

STATE OF MICHIGAN  
IN THE SUPREME COURT

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

Plaintiff-Appellant/  
Cross-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-Appellee/  
Cross-Appellant.

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**PLAINTIFF-APPELLEE'S BRIEF ON APPEAL**

**\*ORAL ARGUMENT REQUESTED\***

**TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
INDEX OF AUTHORITIES. ....	iii
COUNTER-STATEMENT OF JURISDICTIONAL BASIS. ....	vii
COUNTER-STATEMENT OF QUESTIONS PRESENTED.....	viii
COUNTER-STATEMENT OF FACTS. ....	1
ARGUMENTS:	
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).....	21
A.    THE LANGUAGE OF MRPC 1.5(e) AND THE HISTORICAL CONTEXT IN WHICH IT WAS ADOPTED DEMONSTRATE THAT AN ATTORNEY-CLIENT RELATIONSHIP IS NOT REQUIRED AS THE BASIS FOR A VALID REFERRAL.. ....	21
B.    SHERBOW’S REFERRAL OF DION RICE TO THE FIEGER FIRM WAS THE RESULT OF MR. SHERBOW’S RENDERING HIS PROFESSIONAL ADVICE AS TO THE BEST FIRM TO RETAIN, WHICH ADVICE DION RELIED ON. THAT EXCHANGE CONSTITUTED AN ATTORNEY-CLIENT RELATIONSHIP.. ....	29
C.    IF THIS COURT HOLDS THAT AN ATTORNEY-CLIENT RELATIONSHIP IS A PREREQUISITE TO A VALID REFERRAL, IT SHOULD REMAND THIS CASE FOR A RETRIAL LIMITED TO WHETHER MR. HILL WAS INFORMED OF THE FEE SHARING AGREEMENT.....	30
1.    The jury found that DION RICE was MR. SHERBOW’s client at the time of the referral. Defendant has not appealed from the trial court’s express rejection of Defendant’s proposed instruction that MR. LINDEN was the client for purposes of the claim of the Estate of Charles Rice. There is, therefore, no tenable basis for reversing the verdict as to the claim of the Estate.....	31

**TABLE OF CONTENTS cont'd**

	<b><u>PAGE</u></b>
2. DION RICE also consulted MR. SHERBOW on behalf of MS. DIXON, MERVIE RICE, and PHILLIP HILL. MR. SHERBOW's services were also rendered on their behalf. Therefore, all four claimants had the requisite attorney-client relationship with MR. SHERBOW for purposes of the referral. . . . .	31
II. DEFENDANT HAS THE BURDEN OF PROOF ON ITS AFFIRMATIVE DEFENSE OF ILLEGALITY.....	37
RELIEF. ....	42

**INDEX OF AUTHORITIES**

<b><u>CASES</u></b>	<b><u>PAGE(s)</u></b>
<i>American Trust Co v Michigan Trust Co</i> , 263 Mich 337; 248 NW2d 829 (1933). . . . .	39
<i>Beason v Beason</i> , 435 Mich 791; 460 NW2d 207 (1990). . . . .	2, 31
<i>Benson v BH Morgan &amp; Co</i> , 26 Ill App 22 (1887). . . . .	37
<i>Calvin v Koltermann v Underream Piling Co</i> , 563 SW2d 950 (Tex Civ App 1978). . . . .	2
<i>Cantleberry v Holbrook</i> , 2013 WL 3280023 (Ohio App 2013). . . . .	37
<i>Corcoran v Northeast Illinois Regional Commuter Railroad Corp</i> , 345 Ill App 3d 449; 803 NE2d 87 (2003).. . . . .	24
<i>Daley Mack Sales, Inc v Klink</i> , 26 Pa D&C 3d 341 (Pa Common Pleas 1982). . . . .	37
<i>Darnell v State</i> , 369 P2d 470 (Okla Crim App 1962). . . . .	2
<i>DeHoop v Peninsular Life Ins Co</i> , 193 Mich 380; 159 NW2d 500 (1916).. . . . .	34
<i>Department of Environmental Quality v Worth Township</i> , 491 Mich 227; 814 NW2d 646 (2012). . . . .	22
<i>Derivi Construction &amp; Architecture Inc v Wong</i> , 118 Cal App 4 <sup>th</sup> 1268, 14 Cal Reporter 3d 329 (2004). . . . .	41
<i>Doherty, PC v Lockwood</i> , 259 Mich App 38; 672 NW2d 884 (2003). . . . .	37
<i>Eaton v Brock</i> , 124 Cal App 2d 10; 268 P2d 58 (1954). . . . .	37
<i>Edwards v Sheets</i> , 66 Ariz 213; 185 P2d 1001 (1947). . . . .	2
<i>Emery v Ford</i> , 234 Mich 11; 207 NW2d 856 (1926). . . . .	34
<i>Evans &amp; Luptak, PLC v Lizza</i> , 251 Mich App 187; 625 NW2d 16 (2000).. . . . .	37
<i>Feldman v Gamble</i> , 26 NJ Eq 494 (1875).. . . . .	37
<i>Fox v Interstate Power Co</i> , 521 NW2d 762 (Iowa App 1994). . . . .	2
<i>Gill v Smith</i> , 233 SW2d 223 (1950).. . . . .	37

**INDEX OF AUTHORITIES cont'd**

<b><u>CASES</u></b>	<b><u>PAGE(s)</u></b>
<i>Haara v Vreeland</i> , 254 Mich 462; 236 NW2d 836 (1931). . . . .	2
<i>Haliw v City of Sterling Heights</i> , 471 Mich; 691 NW2d 753 (2005). . . . .	22
<i>Hardware Mutual Casualty Co v Jones</i> , 363 F2d 627 (14 <sup>th</sup> Cir 1966). . . . .	2
<i>Hermitage House Square, LP v England</i> , 929 SW2d 356 (Tenn App 1996). . . . .	37
<i>Holstein v Grossman</i> , 246 Ill App 3d 719; 616 NE2d 1224 (1993). . . . .	24
<i>Hughes v Shaw</i> , 147 Va 409; 137 SE 370 (1927). . . . .	37
<i>Idalski v Crouse Cartage Co</i> , 229 F Supp 2d 730 (ED Mich 2002). . . . .	40, 41
<i>Jackson v Fisher</i> , 341 Ill App 311, 93 NE2d 438 (1950). . . . .	2
<i>JW Ripy &amp; Son v Art Wall Paper Mills</i> . 41 Okla 20, 136 P 1080 (Okla 1913). . . . .	37
<i>Koch v City of Hutchinson</i> , 814 F2d 1489 (10 <sup>th</sup> Cir 1987). . . . .	2
<i>Largel v Boscoglia</i> , 330 Mich 655; 48 NW2d 119 (1951). . . . .	32
<i>Lima Township v Bateson</i> , 302 Mich App 483; 838 NW2d 898 (2013). . . . .	38
<i>Macomb County Taxpayers Association v L'Anse Creuse Public Schools</i> , 455 Mich 1; 564 NW2d 457 (1997). . . . .	29, 30
<i>Mallory v City of Detroit</i> , 181 Mich App 121; 449 NW2d 115 (1989). . . . .	39
<i>Massachuset Medical Society v Dukakis</i> , 637 F Supp 684 (D Mass 1986). . . . .	2
<i>Metro Services Organization v City of Detroit</i> , unpublished per curiam opinion of the Court of Appeals, rel'd 2/1/11 (Nos. 292052, 292588). . . . .	37
<i>Palenkas v Beaumont Hospital</i> , 432 Mich 527; 443 NW2d 354 (1989). . . . .	37, 38
<i>People v Danton</i> , 36 Misc. 3d 898, 949 NYS2d 887 (2012). . . . .	38
<i>Pueblo Bank and Trust Co v McMartin</i> , 528 P2d 953 (Colo App 1974). . . . .	2

