

Lawyers to MSC: Hands off our fees

By Carol Lundberg
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Lansing attorney Richard D. McLellan isn't a trial lawyer.

He wouldn't be affected if the Michigan Supreme Court adopts a proposed amendment to the Michigan Rule of Professional Conduct that would limit lawyer-to-lawyer referral fees, and require clients to approve fees at the start of a case.

But he urged the Court to reject it anyway.

At the Court's Sept. 28 administrative hearing, McLellan said the main problems with the amendment to MRPC 1.5 are that it would create a danger of government price-setting, disrupts a system that is valuable to society, and that there is no indication that the current rule poses a problem for clients.

"In political branches, government pricing proposals have generally been rejected," McLellan said.

It makes even less sense in the legal services profession, which is highly competitive, he added.

The unnecessary amendment would only put an additional burden on lawyers, he said.

Chief Justice Robert P. Young Jr. asked, "Whose interests are we protecting?"

McLellan said that the client's interests are best protected when case referral is encouraged because they are more likely to be represented by the lawyer best suited to win their case.

The amended rule would apply to cases where the attorney's compensation is an agreed-upon share of the case award or settlement, according to a Court summary:

"Under the proposed amendment of Michigan Rule of Professional Conduct ... [a]n attorney who refers a contingent fee case to another attorney could receive a referral fee, but the fee would be capped at '25 percent of the amount recovered.' The rule change is aimed at discouraging attorneys from operating as brokering services and directing clients to lawyers who pay the highest referral fees. A referring attorney who also contributes a 'substantial input

of time or cost, or assumption of risk' could receive a larger fee if the other attorney agrees and if the court approves."

But McLellan argues that 25 percent is just an arbitrary number, and there have been no studies or analyses to support the Court taking on a "quasi-legislative role" by limiting those arms-length contracts between lawyers.

David E. Christensen, of Gursten, Koltonow, Gursten, Christensen & Raitt PC in Farmington Hills, speaking on behalf of the Negligence Section of the State Bar of Michigan, agreed, saying that if the Court approved the amendment, nobody's best interests would be served.

Discouraging referrals is damaging to the public and to clients, he said.

"It encourages attorneys to keep cases better served in other hands," Christensen said.

Further, he said, it wouldn't make sense to disclose to a client the exact percentage of the split between the lawyers before the case begins, because often those details are worked out at the end of a case, especially if both lawyers participate in representing the client.

And even if the exact agreement is known at that outset, the referral fee arrangement is "invisible to the client," Christensen said, because the amount being shared is not part of the client's share of a settlement or award.

Christensen said that the amendment would have another consequence: It would disproportionately hurt small firms and solo practitioners who rely on work from larger firms with budgets large enough to advertise.

Cynthia C. Bullington, on behalf of the Michigan Attorney Grievance Commission, said that the Court should reject the amendment.

She's concerned about the additional layer of paperwork and procedure, but also because the proposed rule, as written, could have the unintended consequence of fees amounting to more than half of settlements or awards.

"It could be read ... to add another 25 percent fee" on top of the standard one-third contingency, she said.

The better course of action, if the Court is to take any action at all, is for a lawyer to provide written notice to the client, explaining that there is a referral fee being paid, Bullington said.

If the goal is for the client to be informed that there is a referral fee arrangement, that should suffice. And it would not discourage the practice of referring work between attorneys.

Bullington said that she could only think of two instances in which a client complained to her office about a lawyer referral fee.