STATE OF MICHIGAN
IN THE SUPREME COURT

LAW OFFICES OF JEFFREY SHERBOW, P.C.,

Plaintiff-Appellant and
Cross-Appellee

v

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

Defendant-Appellee and
Cross-Appellant.

Supreme Court No. _____

Court of Appeals No. 338997

Oakland County Circuit
Case No. 15-147488-CB

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

* * *

APPENDIX OF EXHIBITS

Submitted by:
Geoffrey N. Fieger (P30441)
Sima G. Patel (P69541)
Fieger, Fieger, Kenney & Harrington P.C.
Attorneys for Defendant-Appellant
19390 W. 10 Mile Road
Southfield, Michigan 48075
(248) 355-5555

TABLE OF CONTENTS

INDEX TO DEFENDANT-APPELLANT'S APPENDICES OF EXHIBITS

Volume I:

Volume II:

Volume III:

Volume IV:

INDEX OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF THE BASIS OF JURISDICTION

On June 28, 2017, Plaintiff filed a claim of appeal from the April 26, 2017 order of judgment from the Oakland County Circuit Court. (Appx Vol I, p 19)

On January 15, 2019 the Court of Appeals reversed and remanded for a new trial in a published opinion (Court of Appeals Unpublished Opinion, Appx Vol I, p 1-17). Defendant-Appellant filed a timely motion for reconsideration, which was denied on March 5, 2019. (Appx Vol I, p 18)

This Honorable Supreme Court has jurisdiction to grant leave to appeal from the decision of the Court of Appeals pursuant to MCR 7.303(B)(1) and MCR 7.305(B)(3) and (5).

STATEMENT OF QUESTIONS PRESENTED

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

   Defendant-Appellant answers: "Yes."
   Plaintiff-Appellee answers: "No."
   Court of Appeals answered: "No."

2. Michigan Rule of Professional Conduct 1.5(e) requires that, before an attorney agrees to split fees with another attorney from a different firm, the client must be advised of the fee-splitting arrangement and "not object." If a client is not made aware of the fee-splitting, the contract is illegal and unenforceable as a matter of law.

   Did the Court of Appeals err in holding that Defendant here had the burden of establishing the validity of such a contract?

   Defendant-Appellant answers: "Yes."
   Plaintiff-Appellee answers: "No."
   Court of Appeals answered: "No."

I. INTRODUCTION: Judgment Appealed, Statement of Reasons for Appeal, and Relief Sought:

The Court of Appeals, in a published opinion setting new case law precedent in Michigan, held that an attorney-client relationship is not necessary for a lawyer to legally and ethically refer a client under MRPC 1.5(e). MRPC 1.5(e) only permits a "division of a fee between lawyers who are not in the same firm if" "the client is advised of and does not object to the participation of all the lawyers involved." (Emphasis added.) 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." According to the Court of Appeals, the referring lawyer does not have to have *any* type of relationship with a client before making a referral. This holding is radical, dangerous, and opens the door to the type of unethical conduct that took place in this case.

This is a fee-sharing dispute action between Defendant Fieger & Fieger, P.C. ("the Fieger firm") and Plaintiff Sherbow[1]. The Fieger firm represented four clients in litigation arising from an automobile collision in Ohio. The four clients all retained the Fieger firm individually and were never "referred" by anyone. Mervie Rice, Dorothy Dixon, Philip Hill (who were all injured in the collision), and Howard Linden, Personal Representative of the Estate of Charles Rice, Deceased (who was killed in the collision)

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

are the individuals involved. With about $500,000 in advanced costs and hundreds of hours of legal work, the Fieger firm obtained substantial recoveries for each of the four seperate clients.

Sherbow alleged that he had "referred" the clients to Fieger and, in this litigation, claimed that he was owed a referral fee. The clients, however, testified to the contrary that they never had any relationship with Sherbow, never consulted with him about their cases, never retained him, and never gave him authority over their cases to "refer." Instead, each of the clients maintained that they independently retained the Fieger Firm as their choice of counsel.

At trial, Sherbow admitted that he had never consulted with any of the four clients before he claimed a stake in the subsequent litigation. (In fact, as to Phillip Hill, Sherbow acknowledged that he never met him.) Sherbow heard about the automobile accident in Ohio from a friend of the family (someone unrelated to any of the four clients). Then, before any client contact at all, he made a call to his old friend Jeff Danzig (who worked at the Fieger Firm at the time) and claimed "dibs" on the cases. Sherbow claims that, from that point onward, he "referred" the cases.[2]

Later, Sherbow contacted and solicited Dion Rice (the decedent Charles Rice's son), and even went to Dion's home, all in the hopes of attaching himself to the litigation. Sherbow claimed that, based on his speaking with Dion, he had "referred" all

[2] Because of the Fieger Firm's stature, it is not uncommon for the firm to be contacted in serious injury cases.

four clients to the Fieger firm, even though Sherbow had never spoken to them or had any type of professional relationship with them.

The clients all testified that they independently sought representation from the Fieger firm based upon the firm's solid reputation for excellence and trial advocacy. They did not consult with Sherbow about legal representation and never asked him to be their attorney.

Fieger argued that, in order for there to be a legal and ethical referral, Sherbow was required (at the very least) to have an "attorney-client" relationship with the clients. This relationship would, at a minimum, involve consultation with and advising the clients about the case, and then sending them (i.e. "referring" them) to Fieger. Because this never took place, the referral-fee "agreement" was invalid, and Fieger maintained that it did not owe any share of fees to Sherbow.

The case was tried before a jury, which found that Mervie Rice, Dorothy Dixon, and Philip Hill were *not* Sherbow's clients[3] and that Sherbow did not "refer" them to the Fieger Firm. Thus, Sherbow was not owed any referral fee as to these clients. Sherbow appealed the judgment to the Court of Appeals.