**INDEX OF AUTHORITIES cont'd**

<b><u>CASES</u></b>	<b><u>PAGE(s)</u></b>
<i>Ravich, Koster, Tobin, Oleckna, Reitman &amp; Greenstein v Gourvitz</i> , 287 NJ Super 533; A2d 613 (1996). . . . .	671 24
<i>Renda v UAW</i> , 366 Mich 58; 114 NW2d 343 (1962). . . . .	34
<i>Robert L Crill, Inc v Bond</i> , 76 SW3d 411 (Tex App 2001).. . . . .	25, 32, 33
<i>Ryder v Farmland Mutual Ins Co</i> , 248 Kan 352; 807 P2d 109 (1991). . . . .	24
<i>Shans v Carney</i> , 518 NW2d 366 (Iowa 1994).. . . . .	2
<i>Snider v Bob Thibodeau Ford Inc</i> , 42 Mich App 708; 202 NW2d 727 (1972).. . . . .	38
<i>Stanek v Libera</i> , 73 Minn 171; 75 NW 1124 (1898).. . . . .	2
<i>State v Kitchens</i> , 299 Conn 447, 10 A3d 942 (2011).. . . . .	41
<i>Stebbins v Leowolf</i> , 57 Mass 137 (1849).. . . . .	37
<i>Strausberg v Laurel Healthcare Providers, LLC</i> , 304 P3d 409 (NM 2013).. . . . .	37
<i>Thatcher v Darr</i> , 27 Wyo 452; 199 P 938 (1921). . . . .	37
<i>W H H Peck Co v Gordon</i> , 112 Mich 487; 70 NW2d 1034 (1897).. . . . .	35
<i>Wilder v Nolte</i> , 195 Wash 1; 79 P2d 682 (1938).. . . . .	37

<b><u>RULES &amp; STATUTES</u></b>	<b><u>PAGE(s)</u></b>
MCR 2.111(F)(3)(a).. . . . .	15, 37
MCR 7.212(C)(6).. . . . .	1, 3
MCR 7.312(A).. . . . .	1
MRPC 1.1(a). . . . .	26, 27
MRPC 1.5(e). . . . .	viii, 14-19, 21, 23, 25, 26, 28, 34, 37, 39, 40

**INDEX OF AUTHORITIES cont'd**

**RULES & STATUTES**

**PAGE(s)**

MRPC 1.5(g) ..... 25

**OTHER AUTHORITIES**

**PAGE(s)**

*Black's Law Dictionary* (7<sup>th</sup> ed). . . . . 24

**COUNTER-STATEMENT OF JURISDICTIONAL BASIS**

Plaintiff agrees with Defendant's Statement of Jurisdictional Basis.

**COUNTER-STATEMENT OF QUESTIONS PRESENTED**

- I. DOES MRPC 1.5(e) REQUIRE AN ATTORNEY TO HAVE AN ATTORNEY-CLIENT RELATIONSHIP WITH A PERSON IN ORDER TO ETHICALLY REFER HIM TO ANOTHER ATTORNEY?

The trial court answered, "No".

The Court of Appeals answered, "No".

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

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

- I.A. IF AN ATTORNEY-CLIENT RELATIONSHIP WERE REQUIRED, WOULD IT BE ESTABLISHED BY PROVIDING REQUESTED ADVICE AS TO THE BEST FIRM TO LITIGATE A PERSON'S CLAIM?

The trial court's jury instruction was consistent with, "Yes".

The Court of Appeals did not address this question.

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

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

- II. DOES DEFENDANT HAS THE BURDEN OF PROOF ON ITS AFFIRMATIVE DEFENSE OF ILLEGALITY?

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".

**COUNTER-STATEMENT OF FACTS**

The necessary premise for any reasoned discussion or debate is a common understanding of the historical facts giving rise to the issue. That is the principle underlying MCR 7.212(C)(6).<sup>1</sup> Even though the attorneys are expected to vigorously advocate their clients' positions, they are required to provide this Court with a complete and unbiased factual account:

**“(C) Appellant’s brief; Contents.** The appellant’s brief must contain, in the following order:

\* \* \* \*

“(6) A statement of facts that must be a clear, concise, and chronological narrative. **All material facts**, both favorable and unfavorable, must be fairly stated **without argument or bias.**”

MCR 7.212(C)(6) (emphasis added).

Defendant’s Statement of Facts does not even attempt to comport with that Rule. But the violation is not limited to the depressingly all-too-common misrepresentation of the evidentiary account.<sup>2</sup> Here, FIEGER FIRM attempts to cause this Court to ignore facts by which this Court is bound — those found by the jury:

- (1) The jury **expressly rejected** FIEGER FIRM’s allegation that MR. DANZIG conspired with MR. SHERBOW to concoct the claim for a referral fee. (22a, ¶3; 710a).
- (2) The jury found that DION RICE employed MR. SHERBOW for advice as to whom to retain to represent his father’s estate. (21a, ¶1; 709a; 712a; 715a).

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<sup>1</sup> That Court Rule applies in this Court. MCR 7.312(A).

<sup>2</sup> For example, FIEGER FIRM avers as fact that MR. SHERBOW first contacted DION RICE at his father’s funeral. (Defendant’s Brief on Appeal, p 5). That funeral took place on July 28, 2012 (340a - 341a, 348a), two days **after** the July 26, 2012, meeting at which DION RICE retained FIEGER FIRM with MR. SHERBOW in attendance.

- (3) The jury also necessarily found that DION RICE (on behalf of his mother [125a, 128a, 524a, 528a, 819a] and his father's estate [741a]) and MERVIE RICE were at the July 26, 2012, meeting at FIEGER FIRM's office (176a), and were then and there advised of the fee sharing agreement (21a - 22a, ¶2; 712a).

It is fundamental to our judicial system that an unchallenged verdict from a properly instructed jury is binding on an appellate court:

“Jury findings on sharply conflicting evidence are conclusively binding on appeal in as much as jurors are charged with the exclusive duty of assessing the credibility of witnesses and determining the weight to be given to their testimony.”

*Koch v City of Hutchinson*, 814 F2d 1489, 1496 (10<sup>th</sup> Cir 1987).

