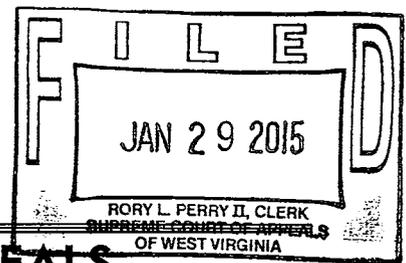


ARGUMENT
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**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Gary W. Rich and
Law Office of Gary W. Rich, L.C.,
Plaintiffs/Counter-Defendants/
Third-Party Plaintiffs below,
Petitioners,

No. 14-0998

v.

Joseph Simoni,
Defendant/Counter-Claimant below,
Respondent,

v.

**Cochran, Cherry, Givens, Smith,
Lane & Taylor, P.C.,
Levin, Papantonio, Thomas, Mitchell,
Rafferty & Proctor, P.A., and
Baron and Budd, P.C.**,
Third-Party Defendants/
Counter-Claimants below,
Respondents.

THIRD-PARTY RESPONDENTS' BRIEF

William F. Cash III
Levin Papantonio et al.
316 South Baylen Street Suite 600
Pensacola, Florida 32502
Phone: 850-435-7059
bcash@levinlaw.com
(*Pro hac* application forthcoming)
Counsel for Levin Papantonio

Christopher J. McCarthy
Booth & McCarthy
901 West Main Street Suite 201
Bridgeport, West Virginia 26330
Phone: 304-842-0460
cjmccarthy@booth-mccarthy.com
West Virginia Bar No. 7079
*Counsel for Third-Party
Respondents*

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I. CERTIFIED QUESTION AND RULES OF PROFESSIONAL CONDUCT AT ISSUE

The question certified to this Court by the federal court and accepted by this Court for answering is:

Are the West Virginia Rules of Professional Conduct statements of public policy with the force of law equal to that given to statutes enacted by the West Virginia State Legislature?

The federal court determined, JA2146-47, 2159-60, that two sections of Rule 5.4 of the West Virginia Rules of Professional Conduct¹ are relevant:

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER.

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that [all exceptions are inapplicable].

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

. . .

II. INTRODUCTION

The Court's answer to the certified question should clearly be Yes.

West Virginia's Rules of Professional Conduct are important law promulgated under the Judiciary's Constitutional power to set rules governing the practice of law—and the conduct of anyone dealing in or engaging in legal practice in this State. The Rules set minimum standards of

¹ We will sometimes use the abbreviation RPC.

behavior for ethical conduct, and as such, it should be made clear that they express the public policy of the State.

Simoni's and Rich's unethical contract to split fees should be given no quarter. This Court should turn away any argument based on Simoni's private gain, because the public policy expressed in the Rules must trump any individual's personal interest. Equity is not with Simoni anyway—he wanted to become an attorney, and he was fully aware of the Rules, and in applying to the bar, he agreed to be bound by all of them.

By holding that the Rules express public policy, this Court would join a growing majority of states. And by disapproving the arrangement Rich and Simoni made, the Court would deter persons in the future—both lawyers and non-lawyers—from entering into such arrangements. That would benefit the public. It would also defend the integrity of the judicial system of this State and the noble profession of law.

* * *

The Third-Party Respondents—Levin Papantonio, The Cochran Firm, and Baron & Budd—hereafter the “Third-Party Law Firms”—are in a unique position in this suit. Although we are parties to the underlying action, we bear no direct liability to the ultimate claimant, Simoni. Simoni never sued

us, and he affirmed under oath he does not seek compensation from us because Rich is the responsible party. JA1830:4-19. We had absolutely no knowledge of the improper, unethical arrangement he alleges until Simoni made his attempts to enforce his fee split with Rich. We were haled into court by Rich only after his attempts to have Simoni's claims dismissed failed. Now we are in the case on the theory that Rich's secret relationship with Simoni should be imputed to us, even though we did not know about it and would have vehemently objected to any deal which, like this one, violates the Rules of Professional Conduct. As the federal court noted in the memorandum decision, JA2131-32, the third-party case against us was stayed to resolve the core question now certified to this Court.

Our answer to the certified question is **Yes: the Rules of Professional Conduct are statements of public policy entitled to equal weight and force of law as the statutes of this State.**

III. STATEMENT OF THE CASE

The lurid story that has unfolded through discovery in this case should shock any ethical attorney. Rich, a lawyer with absolutely no experience in toxic tort litigation, embraced Simoni, a sociology professor,

in a business relationship unabashedly based on the splitting of attorney fees on cases ginned up by Simoni. The two of them together, recognizing they did not have the talent or expertise to handle such cases, would package the cases to be shopped to “big out-of-state firm[s] with the resources to be able to do a significant job.” JA1595:8-14 (Simoni Dep.).