On appeal, to circumvent the requirements of MRPC 1.5(e), and to disguise his own unethical conduct (of not having any association with the clients), Sherbow argued

[3] The jury found that Dion Rice, acting on behalf of the Estate of Charles Rice, was a "client." However, this was clear error because Dion did not have any legal authority to act on behalf of the Estate. Howard Linden was the duly appointed personal representative of the Estate, and he was the Client. In uncontroverted testimony, Mr. Howard Linden stated that he did not agree to have Sherbow represent the Estate, or ever agree that Sherbow should get a portion of the attorney fees.

that an attorney does not need to have a "client" in order to legally or ethically refer a "client" to another firm. He claimed that any type of relationship with the "client" was unnecessary, and that a lawyer can ethically "refer" anyone to another attorney without the "client" ever knowing, meeting or consulting with the first lawyer.

The Court of Appeals, in a published opinion, adopted this reasoning. This Court should grant leave to appeal to consider this significant issue that not only implicates the ethical behavior of lawyers, but also impacts the public in general. The Court of Appeals decision opens the door to unethical and predatory conduct by less scrupulous members of the bar: open the newspaper and start claiming to have "referred" an injured person to another firm.

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

Michigan has long recognized, for over a century, that an attorney-client relationship attaches when a client "consults with an attorney in his professional capacity, with view of obtaining professional advice or assistance[.]" *Devich v Dick*, 177 Mich 173, 178; 143 NW 56 (1913). "It is not essential to such relation that any fee be paid, promised, or charged" or that the attorney was never formally retained. *Id* at 179. In order to protect the interests of the public, Michigan law *should require* that a legal consultation (i.e. a nascent attorney-client relationship) be a simple prerequisite to claim

a "referral" under the Michigan Rules of Professional Conduct. Otherwise, there is no bar to the type of predatory conduct that the facts showed were engaged in in this case.

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

II. STATEMENT OF FACTS

a. The Fatal Collision

At about 1:00 a.m. on July 13, 2012, four Michigan relatives were involved in an automobile collision in Dayton, Ohio. Charles Rice ("Mr. Rice") lost his life; Dorothy Dixon ("Dixon") suffered injuries so severe that she was comatose for weeks; Philip Hill ("Hill") and Mervie Rice ("Mervie") suffered significant injuries. The Estate of Charles Rice, Ms. Dixon, Mr. Hill and Mervie are the "clients" in the underlying cases.

b. Sherbow Hears about the Collision, Imposes Himself and "Stakes his Claim" on the cases

Sherbow admitted at trial that he heard about the collision on July 13 from Jennifer Hatchett, a third party who is unrelated to any of the clients.[4] Sherbow testified that, upon hearing this news, his first course of action was to "immediately then call[] Danzig[.]"[5] Jeff Danzig, a long time golfing buddy of Sherbow, and was an attorney at the Fieger firm at the time.[6] Sherbow and Mr. Danzig had been friends for over fifteen years; Sherbow went on annual golfing trips with Mr. Danzig and stayed at Mr. Danzig's property "up north."[7] Sherbow also had a business relationship with Mr. Danzig, and Mr. Danzig had personally made substantial money from Sherbow's referrals over the years.[8] Sherbow's claims arise out of several letters that Danzig wrote to him, allegedly confirming a "referral" (of clients that Sherbow did not have or even know).

Sherbow claimed that his very first phone call was to Mr. Danzig "to try to take care" of the clients; however, he prefaced this statement by acknowledging that "this was a very – very serious case, potential great exposure[.]" Sherbow called Danzig to stake his "claim" on cases that he had absolutely no relationship to, and to make sure that Danzig acknowledged that the cases "w[ere] related to me."[9] At that point, Sherbow had had no contact with any of the "clients." Nevertheless, this is when he

[4] Trial Transcript Volume II, February 28, 2017, p. 76.
[5] Id.
[6] Trial Transcript Volume I, February 27, 2017, p. 178.
[7] Id. at 190-191.
[8] Id.
[9] Trial Transcript Volume II, February 28, 2017, p. 76

claims that this "referral" occurred. Sherbow relates everything thereafter back to his first contact with Danzig, falsely claiming that he was the attorney responsible for "bringing the cases to the Fieger firm."

After contacting Danzig, Sherbow began an attempt to solicit the cases by making direct contact with Dion Rice (the decedent's son) and interposing himself at the Rice funeral. Sherbow solicited Dion by calling him directly.[10] Dion testified that he did not know Sherbow personally but did know that his father had known Mr. Sherbow in the past.[11]

Dion testified about the initial phone conversation with Sherbow. In that conversation, Sherbow introduced himself to Dion as his "dad's friend" and offered help in finding a lawyer, etc.[12] Dion never agreed to retain Sherbow, and told Sherbow that he would find out what other members of his family were doing and get back to Sherbow.[13] Dion never told Sherbow that he wanted to retain him, never asked for help finding a lawyer, and did not give Sherbow any authority to "refer" his father's case (and claim a "referral" fee) to another attorney.[14]

At that point, Sherbow did not back off; he continued to solicit Dion, following up with more phone calls and a visit to Dion's home.[15] Sherbow told Dion that he "knew a couple of guys down at Fieger's;" Dion responded that the family were already

---

[10] Id. at 121-122.
[11] Trial Transcript Volume III, March 2, 2017, p. 107.
[12] Id. at 108.
[13] Id.
[14] Id. at 111.
[15] Id. at 108.

retaining the Fieger firm.[16] Dion told Sherbow that he had previously contacted the Fieger firm by the time Sherbow went to visit Dion at his home, days after the accident.[17]