“Where there is sufficient competent evidence in the record to support a jury's findings and the jury has been correctly instructed by the trial court, the jury's findings are binding upon appellate courts.”

*Pueblo Bank and Trust Co v McMartin*, 528 P2d 953, 954 (Colo App 1974).

“It is not claimed in this appeal that the evidence does not support these findings, or that the verdict of the jury is contrary to the manifest weight of the evidence. These findings then become binding upon the appellant, and this Court will have to assume as a matter of fact, the jury's findings are correct.”

*Jackson v Fisher*, 341 Ill App 311, 93 NE2d 438, 440 (1950).

That principle has been recognized by this Court, *Beason v Beason*, 435 Mich 791, 804; 460 NW2d 207 (1990); *Haara v Vreeland*, 254 Mich 462, 466; 236 NW2d 836 (1931), and is universally recognized.<sup>3</sup>

FIEGER FIRM has never appealed from the instructions given to the jury, nor has it ever

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<sup>3</sup> E.g., *Hardware Mutual Casualty Co v Jones*, 363 F2d 627, 632 (14<sup>th</sup> Cir 1966); *Massachusetts Medical Society v Dukakis*, 637 F Supp 684, 690 (D Mass 1986); *Edwards v Sheets*, 66 Ariz 213; 185 P2d 1001, 1004 (1947); *Shans v Carney*, 518 NW2d 366, 368-69 (Iowa 1994); *Fox v Interstate Power Co*, 521 NW2d 762, 764 (Iowa App 1994); *Stanek v Libera*, 73 Minn 171; 75 NW 1124, 1125 (1898); *Darnell v State*, 369 P2d 470, 473 (Okla Crim App 1962); *Calvin v Koltermann v Underream Piling Co*, 563 SW2d, 950, 959 (Tex Civ App 1978).

challenged the sufficiency of the evidence to warrant the jury's fact finding. Nevertheless, in the face of those findings, Defendant reprises in this Court the character assassination and misrepresentations of fact that the jury rejected. In doing so, FIEGER FIRM demonstrates a cynical contempt for the judicial process, which is premised on the good faith of the attorneys who appear before the courts. Rather than attempt to identify each violation of Rule 7.212(C)(6), Plaintiff proffers the following account.

### **Introduction**

This is an action by Plaintiff, JEFFREY SHERBOW<sup>4</sup>, 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").

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.

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<sup>4</sup> Technically, 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.

Historical Facts — How THE FIRM Processed Incoming Referrals<sup>5</sup>

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. (171a, 211a, 213a). In 2012, MR. DANZIG controlled and administered THE FIRM's intake department. (172a). The department had a clerical staff of 56 people taking approximately 100 calls/day. (173a). 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. (173a, 174a).

MR. DANZIG chaired a committee of three attorneys who reviewed all of the cases that came into the intake department. (173a). 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. (173a-174a). In 2012, the committee consisted of MR. DANZIG, BOB GIROUX, and JAMES HARRINGTON. (204a).

By virtue of his position, MR. DANZIG had authority to sign referral agreements on behalf of THE FIRM. (175a, 179a, 184a).

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**

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<sup>5</sup> The factual account in the text will be the one consistent with the jury's findings.

**you or the referring attorney."**

(7b) (emphasis added).

MR. DANZIG testified — without contradiction<sup>6</sup> — that he had authority to bind THE FIRM without MR. FIEGER's signature (179a, 256a); that in practice there was never a policy of requiring MR. FIEGER to approve each referral in writing (184a, 602a-603a); and that MR. FIEGER approved every referral that MR. DANZIG ever brought into THE FIRM (250a). BOB GIROUX, who was also a partner at THE FIRM, corroborated that the memorandum was not followed. (264a-265a).

MR. HARRINGTON testified that the memorandum represented THE FIRM's policy (447a); that he personally never deviated from it (462a-463a); 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. (463a). He did not testify as to whether the policy applied to MR. DANZIG, MR. GIROUX, or other supervisory attorneys in THE FIRM.

**Historical Facts — MR. SHERBOW's Relationship with Charles Rice**

Charles Rice was a retired Detroit Police Department Sergeant. (317a). Years ago, MR. SHERBOW was introduced to him by a mutual friend. (316a-317a). 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. (317a, 318a). They also spoke on the phone a few times. (317a). MR. SHERBOW helped out some of Mr. Rice's family members. (317a).

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. (305a).

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<sup>6</sup> MR. FIEGER was not permitted to testify because he chose to participate as an attorney rather than as a witness. (8b).

JENNIFER HATCHETT was the Executive Director. (305a). The organization was involved in some litigation, and Mr. Rice suggested to MS. HATCHETT that they consult "his friend, Jeffrey Sherbow". (305a). MR. SHERBOW was retained at a dinner table when he said, "Give me a dollar, I'll be [your] lawyer." (318a).

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". (306a). In some pending litigation, Mr. Rice's corporation was being represented by attorneys with potential conflicts of interest. (317a-318a). MR. SHERBOW consulted with Mr. Rice and MS. HATCHETT (306a, 10b), met with the other attorneys (318a), and scheduled a meeting with Mr. Rice and MS. HATCHETT for July 17, 2012 (306a-307a, 318a).

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. (129a-130a). Mr. Rice drove off the road. (Id.). He was killed; DOROTHY DIXON was rendered comatose; MS. RICE and MR. HILL were seriously injured. (188a-189a).

On the day of the accident, Charles and DOROTHY's son, DION RICE, called MS. HATCHETT and told her about it. (309a, 550a). He asked for the name of the attorney who was his father's friend. (309a, 310a, 550a-551a). MS. HATCHETT gave MR. SHERBOW's number to DION. (310a, 543a). At the time, DION was looking to MR. SHERBOW as to what to do. (551a). MS. HATCHETT said that

DION later told her that he had gotten in touch with MR. SHERBOW and set up a meeting. (311a).

That same day, Charles RICE's mother told his sister, DOROTHY LAWRENCE, about the accident. (295a). She told MS. LAWRENCE to go to Dayton to check on Charles. (Id.). 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. (Id.). She stayed in Dayton until the following Monday or Tuesday, when she returned to Detroit with DION. (295a-296a).<sup>7</sup>

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. (320a, 322a-323a, 360a). She said that DION wanted to talk to MR. SHERBOW. (362a, 365a). She gave MR. SHERBOW DION and MS. DIXON's phone numbers. (381a).

MR. SHERBOW immediately called MR. DANZIG<sup>8</sup>, because it was a very serious case with a large potential exposure (192a, 320a, 322a), and THE FIRM had the resources to fund this type of case (322a-323a). 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. (337a).

When MS. HATCHETT called a second time with more details, MR. SHERBOW called MR. DANZIG again. (323a). MR. SHERBOW was setting up MR. DANZIG to have the victims take their cases to THE FIRM. (363a).

At 6:00 pm the following day, July 14, 2012, as he was on his way to Dayton, DION called MR.

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<sup>7</sup> July 13, 2012, was a Friday, so MS. LAWRENCE and DION returned to Detroit on July 16 or 17.