That is how we, the Third-Party Law Firms, came onto the scene. Our view of the pertinent facts is different from Rich’s or Simoni’s, and that is because neither of them has an interest in airing their own misconduct. They both have unclean hands.

Simoni earned his J.D. at West Virginia University in 1995. JA1570:18-71:3. During law school, he passed a course on professional responsibility and learned lawyers could not share fees with non-lawyers. JA1775:1-13. Simoni passed the attorney ethics exam at least twice. JA1773:16-74:2. But although he took the bar exam four times, he never passed. JA1772:12-15.

The relationship between Rich and Simoni dates back to 1999, when the two met in an EconoLodge motel room in Fairmont. JA1016:7-24 (Rich Dep.), JA1586:21-87:1, 1589:3-13 (Simoni Dep.). Rich claims he believed Simoni was a lawyer when they met. There is no document in the record to support that—Simoni’s name had never appeared on any pleadings, Simoni

had never made any court appearances, and Rich knew Simoni was a professor with no law office and no staff. Around 2000 or 2001, Rich says, he learned Simoni was a non-lawyer. JA1040:24-42:5. Even after that, however, he continued to use Simoni to find cases *and continued to promise to split fees with him*. JA1040:6-20.

Early in their relationship, Simoni got a taste of the kind of money that could come from working with lawyers. The first case Simoni litigated with Rich was the “WVU case”—a case that involved asbestos injuries (but not any of the Third-Party Law Firms). Simoni located the Sweeney law firm in Ohio and brought it in to litigate the WVU case. JA1595:15-96:21. Simoni testified he expected to receive 50% of Rich’s fee in that case. JA1608:16-22. Although Rich refused to pay Simoni directly, the Sweeney firm ultimately gave Simoni \$30,000 “for [his] work on the West Virginia University case.” JA1914:1-5 (Simoni Dep.). Not only did Simoni get paid for his litigation work, Simoni was also a plaintiff in the same case. JA1638:20-39:16.

Simoni and Rich collaborated on at least five potential litigations in this State: the WVU case, the Spelter case involving heavy metal

contamination, the Fairmont asbestos case, and two others which did not pan out. JA1615:3-16:4, 1617:10-18:16 (Simoni Dep. (other two cases)).

Rich's share of attorney fees on the cases which did get litigated was substantial. In either man's version of their arrangement, the intent was always—"from the outset"—to share this fee with Simoni. JA1037:4-24 (Rich Dep.). Simoni says the division originally contemplated was an even split. JA1590:22-91:3 ("we were agreeing to work on the case together . . . we would share the benefits half/half, 50/50"). The arrangement changed over the years, JA2137-39 (federal court describing different fee splits), but neither man reduced it to a clear, signed writing. JA1590:20-21. Nevertheless, the federal court found it "unequivocally establishe[d]" that their agreement was a percentage fee split. JA2166. Simoni did not dispute the characterization of his compensation as a "finder's fee" for locating viable plaintiffs. JA1958:7-59:1.

Simoni's negotiated fee was a piece of a contingency fee, and the contingency was whether plaintiffs won anything in their lawsuits. Simoni acknowledged that under their agreement, "I wouldn't get anything if there wasn't success." JA2139-40 (federal court), 1727:19-28:13 (Simoni Dep.).

When asked whether he expected any compensation in the event of “bad results” in a case, his answer was: “No. Get zero.” JA1728:14-17.

The Simoni/Rich deal was made in 1999, and the two men got the Third-Party Law Firms involved to handle the heavy lifting of the litigated cases after that. Having made his bargain and, in his eyes, having earned his money, Simoni began looking for a way to collect it.

Simoni was aware that any payment to him that looked like legal fees would be ethically fraught, so he discussed with Rich many ways Simoni could be compensated. As the federal court noted, at one point Simoni sought advice from an attorney who told him to restructure his deal with Rich— on paper, at least—as a “payoff for consulting, investigation, organizing, client rapport, et cetera, not for practice of law.” JA2138, JA1673:22-79:11. Simoni also testified he and Rich considered “a way that [Rich] could channel money through forgiveness of debt,” “in the form of loans to [Simoni] where [Rich] would forgive the debt owed.” JA1711:13-1712:8, 1709:24-1710:13. Simoni also admits that he was referred by Rich to a real estate broker in Florida as another “conduit” through which Dr. Simoni could be compensated. In Simoni’s understanding, Rich would use his own money to buy Florida real estate, and “[Simoni] would get something from

that business transaction. You know, money could be channeled to me through that business transaction.” JA1729:1-15 (Simoni Dep.). All these means were ways Simoni contemplated being paid—because he knew Rich could not get away with writing Simoni a check whose memo line clearly read: “For payment of legal fees.”