Despite being informed that his services were not required, Sherbow, nevertheless, continued to attempt to impose himself into the matter. He again contacted his old friend Jeff Danzig, and got himself invited to a meeting at the Fieger firm on July 26, 2012.[18] This meeting included Dion, Mervie, Danzig, Sherbow, and two lawyers from separate law firms: Jody Lipton (who represented the survivors for first-party no-fault benefits) and Howard Linden (who was later appointed Personal Representative of the Estate of Charles Rice). Mervie and Dion did not request Sherbow's attendance at the Fieger firm meeting. Sherbow's attendance at the Fieger firm meeting was not at Dion's request.[19] Mervie Rice had never even spoken with Sherbow or met him; she did not know him.[20]

Sherbow admitted that he did not have any relationship with any of the clients: Sherbow admitted at trial that he never met Dorothy Dixon until the fall of 2014, years later, when the Fieger firm uncovered the fraud that Sherbow had not referred the cases to the firm, and that written representations by Mr. Danzig were part of a scheme to defraud the Fieger firm.[21] Sherbow admitted that he had never met with or spoken to

---

[16] Id. at 108-109; 111.
[17] Id. at 121-122.
[18] Trial Transcript Volume II, February 28, 2017, p. 87.
[19] Trial Transcript Volume III, March 2, 2017, p. 111-112.
[20] Id. at 64.
[21] Trial Transcript Volume II, February 28, 2017, p. 75.

Mr. Phillip Hill until Mr. Hill's deposition was taken in this case.[22] Sherbow admitted that he did not meet Mervie Rice until the July 26 meeting.[23] Even at that time, he did not communicate directly with her, and Mervie testified that she had retained the Fieger firm directly.[24] Sherbow admitted that he never met with or consulted with Howard Linden, the duly appointed personal representative of the Estate of Charles Rice.[25]

Howard Linden testified that as the personal representative of the Estate of Charles Rice, he was the "client."[26] Linden further testified that there was never any discussion of any "referral" at the meeting, and that he did not consent to any.[27] Mr. Linden was never told that the case was "referred" by Sherbow, or that Sherbow would be sharing a fee with the Fieger Firm.[28] Mr. Linden did not consent or agree to Sherbow sharing attorney fees with the Fieger firm.[29]

Despite Sherbow's admissions that he never had any contact (or relationship) with the clients, Sherbow still claimed that he was owed a referral fee. Sherbow claimed that his entitlement to the fees was based solely on his unsolicited communications with Dion, his tag-along to the July 26 meeting, and his communications with longtime

---

[22] Id.
[23] Id.
[24] Trial Transcript Volume III, March 2, 2017, p. 63-64.
[25] Trial Transcript Volume II, February 28, 2017, p. 145-147.
[26] February 17, 2017 De Bene Esse Deposition of Howard Linden, pg 14. It was stipulated on the record that, starting on page 43 at line 21 through page 51, line 12 of the deposition would not be (and was not) shown to the jury. Trial Transcript Vol. III, p. 59.
[27] Id.
[28] Id. at 21-22.
[29] Id. at 23.

friend Mr. Danzig. Any type of attorney-client relationship, communication with the client, or consent by them was, apparently, deemed unnecessary.

Mervie Rice had no idea who Sherbow was until after this fee dispute arose, and was surprised to learn that Sherbow was claiming to have "referred" her to the Fieger Firm.[30] Mervie testified that she had independently called the Fieger firm after seeing a commercial on television.[31] Fieger firm intake documents and notes taken by a receptionist were admitted as exhibits at trial, and support Mervie's statement that she independently called the Fieger firm on July 17, 2012 to discuss retaining the firm for representation.[32] Sherbow had nothing to do with Mervie being at the July 26 meeting; she was there to retain the Fieger firm.

Sherbow claims that, at the July 26 meeting, Mervie and Dion were advised that he was a "referring" attorney and would be receiving a share of the attorney fees, and that they did not object. Dion and Mervie, to the contrary, testified that they were never advised that Sherbow would receive a share of the attorney fees, and were never given an opportunity to object since they didn't know about a fee-sharing agreement in the first instance.[33]

Mervie became frustrated with Sherbow's trial counsel during cross-examination on this subject. Sherbow's trial counsel asked Mervie targeted questions about whether she ever objected to a fee-splitting agreement with Sherbow. Mervie answered "no," but

---

[30] Trial Transcript Volume III, March 2, 2017, p. 64.
[31] Id. at 63.
[32] Id. at 20-21.
[33] Trial Transcript Volume III, March 2, 2017, p. 113, 78.

then explained: "No, I didn't know Mr. Sherbow at all, so the objection of Mr. Sherbow, how would I be able to, you know, if I don't know him. I didn't (know) him."[34] The July 26 meeting is the last time that Sherbow claims to have performed any "referral" services of any kind.

Phillip Hill did not attend the July 26 meeting at the Fieger firm. Instead, Mr. Hill contacted the Fieger firm directly for representation.[35] Mr. Hill did not know Sherbow, did not retain him, and never asked him to be his lawyer.[36] Mr. Hill signed a retainer agreement with the Fieger firm on August 6, 2012. Mr. Hill testified that he was never told about Sherbow and never advised that Sherbow would be sharing a fee with the Fieger firm.[37] It goes without saying that Mr. Hill could not object to something that he was not made aware of.

Sherbow admits that he never spoke with or had a relationship with Phillip Hill.[38] Instead, Sherbow bases his claim for referral fees from Mr. Hill's case on a conversation that he claims to have had with Mr. Danzig.[39] Sherbow testified: "I've never denied I never met Phil Hill. I never denied that I didn't meet Mervie Rice for the first time when we signed up those cases. Never denied that."[40] But Sherbow claims here that he is entitled to a share in fees based solely upon oral conversations with Dion and Danzig, and a letter from Danzig.

---

[34] Id. at 78.
[35] Id. at 124.
[36] Id. at 124-125.
[37] Id. at 125-126.
[38] Trial Transcript Volume II, February 28, 2017, p. 139-140.
[39] Id.
[40] Id. at 140.