<sup>8</sup> MR. SHERBOW and MR. DANZIG were friends, although not close ones. (254a-255a, 337a-338a). Once a year, MR. SHERBOW went to MR. DANZIG's place up north for golf with six other guys. (254a, 337a). Other than that, the two did not socialize (254a, 255a, 338a), although they did communicate regularly (256a).

SHERBOW. (324a-325a, 364a-365a). Three days later, July 17, DION called MR. SHERBOW again to arrange a meeting. (325a, 367a).

MR. SHERBOW met with DION and MS. LAWRENCE later that week. (298a, 325a, 554a, 564a-565a). MR. SHERBOW got as much information as he could from DION (118a-119a, 146a-149a, 200a, 13b), and passed it along to MR. DANZIG (146a, 190a-191a), who opened a file (146a, 186a-187a).

MR. DANZIG immediately began calling MERVIE RICE at the number MR. SHERBOW had given him. (197a-198a). MR. DANZIG updated the file the next day with information he had gotten from MS. RICE on the phone. (193a-194a, 197a-198a, 201a-204a, 278a, 280a, 284a-285a).

On July 20, 2012, MR. SHERBOW called MR. DANZIG to update him about scheduling a meeting with everyone. (332a). A July 26 meeting was organized and scheduled by MR. DANZIG and MR. SHERBOW (209a), with information gotten from DION (333a), who assembled and organized everything (271a, 321a).

On July 25, the day before the meeting, MR. DANZIG generated a handwritten intake sheet for DOROTHY DIXON (20b), who was still in a coma (206a-207a). MR. DANZIG had spoken to DION about being her guardian/conservator. (207a-208a).

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. (176a). THE FIRM referred the first-party claims to Ms. Lipton, who paid THE FIRM a referral fee. (178a).

MR. DANZIG took the lead at the meeting. (334a). He introduced everyone, including MR. SHERBOW as the attorney who had referred the case to THE FIRM. (210a, 334a-335a). He explained

that THE FIRM would represent them; that he would be the attorney; and that MR. FIEGER would be the trial attorney. (334a). He also explained the referral fee arrangement with MR. SHERBOW. (211a).<sup>9</sup> MR. DANZIG testified that no one objected to the referral fee. (392a).

Two retainer agreements were signed at that meeting. (335a). One was a retainer agreement signed by MERVIE RICE. (21b). The other was a retainer agreement signed by DION RICE on behalf of Charles' Estate. (248a, 4b).

After signing up the clients, MR. DANZIG immediately told MR. FIEGER about the case and MR. SHERBOW's referral. (227a, 228a, 252a, 405a). MR. FIEGER had no objection. (228a, 229a, 405a). 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. (263a). MR. FIEGER had no problem with the referral. (263a).

PHILLIP HILL was not available for the July 26 meeting. (219a). So MR. DANZIG and Ms. Lipton went to his apartment on August 6, 2012. (219a, 562a). At that time, MR. HILL signed a retainer agreement with THE FIRM (24b). He recalled MR. DANZIG explaining how the fees would be charged. (562a).

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.

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<sup>9</sup> MERVIE RICE testified that although MR. DANZIG may have explained the referral fee, she did not recall it. (501a, 508a). She also admitted that she did not object to it at the July 26 meeting. (513a-514a). DION RICE at first testified that MR. DANZIG did not inform him about the referral fee (548a-549a), but then testified that he did not remember everything that was said (556a).

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 712a [client must be advised] with 725a [verdict in favor of Plaintiff as to DION RICE]).

(219a). MR. HILL denied that. (562a).

MS. DIXON testified that she was in a coma for two months after the accident. (525a). She confirmed that DION had retained THE FIRM on her behalf (524a, 528a), as Defendant conceded in its opening statement (157a, 160a), as MR. DANZIG (579a-580a) and MR. SHERBOW (321a, 339a) recognized at the time, and as the judge recognized at trial (819a). 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. (524a).

On August 2, 2012, MR. DANZIG wrote a letter to MR. SHERBOW (737a), confirming MR. SHERBOW's entitlement to a one-third referral fee on the MERVIC RICE case. (158a-159a, 213a-214a). On August 15, 2012, MR. DANZIG sent MR. SHERBOW a second letter (1b) on behalf of THE FIRM, confirming his entitlement to a one-third attorney fee on the other three cases. (161a, 216a-217a).

As the case progressed, local counsel in Ohio wanted more than the 10% of the fee to which he had agreed. (223a). MR. DANZIG discussed the matter with MR. SHERBOW, who agreed to reduce his share of the fee from  $33^{1/3}$  to 20%. (342a). On January 2, 2014, MR. DANZIG sent MR. SHERBOW a letter (3b) confirming the new fee split. (162a, 402a).

MR. DANZIG left THE FIRM in January 2014. (180a, 225a).

#### **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. (287a, 354a). MR. FIEGER did not like paying referral fees. (202a). At the time, MR. SHERBOW had a case with MR. GIROUX, who assured MR. SHERBOW on several occasions that he would get paid. (272a, 345a-346a).

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. (344a). 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. (343a-344a, 27b).

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**.<sup>[10]</sup> 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."

(687a-688a) (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

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<sup>10</sup> MR. SHERBOW had filed an attorney lien in the Ohio court (28b) **only on the attorney fees** in order to protect his fee. (350a). He withdrew it after MR. FIEGER violated the lien by taking all the money. (357a-358a).

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"

(346a-347a, 29b).

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.

"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"

(349a, 30b).

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 pre-dated 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"

(349a, 32b).

MR. FIEGER eventually drafted four identical letters (34b-37b), and four substantially identical affidavits (38b-45b) that he told his clients he needed them to sign. (514a). 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. (32a). 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.

(46b-59b).

In its August 17, 2016, Opinion and Order (60b), 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. (62b-63b).
- (2) "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].**" (66b) (emphasis added).
- (3) 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." (67b) (emphasis added).

**The Litigation — The Trial**<sup>11</sup>

Beginning with its opening statement (147a-148a, 154a), Defendant made it a central theme of the defense that none of the four clients had ever retained MR. SHERBOW as their attorney. (198a, 221a, 376a-377a, 500a, 526a, 560a). Despite its pre-trial ruling that an attorney-client relationship was not necessary to entitle Plaintiff to an attorney fee (62b-63b), the trial court allowed Defendant to elicit testimony on that issue, saying that it would deal with the issue in the instructions. (376a).

When the time came, the trial court instructed the jury, over Plaintiff's objection (607a, 610a-617a), that Plaintiff had to prove that the four tort plaintiffs were MR. SHERBOW's clients before he referred them to THE FIRM. (709a, 715a).

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 —"

(679a) (emphasis added).

Again despite a previous ruling to the contrary (66b), the trial court refused to instruct the jury that Defendant had the burden of proving that the referral agreement violated MRPC 1.5(e). (626a).

