do with Mervie being at the July 26 meeting; she was there to retain the Fieger firm.

Sherbow claims that, at the July 26 meeting, Mervie and Dion were advised that he was a “referring” attorney and would be receiving a share of the attorney fees, and that they did not object. Dion and Mervie, to the contrary, testified that they were never advised by Sherbow (or anyone) that he was claiming to have referred them to the Fieger firm and wanted to receive a share of the attorney fees. Also, neither client was ever given any opportunity to object since they didn’t even know about a fee-sharing agreement in the first instance.³²

Mervie became frustrated with Sherbow’s trial counsel during cross-examination on this subject. Sherbow’s trial counsel asked Mervie targeted questions about whether

²⁹ Trial Transcript Volume III, March 2, 2017, p. 64; Appx p 500a.

³⁰ Id. at 63; Appx p 499a.

³¹ Id. at 20-21; Appx p 456a-457a.

³² Trial Transcript Volume III, March 2, 2017, p. 113, 78; Appx p 549a, 514a.

she ever objected to a fee-splitting agreement with Sherbow. Mervie answered “no,” but then explained: “No, I didn’t know Mr. Sherbow at all, so the objection of Mr. Sherbow, how would I be able to, you know, if I don’t know him. I didn’t [know] him.”³³ The July 26 meeting is the last time that Sherbow claims to have had any connection with anyone.

Phillip Hill was hospitalized and did not attend the July 26 meeting at the Fieger firm. Instead, Mr. Hill later contacted the Fieger firm directly for representation.³⁴ Mr. Hill did not know Sherbow, did not retain him, and never asked him to be his lawyer.³⁵ Mr. Hill signed a retainer agreement with the Fieger firm on August 6, 2012. Mr. Hill testified that he was never told about Sherbow’s claimed involvement in the case and was never advised that Sherbow would be sharing a fee with the Fieger firm.³⁶ It goes without saying that Mr. Hill could not object to something that he was not ever made aware of.

Sherbow candidly admitted that he never spoke with or had a relationship with Phillip Hill.³⁷ Instead, Sherbow claims that he is entitled to a referral fee from Mr. Hill’s case because of a conversation that he claims to have had with Danzig.³⁸ Sherbow testified: “I’ve never denied I never met Phil Hill. I never denied that I didn’t meet

³³ Id. at 78; Appx p 514a.

³⁴ Id. at 124; Appx p 124a.

³⁵ Id. at 124-125; Appx p 560a-561a.

³⁶ Id. at 125-126; Appx p 561a-562a.

³⁷ Trial Transcript Volume II, February 28, 2017, p. 139-140; Appx p 383a-384a.

³⁸ Id.

Mervie Rice for the first time when we signed up those cases. Never denied that.”³⁹ Yet Sherbow claims here that he is entitled to a share in Fieger’s attorney fees based solely upon conversations he claims to have had with Dion and Danzig, and a confederate letter from Danzig.

Sherbow also never had a conversation or relationship with Dorothy Dixon regarding any legal representation or consultation with respect to the Ohio accident. Dorothy suffered grievous injuries in the accident and was in a coma for months after the collision; she was later moved to a nursing home to rehabilitate.⁴⁰

Ms. Dixon had previously met and had had a prior bad experience with Sherbow. She testified that she had been involved in another automobile collision years before, and that Sherbow had tried to solicit her back then.⁴¹ Ms. Dixon did not retain Sherbow and chose other counsel.⁴² Ms. Dixon testified that she would never have chosen Sherbow as her attorney; she testified she “didn’t hire him then at the last one, and I wouldn’t have hired him at this one.”⁴³

Neither Danzig nor Sherbow told Ms. Dixon that her case had been secretly “referred,” or that Sherbow was claiming referral fees from her case.⁴⁴ Mr. Sherbow later tried to browbeat Ms. Dixon into giving him a fee. After the Fieger firm uncovered

³⁹ Id. at 140; Appx p 384a.

⁴⁰ Trial Transcript Volume III, March 2, 2017, p. 88; Appx p 524a.

⁴¹ Id. at 86-87; Appx p 522a-523a.

⁴² Id.

⁴³ Id. at 90; Appx p 526a.

⁴⁴ Id.

the fraud, he “bombarded his way” into her apartment, and came in talking about money and demanding a fee.⁴⁵ That uninvited and badgering meeting was the only time that Ms. Dixon ever had personal contact with Sherbow regarding the 2012 collision.⁴⁶

e. The Circuit Court’s Jury Instructions and the Jury Verdict

The Circuit Court determined that, as a prerequisite to making a valid and ethical referral under Michigan law, Sherbow must first prove that he had an attorney-client relationship with the clients. At the end of trial, the Circuit Court instructed the jury that, in order to find in favor of Plaintiff on any of the four underlying cases, the jury must first find that 1) the individual was a client of Sherbow’s, and 2) that Sherbow had actually referred the client to the Fieger firm. The Court instructed in relevant part as follows:

You’re instructed that as a matter of law, the Plaintiff, Jeffrey Sherbow, must prove to you by a preponderance of the evidence that Mervie Rice, and/or Dorothy Dixon, and/or Phillip Hill, and/or Dion Rice on behalf of the estate of Charles Rice were his clients as I will instruct you, and that he referred Mervie Rice, and/or Dorothy Dixon, and/or Phillip Hill, and/or Dion Rice on behalf of the estate of Charles Rice, to the Defendant, Fieger Law. If Plaintiff fails to prove by a preponderance of the evidence that the people whose names I gave you were his clients or that he fails to prove that he -- by a preponderance of the evidence that he referred those to Fieger Law, then your verdict must be for the Defendant as to any cases not so referred.

⁴⁵ Id. at 90-91; Appx p 526a-527a.

⁴⁶ Id. at 91; Appx p 527a.

(Trial Transcript Vol IV, March 3, 2017, p. 63; Appx p 709a)

Regarding who is considered a client, the Court gave the jury the Black's Law Dictionary definition of "client":

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 as by giving advice, appearing in court or handling the matter.

(Trial Transcript Vol IV, March 3, 2017, p. 63; Appx p 709a)

The Circuit Court also instructed the jury that "for a division of fee -- fees to be proper both the referring lawyer and the receiving lawyer are responsible to see that the client is properly advised, and does not object to the participation of the lawyers."⁴⁷ Thus, the Court's instruction placed the burden equally on both the referring attorney and the receiving firm to show that the client had been advised.

The jury found that Mervie Rice, Phillip Hill, and Dorothy Dixon were not "clients" of Sherbow and that he was not owed a referral fee on their cases.⁴⁸ Sherbow appealed the jury's verdict to the Court of Appeals.