Sherbow also never had a conversation or relationship with Dorothy Dixon regarding any legal representation or consultation with respect to the Ohio accident. Dorothy suffered grievous injuries due to the accident and was in a coma for months after the collision; she was later moved to a nursing home to rehabilitate.[41]

Ms. Dixon had previously met and had had a prior bad experience with Sherbow. She testified that she had been involved in another automobile collision years ago, and that Sherbow had tried to solicit her back then.[42] Ms. Dixon did not retain Sherbow and retained other counsel.[43] Ms. Dixon would never have chosen Sherbow as her attorney; she testified she "didn't hire him then at the last one, and I wouldn't have hired him at this one."[44]

Neither Danzig nor Sherbow told Ms. Dixon that her case had been "referred," or that Sherbow was claiming referral fees from her case.[45] Mr. Sherbow later tried to browbeat Ms. Dixon into giving him a fee. After the fee dispute arose, he "bombarded his way" into her apartment, and came in talking about money and demanding a fee.[46] That uninvited and aggressive meeting was the only time that Ms. Dixon ever had contact with Sherbow in her case.[47]

---

[41] Trial Transcript Volume III, March 2, 2017, p. 88.
[42] Id. at 86-87.
[43] Id.
[44] Id. at 90.
[45] Id.
[46] Id. at 90-91.
[47] Id. at 91.

c. The Circuit Court's Jury Instructions, Sherbow's Claims of Error on Appeal, and the Court of Appeals opinion

Sherbow had a full and fair opportunity to present his case to the jury. There was conflicting testimony from Sherbow and Danzig, all of which was presented to the jury for its consideration.

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

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

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

> The definition of a client is a person or entity that employs a professional for advice or help in that professional's line of work, especially one in whose interest a lawyer acts as by giving advice, appearing in court or handling the matter.
>
> (Trial Transcript Vol IV, March 3, 2017, p. 63)

The jury found against Sherbow as to Mervie Rice, Phillip Hill, and Dorothy Dixon.

On appeal Sherbow raised four issues of error:

Significant to this application, Sherbow argued in the Court of Appeals that the Circuit Court erred by instructing the jury that an attorney-client relationship was necessary for a valid, ethical referral. Sherbow claimed that the law does not require an attorney-client relationship between a "referring attorney" and the "client." The Court of Appeals agreed with Sherbow and held, for the first time in Michigan law, that a "referring attorney" does not need to have an "attorney-client" relationship with the clients in order to make a legal and ethical referral.

Sherbow also argued on appeal that the Circuit Court erred by not reversing the burden of proof and not instructing the jury that it was the Defendant's burden to establish at trial that the clients were not advised of the fee-splitting agreement (as an affirmative defense).

The Circuit Court had instructed the jury that "for a division of fee -- fees to be proper both the referring lawyer and the receiving lawyer are responsible to see that the client is properly advised, and does not object to the participation of the lawyers."[48] The Court's instruction placed the burden equally on both Plaintiff and Defendant. In its Cross-Appeal, the Fieger Firm argued that the Plaintiff has the burden of proof to establish that the referral contract was valid in the first instance, thus placing the burden on Plaintiff to show compliance with the Michigan Rules of Professional Responsibility.

---

[48] Trial Transcript Vol IV, March 3, 2017, p. 66.

The Court of Appeals, however, held that the illegality of a referral contract is an affirmative defense, and thus, it was Defendant's burden to prove. Irrespective of the burden of proof, the Court of Appeals held that no attorney-client relationship of any kind is necessary for a valid referral fee-sharing agreement under MRPC 1.5(e).

After making this legal holding, the Court of Appeals went on to consider whether a new trial was necessary. The Court held that juror "confusion", stemming from erroneous jury instructions regarding the requirement of a prerequisite attorney-client relationship, and the resultant burden of proof, necessitated a new trial. Despite this legal determination, the Court then incongruously only remanded for a new trial the fee-dispute cases arising from Mervie Rice's, Dorothy Dixon's, Philip Hill's cases, and not the Estate of Charles Rice. The jury instructions that allegedly created "juror confusion", however, were the same for all four clients. If a new trial was appropriate, then logic dictates that a new trial is required for all four clients' cases, not only the 3 in which Defendant prevailed. The exclusion of the Estate of Charles Rice from the Court's holding is inexplicable, and creates the appearance that, notwithstanding the alleged erroneous effect of the Court's instructions as to all the cases, only the cases that found in favor of Defendant were to be reversed.

The Court of Appeals legal determination that no attorney-client relationship of any kind is necessary for a valid "referral" of a "client," from one attorney to another is radical, and opens the floodgate to the type of predatory conduct which occurred in this case.

III. LAW AND ARGUMENT

a. Standard of Review

Whether any attorney-client relationship is a necessary predicate to a valid referral, and whether a referral contract is a valid contract (in compliance with the Michigan Rules of Professional Conduct) are unvarnished issues of law for this court to review *de novo*. This Court reviews questions of law de novo. *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 569; 592 NW2d 360, 363 (1999); see also *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 43; 672 NW2d 884 (2003).

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

As an issue of first impression in Michigan, the Court of Appeals held that an "attorney-client" relationship with a "client" by a "referring" attorney is not required for that attorney to later claim a referral fee. This holding is radical and dangerous, and taken to its extreme, allows for the predatory and unethical conduct such as occurred here, where an attorney candidly admits that he had no prior contact with clients (never met them, never spoke with them, was never consulted by them) but, nevertheless, can claim that he "referred" the "clients" (and is entitled to attorneys fees). This result is unconscionable, contrary to the basic principles that guide the ethical practice of law, and leaves the public open to being taken advantage of by less scrupulous members of this profession.

The Court of Appeals analysis that an attorney-client relationship with a referred client is not necessary is based upon a skewed interpretation of MRPC 1.5(e). MRPC 1.5(e) allows a "division of a fee between lawyers who are not in the same firm" **only if** "(1) **the client** is advised of and does not object to the participation of all the lawyers involved; and (2) the total fee is reasonable." (Emphasis added.)