Finally, the trial court refused to use Plaintiff's proposed Form of Verdict (71b-73b), which made

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<sup>11</sup> The testimony on which the foregoing historical factual account is premised will not be repeated here.

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. (725a).

On April 26, 2017, the trial court entered an Order of Judgment (19a-20a), awarding Plaintiff \$93,333.33.

### **The Appeal**<sup>12</sup>

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.).

Defendant cross-appealed from the trial court's August 17, 2016, Opinion and Order. Defendant did not appeal from any rulings during the trial, nor did it challenge the instructions or otherwise attack the jury's verdict. Defendant argued only that:

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<sup>12</sup> Defendant 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.

- (1) The referral violated MRPC 1.5(e) because:
  - (a) None of the tort plaintiff's was a client of MR. SHERBOW's at the time of the referral; and
  - (b) The clients did not affirmatively acquiesce in the fee-splitting agreement.

(Defendant's Brief on Appeal, III.b.).

- (2) MR. DANZIG had no apparent authority to bind THE FIRM. (Defendant's Brief on Appeal, III.c.).

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 in here relevant part:

- (1) 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. (16a).
- (2) 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. (12a-14a).
- (3) 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. (11a-12a).
- (4) 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. (5a).
- (5) The client's objection must be made at the time the client is informed of the agreement, not after the case is resolved. (10a). However, evidence of later objections is relevant, because they make it more likely that the client was not advised of the agreement. (10a.).
- (6) The issue as to a JNOV in favor of Plaintiff on MERVIE RICE's claim was not preserved for appeal. (16a-17a).

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. (17a).

### **The Appeals To This Court**

On March 18, 2019, Plaintiff file an Application For Leave To Appeal to this Court, (80b)

limited to three issues:

- (1) Whether Plaintiff was entitled to JNOV as to the claim of DORTHY DIXON;
- (2) Whether Plaintiff is entitled to JNOV as to the claim of MERVIE RICE; and
- (3) Whether on retrial, the client's post-settlement objections should be excluded as irrelevant and as a matter of public policy.

On February 5, 2019, Defendant filed a Motion For Reconsideration in the Court of Appeals.

(80b). On March 5, 2019, the Court of Appeals entered an order denying that motion. (80b). On April 16, 2019, Defendant filed its own Application For Leave To Appeal to this Court (80b), raising the following issues:

- (1) Whether an attorney-client relationship is a prerequisite to a valid and ethical referral of a claimant;
- (2) Whether Plaintiff had the burden of proving the existence of a valid and enforceable contract; and
- (3) Whether the Court of Appeals should have ordered a retrial as to all four cases.

On February 5, 2010, this Court entered an order (82b) granting leave to appeal and directing the parties to address:

- (1) Whether 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 the contract's compliance with MRPC 1.5(e); 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.

That same day, this Court entered an order (83b) holding in abeyance Plaintiff's Application For Leave To Appeal.

**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).**

In this issue, Plaintiff will discuss the first, second and fourth questions which this Court directed the parties to brief. In Issue I.A., Plaintiff will demonstrate that both the historical context and the language of MRPC 1.5(e) demonstrate that an attorney-client relationship is not required for a valid referral.

In Issue I.B., Plaintiff will explain that in the circumstances in which the underlying case was referred, a *de facto* attorney-client relationship existed between MR. SHERBOW, MR. RICE, and the other claimants on whose behalf MR. RICE solicited MR. SHERBOW's advice as to who should litigate the claims.

In Issue I.C., Plaintiff will demonstrate that even if an attorney-client relationship were required, in light of the discussion in Issue I.B., reversal of the jury's verdict would not be required as to the claim of the Estate of Charles Rice; and that the only issue to be litigated on retrial is whether the fee-sharing agreement was disclosed to MS. DIXON and to PHILLIP HILL.

**A. THE LANGUAGE OF MRPC 1.5(e) AND THE HISTORICAL CONTEXT IN WHICH IT WAS ADOPTED DEMONSTRATE THAT AN ATTORNEY-CLIENT RELATIONSHIP IS NOT REQUIRED AS THE BASIS FOR A VALID REFERRAL.**

FIEGER FIRM's discussion of this issue lacks an organizing analytical framework within to address this issue. It is impossible to undertake a meaningful discussion of what should be required for a valid referral without identifying the primary systemic goal served by referrals, and reasoning through whether a particular requirement or limitation furthers that goal.

Plaintiff appreciates that the decisive factor in interpreting a Court Rule is the language of the Rule. *Haliw v City of Sterling Heights*, 471 Mich 700, 704-05; 691 NW2d 753 (2005). However, the reason for the choice of the language can be reliably inferred from the context in which it was adopted. See *Department of Environmental Quality v Worth Township*, 491 Mich 227, 241-242; 814 NW2d 646 (2012).

**The Primary Purpose of Allowing Referral Fees Is To Maximize The Client's Recovery**

Both parties agree that:

“The [Supreme] 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.*”

(Defendant's Brief, p 22-23) (emphasis in original).

In the context of personal injury claims (which account for the vast majority of referral fees), the client's self-evident interest is in maximizing his recovery. That interest is best served by the client retaining the law firm that will obtain the highest recovery. It follows that any restrictions on referrals which do not add to the protection and furtherance of the client's interests should be avoided. That is where Defendant's argument stands exposed for what it is.

The essence of FIEGER FIRM's argument in favor of the additional restriction it wants to place on referrals is captured in the following passages from Defendant's Brief on Appeal:

“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.**”

\* \* \* \*

“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.”

(Defendant’s Brief, p 1, 34) (emphasis added).

The only protection Defendant seeks is for **the firm** being asked to pay the fee. At no point in FIEGER FIRM’s entire Brief on Appeal does it explain how its additional restriction provides any protection for **the client**. The dispute is over the one-third attorney fee; the client’s money is not involved. Thus, FIEGER FIRM’s argument is not about protecting clients, or even furthering their interests. As the Court of Appeals noted in the instant case (13a - 14a), imposing the additional restriction advocated by FIEGER FIRM can only make it easier for firms who do not want to honor their fee-sharing agreements by imposing an additional hurdle to collection.

In any event, the main point of this sub-issue is that in enacting Rule 1.5(e), this Court intended to make it easier, not harder, to validly refer a client to a firm which will maximize the client’s recovery. Gratuitously imposing an additional requirement to being compensated for doing so is inconsistent with this Court’s intent in choosing MRPC 1.5(e).

**The Language of MRPC 1.5(e) Does Not Require  
An Attorney-Client Relationship as a Prerequisite to a Valid Referral**

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."

(709a).

It is generally understood that a retainer agreement contemplates the attorney acting in a case on the client's behalf. *Black's Law Dictionary* (7<sup>th</sup> ed), p 1317. Thus, a retainer agreement would obligate the attorney to perform services on the case.<sup>13</sup>

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).<sup>14</sup> 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).

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<sup>13</sup>As will be discussed below, Defendant has modified its position so as not to require that an attorney referring a matter actually work on it, or be retained. That formulation of "attorney-client relationship" will be discussed below. The discussion here will address the argument that Defendant originally made.