With respect to the Estate of Charles Rice, the jury found that Dion Rice, acting on behalf of the Estate, was a "client" of Sherbow. Dion, however, was not the client; Howard Linden, the personal representative of the Estate of Charles Rice, was the

⁴⁷ Trial Transcript Vol IV, March 3, 2017, p. 66; Appx p 712a.

⁴⁸ Trial Transcript Vol IV, March 3, 2017, p. 79; Appx p 725a.

client. Defendant cross-appealed, arguing that it was entitled to judgment as a matter of law with respect to the Estate of Charles Rice case.

f. The Court of Appeals proceedings and published Court of Appeals opinion holding that an attorney-client relationship is not required for an attorney to make an ethical referral.

On appeal Sherbow raised four issues of error. Significant to this appeal, Sherbow argued in the Court of Appeals that the Circuit Court erred by instructing the jury that an attorney-client relationship was a necessary predicate for a valid, ethical referral. Sherbow claimed that MRPC 1.5(e) does not require an attorney-client relationship between a referring attorney and the “client” in order for an attorney to claim a share in fees. Sherbow also argued on appeal that the Circuit Court erred by not instructing the jury that it was the Defendant’s burden of proof to establish that the clients were not advised of/did not consent to the fee-splitting agreement (as an affirmative defense).

In its Cross-Appeal, the Fieger firm argued that the Plaintiff has the burden of proof to establish that the referral contract was valid in the first instance, thus placing the burden on Plaintiff to show compliance with the Michigan Rules of Professional Conduct.

The Court of Appeals, deciding an issue of first impression under Michigan law, held that a “referring attorney” does not need to have an “attorney-client” relationship with the clients in order to make a legal and ethical referral under MRPC 1.5(e). *Law*

Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC, 326 Mich App 684, 711; 930 NW2d 416, 432 (2019).

The Court of Appeals further held that the illegality of a referral contract is an affirmative defense, and thus, shifted the burden and held that it was Defendant's burden to prove that Plaintiff had not complied with the rules. The Court of Appeals also held that an attorney-client relationship (of any kind) is not necessary for a valid referral fee-sharing agreement under MRPC 1.5(e). *Id.* at 707.

After making this legal determination, the Court of Appeals went on to consider whether a new trial was necessary. The Court curiously held that there was juror "confusion" stemming from an "erroneous" jury instruction regarding the requirement of a prerequisite attorney-client relationship, and the burden of proof, and thus, a new trial was necessary. Despite this legal determination, the Court then, inexplicably, only remanded for a new trial the fee-dispute cases arising from Mervie Rice's, Dorothy Dixon's, and Philip Hill's cases, but not the Estate of Charles Rice. (The "confusing" jury instruction was given on all four cases."⁴⁹

⁴⁹ Unless the Court of Appeals was holding that an allegedly erroneous instruction is unacceptable when one party prevails, but not when the opposing party does, the failure to include the Estate in its holding is plain error.

g. This Court granted leave to appeal.

The Fieger firm filed a timely application for leave to appeal the Court of Appeals decision. On February 5, 2020, this Court granted leave to appeal and instructed the parties to address:

(1) whether Michigan Rule of Professional Conduct (MRPC) 1.5(e) requires the client to have an attorney-client relationship with all participating lawyers; (2) if so, what are the parameters of such relationship and how is it formed; (3) which party carries the burden with respect to a contract's compliance with MRPC 1.5(e), see *Palenkas v. Beaumont Hosp.*, 432 Mich. 527, 548-550, 443 N.W.2d 354 (1989); and (4) if an attorney-client relationship with all participating lawyers is required under MRPC 1.5(e), whether reversal is required in this case. See MCR 2.613(A); *Cox v. Bd. of Hosp. Managers for City of Flint*, 467 Mich. 1, 15, 651 N.W.2d 356 (2002).

Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC, 937 NW2d 685 (Mich, 2020).

Defendant now asks that this Court reverse the Court of Appeals and affirm the jury verdict as to Mervie Rice's, Dorothy Dixon's, and Philip Hill's cases, and hold that Defendant is entitled to judgment as a matter of law as to the Estate of Charles Rice case. The Court of Appeals legal determination that no attorney-client relationship of any kind is necessary for a valid "referral" of a "client" from one attorney to another is radical, and opens the floodgate to the type of predatory conduct which occurred in this case.

III. LAW AND ARGUMENT

a. Standard of Review

Whether an attorney-client relationship is a necessary predicate for a valid referral, and whether a referral contract is a valid contract (in compliance with the Michigan Rules of Professional Conduct) are unvarnished issues of law, which this Court reviews *de novo*. *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 569; 592 NW2d 360 (1999); see also *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 43; 672 NW2d 884 (2003).

- b. The Court of Appeals holding that an attorney-client relationship is unnecessary in order for an attorney to “refer” a “client” is radical and should be rejected by this Court. An attorney-client relationship must be a prerequisite for a valid and ethical referral of a “client” from one attorney to another.**

As an issue of first impression in Michigan, the Court of Appeals held that an “attorney-client” relationship with a “client” by an attorney claiming to have made a referral is not required for that attorney to later claim a referral fee under MRPC 1.5(e). This holding is radical and dangerous. If taken to its extreme, it allows for the predatory and unethical conduct seen here: where an attorney candidly admits that he had no prior contact with clients (never met them, never spoke with them, was never consulted by them) but, nevertheless, claims that he “referred” the “clients” (and is entitled to attorney’s fees). This result is unconscionable, contrary to the basic principles that guide the ethical practice of law, and leaves the process open to abuse by less than scrupulous

members of this profession.

The Court of Appeals analysis that an attorney-client relationship with a referred client is not necessary is based upon a skewed interpretation of MRPC 1.5(e). MRPC 1.5(e) allows a “division of a fee between lawyers who are not in the same firm” **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.” (Emphasis added.)

At-issue here is whether the word “client” in subsection (1) applies to the referring attorney, so that they must have some type of attorney-client relationship with the “client” in order to “refer” them. The Court of Appeals incongruously held that the word “client” does not relate to any relationship between the referring attorney and the party, but only to the relationship with the attorney later receiving the referral. Defendant asks that this Court reject this nonsensical interpretation because it is contrary to both the ethical practice of law and the reason an exception for fee-sharing between attorneys was adopted by this Court in the first place.

1. The Historical Adoption of MRPC 1.5(e)

MRPC 1.5(e) was adopted by this Court in 1988 when this Court promulgated the current version of the Michigan Rules of Professional Conduct. By doing so, the Court exercised its authority to “provide for the organization, government, and membership of the state bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members.” MCL 600.904.