Because both parties knew they were contemplating something unethical, even illegal, the Rich/Simoni relationship was marked by great secrecy and mistrust between the two over the years. Both men were very concerned that their conversations might be overheard—even by others inside Rich’s office. One meeting in 2002 began in Rich’s office, but Simoni claims Rich led him into “a Morgantown alleyway” to conclude the meeting. JA146 ¶ 41 (Simoni Am. Compl.). Simoni knew Rich was “concerned about his office area being under some kind of surveillance” or had been “bugged.” JA1653:4-22 (Simoni Dep.).

Rich continued to exhibit paranoia and anger toward Simoni over the years. In the alley meeting, Rich told Simoni he had “put him at risk,” and Rich told Simoni if he threatened Rich’s position again, Rich would “come at [Simoni] physically.” JA1652:14-1653:3, 1657:20-23 (Simoni Dep.). Rich

was “very upset with [Simoni].” JA1096:6-13 (Rich Dep.). The federal court found Rich’s behavior occasionally “bizarre.” JA2176.

Simoni would “remove[] the battery from his phone before he would talk about anything he felt was sensitive.” JA1349:19-1350:5 (Rich Dep.). Rich testified, “Both of us were concerned about our phones being tapped,” such that they could not speak openly about their affairs. JA1346:18-21.

The federal court decision recounts that in 2005, the two men met at a picnic shelter along the Rail-Trail path in Morgantown. JA2139. At that meeting, “Rich suggested that the two write notes to one another, rather than communicate verbally.” *Id.* This discussion “includ[ed] the fact that Dr. Simoni’s compensation . . . **would depend on and be a function of the final recovery.**” JA148 ¶ 52 (Simoni Am. Compl.) (emphasis added).

Simoni continued to seek payment from Rich in 2007. He called Rich about the WVU case—the one that involved the Sweeney firm in Ohio. JA1743:20-44:1 (Simoni Dep.). Simoni reminded Rich of their “good faith man-to-man agreement and that [Rich] was [a] man of his word.” JA1745:6-16. Simoni asked Rich to “[s]earch his mind and soul and look in [the] mirror.” JA1745:9-16. Rich demurred, and Simoni became “concerned” and “just ended the conversation.” JA1748:10-18.

The two men never talked again until this case was filed.

* * *

The certified question arose from litigation over fees from the Spelter case (involving Levin Papantonio and the Cochran Firm) and the Fairmont asbestos litigation (involving Baron & Budd). The Third-Party Law Firms agree Simoni played a small role in what can be characterized as an investigative capacity, although by no means was he the only investigator, and in that role did receive a *de minimis* amount of expense reimbursement—for example, in the Spelter case, about thirty dollars for photocopying costs. However, we maintain, and Simoni agrees, that we never were supposed to pay Simoni for his time or labor, and that he never asked us for payment for time or labor. JA1766:8-67:9 (Simoni Dep.) (never claimed on Spelter case); JA1827:6-1828:6 (never claimed on Fairmont case); JA1830:4-23 (did not sue the Third-Party Law Firms because he was looking to Rich); JA1952:14-19 (no reason to sue Levin Papantonio and no promise made by Levin Papantonio). As we found out much later, this was because his compensation was always supposed to come from Gary Rich.

* * *

As is evident from all the pleadings, and the federal court's decision, the other two parties *agree* there was once a fractional fee-splitting arrangement. In fact, Simoni admits that "most, if not all" of the discussions on compensation "were underscored by the prospect of 'percentage split of attorney fees earned by Rich.'" JA400, 2166. The only difference between Rich's version of the agreement and Simoni's is that Rich maintains their agreement was contingent on Simoni's passing the bar exam, and Simoni says it wasn't.

About March 2010, about a decade after making his unethical deal with Rich, Simoni hired counsel and sought compensation. JA412. In 2012, Rich, as the federal court described it, "preemptively initiated this litigation." JA2143. After unsuccessful motion practice by Rich, *see generally* JA72-134, Simoni's claims were limited to quantum meruit and

related theories. We were impleaded as third-party defendants, and this question was ultimately certified.²

IV. SUMMARY OF ARGUMENT

The Rules of Professional Conduct are expressions of public policy and entitled to the same weight as statutes for several reasons. First, the Constitution authorizes the Judiciary to make rules regulating the courts and the bar, and *only* the Judiciary can make such rules. Because this Court exercised its Constitutional authority—under a provision that expressly says any rules will “have the force and effect of law”—the Rules of Professional