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

1. The Historical Adoption of MRPC 1.5(e)

MRPC 1.5(e) was adopted by this Court in 1988 when this Court promulgated the current version of the Michigan Rules of Professional Conduct. By doing so, the Court exercised its authority to "provide for the organization, government, and membership of the state bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members." MCL 600.904. See also Const 1963, art 6, § 5. The language of MRPC 1.5(e) has remained unchanged in the intervening 30 years.

While many of the adopted rules were identical to the American Bar Association

Model Rules, MRPC 1.5(e) was not. The ABA model rule for this section provided:

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

The rule as adopted by this Court provides:

> (e) A division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the client is advised of and does not object to the participation of all the lawyers involved; and
>
> (2) the total fee is reasonable.

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

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

> **Division of Fee.** A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee on agreement between the participating lawyers if the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive.

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

attorneys for referrals *was to better serve the client*.

The Court's choice to deviate from the Model rule was a deliberate one. Before adopting the MRPC, the Court requested comments from various legal groups within the state on the changes proposed by the State Bar of Michigan. The proposed changes included a request that the court adopt Model Rule 1.5(e) to replace the prior aspirational cannons of professional responsibility. "While the State Bar of Michigan requested the adoption of the Model Rule, the Michigan Attorney Grievance Commission did not believe that the Model Rule was appropriate and, therefore, proposed a more liberal rule that was virtually identical to the current MRPC 1.5(e)." Sean M. Carty, *Money for Nothing? Have the new Michigan Rules of Professional Conduct Gone Too Far in Liberalizing the Rules Governing Attorney's Referral Fees?*, 68 U Det L Rev 229, 242 (1991) (cleaned up). The Court ultimately adopted the Grievance Commission's proposal. One of the main reasons in favor of the Grievance Commission's proposal was to better serve the client's interests by creating an incentive for cases to be referred to more experienced and specialized practitioners. Id. at 243. The Court, as evidenced by the commentary to the Rule, found this goal persuasive, and adopted the current rule *in order to better serve the client*.

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

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

The proper interpretation of MRPC 1.5(e) presents an issue of statutory interpretation for this Court. The rules of statutory construction apply to rules promulgated by the Michigan Supreme Court, such as the Michigan Rules of Professional Conduct. *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139, 141 (2003); *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 44; 672 NW2d 884, 888 (2003).

MRPC 1.5(e) does not specifically state that both the "referring attorney" and the "receiving attorney" must have an attorney-client relationship with the "client" being "referred." This presents an ambiguity in the Rule. "If reasonable minds can differ about the meaning of a statute, judicial construction is appropriate. The court must consider the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the statute's purpose, but should also always use common sense. Statutes should be construed to avoid absurd consequences, injustice, or prejudice to the public interest." *Morris & Doherty, PC* 259 Mich App at 44 (cleaned up). The Michigan Rules of Professional Conduct constitute "definitive indictors of public policy." *Terrien v Zwit*, 467 Mich 56, 67; 648 NW2d 602, 608 (2002).

The primary purpose and goal for adopting the relaxed version of MRPC 1.5(e) was to better serve the client by encouraging involvement of experienced and specialized attorneys. To facilitate and encourage this goal, the Rule allows a referring

lawyer to claim a split in fees when a case is sent (i.e. referred) to other counsel. This goal to better serve the client's interests is only preserved if there is an attorney-client relationship with the referring attorney in the first place.

Here, the Court of Appeals, relying on *McCroskey, Feldman, Cochrane & Brock, PC v Waters*, 197 Mich App 282, 287; 494 NW2d 826, 828 (1992), held that the policy purposes behind MRPC 1.5(e) do not require any attorney-client relationship with a "client" to refer the "client." *Waters*, however, is inapposite to the facts adduced here, where Sherbow admits that he had no relationship whatsoever with the "clients" before his claimed "referral" of them.

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

The Court of Appeals reliance on *Waters* to define the public policy of MRPC 1.5(e) as it relates to this case is insufficient. Unlike *Waters*, this case *does* involve a referral dispute, and goes to the heart of why MRPC 1.5(e) was promulgated. The Rule is not in place to allow unscrupulous attorneys to finagle fees in cases where they have

no relationship with the clients. The Rule was promulgated so that, after being consulted on a case, an attorney who is less qualified or experienced has an incentive to hand the case off to a more competent firm. It is the client's interests that are paramount, not the pockets of an unscrupulous attorney.

MRPC 1.5(e) must logically be interpreted such that the word "client" apply to both the referring and receiving attorneys. To hold otherwise is the height of absurdity. The referring attorney must have some type of relationship with party in order for there to be a valid referral. This interpretation is supported by the context of MRPC 1.5(e), which allows referrals and fee-sharing between attorneys, but not between non-attorneys, as well as other ethics rules and statutes.

The rationale behind this attorney-specific exception is found in MRPC 1.1(a). MRPC 1.1 requires attorneys to provide competent representation to clients. MRPC 1.1(a) provides that a lawyer shall not "handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it[.]" Thus, lawyers have an ethical obligation to seek out and partner with other lawyers who have expertise in specific areas, with the overarching goal being to provide the most competent representation possible to the client. Thus, it is the client's wellbeing that has prompted the exception to fee-sharing between attorney in MRPC 1.5(e).

Michigan State Bar Ethics Opinion RI-158 supports this analysis of Michigan public policy, as defined by the Rules of Professional Conduct. (Appx Vol IV, p 83) "Although State Bar Ethics Opinions are not binding on this Court, they are

instructive." *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 202; 650 NW2d 364 (2002). Opinion RI-158 considered the interplay between MRPC 1.5(e) and 1.1. The Ethics panel considered whether an attorney can demand payment of a referral fee before making a referral to more competent counsel. RI-158 instructs that a lawyer cannot refuse to give a proper referral or make his referral contingent on receiving a referral fee. The Court of Appeals recognized the long-espoused principle that "[i]f the client offers objection to the participation, then the lawyer may not request or receive a referral fee." The opinion further instructs that "the lawyer should be cognizant of MRPC 1.1 governing lawyer competence and make every reasonable effort to assure that the receiving lawyer has the competence and skills necessary to meet the client's objectives. Neither lawyer should allow the referral relationship to affect either lawyer's professional judgment regarding the best interests of the client."