See also Const 1963, art 6, § 5. The language of MRPC 1.5(e) has remained unchanged in the intervening 30 years.

While many of the adopted rules were identical to the American Bar Association Model Rules, MRPC 1.5(e) was not. The ABA model rule for this section provided:

- (e) A division of a fee between lawyers who are not in the same firm may be made only if:
- (1) the division is in proportion to the service performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
 - (2) the client is advised of and does not object to the participation of all the lawyers involved; and
 - (3) the total fee is reasonable.

The rule as adopted by this Court provides:

- (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.

Significantly, the rule adopted in Michigan does not require a “proportional performance” of work or joint representation that was required by the ABA model rule.

The comments to the rule explain why this Court deviated from the ABA model rule:

Division of Fee. A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring

lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee on agreement between the participating lawyers if the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive.

This commentary to the rule was first published in the 1989 published MRPCs and has remained unchanged to this date. The stated purpose for allowing fee-sharing between attorneys for referrals *was to better serve the client*.

The Court's choice to deviate from the ABA Model rule was a deliberate one. Before adopting the MRPC, the Court requested comments from various legal groups within the state on the changes proposed by the State Bar of Michigan. The proposed changes included a request that the court adopt Model Rule 1.5(e) to replace the prior aspirational canons of professional responsibility. "While the State Bar of Michigan requested the adoption of the Model Rule, the Michigan Attorney Grievance Commission did not believe that the Model Rule was appropriate and, therefore, proposed a more liberal rule that was virtually identical to the current MRPC 1.5(e)." Sean M. Carty, *Money for Nothing? Have the new Michigan Rules of Professional Conduct Gone Too Far in Liberalizing the Rules Governing Attorney's Referral Fees?*, 68 U Det L Rev 229, 242 (1991) (cleaned up).

The Court ultimately adopted the Grievance Commission's proposal. One of the main reasons in favor of the Grievance Commission's proposal was to better serve the client's interests by creating an incentive for cases to be referred to more experienced and specialized practitioners. *Id.* at 243. The Court, as evidenced by the commentary to the Rule, found this goal persuasive, and adopted the current rule *in order to better serve*

the client.

Against this backdrop, this Court must now consider whether MRPC 1.5(e) requires, at a minimum, that a “referring attorney” have some type of attorney client-relationship with a client in order to make a valid referral.

2. Since MRPC 1.5(e) was adopted to better serve the interests of the client, an attorney-client relationship with the referring attorney is essential to ensure that the client receives the benefit of the rule.

The proper interpretation of MRPC 1.5(e) presents an issue of statutory interpretation for this Court. The rules of statutory construction apply to rules promulgated by the Michigan Supreme Court, such as the Michigan Rules of Professional Conduct. *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003); *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 44; 672 NW2d 884 (2003).

To reiterate, the language at-issue in MRPC 1.5(e) provides: “A division of a fee between lawyers who are not in the same firm may be made only if. . .the client is advised of and does not object to the participation of all the lawyers involved[.]” The Rule does not specifically designate whether one or both of the two attorneys must have an attorney-client relationship with the “client” being “referred.” This presents a *possible* ambiguity in the Rule.

“When interpreting statutes, we begin with the statute’s plain language. In doing so, we examine the statute as a whole, reading individual words and phrases in the

context of the entire legislative scheme. We must give effect to every word, phrase, and clause and avoid an interpretation that would render any part surplusage or nugatory. When the statute's language is unambiguous, the statute must be enforced as written. These same legal principles govern the interpretation of court rules." *People v Comer*, 500 Mich 278, 287; 901 NW2d 553 (2017) (cleaned up).

"If reasonable minds can differ about the meaning of a [rule], judicial construction is appropriate. The court must consider the object of the [rule], the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the [rule's] purpose, but should also always use common sense. [Rules] should be construed to avoid absurd consequences, injustice, or prejudice to the public interest." *Morris & Doherty, PC* 259 Mich App at 44 (cleaned up). The Michigan Rules of Professional Conduct constitute "definitive indicators of public policy." *Terrien v Zwit*, 467 Mich 56, 67; 648 NW2d 602 (2002).

The primary purpose and goal for adopting the relaxed version of MRPC 1.5(e) was to better serve the client by encouraging involvement of experienced and specialized attorneys. To facilitate and encourage this goal, the Rule allows a referring lawyer to claim a split in fees when a case is sent (i.e. referred) to other counsel. This goal to better serve the client's interests is only preserved if there is an attorney-client relationship with the referring attorney in the first place.

MRPC 1.5(e) must logically be interpreted so that the word "client" apply to both the referring and receiving attorneys. To hold otherwise is absurd. The referring

attorney must have some type of relationship with a client in order to “refer” him or her. This interpretation is supported by the context of MRPC 1.5(e), which allows referrals and fee-sharing between attorneys, but not between non-attorneys, as well as other ethics rules and statutes.

The rationale behind this attorney-specific exception is found in MRPC 1.1(a). MRPC 1.1 requires attorneys to provide competent representation to clients. MRPC 1.1(a) provides that a lawyer shall not “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[.]” Thus, lawyers have an ethical obligation to seek out and partner with other lawyers who have expertise in specific areas, with the overarching goal being to provide the most competent representation possible to the client. Thus, it is the client’s wellbeing that has prompted the exception to fee-sharing between attorney in MRPC 1.5(e).

Michigan State Bar Ethics Opinion RI-158 supports this analysis of Michigan public policy, as defined by the Rules of Professional Conduct. (Appx p 729a) “Although State Bar Ethics Opinions are not binding on this Court, they are instructive.” *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 202; 650 NW2d 364 (2002). Opinion RI-158 considered the interplay between MRPC 1.5(e) and 1.1. The Ethics panel considered whether an attorney can demand payment of a referral fee before making a referral to more competent counsel. RI-158 instructs that a lawyer cannot refuse to give a proper referral or make his referral contingent on receiving a referral fee. The SBM

Ethics Panel recognized the long-espoused principle that “[i]f the client offers objection to the participation, then the lawyer may not request or receive a referral fee.” (Appx p 730a) The opinion further instructs that “the lawyer should be cognizant of MRPC 1.1 governing lawyer competence and make every reasonable effort to assure that the receiving lawyer has the competence and skills necessary to meet the client's objectives. Neither lawyer should allow the referral relationship to affect either lawyer's professional judgment regarding the best interests of the client.” Id.