<sup>14</sup>Unlike MRPC 1.5(e), the Illinois rule also requires that the referring attorney also assume legal responsibility for the conduct of the receiving attorney. *Id.* at 1233.

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 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. (13a). 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.’”

(13a-14a).

### **Response to Defendant’s 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 Brief, p 25) (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. (Defendant's Brief, p 25-27). 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. As noted above, 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 absurd."

(Defendant's Brief, p 24). 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 jury<sup>15</sup> — 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.'"

(Defendant's Brief, p 1).

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 sign a contract to split its contingent fee with him. Nor does it explain how the chimerical interloper will submit evidence that the clients were informed of the non-existent fee-splitting arrangement.

In the instant case, Plaintiff is suing because FIEGER FIRM — through its authorized agent,

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<sup>15</sup> The jury expressly found that DION RICE was Plaintiff's client, and was lawfully referred by Plaintiff, (54a-55a, 709a, 712a, 715a).

MR. DANZIG — **did** agree to pay Plaintiff a referral fee.<sup>16</sup>

**B. SHERBOW’S REFERRAL OF DION RICE TO THE FIEGER FIRM WAS THE RESULT OF MR. SHERBOW’S RENDERING HIS PROFESSIONAL ADVICE AS TO THE BEST FIRM TO RETAIN, WHICH ADVICE DION RELIED ON. THAT EXCHANGE CONSTITUTED AN ATTORNEY-CLIENT RELATIONSHIP.**

If this Court were to hold that an attorney-client relationship is a prerequisite to a valid referral, the instant case presents an example of what might be reasonably required. This Court has defined an attorney-client relationship as follows:

“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,’ *Haskins v Bell*, 373 Mich 389, 291, 192.w.2d 390 (1964), not solely, or even primarily, upon a client’s obligation to pay. **The rendering of legal advice and legal services by an attorney and the client’s reliance on that advice or those services is the benchmark of an attorney-client relationship.**”

*Macomb County Taxpayers Association v L’Anse Creuse Public Schools*, 455 Mich 1, 10-11; 564 NW2d 457 (1997) (footnote omitted) (emphasis added).

A layperson asking the advice of an attorney as to whom to retain for a legal matter fits easily into that definition. Indeed, Defendant concedes that point:

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

\* \* \* \*

“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.”

\* \* \* \*

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<sup>16</sup> In so finding, the jury necessarily rejected FIEGER FIRM’s scurrilous fantasy of a conspiracy between MR DANZIG and Plaintiff. (54a; 710a).

“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.”

(Defendant’s Brief, p 26, 32, 34 [cleaned up]) (emphasis added).

The trial court instructed the jury 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 on in whose interest a lawyer acts as by giving advice, appearing in court or handling the matter.”

(709a).

The governing case law, Defendant’s argument, and the jury instruction given in the instant case are in accord. If a person asks an attorney which firm he considers to be the best one to represent the person in a particular matter, he is seeking the attorney’s advice. When the person acts in reliance on that advice, the transaction “is the benchmark of an attorney-client relationship”. *Macomb County Taxpayers Association, supra*. Plaintiff does not concede that this Court should burden the referral system with additional requirements. However, if this Court deems it advisable to do so, the foregoing is the most that this Court should require as an attorney-client relationship.

**C. IF THIS COURT HOLDS THAT AN ATTORNEY-CLIENT RELATIONSHIP IS A PREREQUISITE TO A VALID REFERRAL, IT SHOULD REMAND THIS CASE FOR A RETRIAL LIMITED TO WHETHER MR. HILL WAS INFORMED OF THE FEE SHARING AGREEMENT.**

A holding by this Court that an attorney-client relationship is required would not require reversal of the verdict in Plaintiff’s favor as to the claim of the Estate of Charles Rice. As to the remaining claims, application of the requirement discussed in Issue I.B., *supra*, would require a retrial limited to

the question whether MR. HILL was informed of the fee-sharing agreement.

- 1. The jury found that DION RICE was MR. SHERBOW's client at the time of the referral. Defendant has not appealed from the trial court's express rejection of Defendant's proposed instruction that MR. LINDEN was the client for purposes of the claim of the Estate of Charles Rice. There is, therefore, no tenable basis for reversing the verdict as to the claim of the Estate.**

The sole basis for Defendant's challenge to the verdict as to the Estate of Charles Rice is that - HOWARD LINDEN was the client. (Defendant's Brief, p 47-48). That argument should be rejected for two reasons.

First, the trial court expressly rejected FIEGER FIRM's requested instruction that MR. LINDEN was the client as to the claim of the Estate. (617a). FIEGER FIRM has never appealed from that ruling or any other aspect of the trial. It is therefore foreclosed from advancing this argument. *E.g., Beason v Beason, supra*, and cases cited at p 2, *supra*.

Second, as was demonstrated above, DION fits the definition of "client" discussed in the previous sub-issue. He sought MR. SHERBOW's advice on behalf of the Estate, and relied on it. Therefore, a holding by this Court that that was a prerequisite to a valid referral would not yield a different result than that found by the jury.

- 2. DION RICE also consulted MR. SHERBOW on behalf of MS. DIXON, MERVIE RICE, and PHILLIP HILL. MR. SHERBOW's services were also rendered on their behalf. Therefore, all four claimants had the requisite attorney-client relationship with MR. SHERBOW for purposes of the referral.**

It is undisputed that DION RICE consulted with MR. SHERBOW on behalf of his mother, DOROTHY DIXON. At trial, Defendant conceded (125a, 127a), and the trial court explicitly recognized

it (609a). MS. DIXON herself expressly attested to that fact:

"Q [MR. FEIGER]: Okay. At what point did you learn that I was your attorney?

"A: My son came to -- I was in a nursin' home for a year and a half, and while I was there they came. He came and he told me that he had hired Mr. Fieger. I have a memory problem, too.

"Q: And how did you feel about that?

"A: **I was happy, I think he done good. He got you.**"

\* \* \* \*

"Q: **So who hired the lawyers for you?**

"A: **My son.**

"Q: Okay, and Dion Rice if [sic: is] your son?

"A: Yes."

(524a, 528a) (emphasis added).

DION hired FIEGER FIRM on MR. SHERBOW's recommendation, which DION solicited on his mother's behalf. He requested and received MR. SHERBOW's advice as his mother's agent. *E.g.*, *Largel v Boscoglia*, 330 Mich 655, 659; 48 NW2d 119 (1951).

As to MERVIE RICE and PHILLIP HILL, Defendant admits that DION was seeking advice for his family members. (Defendant's Brief, p 35). So the question is whether his status as a client extended to the other family members. A sister state case which is directly on point says that it does.

In *Robert L Crill, Inc v Bond*, 76 SW3d 411 (Tex 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.

So Plaintiff in fact referred all four cases to FIEGER FIRM. It does not follow, however, that he is therefore entitled to a referral fee as to the other three cases. That requires resolving a second question: whether they were informed of the fee-sharing agreement.

