

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 REPLY BRIEF

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ARGUMENT

- A. **Requiring an attorney-client relationship with the referring attorney protects the client and ensures that they receive the benefit for why the fee-sharing exception for attorneys in MRPC 1.5(e) exists in the first place.**

While the parties do not agree on much, both sides agree that the client's interests are paramount. (See Plaintiff's Brief, p 22) From that perspective, MRPC 1.5(e) can only be interpreted to mean that a referring attorney must have an attorney-client relationship with the client before making a valid and legal referral.

This Court should hold minimally that 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*. The Court of Appeals opinion, holding otherwise, is frankly radical and opens the practice of law to a floodgate of the type of predatory and unethical conduct seen in this case.

Plaintiff relies heavily on *Ryder v Farmland Mut Ins Co*, 248 Kan 352; 807 P2d 109 (1991), a Kansas Supreme Court case that also dealt with whether a referring attorney must have an attorney-client relationship with the client to make a valid referral and claim a fee, under Kansas's analogous version of Rule 1.5. But *Ryder* provides no support for the question before this Court, which is whether the *client's* interests are best served by requiring an attorney-client relationship.

As a preliminary matter, there are significant differences between the *Ryder* case and the case at bar. In *Ryder*, it was undisputed by all parties that the attorney who represented the underlying clients would not have received the case but for the referral. *Id.* at 355. That is not the case here. The underlying clients all testified that they sought out the services of the Fieger firm themselves. They did not know Sherbow. This was a highly contested issue.

Second, and more importantly, *Ryder* concedes that a client's interests are best served if an attorney-client relationship *is required*: "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." *Id.* at 363 (emphasis added). If something is preferable that means that that option is better. It is better for the client to require an attorney-client relationship.

The Kansas Supreme Court's "construction" of the Rule is likewise weak and provides no useful guidepost. The "construction" recognized that there were two possible ways to read the Rule, and then picked one:

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 a 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. [*Id.*]

The court provided no other justification for the illogical conclusion that the Rule should be interpreted to mean that the client need have an attorney-client relationship only with the receiving attorney; Michigan's MRPC 1.5(e) can—and should—be interpreted to mean that the client have an attorney-client relationship with both the referring and receiving attorney. Given the paucity of analysis on this issue, and the court's admission that requiring an attorney-client with both attorneys would be more beneficial to the client, *Ryder* is not persuasive.

As discussed at length in Defendant's brief on appeal, this Court's analysis should focus on Michigan law, the Michigan Rules of Professional Conduct, and the guiding principle that any interpretation of the Rules should put the client's interests first. Doing so mandates that MRPC 1.5(e) be interpreted to mean that a referring attorney must have an attorney-client relationship with the client before being able to make a valid and legal referral. 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.

- B. Sherbow concedes that, if an attorney-client relationship was required, the trial court gave the correct jury instruction on the issue. As a result, the jury verdict in favor of Defendant should be affirmed.**

Sherbow concedes that, if this Court holds that an attorney-client relationship with a referring attorney is necessary, the Circuit Court correctly instructed the jury on

the issue. (Plaintiff's Brief, p. 30: "The governing law, Defendant's argument, and the jury instruction given in the instant case are in accord.") Consequently, Sherbow concedes that 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's jury instruction correctly instructed the jury regarding the definition of a client. The jury duly deliberated on the issue and found that Mervie Rice, Dorothy Dixon, and Phillip Hill were not "clients" of Sherbow. Sherbow's concession requires that, if an attorney-client relationship is required, then the Court of Appeals judgment should be vacated and the jury's verdict in favor of Defendant be affirmed.

C. Sherbow's arguments outside the scope of issues this Court granted leave to appeal to consider should be disregarded.

Sherbow spends considerable real estate in his brief on appeal devoted to arguing that he is entitled to judgment notwithstanding the verdict (JNOV) on the jury's verdict as to Dorothy Dixon and the other clients based on a "*de facto agent*" theory. In essence, Sherbow argues that, irrespective of the jury's finding to the contrary (and Sherbow's own concession that the Circuit Court gave the appropriate jury instruction regarding the definition of "client"), he is entitled to a ruling that, notwithstanding the facts, he had an attorney-client relationship with the client. Sherbow's arguments should not be considered by this Court because they are outside the scope of issues that

this Court granted leave to appeal to consider. As a result, those issues have not been briefed and are not properly before the Court.

The Court granted Defendant-Appellant's application for leave to appeal and ordered 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. [*Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, 937 NW2d 685 (Mich, 2020).]

The Court specifically did *not* grant Sherbow's application for leave to appeal, which raised the "*de facto agent*" theory he now tries to argue, and, instead, the Court is holding that case in abeyance. *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, 937 NW2d 694 (Mich, 2020). Sherbow's "*de facto agent*" argument (in addition to being erroneous) is not before this Court.

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, without the clients' knowledge or consent, and then tries 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.

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 has clearly engaged in here.

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 also affirm the jury’s 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,

FIEGER, FIEGER, KENNEY & HARRINGTON, P.C.

Date: September 29, 2020

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