RI-158 analyzed the interplay between an attorney's pecuniary interest in a referral and the client's need for competent counsel:

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

Thus, a lawyer has ethical and legal obligations above and beyond those expected of the public at-large. A lawyer can provide professional services as an advisor and intermediary, not just as a diligent advocate. These are hallmarks of an attorney-client

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

RI-158 further explained the unique role of a lawyer, and why an exception to fee-sharing by lawyers advances the purpose of a client getting the most competent representation:

> The lawyer plays a unique role in the administration of justice, and owes a duty to ensure public understanding and acceptance of that system. The lawyer has a duty to exemplify the legal profession's ideals of public service and has a difficult and challenging task of addressing conflicting responsibilities, particularly between the lawyer's own economic aspirations and in ensuring full and fair legal services to the public. In order to maintain an independent legal profession, it is important to preserve, maintain and enhance the profession and that lawyers work to assist their clients in obtaining their lawful objectives. When an individual lawyer is not able to meet the needs of the lawyer's clients for legal services, the lawyer has every right to assist that client in finding a proper provider of legal services. Although nothing prevents the lawyer from attempting to obtain an appropriate referral fee for this activity, when and if that objective cannot be reached, it would appear not to be in the interests of the legal profession or the public for the lawyer to refuse to provide a recommendation or referral to appropriate services.
>
> MRPC 1.2(a) provides that a lawyer shall seek the lawful objectives of a client through reasonably available means permitted by law under these rules. Although this rule does not specifically mandate that a lawyer must make a referral even if the lawyer will receive no compensation therefor, it would be the antithesis of the concept of enhancing the legal profession if the lawyer willfully refused to provide such a referral solely because the client and/or the receiving lawyer declined to pay a referral fee for such assistance.

The permeating theme identified in RI-158 is that the client's needs are paramount, and the Michigan Rules of Professional Conduct were enacted with the goal of providing the best representation with the highest integrity. An attorney-client relationship sits at the core of these objectives. The Michigan Rules of Professional Conduct resoundingly

advance public policy protecting a client and advancing ethical practices and representation based on the client's best interest. "Basic concepts of loyalty to the client, as well as placing the client's interests as primary, prohibit the lawyer from using the lawyer's position of trust and confidence to extract agreement from the client to pay a referral fee. See Comment to Rule 1.7, Conflict of Interest." RI-158.

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

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

> This additional requirement also has the potential to result in situations where an attorney, who typically would immediately refer a case that they knew they were not qualified or adequately able to handle, might retain the case for a certain period of time. In so doing, that underqualified or underprepared attorney might cause a detriment to the injured party's case. After all, Michigan law with respect to personal injury cases often have exacting statutory requirements (such as medical malpractice, the no-fault act, cases implicating governmental immunity, etc.) which an attorney not versed in that area of law might unwittingly fail to meet. *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, ___ Mich App ___ (slip op at 13); ___ NW2D ___ (2019).

The Court, however, failed to reconcile how this interest is met or preserved by allowing an attorney who has no relationship to the clients to nevertheless claim a referral fee predicated solely upon the fact that the attorney learned about tragedy from a third-party. It is not.

3. An attorney-client relationship will not adversely impact legitimate and ethical referrals in Michigan:

An attorney-client relationship with the referring lawyer is not an onerous or burdensome requirement. Such a relationship instead will ensure that the referring lawyer has some connection and nexus to the clients and is not abusing a situation to claim a fee in cases where the attorney has no relationship whatsoever with the client.

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

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

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

Michigan has recognized for over a century that an attorney-client relationship attaches when a client "consults with an attorney in his professional capacity, with view

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

This Court should hold here that a legal consultation (i.e. an attorney-client relationship) is a minimum prerequisite to a valid "referral" of a client under the Michigan Rules of Professional Conduct. Otherwise, there is no bar to the type of predatory conduct that Sherbow has admitted to in this case.

The Court of Appeals hasty one-sentence analysis of what constitutes an attorney-client relationship under Michigan law, and when it attaches to form obligations on the part of an attorney, misses the mark. *Offices of Jeffrey Sherbow, PC,* slip op at 13, partially quoting *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Sch*, 455 Mich 1, 11; 564 NW2d 457, 462 (1997). In fact, the full quote to the cited section states:

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

It is the consultation and advise that gives rise to an attorney-client relationship, *not* an expectation of payment.[49] The permeating theme of the Michigan Rules of Professional

[49] The limited scope and nascent nature of the attorney-client relationship in this context is analogous to the type of relationship that is formed when a potential client

Conduct is to protect the interests of the client. An attorney-client relationship protects this interest in the context of a referral. Requiring Sherbow to have this basic relationship with the clients before claiming a "referral" should be the bare minimum of acceptable ethical conduct.

MRPC 1.2(b) allows a lawyer to ethically limit the scope of representation. There is nothing prohibiting a referring attorney from limiting the scope of his representation simply to advising and helping the client find competent representation. But this very act—helping the client find competent representation—involves an attorney-client relationship. Presumably the client has consulted with the referring attorney and has sought help for litigating a case. Such a holding protects ethical lawyers and firms who are first consulted by a "client," but who then refer the case to another lawyer for various reasons.

This Court should unequivocally 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 the attorney to monetize on the misfortune of acquaintances.