The jury's verdict answers the question in the affirmative as to MERVIE RICE. She was present at the July 26, 2012 meeting. (176a). The jury found that the fee-sharing agreement was disclosed at that meeting. (Compare 712a [client must be informed] with 725a [verdict in favor of Plaintiff as to DION

RICE]). And she admits that she did not object to the arrangement (513a-514a). Therefore, the correct disposition as to her claim is a JNOV in favor of Plaintiff.

The same is true as to MS. DIXON's claim. DION was acting on behalf of his mother at the July 26, 2012, meeting. That being so, both the parties and the trial court recognized that he was his mother's *de facto* agent. See *DeHoop v Peninsular Life Ins Co*, 193 Mich 380, 389; 159 NW2d 500 (1916). As such, he had the authority to do all things reasonably necessary to accomplish the purpose of his agency. E.g., *Renda v UAW*, 366 Mich 58, 95; 114 NW2d 343 (1962); *Emery v Ford*, 234 Mich 11, 28; 207 NW2d 856 (1926). That authority necessarily included the power to seek MR. SHERBOW's assistance in retaining THE FIRM, and not objecting to MR. SHERBOW's receiving a referral fee for his efforts.

Nevertheless, the Court of Appeals utterly ignored the undisputed fact of that agency. Without so much as citing a case,<sup>17</sup> the Court dismissed it as follows:

"Plaintiff's argument for JNOV relies on a series of presumptions, the first of which is that Dion entered into a contract for representation with Defendant on behalf of Dixon, and thus, for the purposes of MRPC 1.5(e), he was considered the 'client' who had to be informed of the referral fee agreement and not object."

That proposition was not a presumption. It was a legal conclusion which followed from the undisputed fact of DION's agency, and the authority necessarily appurtenant thereto. It is basic that a principal is bound by the acts of her agent within the scope of his authority. *Renda, supra* at 94. As noted above, that authority certainly extended to not objecting to the fee agreement.<sup>18</sup>

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<sup>17</sup>At no point in its entire discussion of this issue did the Court of Appeals cite a single case articulating agency law, nor does it even articulate any agency principles. Indeed, as demonstrated in the text, the Court of Appeals' analysis violated basic agency principles.

<sup>18</sup>DION's authority to act on behalf of his mother was never challenged by Defendant, and was, indeed, acknowledged by the trial court. Accordingly, the fundamental agency principles applicable here were not presented to the Court of Appeals. This case illustrates the hazards of a court's avoiding the issue actually joined by the parties, and instead recasting the issue into one

The panel then underscored its misapprehension of agency law by positing that MS. DIXON had the option of either ratifying or renouncing the retention contract, with the fee-sharing agreement, which DION made with FIEGER FIRM on her behalf:

"While Dion initially hired Defendant on behalf of Dixon, **she clearly was given the opportunity to either ratify or exit that contract.** As the record makes clear, Dixon approved of the hire. Dixon's acknowledgment that she approved of Dion's decision to retain Defendant to represent her does not morph Dion into a 'client' with respect to either the contract between Defendant and Dixon or pursuant to MRPC 1.5(e)."

(16a) (emphasis added).

From that premise, the panel drew the following conclusion:

"Thus, with respect to Dixon, Dion was not considered the 'client' pursuant to MRPC 1.5(e). Consequently, the jury's finding that Dion was Sherbow's client, Sherbow referred him to Defendant, and that Dion was aware of the referral fee agreement and did not object, did not require a judgment with respect to Dixon. If the jury believed that Dixon was not made aware of the referral fee agreement when she ratified Dion's contract with Defendant, then the contract violated MRPC 1.5(e) and was unenforceable as violative of public policy. . . . Therefore, because judgment in Plaintiff's favor was not required as a matter of law based on the jury's findings of fact, the trial court properly denied Plaintiff's motion for JNOV."

(Id., p 16).

The premise for the Court's reasoning was without any legal support. A principal has the option to renounce a contract made by her agent **only if the agent did not have the authority to enter into the contract on behalf of the principal.** *E.g., W H H Peck Co v Gordon*, 112 Mich 487, 490-91; 70 NW2d 1034 (1897); *Pennisular Bank v Hanmer*, 14 Mich 208, 214 (1866). At no point did the panel explain how DION – who all agree was acting on behalf of his mother as her agent – lacked the authority to act on her behalf.

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which neither party discussed. As the text analysis demonstrates, a modicum of input on the basics of agency law would likely have prevented the error perpetrated by the panel.

In other words, the Court of Appeals *sua sponte* created an issue on a point on which the parties have agreed since the inception of this case, i.e., DION's *de facto* authority to act on his mother's behalf in retaining an attorney for her. The panel then implicitly (and likely unknowingly) held that contrary to that stipulated fact, DION had no authority to do so, leaving MS. DIXON free to repudiate the retention of FIEGER FIRM and the fee-sharing agreement. And it did all of that without even a nod to any principles of agency law, much less citation to any authority. That being so, the proper disposition of Plaintiff's claim as to MS. DIXON is a remand for a JNOV in favor of Plaintiff.

Finally, Plaintiff admits that there is a triable fact question as to whether PHILLIP HILL was informed of the fee-sharing agreement. MR. DANZIG said that the provided a complete explanation. (219a). MR. HILL denied it. (562a).

In sum, a holding that an attorney-client relationship was required should result in a retrial as to whether PHILLIP HILL was advised of the fee-sharing agreement.

## II. DEFENDANT HAS THE BURDEN OF PROOF ON ITS AFFIRMATIVE DEFENSE OF ILLEGALITY.

The jury found that MR. DANZIG had the authority to bind the firm to the referral agreement. (22a, ¶3; 725a). Therefore, the letters of August 2, 2012, August 15, 2012, and January 2, 2014 (737a, 1b, 3b) constitute a prima facie contract. Thus, the alleged illegality of the contract (for violating MRPC 1.5[e]) was an affirmative defense, MCR 2.111(F)(3)(a), on which Defendant had the burden of proof.

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; 672 NW2d 884 (2003); *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196; 625 NW2d 16 (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) (89a).<sup>19</sup> That, however, does not end the inquiry.

As this Court pointed out in *Palenkas v Beaumont Hospital*, 432 Mich 527, 550; 443 NW2d 354 (1989), the term "burden of proof" has been used to denote both the burden of going forward with

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<sup>19</sup>*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. (86a, 89a). 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; *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).

evidence, as well as the ultimate burden of persuasion.

Generally, the party asserting an affirmative defense has the burden of coming forward with evidence to support it. *Id.* at 549; *Lima Township v Bateson*, 302 Mich App 483, 495-96; 838 NW2d 898 (2013). In this instant case, there is no dispute but that FIEGER FIRM introduced evidence that MS. DIXON and PHILLIP HILL were not informed of the fee sharing agreement at the time they retained FIEGER FIRM. (120a-121a, 131a-132a, 562a). So the issue is who bears the ultimate burden of persuasion.