RI-158 analyzed the interplay between an attorney’s pecuniary interest in a referral and the client’s need for competent counsel, and turned to the Preamble of the MRPC to guide its interpretation:

In addressing this issue, a review of the preamble to the Michigan Rules of Professional Conduct entitled "A Lawyer's Responsibilities" is instructive. As is emphasized there, a lawyer is a representative of clients as well as an officer of the legal system, and a public citizen having a special responsibility for the quality of justice. As noted in MRPC 2.1, a lawyer performs various legal as well as other nonlegal functions on behalf of the lawyer's client. As an advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and also performs responsibilities as a negotiator, intermediary and evaluator in addition to the responsibilities as a diligent advocate. [Id.]

Thus, a lawyer has ethical and legal obligations above and beyond those expected of the public at-large. A lawyer can provide professional services as an advisor and intermediary, not just as a diligent advocate. These are hallmarks of an attorney-client relationship. While the scope of the representation may be narrow (simply advising a client about competent counsel and providing a referral), a relationship does exist.

RI-158 further explained the unique role of a lawyer, and why an exception to

fee-sharing by lawyers advances the purpose of a client getting the most competent representation:

The lawyer plays a unique role in the administration of justice, and owes a duty to ensure public understanding and acceptance of that system. The lawyer has a duty to exemplify the legal profession's ideals of public service and has a difficult and challenging task of addressing conflicting responsibilities, particularly between the lawyer's own economic aspirations and in ensuring full and fair legal services to the public. In order to maintain an independent legal profession, it is important to preserve, maintain and enhance the profession and that lawyers work to assist their clients in obtaining their lawful objectives. When an individual lawyer is not able to meet the needs of the lawyer's clients for legal services, the lawyer has every right to assist that client in finding a proper provider of legal services. Although nothing prevents the lawyer from attempting to obtain an appropriate referral fee for this activity, when and if that objective cannot be reached, it would appear not to be in the interests of the legal profession or the public for the lawyer to refuse to provide a recommendation or referral to appropriate services.

MRPC 1.2(a) provides that a lawyer shall seek the lawful objectives of a client through reasonably available means permitted by law under these rules. Although this rule does not specifically mandate that a lawyer must make a referral even if the lawyer will receive no compensation therefor, it would be the antithesis of the concept of enhancing the legal profession if the lawyer willfully refused to provide such a referral solely because the client and/or the receiving lawyer declined to pay a referral fee for such assistance.

The permeating theme of the MRPC is that the client's needs are paramount, and the Michigan Rules of Professional Conduct were enacted with the goal of providing the best representation with the highest integrity. An attorney-client relationship sits at the core of these objectives. The Michigan Rules of Professional Conduct resoundingly advance public policy protecting a client and advancing ethical practices and representation based on the client's best interest. "Basic concepts of loyalty to the client,

as well as placing the client's interests as primary, prohibit the lawyer from using the lawyer's position of trust and confidence to extract agreement from the client to pay a referral fee. See Comment to Rule 1.7, Conflict of Interest.” RI-158. (Appx p 731a)

MRPC 1.5(e) is in place to encourage attorneys to refer clients to the most competent counsel. Otherwise, there is no logical reason why attorneys should be allowed to share fees. Non-attorneys are prohibited from fee sharing for similar referral services. See *Morris & Doherty PC, supra* (holding that a referral fee agreement with an inactive lawyer is void and unenforceable because it is against public policy).

Here, the Court of Appeals *agreed* that the public policy behind MRPC 1.5(e) is to ensure that the client receives the most competent representation:

This additional requirement also has the potential to result in situations where an attorney, who typically would immediately refer a case that they knew they were not qualified or adequately able to handle, might retain the case for a certain period of time. In so doing, that underqualified or underprepared attorney might cause a detriment to the injured party's case. After all, Michigan law with respect to personal injury cases often have exacting statutory requirements (such as medical malpractice, the no-fault act, cases implicating governmental immunity, etc.) which an attorney not versed in that area of law might unwittingly fail to meet. [*Law Offices of Jeffrey Sherbow, 326 Mich App at 711-712.*]

The Court, then, failed to reconcile how this interest is met or preserved by allowing an attorney who has no relationship with a client to nevertheless claim a referral fee without any connection to the client. It is not.

The Court of Appeals, supposedly relying on *McCroskey, Feldman, Cochrane & Brock, PC v Waters, 197 Mich App 282, 287; 494 NW2d 826, 828 (1992)*, held that the policy purposes behind MRPC 1.5(e) do not require any attorney-client relationship

with a “client” to refer the “client.” *Waters*, however, is inapposite to the facts adduced here, where Sherbow admits that he had no relationship whatsoever with the “clients” before his claimed “referral” of them.

Waters involved the enforceability of an employment agreement between a lawyer and his former law firm. The agreement set forth a mechanism for dividing attorney fees for cases that were originally with the firm but later taken with the departing attorney. The departing attorney claimed that the employment agreement was unenforceable, in part relying in MRPC 1.5(e). The Court of Appeals disagreed and held that the agreement was enforceable. As to MRPC 1.5(e), the Court held that the Rule was not applicable under the circumstances, which did not involve a referral agreement, but an employment contract covering circumstances after a lawyer leaves a firm which provided a mechanism for dividing an already existing fee.

The Court of Appeals reliance on *Waters* to define the public policy of MRPC 1.5(e) as it relates to this case is insufficient. Unlike *Waters*, this case *does* involve a referral dispute, and goes to the heart of why MRPC 1.5(e) was promulgated. The Rule is not in place to allow unscrupulous attorneys to obtain fees in cases where they have no relationship with the clients. The Rule was promulgated so that, after being consulted on a case, an attorney who is less qualified or experienced has an incentive to hand the case off to a more competent firm. It is the client’s interests that are paramount, not the pockets of an unscrupulous attorney.

3. **An attorney-client relationship will not adversely impact legitimate and ethical referrals in Michigan: the parameters of the relationship and how it is formed.**

An attorney-client relationship with the referring lawyer is not an onerous or burdensome requirement. Such a relationship ensures that the referring lawyer has some connection and nexus to the clients, and is not abusing a situation to falsely claim a fee in cases where the attorney has no relationship whatsoever with the client. This requirement is especially important given the prevalence of technology and social media presence, making such information quickly and widely available.

Under the Michigan Rules of Professional Conduct, a lawyer, as a representative of clients, can perform various functions. As stated in the Preamble: A Lawyer's Responsibilities under the MRPCs:

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. As a **representative of clients**, a lawyer performs various functions. As **advisor**, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As **advocate**, a lawyer zealously asserts the client's position under the rules of the adversary system. As **negotiator**, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As **intermediary** between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a **spokesperson** for each client. A lawyer acts as **evaluator** by examining a client's legal affairs and reporting about them to the client or to others.