---

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

Sherbow's conduct in this case is seriously suspect and is not the type of behavior that should be sanctioned in Michigan. Sherbow ***admits that his first call after hearing about the tragedy from a third-party was to Danzig, and he let it be known that the cases resulting from the accident were "his***." Sherbow then attempted to solicit Dion, even though this type of solicitation is unethical in Michigan. MCL 600.919(2) instructs "Any agreement for such compensation, or for reimbursement of any expenses, incident to the prosecution or defense of any claim by any party is wholly void if such professional employment was solicited by the member of the bar, or by any other person acting on his behalf or at his request, unless the services of such member of the bar were first requested by such party." Dion did not request that Sherbow get involved; in fact, at trial, Sherbow admitted that he called Dion first![50]

Dion did not agree to have Sherbow become involved in any manner, and clearly told Sherbow that he would determine what other members of his family were doing before getting back to Sherbow.[51] Dion told Sherbow that he had already contacted the Fieger firm when Sherbow again solicited him, at his home, just days after the accident.[52] Sherbow's "efforts" were superfluous, unwanted, and unethical.

Sherbow never even had a single conversation or consultation with any of the other clients. Sherbow admitted that he had never spoken with or consulted with Mervie Rice, Dorothy Dixon, Phillip Hill or Howard Linden, personal representative of

---

[50] Trial Transcript Vol II at 122.
[51] Trial Transcript Vol III at 111.
[52] Id. at 121-122.

the Estate of Charles Rice. And yet, Sherbow claims a referral fee from "clients" he never had.

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

There is a right way to make a referral and a wrong way. Sherbow's way (calling "dibs" on cases before he was ever sought out, met with, or consulted with the clients) is obviously wrong. Attorney referrals in Michigan serve the important purpose of ensuring that clients are directed to experienced attorneys with specialized skill sets. That basic precept—a consultation for legal advice, and information regarding the best source to get representation—provides the basic building blocks of an attorney-client relationship. Allowing attorneys like Sherbow to claim referrals without any consultation makes no sense, and is a disservice to the ethical attorneys who *do* provide the important service of providing legitimate referrals.[53]

---

[53] The Court of Appeals adopted the reasoning of the Kansas Supreme Court in *Ryder v Farmland Mut Ins Co*, 248 Kan 352, 362; 807 P2d 109, 117 (1991), which held that an attorney-client relationship with a referring attorney is not necessary. *Ryder*, however, does not provide any detailed analysis of Michigan policy, or examine how

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

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

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

> "When plaintiff cannot establish its cause of action without relying upon an illegal contract, it cannot recover. The contract was of no force, effect, or efficacy. It was invalid, null, and void."
>
> * * *
>
> "The general rule of law is, that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover." (citations omitted).
> *Am Tr. Co v Michigan Tr. Co*, 263 Mich 337, 339–340; 248 NW 829 (1933).

Thus, it must be Plaintiff's burden of proof to establish the existence of a valid and enforceable contract. The burden cannot shift to the Defendant. The Court of Appeals erred in holding that establishing the existence of a valid referral contract is an affirmative defense.

---

the requirement meshes with the prevailing interest in favor of the client. *Ryder* instead fell back on shallow statutory analysis, holding that since the rule did not explicitly require a relationship, one was not required.

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

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

The "letter"-contract at-issue in this case violates the Michigan Rules of Professional Conduct, is against public policy, and is unenforceable as a matter of law. Michigan Courts will not enforce a contract that is contrary to Michigan law. *Rory v Contl Ins Co*, 473 Mich 457, 491; 703 NW2d 23, 43 (2005). Under the Rules of Professional Conduct, a fee-splitting agreement between attorneys cannot be enforced unless the client is advised of the arrangement and does not object. MRPC 1.5(e). Here, there is no evidence whatsoever that the Fieger clients were ever advised of a fee-splitting agreement with Sherbow and did not object. Mere silence is not enough to affirmatively show that the clients were advised of the feel-splitting and did not object.

Sherbow acknowledges that he was never retained by any of the four clients, <u>and none was ever his client</u>. When he filed this suit, he had still never had a single

conversation regarding representation with Mervie Rice, Philip Hill, Dorothy Dixon, or Howard Linden as Personal Representative of the Estate of Charles Rice. Sherbow also did not have a telephone call with Dorothy Dixon until the summer of 2014. He never met Philip Hill at all; he did not meet Dorothy Dixon, who was comatose in the summer of 2012, until mid-2014, long after Danzig signed a letter giving Sherbow a share of the fees earned from her case.

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

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

violates the rules is against public policy. As a result, the Court declined to enforce the contract as a matter of law. *Id* at 189, 195–197.

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

Michigan State Bar Ethics Opinion RI-234 provides further guidance regarding Sherbow's duty to inform clients about a fee-sharing agreement, and counsels that silence alone cannot suffice. (Appx Vol IV, p 86) Opinion RI-234 instructs that, prior to the division of a fee between lawyers who are not in the same law firm, the client must be advised of the identity of the lawyers who will divide the fee. The client must also be advised which lawyer the client should contact for information regarding the case, what services each lawyer will be providing on the case, and which lawyer(s) will be responsible for the matter. Under this analysis, Sherbow clearly fails.

Although not binding, there have been a number of unpublished Court of Appeals decisions that have affirmed the principle that a referring lawyer has the obligation of proving the existence of a valid and legal contract by establishing that the clients were informed of an agreement to share fees and did not object. Following *Evans & Luptak* and *Morris & Doherty*, the Court of Appeals examined the precise issue

presented here in *Morad v Cabadas*, unpublished opinion per curiam of the Court of Appeals, issued January 11, 2005 (Docket No. 245976) (Appx Vol IV, p 88): whether a fee-splitting agreement that violates MRPC 1.5(e) is unenforceable as a matter of law. In keeping with prior precedent, the Court held that a fee-splitting agreement entered into without the client's knowledge or consent, in violation of MRPC 1.5(e), is unenforceable as a matter of law because the contract contrary to Michigan's public policy, evidenced by our laws.

