

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND  
BUSINESS COURT**

**LAW OFFICES OF JEFFREY SHERBOW, PC,  
Plaintiff,**

v.

**Case No. 15-147488-CB  
Hon. James M. Alexander**

**FIEGER & FIEGER, PC,  
Defendant.**

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**OPINION AND ORDER RE: SUMMARY DISPOSITION**

For the second time, this matter is before the Court on Defendant’s motion for summary disposition. The Court will note that Defendant again fails to identify which Court Rule it relies on in support of its motion, but infers in a footnote on page 3 of its Brief that MCR 2.116(C)(8) applies.

When analyzing such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dept of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). A (C)(8) motion may be granted only where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.* And, when deciding such a motion, **the court considers only the pleadings**. MCR 2.116(G)(5) (emphasis added).<sup>1</sup> In response to Defendant’s motion, Plaintiff seeks summary disposition under MCR 2.116(I)(2).

This motion presents a fairly straightforward issue. Can two Michigan-licensed attorneys

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<sup>1</sup> As a result, Defendant’s reference to evidence outside of the pleadings is inappropriate. Such evidence may not be considered. MCR 2.116(G)(5); and *Wade v Dept of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992).

contract for a fee-sharing agreement when only one of said attorneys is licensed in the jurisdiction where the suit was tried? In this case, according to its Complaint, Plaintiff referred clients to Defendant, who were involved in multiple personal-injury and wrongful-death lawsuits related to an automobile accident in Ohio.

In return for the referral, Plaintiff claims that it was promised a percentage of Defendant's attorney fee award. The Ohio cases ultimately resolved for approximately \$10.5 million, and Defendant received over \$3 million in fees.

Despite the referral-fee agreement, Plaintiff claims that Defendant now refuses to pay Plaintiff its percentage of the award. In addition to disputing Plaintiff's factual allegations about the existence of said agreement (subject to a prior summary disposition motion under (C)(10)), Defendant claims that the referral-fee agreement should be governed by Ohio law, which would make the agreement unenforceable.

In support, Defendant cites to Ohio Prof. Cond. R. 1.5(e), which provides:

Lawyers who are not in the same firm may divide fees only if all of the following apply:

- (1) the division of fees is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation and agrees to be available for consultation with the client;
- (2) the client has given written consent after full disclosure of the identity of each lawyer, that the fees will be divided, and that the division of fees will be in proportion to the services to be performed by each lawyer or that each lawyer will assume joint responsibility for the representation;
- (3) except where court approval of the fee division is obtained, the written closing statement in a case involving a contingent fee shall be signed by the client and each lawyer and shall comply with the terms of division (c)(2) of this rule;
- (4) the total fee is reasonable.

Defendant claims that none of these requirements were met. Defendant also cites Ohio Prof. Cond. R. 5.4(a), which provides that “A lawyer or law firm shall not share legal fees with a nonlawyer,” except in certain limited circumstances.

And citing *Disciplinary Counsel v Harris*, 996 NE2d 921; 137 Ohio St 3d 1 (2013), Defendant claims that Plaintiff, as an attorney licensed to practice law in another jurisdiction (but not Ohio), is “no different from an accountant, a real estate agent, or a financial planner who undertakes activity that constitutes the practice of law.” *Harris*, 996 NE2d at 925.

Defendant claims that Ohio law should be applied because Michigan’s Rules of Professional Conduct mandate so in a case like this, citing MRPC 8.5(b), which provides:

In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise.

Defendant argues that, under MRPC 8.5(b)(1), “the controlling rule of ethics is that of Ohio,” which would bar Plaintiff’s claims.

Like Michigan, Ohio adopted the ABA’s model rule addressing choice of law. Plaintiff responds that Ohio’s counterpart to MRPC 8.5(b), Ohio Prof. Cond. R. 8.5(b), includes a comment that clarifies that 8.5(b)(1) is only applied if there is a “proceeding pending before a tribunal.” But in all other cases, “**including conduct in anticipation of a proceeding not yet pending**,” (b)(2) applies. Ohio Prof. Cond. R. 8.5, Comment 4.2

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<sup>2</sup> A comment to MRPC 8.5 similarly provides (emphasis added):

Paragraph (b)(1) provides, as to a lawyer’s conduct relating to a **proceeding pending before a tribunal**, that the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, **including conduct in anticipation of a proceeding not yet pending before a tribunal**,

As a result, Plaintiff argues that the Court should apply MRPC 8.2(b)(2), which provides (emphasis added):

for any other conduct, **the rules of the jurisdiction in which the conduct occurred**, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct; a lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.

The Court agrees. Both states’ Rule 8.5(b)(1) only applies to conduct while a proceeding is pending. Plaintiff’s Complaint alleges that he introduced the relevant clients to Defendant and Defendant agreed to the referral-fee agreement **before** initiation of the underlying lawsuits. Plaintiff’s Complaint, at paragraphs 8-15. In other words, there was no proceeding pending at the time of the conduct.

As a result, the alleged referral-fee agreement was “conduct in anticipation of a proceeding not yet pending” – subject to Rule 8.5(b)(2). Under said Rule, the conduct occurred in Michigan, and therefore, Michigan Rules apply.<sup>3</sup>

Further, a comment to MRPC 8.5(b)(2) provides “In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be either where the conduct occurred, where the tribunal sits, or in another jurisdiction.” This comment is instructive. In this case, it was anticipated that a proceeding was likely to be before a tribunal. This was, in fact, the very subject of the agreement. As a result, it is appropriate to apply Michigan

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paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer’s conduct occurred or, if the predominant effect of the conduct is in another jurisdiction, the lawyer shall be subject to the rules of that jurisdiction. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be either where the conduct occurred, where the tribunal sits, or in another jurisdiction.

<sup>3</sup> While the specific provision of MRPC 8.5(b)(2) that governs “conduct in anticipation of a proceeding not yet pending” applies, the Court will also note that the “predominant effect” clause could not implicate Ohio Rules for two reasons. First, the predominant effect of two Michigan attorneys contracting in Michigan to split a fee is in Michigan (not a different jurisdiction), despite the situs of the litigation. Second, as provided later in this Opinion, Ohio law does not

Rules as the place “where the conduct [in this case, the negotiation of the referral-fee agreement] occurred.”

For all of the above reasons, Defendant’s motion for summary disposition is DENIED.

Plaintiff’s motion under (I)(2), however, is GRANTED. This lawsuit is one between two Oakland County Professional Corporations in a dispute over a contract negotiated in Oakland County. Michigan law and the Michigan Rules of Professional Conduct apply in this case.

**IT IS SO ORDERED.**

December 16, 2015  
Date

/s/ James M. Alexander  
Hon. James M. Alexander, Circuit Court Judge