² Rich has impleaded us on the theory that if he owes money to Simoni, then we owe money to Rich. This does not follow, for we did not make any such arrangement with Simoni, Rich admits he did not tell us about any of the unethical conduct at issue, and Rich was the beneficiary of his own unethical agreement. All that is the subject of our third-party defenses, which the federal court has yet to hear. In the federal court, Rich argued that paying Simoni must be “foreclosed in its entirety by principles of legal ethics,” which at the time he said *do* carry the full force of law, and thus the Simoni arrangement was “void as against public policy.” JA76, 80. Now, believing we should be liable to him, Rich has lost his way and “takes no position” on the certified question. (Rich Br. 9.) Rich’s seemingly innocuous plea for this Court to “provide clarity” and state “under what circumstances[] Dr. Simoni can be compensated,” *id.* at 17, is a cynical attempt to have this Court answer a question other than the one certified.

Conduct are clearly expressions of public policy made by the only body that can express it.

Second, in holding that the Rules embody the public policy of West Virginia, this Court would confirm that the Rules were written for good policy reasons. These policy reasons include ensuring that attorneys do not give less attention to clients whose fees they must split, the discouragement of barratry, and eliminating pressures from the non-lawyer's personal interests on the attorney/client relationship and practice of law. As confirmed by a good majority of other states to have considered the issue, these are all reasons to hold the Rules express a vital public policy that is more important than any private interest.

Finally, even if the Court were inclined to breathe some life into the unethical arrangement at issue here, the Court should be aware that Simoni has committed significant misconduct that disqualifies him from any remedy. The Court should not give leniency to Simoni or grant him relief from the adverse effects of his own misconduct.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case presents an issue of critical importance—first and foremost, important to the citizens of this State, who expect their judicial system and the attorneys who work in it to uphold the highest ethical standards. The Court has already scheduled oral argument under Rule 20.

Under Rule 20(e), argument is limited to “twenty minutes per side.” The Third-Party Law Firms request that we be given twenty minutes not to be shared with Simoni or Rich. As grounds: Simoni is certain to argue that the answer to the certified question should be No, whereas Rich “take[s] no position” on the certified question (Rich’s Br. 9). The Third-Party Law Firms, then, will be the only parties arguing Yes. The Court will benefit from a full hearing of the question, so we respectfully ask for a full twenty minutes, and we promise the Court a well-prepared presentation.

VI. ARGUMENT

A. The Judiciary’s Rules of Professional Conduct do carry the same force of law as the Legislature’s statutes.

The certified question asks whether “the West Virginia Rules of Professional Conduct [are] statements of public policy with the force of law

equal to that given to statutes enacted by the West Virginia State Legislature.” The answer is assuredly Yes.

1. The Judiciary has the Constitutional power to make and establish its Rules, and those Rules carry the force and effect of law.

The Judiciary of this State has its own independent authority to make rules in a sphere exclusively occupied by the Judiciary. Those rules are expressly mandated by the Constitution to have the force and effect of law.

The West Virginia Constitution’s Article VIII establishes the Judiciary as an independent department of the State. This makes the Judiciary one of “three co-equal branches of government.” *State ex rel. Lambert v. Stevens*, 200 W.Va. 802, 812, n.28, 490 S.E.2d 891, 901 (1997).

Relating to the Supreme Court of Appeals, Article VIII provides that:

The court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the state relating to writs, warrants, process, practice and procedure, **which shall have the force and effect of law.**

W.Va. Const. art. VIII, § 3 (emphasis added).

This Court’s own holding could not be plainer: “[T]he rules of this Court governing the practice of law and the conduct of lawyers . . . have the force and effect of law.” Syl. pt. 5, *Manchin v. Browning*, 170 W.Va. 779, 296

S.E.2d 909 (1982). So the Rules of Professional Conduct, established under this constitutional grant of authority to make and enforce positive law, *unquestionably* have the force of law.

The question the federal court posed is whether those Rules have the *equal* force of law given to statutes enacted by the Legislature. Unless the power of the Judiciary is somehow subordinated to that of the Legislature, the answer is obviously Yes. But there is no reason why this Court's Rules—when cabined to the scope of authority granted to the Judiciary by the Constitution—should have any less weight than statutes passed by the Legislature under *its* Constitutional authority.