Similarly, *Kosinski v Mason*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 2001 (Docket No. 224658) (Appx Vol IV, p 89) is also persuasive because, once again, the Court held that a client must affirmatively "not object" to a split in attorney fees. Mere silence on the subject is not enough to create a question of fact on the issue. In *Kosinski*, the plaintiff was a probate lawyer who shared office space with the defendant, a personal injury lawyer. The client lost her father in a bus accident and was seeking legal representation. Plaintiff claimed that he recognized a potential wrongful death claim, offered to refer the client to defendant, called defendant to apprise him of the situation, and subsequently walked the client across the hall and introduced her to defendant. The client, meanwhile, stated that she became aware of both plaintiff and defendant, and the type of work they performed, during discussions with coworkers. She claimed that she went to their office space intending to see both men, and that after she mentioned to plaintiff that she was next going to speak with defendant, she merely agreed to plaintiff's offer of an introduction.

The Court of Appeals considered this context, and the requirements of MRPC

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

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

The Court further held that mere silence on the part of the client was not enough for plaintiff to establish the existence of a valid and enforceable agreement to share fees, making summary disposition appropriate. The *Kosinski* Court squarely placed the burden of establishing a valid and enforceable contract on the plaintiff (not defendant), and concluded that "Because no material question of fact exists regarding compliance with the requirement of Rule 1.5(e) that the client knowingly approve of a division of fees arrangement, plaintiff's claim is unenforceable and summary disposition was appropriate." *Id* at *3. [54]

The critical language of MRPC 1.5(e) allows the Danzig-Sherbow agreement only if, "the client is advised of and does not object to the participation of all lawyers involved". But, as discussed in the prior section, Sherbow never had any "clients" to refer, let alone any discussion with them advising them of their rights.

---

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

d. The Court of Appeals has granted a new trial based on "juror confusion" of the issues due to the jury verdict form and jury instructions. But a new trial was only ordered for 3 of the 4 clients' cases. The Court of Appeals erred by not applying its analysis to all 4 cases.

The Court of Appeals premised its decision to grant a new trial as to the claims for fees for Mervie Rice's, Dorothy Dixon's, and Philip Hill's cases on "juror confusion" of the issues because of alleged errors in the jury instructions and on the jury verdict form.

First, there was no juror confusion, and the Court of Appeals erred in holding that there was. See Jury Verdict Form (Appx Vol I, p 21). The jury was asked in Question 2 "If yes to any part of 1, did Plaintiff refer one, some or all of the following personal injury cases to Defendant?" The Jury answered "Yes" as to the Estate of Charles Rice, but "No" as to Mervie Rice, Phillip Hill, and Dorothy Dixon. The jury clearly and unambiguously, irrespective of their answer to Question 1 regarding attorney-client relationship, also found that the cases of Mervie Rice, Phillip Hill, and Dorothy Dixon were not "referred" by Sherbow. The jury's finding is crystal clear; there was no confusion. How then can the court of Appeals exempt one identical case that was concurrently tried from its holding?

Since the Court of Appeals ordered a new trial based on alleged juror confusion of the issues, the Court should have ordered a new trial as to all four underlying cases. Instead, the Court granted a new trial as to Mervie Rice, Phillip Hill, and Dorothy Dixon's cases, but exempted, for no stated reason, the Estate of Charles Rice's case. The very same jury instructions and verdict form were used in all four cases. Thus, if a new

trial is required for three, then it must be ordered as to all four cases. Why would it not? If the instructions were wrong for some, they were wrong for all. Unless there is some unknown reason to exempt a verdict favorable to Plaintiff, but reverse the verdicts unfavorable to plaintiff; such an inequitable holding should be reversed by this Court.

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

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

The same instruction was applied to all four cases. Likewise, the verdict form was the same as to all four cases. See Appx Vol I, p 21-22.

As a result of the perceived errors in the instructions, the Court of Appeals ordered that a new trial was required:

> Considering the trial court's confusing and improper instructions given regarding MRPC 1.5(e) and on the party bearing the burden of proof, defendant was "effectively relieved" of its burden of proof and as a result the jury was not allowed "to decide the case intelligently, fairly, and impartially." *Cox ex rel Cox*, 467 Mich at 15.

> We vacate the jury's verdict with respect to the first two questions asked on the verdict form, and remand for a new trial consistent with this opinion. (Slip opinion, p 15)

The Court's conclusion and instructions on remand, however, indicate that a new trial should apply only to Mervie Rice, Dorothy Dixon, and Philip Hill's cases, and not to the verdict favorable to Plaintiff:

> We affirm the trial court's orders denying summary disposition and JNOV, vacate the jury's verdict with respect to the first two questions regarding Mervie, Hill, and Dixon, and remand for further proceedings consistent with this opinion. (Slip Opinion, p 17)

This was clear error. Since the very same jury instructions and verdict form were used as to all four cases, any "juror confusion" regarding the issues must ***apply to all four cases***. In the alternative, a new trial must be ordered for all four fee dispute cases.

IV. CONCLUSION AND RELIEF REQUESTED

The Court of Appeals legal determination that an attorney-client relationship is not necessary for a valid referral from one attorney to another is radical, and opens the floodgate 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 conspires to finagle 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 engaged in in this case.

WHEREFORE, Defendant-Appellant requests that this Honorable Court GRANT its application for leave to appeal and address this significant issue of Michigan jurisprudence. In the alternative, Defendant asks that this Court peremptorily reverse the holding of the Court of Appeals and hold that an attorney-client relationship is necessary to make an ethical referral.

Respectfully submitted,

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

Date: April 16, 2019

By: /s/ Sima G. Patel

Sima G. Patel (P69541)
Attorneys for Defendant-Appellant
19390 West Ten Mile Road
Southfield, MI 48075-2463
(248) 355-5555