A lawyer can be a representative of a client as an advisor, advocate, negotiator, intermediary, spokesperson, and evaluator. Each of these functions presumes a trust-based relationship with the client, with the lawyer offering something based on their

professional judgment. The preamble recognizes that a lawyer can represent clients in the role of an advisor by providing the client with an informed understanding of the client's rights and obligations. *This role encompasses consulting with a client and making a proper referral to another attorney.*

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[.]" *Devich v Dick*, 177 Mich 173, 178; 143 NW 56 (1913). "It is not essential to such relation that any fee be paid, promised, or charged" or that the attorney was never formally retained. *Id* at 179.

"The relation of attorney and client is one of agency." *Fletcher v Bd of Ed of Sch Dist Fractional No 5, Brighton & Genoa Tps, Livingston Co*, 323 Mich 343, 348; 35 NW2d 177 (1948). "Whether in any case an attorney is professionally employed depends on the relations and mutual understanding of the parties, on what was said and done, and all the facts and circumstances of the particular undertaking." *Case v Ranney*, 174 Mich 673, 682; 140 NW 943 (1913).

This Court should hold here that a legal consultation (i.e. an attorney-client relationship) is a minimum prerequisite to a valid "referral" of a client under the Michigan Rules of Professional Conduct. This requirement is not unduly burdensome. Otherwise, there is no protection against the type of predatory conduct that Sherbow has admitted to in this case.

The Court of Appeals did not devote any significant consideration to the

parameters of an attorney-client relationship. Instead, it focused on the purported onerous chilling effect that a relationship prerequisite would have on referring cases to more competent counsel. This rationale, however, makes no sense. How could an attorney “refer” a case, if they were never consulted by the client in the first place? They cannot. And, if a consultation does take place, then the client has sought out the attorney seeking legal advice, and the bonds of an attorney-client relationship will have been formed.

The Court of Appeals one-sentence analysis of what constitutes an attorney-client relationship under Michigan law, and when it attaches to form an obligation on the part of an attorney, misses the mark. *Sherbow*, 326 Mich App at 711, partially quoting *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Sch*, 455 Mich 1, 11; 564 NW2d 457 (1997). In fact, the full quote to the cited section states:

The operative principle in the Court of Appeals ruling is that an obligation to pay for legal services is the sine qua non of an attorney-client relationship. This is simply untrue. The relation of attorney and client is one of confidence based upon the ability, honesty, and integrity of the attorney, not solely, or even primarily, upon a client's obligation to pay. The rendering of legal advice and legal services by the attorney and the client's reliance on that advice or those services is the benchmark of an attorney-client relationship. The attorney's right to be compensated for his advice and services arises from that relationship; it is not the definitional basis of that relationship. *Macomb Co Taxpayers Ass'n*, 455 Mich at 10-11 (cleaned up).

It is consultation and advise, based on professional judgment, that gives rise to an attorney-client relationship, *not* an entitlement to payment.

Justice Zahra recognized this principle in his recent dissenting statement to the

order denying leave to appeal in *Sanders v Tumbleweed Saloon, Inc*, 943 NW2d 100, 103–04 (Mich, 2020) (ZAHRA, J., dissenting). Citing to the Court’s decision in *Macomb Co Taxpayers Ass'n*, Justice Zahra acknowledged that an attorney-client relationship in that case was formed when the clients consulted with an attorney, in his capacity as a personal injury lawyer, to obtain legal advice and services. *Id.* The fact that the clients did not retain or pay the attorney was immaterial because “[n]o retainer agreement or formalized documentation is required to establish an attorney-client relationship.” *Id.* citing *Macomb Co Taxpayers Ass'n*, 455 Mich at 11. Again, it is the consultation and advice that is the cornerstone of the attorney-client relationship.

The limited scope and nascent nature of the attorney-client relationship in this context is analogous to the type of relationship that is formed when a potential client seeks a preliminary meeting with an attorney to secure or explore representation. While the consultation may not lead to a formal retention or the payment of an attorney fee, the attorney is still obligated under the Michigan Rules of Professional Conduct to protect the confidentiality of any information learned during the consultation (MRPC 1.6), and would be required to decline representation in any matter that could create a conflict with the potential client’s interests (MRPC 1.7). There is still some type of attorney-client relationship formed, such that the rules of professional conduct attach to and govern the lawyer’s scope of acceptable ethical conduct.

The overarching objective of the Michigan Rules of Professional Conduct is to protect the interests of the client. An attorney-client relationship protects this interest in

the context of a referral. Requiring Sherbow to have this basic relationship with the clients before claiming a “referral” should be the bare minimum of acceptable ethical conduct.

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 advise and help the client find competent representation. But this very act—helping the client find competent representation—involves the exercise of professional judgment and forms the necessary attorney-client relationship. Presumably the client has consulted with the referring attorney and has sought help for litigating a case. Such a holding will protect ethical lawyers and firms who are first consulted by a “client,” but who then refer the case to another lawyer for various reasons.

This Court should require this basic consultation in any case that is being “referred.” Otherwise, there is no check or balance against an attorney claiming a fee for referring cases when there has been no client consultation, no contact with the client, nothing. The attorney fee-splitting exception was enacted for the benefit of the client, not for an attorney to monetize on the misfortune of acquaintances.

Sherbow’s conduct in this case is suspect and is not the type of behavior that should be sanctioned in Michigan. Sherbow *admits that he was never contacted by a client, and that his first call after hearing about the tragedy from a third-party was to his friend Danzig. There and then he let it be known that the cases resulting from the accident should be “his” (irrespective of whether the clients contacted Fieger on their*

own). Sherbow then attempted to solicit Dion, even though this type of solicitation is unethical in Michigan. MCL 600.919(2) instructs “Any agreement for such compensation, or for reimbursement of any expenses, incident to the prosecution or defense of any claim by any party is wholly void if such professional employment was solicited by the member of the bar, or by any other person acting on his behalf or at his request, unless the services of such member of the bar were first requested by such party.” Dion did not contact Sherbow or request that Sherbow get involved; in fact, at trial, Sherbow admitted that he contacted Dion without being asked.⁵⁰

Dion did not agree to Sherbow becoming involved in any manner in his father’s case, and clearly told Sherbow that he would determine what other members of his family were doing before getting back to Sherbow.⁵¹ Dion told Sherbow that he had already contacted the Fieger firm when Sherbow again solicited him, at his home, just days after the accident.⁵² Sherbow’s “efforts” were unwanted and unethical.⁵³

Sherbow admitted that he had never spoken with or consulted with Mervie Rice, Dorothy Dixon, Phillip Hill or Howard Linden, personal representative of the Estate of Charles Rice. And yet, Sherbow claimed a referral fee from “clients” he never had. Sherbow never had a single conversation or consultation with any of the four clients.