Indeed, the Judiciary's Rules *have* to have the same weight as the Legislature's statutes, for the straightforward reason that the Legislature is not permitted to pass statutes on the same subject matter as the Rules. The Separation of Powers Clause, Article V, provides that the three branches' powers "shall be separate and distinct," and that no branch "shall exercise the powers properly belonging to either of the others." This Court has previously invalidated statutes that purported to override the Judiciary's Rules. *E.g., Quelch v. Daugherty*, 172 W.Va. 422, 306 S.E.2d 233 (1983) (overturning statute regulating admission to the bar). No other agency,

department, or body of this State can make law relating to attorney conduct, so the Judiciary must be the body charged with setting public policy on that subject.

Courts in West Virginia's neighbors agree with this straightforward constitutional analysis. Maryland's Rules constitute "a statement of public policy by the only entity in [Maryland] having the Constitutional authority to make such a statement, and it has the force of law." *Post v. Bregman*, 707 A.2d 806, 816 (Md. 1998). Similarly, "to simply dismiss the [Kentucky] Rules of Professional Conduct as unequal to statutes of general application fails to recognize that the power to regulate attorney discipline constitutionally lies solely with the Supreme Court of Kentucky." *Martello v. Santana*, 874 F. Supp. 2d 658, 669 (E.D. Ky. 2012), *aff'd*, 713 F.3d 309 (6th Cir. 2013).

"Today, the exclusive authority to define, regulate and control the practice of law in West Virginia is vested in the Supreme Court of Appeals." *State ex rel. Askin v. Dostert*, 170 W.Va. 562, 566, 295 S.E.2d 271, 275 (1982). If the Legislature can't pass laws regarding attorney discipline, then this Court's pronouncements on attorney discipline must carry the same force of law as legislative statutes.

In the federal court, Simoni made an argument based on the Preamble to the Rules. JA104-05. In relevant part, that Preamble provides:

Scope

... Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are ... not designed to be a basis for civil liability. ...

West Virginia Rules of Professional Conduct, Preamble.

Simoni says this means Rich can still split his fees with Simoni: “As evidenced by the foregoing excerpt, the [Rules] do not amount to positive statements of the law or of public policy sufficient to render an agreement to share legal fees unenforceable.”³ JA105.

Simoni’s interpretation of this language, however, is misguided. Construing a similar preamble, the Minnesota Supreme Court held this section just means a Rule of Professional Conduct violation does not necessarily “give rise to a private cause of action against an attorney.” *In re Disciplinary Action Against Montez*, 812 N.W.2d 58, 66-67 (Minn. 2012). It does not follow, however, that the Rules are not statements of positive law, or do not embody public policy. *See Trotter v. Nelson*, 684 N.E.2d 1150, 1153

³ This is a rather open admission by Simoni that he continues to seek an unethical *fee split* rather than, as he now says, just compensation in quantum meruit.

n.4 (Ind. 1997) (just because Indiana Rules “are not the same as case law or statutes, . . . does not necessarily mean that they evince no public policy”).

In fact, the Rules’ recent revision on January 1, 2015 shows the Court *does* see the Rules as expressive of West Virginia public policy. Just after the material quoted above, the Preamble used to say: “[N]othing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extradisciplinary consequences of violating such a duty.” But that sentence is gone now, and has been replaced by: “Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.” That is akin to saying that the Rules express the Judiciary’s public policy.

This Court exerted Constitutional authority granted to it—and no other entity—when it enacted the Rules of Professional Conduct. This Court should now hold that the Rules embody the public policy of the State with the same force as any legislative enactment.

2. The Rules of Professional Conduct are statements of public policy, because they serve goals that protect the public and provide significant benefit to the public.

Aside from arguments based on the Judiciary's Constitutional authority, there are other good reasons to hold that the Rules are an expression of public policy.

Nearly all American jurisdictions have a rule barring the split of legal fees with non-lawyers.⁴ Courts and commentators have given several bases for the rule. They argue that the rule upholds the integrity of the profession and the judicial system, and it protects the public against unethical conduct by lawyers and substandard representation of clients.

Comment 1 to Rule 5.4, barring the payment of fees to non-lawyers, states that the rule's "limitations are to protect the lawyer's professional independence of judgment." West Virginia RPC 5.4, cmt. 1. That really is the core purpose of the rule, which is promoted through the following means.

⁴ The District of Columbia stands alone in permitting it under very limited circumstances not present here.

Defense against unreasonable incitements to litigation by non-lawyers (barratry)

Fee-splitting with non-lawyers promotes barratry—the improper stirring up of litigation and solicitation of clients. One court found that an arrangement involving the “division of fees” with a non-lawyer was “highly unprofessional and fraught with possibilities of evil, inasmuch as such payments could serve as an inducement to the recipients to seek out or stir up litigation in the hope of obtaining further gratuities.” *In re Krasner*, 204 N.E.2d 10, 13-14 (Ill. 1965).