Michigan courts have recognized that allocating the burden of persuasion is a question of “policy and fairness based on experience in the . . . situation”. *Snider v Bob Thibodeau Ford Inc*, 42 Mich App 708, 718; 202 NW2d 727 (1972). A more detailed analysis of the problem is illustrated in a sister state case.

In *People v Danton*, 36 Misc. 3d 898, 949 NYS2d 887 (2012), the question was the allocation of the burden of proof on eligibility issues for re-sentencing in a criminal matter. Although obviously inapposite on its facts, the opinion provides a useful analytical framework:

“While concluding that there is no unitary principle governing the subject, Professor McCormick has crafted a rubric, the elements of which (the McCormick factors) may be usefully employed in allocating evidentiary burdens:

‘Their allocation, either initially or ultimately, will depend upon the weight given to *any one or more* of five factors: 1) the natural tendency to place the burdens on the party desiring change; 2) special policy considerations such as those disfavoring certain defenses; 3) convenience; 4) fairness, and 5) the judicial estimate of probabilities.’”

*Id.* at 904-05 (emphasis in original).

The first factor favors placing the burden on the party opposing the enforcement of an otherwise binding contract. In the instant case, the jury found that MR. DANZIG had authority to bind THE FIRM,

and that he contracted on behalf of THE FIRM to pay MR. SHERBOW a referral fee. FIEGER FIRM interposed MRPC 1.5(e) in an effort to avoid that obligation. It is, therefore, FIEGER FIRM that is the party desiring a change, i.e., absolution from honoring an otherwise binding contract.

FIEGER FIRM admits that Plaintiff satisfies its burden of proof by demonstrating the existence of an enforceable contract. Plaintiff did so when it proved that FIEGER FIRM's authorized agent agreed with MR. SHERBOW to pay MR. SHERBOW a fee, in consideration for his referring the four cases. That constituted a prima facie showing of proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. *E.g., Mallory v City of Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989).

The case cited by Plaintiff is inapposite. In *American Trust Co v Michigan Trust Co*, 263 Mich 337; 248 NW2d 829 (1933), this Court held that the contract in question was void because its object — the mortgaging of the income from property — was illegal. Here, the object of the contract — the sharing of fees — is recognized as valid. Plaintiff's argument is that it is nevertheless unenforceable because the clients were allegedly not informed of it. The Court of Appeals expressly recognized that distinction:

“However, defendant does not actually contend that the ‘subject matter’ of the contract is illegal, because MRPC 1.5(e) specifically contemplates that referral fees between lawyers are legal, except under certain circumstances. . . . Instead, defendant's argument is that the specific contract in question was unenforceable as violative of public policy due to a failure to comply with MRPC 1.5(e).”

(12a).

Thus, by interposing Rule 1.5(e) as a defense, FIEGER FIRM seeks to avoid honoring an otherwise valid contractual obligation. That is, it seeks to change (eliminate) its contractual obligation.

The second factor — special policy considerations — also favors allocating the burden of

persuasion to Defendant. As was explained in Issue I., *supra*, in enacting Rule 1.5(e), this Court opted to place fewer impediments to referral of cases, not more. As the Court of Appeals noted in its opinion:

“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 second regarding the scope of its rules, the drafters warned that ‘the purposes of the rules can be subverted when they are invoked by opposing parties as procedural weapons.’”

(13a-14a).

The third factor — convenience — likewise militates in favor of imposing the burden on Defendant. In a situation in which the client may be unavailable, or in which he or she simply does not recall whether they were told of the fee sharing agreement, the presumption should be in favor of maintaining the contract. For convenience purposes, the burden should be placed upon the party challenging the contract to produce sufficient evidence to maintain its position.

The fourth factor — fairness — weighs heavily in favor of allocating the burden of Defendant. By hypothesis, disputes of this nature arrive only after the matter referred has been litigated to a favorable resolution. At that point, a nefarious attorney who has received the referral could easily collude with the clients to deprive the referral attorney of his fee. That danger has been expressly recognized.

In *Idalski v Crouse Cartage Co*, 229 F Supp 2d 730 (ED Mich 2002), the clients were advised of the referral agreement and did not object to it. *Id.* at 738. The clients subsequently objected to the referral fee on the ground that the referring attorney had stolen money from them. *Id.* at 737. The representing attorneys argued that the client must consent to the division of fees not at the outset, when the referral was made, but at the conclusion, immediately before payment of the referral fee. In a thoughtful opinion, Hon. David Lawson rejected that argument:

"Since a fee agreement is a contract, obligations become fixed once there was a

meeting of the minds. . . . To allow subsequent events, such as a mere change of heart, to upset the referral arrangement is inconsistent with basic contract law. . . . Further, it would be unwise as a matter of policy to permit a client by whim or fancy, or perhaps more nefarious motives, to undo a referral contract after the lawyers' work is finished but before final payment. As the Michigan Grievance Administrator observed, 'it is easy to conjecture situations where the attorney to whom a case has been referred colludes with the client to deprive the referring attorney of the benefit of his bargain, and later splits the referral fee.' . . . **The Court concludes, therefore, that client consent to a referral agreement is required only at the time the referral agreement is made and not also immediately prior to payment.**"

*Id.* at 739 (emphasis added). That is precisely what occurred here. Simple fairness requires that Defendant prove the truth of a proposition that it concocted itself.

The fifth factor — the judicial estimate of probabilities — also favors imposing the burden on Defendant. That factor places the burden on the party who contends that the more unusual event has occurred. Here, Defendant accuses MR. SHERBOW of unethical behavior. The case law recognizes a presumption that attorneys behave ethically and honestly. *E.g.*, *Derivi Construction & Architecture Inc v Wong*, 118 Cal App 4<sup>th</sup> 1268, 14 Cal Reporter 3d 329, 333 (2004); *State v Kitchens*, 299 Conn 447, 10 A3d 942, 988 (2011) (Katz, J, concurring). Therefore, it is Defendant who posits the more unlikely event.

In sum, reasoned analysis demonstrates that this Court should apply the general rule that the party asserting an affirmative defense should bear the burden of persuasion. The Court of Appeals should be affirmed on this point.

**RELIEF REQUESTED**

Plaintiff-Appellee, LAW OFFICES OF JEFFERY SHERBOW, P.C., ask this Court to grant the following relief:

- (1)(a) Hold that an attorney-client relationship is not a prerequisite for a valid referral entitling an attorney to a fee pursuant to MRPC 1.5(e); or
- (1)(b) Hold that providing requested advice as to the best firm to litigate a person's claim establishes the necessary attorney-client relationship with that person; and
- (2)(a) Hold that neither of the foregoing holdings require reversal of the jury's verdict as to the claim of the Estate of Charles Rice; and
- (2)(b) Remand this case to the trial court for JNOV in favor of Plaintiff as to the claims of DOROTHY DIXON and MERVIE RICE, and for a new trial as to the claim of PHILLIP HILL limited to whether he was advised of the fee agreement; and
- (3) Hold that the burden of proving that the clients were not advised of the fee sharing agreement is on the party asserting it as an affirmative defense.

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