⁵⁰ Trial Transcript Vol II at 122; Appx p 366a.

⁵¹ Trial Transcript Vol III at 111; Appx p 547a.

⁵² Id. at 121-122; Appx p 557a-558a.

⁵³ Moreover, Dion is not a part of this case. He is a taker in his father’s estate. Howard Linden is the client.

Sherbow's behavior was clearly adverse to the clients' interests and solely for his own personal gain. This Court must provide a clear signal, not just to Sherbow, but to all attorneys, that this type of conduct is unethical and will not be condoned. The way to send this message is to require that, in order for an attorney to make a valid referral, there must, at a minimum, be an attorney-client relationship between the "client" and the "referring attorney." This requirement will ensure that a client has actually consulted with the attorney and has been given advise as to the most competent counsel. It will also foreclose predatory conduct.

There is a right way to make a referral and a wrong way. Sherbow's way (calling "dibs" on cases before he was ever sought out, met with, or consulted with the clients) is obviously wrong. Attorney referrals in Michigan serve the important purpose of ensuring that clients are directed to experienced attorneys with specialized skill sets. That basic precept—a consultation for legal advice, and information regarding the best source to get representation—provides the basic building blocks of an attorney-client relationship. Allowing attorneys to claim referrals without any consultation makes no sense, and is a disservice to the ethical attorneys who *do* provide the important service of providing legitimate referrals.⁵⁴

⁵⁴ The Court of Appeals adopted the reasoning of the Kansas Supreme Court in *Ryder v Farmland Mut Ins Co*, 248 Kan 352, 362; 807 P2d 109, 117 (1991), which held that an attorney-client relationship with a referring attorney is not necessary. *Ryder*, however, does not provide any detailed analysis of Michigan policy, or examine how the requirement meshes with the prevailing interest in favor of the client. *Ryder* instead fell back on shallow statutory analysis, holding that because the rule did not explicitly

Michigan public policy favors the ethical conduct of lawyers and placing the clients' interests first. Requiring a basic attorney-client relationship between the referring lawyer and client advances these purposes.

- c. **The alleged referral fee contract violated MRPC 1.5(e) because the clients did not know about an agreement to split fees and did not acquiesce to the split. The agreement is illegal and unenforceable as a matter of law. It is Plaintiff's burden of proof to establish the existence of a valid and enforceable contract. The Court of Appeals erred in holding to the contrary.**

MRPC 1.5(e) requires that "the client is advised of and does not object to the participation of all the lawyers involved" for any division of fees between attorneys not of the same firm. At-issue in this section is who bears the burden of establishing that the clients were informed of the alleged agreement to share attorney fees, and did not object.

It is well-established Michigan law that it is a *plaintiff's burden to establish the existence of a valid and enforceable contract*:

require a relationship, one was not required.

“When plaintiff cannot establish its cause of action without relying upon an illegal contract, it cannot recover. The contract was of no force, effect, or efficacy. It was invalid, null, and void.”

* * *

“The general rule of law is, that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover.” (citations omitted).

Am Tr. Co v Michigan Tr. Co, 263 Mich 337, 339–340; 248 NW 829 (1933).

Thus, it must be Plaintiff’s burden of proof to establish the existence of a valid and enforceable contract. The burden does not rest with the Defendant. The Court of Appeals erred in shifting the burden and holding that establishing the existence of a valid referral contract is *only* an affirmative defense.

The Circuit Court was correct when it gave its instruction as to Sherbow’s burden of proof to establish that there was a valid attorney-client relationship, and that Sherbow, in fact, “referred” the clients to the Fieger firm. The Circuit Court, however, erred in instructing the jury that both Plaintiff and Defendant had the burden of proving that the clients had been advised of the fee-sharing agreement and that they did not object. It was Plaintiff’s burden of proof, because Plaintiff has the burden of establishing a valid and enforceable contract.

Even presuming that compliance with the Rules of Professional Conduct is an affirmative defense, as opposed to an integral part of Plaintiff’s burden in its case-in-chief, Plaintiff still carries the ultimate burden at trial of establishing the legality of the contract. “In its strict sense the term ‘burden of proof’ refers to the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in

a case. A secondary use of the term, however, denotes the burden of going forward, i.e., the obligation to respond to a prima facie case established by the opposing party.” *Palenkas v Beaumont Hosp*, 432 Mich 527, 550; 443 NW2d 354 (1989) (cleaned up). “The burden of going forward with the evidence may shift at various times during the trial from one side to the other as evidence is introduced by the respective parties.” *Id.* “Only when evidence has been introduced tending to prove that the cause of action has been barred will the plaintiff have the burden of producing clear and decisive evidence to negate the bar.” *Id.* “Accordingly, it is consistent both for the defendant to have the initial burden of production on its affirmative defense and for the plaintiff to have the ultimate burden of convincing the jury[.]” *Id.*

Defendant argued that the contract at-issue in this case (the letter authored by Danzig) violates the Michigan Rules of Professional Conduct, is against public policy, and is unenforceable as a matter of law. Michigan Courts will not enforce a contract that is contrary to Michigan law. *Rory v Contl Ins Co*, 473 Mich 457, 491; 703 NW2d 23, 43 (2005). Under the Rules of Professional Conduct, a fee-splitting agreement between attorneys cannot be enforced unless the client is advised of the arrangement and does not object. MRPC 1.5(e). After Defendant raised this issue, it was ultimately Plaintiff’s burden to establish that the clients were advised of a fee-splitting agreement with Sherbow and did not object. Mere silence is not enough to affirmatively show that the clients were advised of the fee-splitting and did not object.

Sherbow acknowledges that he was never retained by any of the four clients, and

none were ever his client. When he filed this suit, he had never had a single conversation regarding representation with Mervie Rice, Philip Hill, Dorothy Dixon, or Howard Linden as Personal Representative of the Estate of Charles Rice. Sherbow did not have a telephone call with Dorothy Dixon until the summer of 2014. He never met Philip Hill at all; he did not meet Dorothy Dixon, who was comatose in the summer of 2012, until mid-2014, long after Danzig signed a letter giving away to his friend Sherbow a share of the Fieger Firm's fees earned from her case.

At trial, all of the clients testified that they had never consulted with Sherbow, were not made aware that he was claiming an attorney fee, and, if they had known, would have objected. None ever consented. Danzig's letter promising a referral fee was made without complying with MRPC 1.5(e), was against Michigan public policy, and thus is void and unenforceable as a matter of law.