Support for this view also comes from the statutory, criminal prohibition against acting as a case runner found in W. Va. Code § 30-2-4. Statutes like this one are indisputably expressions of public policy, *e.g.*, *Abbott v. Marker*, 722 N.W.2d 162, 166 (Wis. Ct. App. 2006) (statutes implicitly declare “that referral agreements between an attorney and a non-attorney are contrary to public policy.”). West Virginia’s statute, criminalizing the payment of referral fees to non-lawyers, embodies public policy; this Court should hold that Rule 5.4 is a *complementary* expression of public policy—the statute’s Rule-based counterpart.

A non-lawyer will make recommendations to bring suit based on considerations other than the client's interests.

There is serious risk that the non-lawyer's motives will turn on his own financial interest rather than the interests of the client or the interests of justice. This is in part because "the nonattorney assumes no responsibility for the case," so "the referral [to a lawyer] will more likely be based on the layperson's desire to share a fee." *O'Hara v. Alhgren, Blumenfeld and Kempster*, 537 N.E.2d 730, 734 (Ill. 1989) (barring fee-split agreement with a non-lawyer as contrary to public policy).

The Restatement (Third) of the Law Governing Lawyers also weighs in on this point. Section 10(3) of the Restatement is nearly identical to Rule 5.4(a). Section 10's cmt. *b* points out: "A person entitled to share a lawyer's fees is likely to attempt to influence the lawyer's activities so as to maximize those fees."

A lawyer who has to make a fee split will not give clients the same attention that he would otherwise.

Fee-split agreements with non-lawyers run a risk that attorneys will not dedicate their full efforts to the clients' representation. "Because the attorneys must share a portion of the fees received from certain clients, but not others, they may be tempted to devote less time and attention to the

cases of the clients whose fees they must share.” *O’Hara*, 537 N.E.2d at 735. Because of these “harmful effects,” fee-split agreements in Illinois are contrary to public policy. *Id.* The Indiana Supreme Court similarly noted an attorney might not devote full time and energy to a client’s case because “the attorney must share fees with another who has done little to earn it.” *Trotter*, 684 N.E.2d at 1154. And here again, the Restatement notes that fee-splitting with a non-lawyer “could lead to inadequate legal services.” Restatement (Third) of the Law Governing Lawyers § 10, cmt. *b.*

The absence of shared responsibilities and lack of control or liability for inadequate services provided by the non-lawyer.

Fee-sharing is permitted *between lawyers* when, among other things, lawyers agree to jointly share responsibility on a case. W. Va. RPC 1.5(e). The basis behind this rule is that lawyers who agree to be jointly responsible will ensure that adequate representation is being provided, lest they find themselves subject to joint liability. And the reason only *licensed* attorneys may practice law is “the protection of the public from . . . unqualified and undisciplined persons over whom the judicial department of the government could exercise slight or no control.” *Sargus v. West Virginia Bd. of Bar Examiners*, 170 W.Va. 453, 457, 294 S.E.2d 440, 444 (1982).

Simoni, however, as a non-lawyer—indeed, as a person with an undisclosed interest in Rich’s fee—could never be subject to liability to clients, or to direct discipline by this Court. He cannot be held accountable. That is another reason not to permit him to share in Rich’s fee.

* * *

All these reasons are important public policy goals of this State. The supreme interest of the Judiciary’s Rules here should be the protection of the public, by safeguarding against these ills. The public interest in good courts and good attorney ethics should trump the individual interest of Simoni or any other fee-splitting non-lawyer.

3. A growing majority of states have held that their Rules of Professional Conduct are statements of public policy.

Courts “have increasingly relied on the rules as a source of substantive law and found that [agreements, including fee-split agreements,] are unenforceable because they violate public policy.” Benjamin P. Cooper, *Taking Rules Seriously: The Rise of Lawyer Rules as Substantive Law and the Public Policy Exception in Contract Law*, 35 *Cardozo L. Rev.* 267, 267 (2013). While there are courts holding otherwise, they are in a “distinct minority.” *Id.* at 283. The Restatement also notes rules can be relevant “as an expression of [] public policy of the jurisdiction,” including

“such issues as the enforceability of transactions entered into in violation of them.” Restatement (Third) of the Law Governing Lawyers § 1, cmt. *b*.