Several Court of Appeals opinions are instructive and confirm that contracts that violate the Michigan Rules of Professional Conduct are against public policy and therefore unenforceable as a matter of law. In *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 194-197; 650 NW2d 364 (2002), the Court of Appeals held that a fee-splitting contract that violates the Michigan Rules of Professional Conduct is unenforceable as a matter of law. Similar to the arguments raised in this case, the plaintiff in *Evans* brought a breach of contract action to recover payment of a referral fee; in defense of the lawsuit, the defendant argued that the fee agreement was unenforceable because the referral was contrary to the Rules of Professional Conduct. *Id.* at 192. The Court agreed with the

defendant's analysis and held that the referral-fee agreement was unenforceable because the referral violated the Rules of Professional Conduct, and conduct that violates the rules is against public policy. As a result, the Court declined to enforce the contract as a matter of law. *Id* at 189, 195–197.

Similarly, in *Morris & Doherty, PC*, 259 Mich App at 58, the Court of Appeals considered whether a fee-splitting agreement between an attorney and an attorney with an inactive bar membership was enforceable. The Court concluded that because enforcement of the agreement would violate the Rules of Professional Conduct, the agreement was unenforceable. The black letter law to be taken from the case is clear: contracts in violation of the law (including the Michigan Rules of Professional Conduct) are void as a matter of law. *Id.* at 60.

Michigan State Bar Ethics Opinion RI-234 provides further guidance regarding Sherbow's duty to inform clients about a fee-sharing agreement, and counsels that silence alone cannot suffice. (Appx p 732a) Opinion RI-234 instructs that, prior to the division of a fee between lawyers who are not in the same law firm, the client must be advised of the identity of the lawyers who will divide the fee. The client must also be advised which lawyer the client should contact for information regarding the case, what services each lawyer will be providing on the case, and which lawyer(s) will be responsible for the matter. Under this analysis, Sherbow's claims utterly fail.

Although not binding, there have been a number of unpublished Court of Appeals decisions that have affirmed the principle that a referring lawyer has the

obligation of proving the existence of a valid and legal contract by establishing that the clients were informed of an agreement to share fees and did not object. Following *Evans & Luptak* and *Morris & Doherty*, the Court of Appeals examined the precise issue presented here in *Morad v Cabadas*, unpublished opinion per curiam of the Court of Appeals, issued January 11, 2005 (Docket No. 245976) (Appx p 734a): whether a fee-splitting agreement that violates MRPC 1.5(e) is unenforceable as a matter of law. In keeping with prior precedent, the Court held that a fee-splitting agreement entered into without the client's knowledge or consent, in violation of MRPC 1.5(e), is unenforceable as a matter of law because the contract is contrary to Michigan's public policy, evidenced by our laws.

Similarly, *Kosinski v Mason*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 2001 (Docket No. 224658) (Appx p 735a) is also persuasive because, once again, the Court held that a client must affirmatively "not object" to a split in attorney fees. Mere silence on the subject is not enough to create a question of fact on the issue. In *Kosinski*, the plaintiff was a probate lawyer who shared office space with the defendant, a personal injury lawyer. The client lost her father in a bus accident and was seeking legal representation. Plaintiff claimed that he recognized a potential wrongful death claim, offered to refer the client to defendant, called defendant to apprise him of the situation, and subsequently walked the client across the hall and introduced her to defendant. The client, meanwhile, stated that she became aware of both plaintiff and defendant, and the type of work they performed, during

discussions with coworkers. She claimed that she went to their office space intending to see both men, and that after she mentioned to plaintiff that she was next going to speak with defendant, she merely agreed to plaintiff's offer of an introduction.

The Court of Appeals considered this context, and the requirements of MRPC 1.5(e), and held that, under the circumstances, the plaintiff could not establish a viable breach of contract claim against the defendant. The Court explained:

Regardless of the potential questions of fact that remained with respect either to the parties' course of dealing regarding referrals and plaintiff's entitlement to a share in this case, or to who first directed Camilleri to defendant-whether it was personal friends who identified and recommended defendant or plaintiff who "referred" her and walked her across the hall to defendant's office-there is no question of material fact on the issue of Camilleri's lack of awareness of or agreement to the alleged division of fees arrangement. Thus, summary disposition was appropriate. *Id* at *1.

The Court further held that mere silence on the part of the client was not enough for plaintiff to establish the existence of a valid and enforceable agreement to share fees, making summary disposition appropriate. The *Kosinski* Court squarely placed the burden of establishing a valid and enforceable contract on the plaintiff (not defendant), and concluded that "Because no material question of fact exists regarding compliance with the requirement of Rule 1.5(e) that the client knowingly approve of a division of fees arrangement, plaintiff's claim is unenforceable and summary disposition was appropriate." *Id* at *3.⁵⁵

⁵⁵ *Morad* and *Kosinski*, although unpublished, are persuasive and worthy of analysis because they construed the exact issue presently before this Court.

The critical language of MRPC 1.5(e) allows the Danzig-Sherbow scheme only if, "the client is advised of and does not object to the participation of all lawyers involved". And it was Sherbow's burden of proof at trial to establish that the clients were advised and did not object to the fee-split.

- d. **The Circuit Court correctly instructed the jury that Sherbow was required to have a "client," i.e. an attorney-client relationship with the clients before he could make a valid and ethical referral. Sherbow admitted at trial that he did not have an attorney-client relationship with any of the clients. As a result, a new trial as to Mervie Rice's, Dorothy Dixon's, and Philip Hill's cases is not warranted. As to the Estate of Charles Rice case, this Court should reverse the jury verdict and enter judgment as a matter of law in favor of Defendant.**

If this Court holds that an attorney-client relationship is necessary for an attorney to make a valid and ethical referral, and claim a share in attorney fees, then the Court of Appeals judgment must be reversed and the jury verdict in favor of Defendant as to Mervie Rice's, Dorothy Dixon's, and Philip Hill's cases should be affirmed. The Circuit Court correctly instructed the jury that Sherbow needed to have a "client" in order to make a valid referral. The jury duly deliberated on the issue and found against Sherbow. There was no error and the jury was not "confused." Critically, Sherbow *admitted* that he had no relationship with any of the clients before he claimed to have made a referral. These admissions, in and of themselves, require judgment in favor of Fieger as to all clients.

“Jury instructions should include “all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them.” *Cox ex rel Cox v Bd of Hosp Managers for City of Flint*, 467 Mich 1, 8; 651 NW2d 356 (2002). “Instructional error warrants reversal if the error resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be inconsistent with substantial justice.” *Id.* (cleaned up). Here, there is no instructional error resulting in unfair prejudice, and the jury’s verdict is consistent with substantial justice.

At the conclusion of the trial, the Circuit Court instructed the jury that, in order to find in favor of Plaintiff on any of the four underlying case referrals, the jury must 1) find that the individual was a client of Sherbow’s, and 2) that Sherbow referred each client to the Fieger firm. The Court instructed in relevant part as follows:

You’re instructed that as a matter of law, the Plaintiff, Jeffrey Sherbow, must prove to you by a preponderance of the evidence that Mervie Rice, and/or Dorothy Dixon, and/or Phillip Hill, and/or Dion Rice on behalf of the estate of Charles Rice were his clients as I will instruct you, and that he referred Mervie Rice, and/or Dorothy Dixon, and/or Phillip Hill, and/or Dion Rice on behalf of the estate of Charles Rice, to the Defendant, Fieger Law. If Plaintiff fails to prove by a preponderance of the evidence that the people whose names I gave you were his clients or that he fails to prove that he -- by a preponderance of the evidence that he referred those to Fieger Law, then your verdict must be for the Defendant as to any cases not so referred. (Trial Transcript Vol IV, March 3, 2017, p. 63; Appx Vol IV, p 63)

The Court instructed the jury on the Black’s Law Dictionary definition of “client.” (Trial Transcript Vol IV, March 3, 2017, p. 63; Appx p 709a)

Likewise, the verdict form required the jury to make the same determination and asked:

1. Were any of the following clients of Jeffrey Sherbow:

- (a) Mervie Rice
- (b) Dion Rice on behalf of the Estate of Charles Rice
- (c) Philip Hill
- (d) Dorothy Dixon

If yes to any of these, go to 2. If no, you are done.

2. If yes to any part of 1, did Plaintiff refer one, some, or all of the following personal Injury cases to Defendant?

- (a) Mervie Rice
- (b) Dion Rice on behalf of the Estate of Charles Rice
- (c) Philip Hill
- (d) Dorothy Dixon

(See Appx p 021a-022a)

The jury therefore was instructed on the correct law regarding the issues, and deliberated on whether any of the Ohio litigation plaintiffs were clients of Sherbow.⁵⁶ It found that Mervie Rice, Phillip Hill, and Dorothy Dixon were not Sherbow's clients, and, as a result, that Sherbow was not entitled to a referral fee. The jury's verdict should be affirmed, and the Court of Appeals should be reversed.

There is no need to remand this case or disturb the jury verdict as to Mervie Rice's, Dorothy Dixon's, and Philip Hill's cases. Sherbow admitted at trial that he did not have any relationship with any of the clients and, as a result, has admitted that there

⁵⁶ The Court of Appeals also erred in its holding that the effect of an erroneous jury instruction should disparately impact the four cases. If the instruction is erroneous, then "juror confusion" would have resulted in all four clients' cases, not only the three Plaintiff lost. This issue, however, is moot because the trial court did not err in its instructions to the jury.

was no attorney-client relationship. Sherbow admitted that he never met Dorothy Dixon until the fall of 2014, years after the Fieger firm filed suit and was already representing her for the auto collision.⁵⁷ Sherbow admitted that he never met with or spoke to Phillip Hill until years after the auto-collision litigation was over and the current fee dispute began.⁵⁸ Sherbow further admitted that he did not meet Mervie Rice until the July 26, 2012 meeting.⁵⁹ Even at that time, he did not communicate directly with her, and Mervie testified that she had sought out and retained the Fieger firm directly.⁶⁰ Sherbow's admissions establish that there is no material dispute that Sherbow did not have an attorney-client relationship with Mervie Rice, Dixon, or Hill. As a result, Sherbow did not have any cases to refer and is not entitled to a referral fee.

This Court *should* reverse the jury verdict in favor of Sherbow with respect to the Estate of Charles Rice case. Based on the testimony presented at trial, there is no material dispute that Sherbow did not have an attorney-client relationship with Howard Linden, the personal representative of the Estate. Sherbow admitted that he never met with or consulted with Howard Linden, the duly appointed personal representative of the Estate of Charles Rice.⁶¹

⁵⁷ Trial Transcript Volume II, February 28, 2017, p. 75; Appx p 319a.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Trial Transcript Volume III, March 2, 2017, p. 63-64; Appx p 499a-500a.

⁶¹ Trial Transcript Volume II, February 28, 2017, p. 145-147; Appx p 389a-391a.

Howard Linden testified that, as the personal representative of the Estate of Charles Rice, he was the “client.”⁶² Linden further testified that there was never any discussion of any “referral” at the meeting, and that he did not consent to any.⁶³ Mr. Linden was never told that the case was “referred” by Sherbow, or that Sherbow would be sharing a fee with the Fieger Firm.⁶⁴ Mr. Linden did not consent or agree to Sherbow sharing attorney fees with the Fieger firm.⁶⁵ There was no attorney-client relationship, no case to refer, and, as a matter of law, Sherbow is not entitled to an attorney fee.

IV. CONCLUSION AND RELIEF REQUESTED

The Court of Appeals legal determination that an attorney-client relationship is not necessary for a valid referral from one attorney to another is radical, and opens the floodgates to the type of predatory conduct seen in this case: where an attorney “calls dibs” on a case (in cooperation with an inside accomplice), without the clients’ knowledge or consent, and then conspires to claim a share in attorney fees from cases that he had absolutely no connection with. This is the wrong direction to take Michigan law.

⁶² February 17, 2017 De Bene Esse Deposition of Howard Linden, pg 14; Appx p 635a. It was stipulated on the record that, starting on page 43 at line 21 through page 51, line 12 of the deposition would not be (and was not) shown to the jury. Trial Transcript Vol. III, p. 59; Appx p 495a.

⁶³ Id.

⁶⁴ Id. at 21-22; Appx p 637a.

⁶⁵ Id. at 23; Appx p 637a.

This Court should hold that some type of attorney-client relationship is necessary before a lawyer can legally and ethically refer a client to another attorney. This relationship does not need to be in the form of a formal retainer but must involve a consultation seeking professional advice. In order to protect the interests of the public, Michigan law *must require* that a legal consultation (i.e. a nascent attorney-client relationship) be a prerequisite to being able to validly “refer” a client under the Michigan Rules of Professional Conduct. Otherwise, there is no bar to the type of predatory conduct that Sherbow engaged in in this case.

WHEREFORE, Defendant-Appellant requests that this Honorable Court reverse the judgment of the Court of Appeals and hold that an attorney-client relationship is necessary to make an ethical referral, and affirm the jury verdict as to the Mervie Rice, Dorothy Dixon, and Phillip Hill cases; Defendant-Appellant asks that this Court further hold that it is entitled to judgment as a matter of law with respect to the Estate of Charles Rice case.

Respectfully submitted,

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Date: July 16, 2020

By: /s/ Sima G. Patel

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