Cases expressing the majority view, that individual states’ Rules of Professional Conduct *are* expressions of public policy, include:

- **Indiana.** In Indiana, because certain Rules of Professional Conduct, including Rule 5.4, are “explicit declarations of what an attorney can or cannot do,” they are “imperatives, . . . explicit judicial declarations of Indiana public policy.” *Trotter v. Nelson*, 684 N.E.2d 1150, 1153 (Ind. 1997). Violating the Indiana Rules of Professional Conduct is “akin to contravening a statute.” *Id.*
- **Georgia.** In Georgia, “State Bar disciplinary provisions establish the public policy” against splitting fees with non-lawyers. *Brandon v. Newman*, 532 S.E.2d 743, 747 (Ga. Ct. App. 2000). “Georgia courts will not enforce illegal or immoral contracts because so doing would implicate the judiciary by facilitating the illegality or immorality.” *Id.*
- **Michigan.** Fee-split contracts which are unethical under that state’s Rules also violate its public policy. *Evans & Luptak, PLC v. Lizza*, 650 N.W.2d 364, 366 (Mich. Ct. App. 2002).
- **Texas.** One court held that paying fees to a non-lawyer under a fee-splitting agreement violates the public policy of the state. *Cruse v. O’Quinn*, 273 S.W.3d 766, 776 (Tex. 2008) (claimant was a disbarred attorney).
- **Other states.** As discussed elsewhere in this brief, Illinois, Wisconsin, Kentucky, and Maryland also observe that their Rules function as expressions of public policy, and these states are far from alone.

4. Holding that the Rules of Professional Conduct express public policy is consistent with *Gaddy Eng’g v. Bowles Rice and Watson v. Pietranton*.

Simoni is likely to argue that this Court’s decisions in two cases, *Gaddy Engineering* and *Watson v. Pietranton*, require the Court to now hold that the Rules of Professional Conduct do not express public policy or do not carry the force of law. If he argues as such, he is incorrect.

In *Gaddy Eng’g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W.Va. 577, 746 S.E.2d 568 (2013) (per curiam), this Court was confronted with an unethical agreement between an engineering firm and a law firm. This Court left open the question at bar, despite exhortation from two members of this Court to address the issue.

The *Gaddy Engineering* plaintiff, an engineering firm, alleged a fee-splitting deal with a Charleston law firm. *Id.*, 231 W.Va. at 583-84, 746 S.E.2d at 574-75. Specifically, the engineering firm sought one-third of the fee earned by the law firm in litigation where the two had worked together. *Id.*

The trial court rejected that claim on impracticability grounds, finding that because the law firm’s clients had opted to pursue their claims through a class action filed by a different firm, there was nothing for the engineering

firm to do. *Id.* Thus, there was no way for the law firm to perform its side of the alleged contract because the two firms did no work together. *Id.* This Court affirmed.

Because the contract-law issue of impracticability decided the case, this Court did not reach the question certified here. Justice Loughry's sound concurrence *did* reach that question, and it should inform the Court's holding in this case.

Nothing in the *per curiam* holding of *Gaddy Engineering* says the Rules of Professional Conduct are not statements of public policy. That question was left open. It is noteworthy, however, that the facts of the case at bar are stronger than those in *Gaddy Engineering*. For example, in *Gaddy Engineering*, the engineering firm alleged the law firm told it "there were ways to get around this fee-splitting impediment," and there was no evidence that anybody at the engineering firm had legal training. *Id.*, 231 W.Va. at 581, n.8, 746 S.E.2d at 572. In that regard, the engineering firm was more of an innocent, or at least lacked understanding as to the true scope of the fee-splitting rule. But in the case at bar, Simoni entered into the relationship *knowing* he was violating the ethics rules, and had actually

passed the ethics exam. Simoni cannot claim, like the engineering firm, that he was misled by a savvier counterparty into agreeing to an illicit deal.

The other case Simoni may rely on is *Watson v. Pietranton*, 178 W.Va. 799, 364 S.E.2d 812 (1987). In the federal court, Simoni called *Watson* “[p]erhaps the most relevant case” on the question of whether the Rules express public policy. JA103. This case does not support him. Indeed, *Watson* is illustrative because it is not animated by the same public policy concerns present here.

In *Watson*, the Court gave effect to an admittedly unethical fee-splitting contract between the estate of a deceased lawyer and the lawyer who took over his pending cases. This Court held that it was “reluctant to enforce an agreement which violates an ethical rule,” but made clear its decision was limited to situations where there is “a contract between lawyers.” *Watson*, 178 W.Va. at 803, 364 S.E.2d at 816; syl. pt., *Watson*.

Simoni is not a lawyer, so *Watson* is inapplicable and so is its rationale. In *Watson*, the Court was faced with apportioning an earned fee between a lawyer and another lawyer. Here, the scenario is different, and the Court must determine whether it will permit the risk that a non-lawyer might exert undue influence on a lawyer and his activities. The public

policy concerns we have previously noted—protection against barratry, inability to hold non-lawyers responsible for misconduct, and so on—were just not present in *Watson*, but they clearly are here.

B. Holding the Rules to be statements of public policy would promote an ethical legal climate in the State, and the Court should reject any argument based on negative personal consequences for Simoni.

Simoni’s chief argument in favor of enforceability here, as it was in federal court, will be that not enforcing the contract leaves Rich with a windfall. JA105-06 (Rich collected “untold amounts in legal fees and expenses as part of the very large settlements”).

The Third-Party Law Firms’ response to that is twofold. First: the interests of public policy always trump the interest of any private litigant. Second: Simoni lacks clean hands and is not entitled to any equitable remedy, so the Court should be unconcerned with the impact of a Yes answer on Simoni’s private interests.

1. Public policy means the interest of the public good trumps any private litigant’s interest.

“Public policy” means that “no person can lawfully do that which has a tendency to be injurious to the public or against public good”—even if no actual injury results “to the public.” *Cordle v. General Hugh Mercer Corp.*,

174 W.Va. 321, 325, 325 S.E.2d 111, 114 (1984). In other words, the public interest supervenes any interest that a private party in the case may have. And “no action can be predicated upon a contract of any kind or in any form which is expressly forbidden by law.” *Wellington Power Corp. v. CNA Surety Corp.*, 217 W.Va. 33, 39, 614 S.E.2d 680, 686 (2005) (citing *State ex rel. Boone Nat’l Bank v. Manns*, 126 W.Va. 643, 647, 29 S.E.2d 621, 623 (1944)).

In the case at bar, the higher public interest of protecting the public’s confidence in the integrity of the bench and bar—and the public’s vital interest in ensuring attorneys act ethically—takes precedence over any supposed injustice suffered by Simoni. As a matter of public policy, the courts simply must be closed to Simoni’s pleas. “It does not matter whose ox is gored. The courts will not enforce an agreement when it is found to be against public policy.” *Schniederjon v. Krupa*, 514 N.E.2d 1200, 1202 (Ill. App. Ct. 1987) (rejecting unethical fee split on public policy grounds).

2. Simoni lacks clean hands, and the Court should be unconcerned with the effect its answer may have on his personal interests.

The Court should not be concerned with any “harsh effect” its decision may have on Simoni individually. Simoni’s remorse over the

consequences of intentionally violating ethics rules *he admits he knew* is of little weight.

Other courts have reached the same conclusion, particularly where a claimant had sought to become an attorney and thus knew the rules. The facts of *Martello v. Santana*, 874 F. Supp. 2d 658, are remarkably similar to those here. The non-lawyer plaintiff in that case was a “well-educated doctor who was in the midst of pursuing a legal degree.” *Id.* at 671. She, like Simoni, had passed the MPRE ethics exam. *Id.* That court had little difficulty rejecting her claim, pointedly noting she was no “naive layman.” *Id.* This case was affirmed. 713 F.3d 309 (6th Cir. 2013).

Simoni knew he was engaged in wrongdoing. Simoni, by his own admission: (1) prospectively violated the Rules of Professional Conduct by making the percentage fee split arrangement; (2) continues to seek a percentage-based fee split *today*; (3) engaged in the unauthorized practice of law in this State; and (4) arguably violated the statute on case-running. Any of these is reason enough for this Court to be unconcerned with his argument that Rich will be left with a windfall.

First, Simoni knowingly entered into an arrangement forbidden under the Rules. As the district judge found, the fact that he made an unethical

fee split agreement—based on a flat percentage fee—was “unequivocally established.” JA2166. Although his share yo-yoed between 50% and 20%, JA2137-38, he admits there was always an intent to divide fees on a straight percentage basis, JA2166.

Simoni had passed the MPRE ethics exam at least twice. He had graduated from law school. He knew the restrictions. He disregarded them.

Second, Simoni continues to seek a percentage fee split even today in the federal court. On motion to dismiss for illegality—the very issue before this Court now—Simoni argued: “any quantum meruit claim is intrinsically tied to the value conferred on the enriched party. In other words, . . . **it is wholly appropriate . . . to invade the fee otherwise due to [Rich].**” JA101 (emphasis added). Thus, Simoni says his value to Rich is just a *portion of*—“tied to”—whatever Rich himself got. While Simoni says an amount “tied to” Rich’s fee is not fee-splitting *per se*, that is just nonsensical. Whatever the label, Simoni wants to be paid out of Rich’s fee.

Third, Simoni engaged in the unauthorized practice of law—an ethical violation that can lead to a criminal conviction under W. Va. Code § 30-2-4. A person is “deemed to be practicing law whenever he . . . furnishes to another advice or service under circumstances which imply the possession

of [or] use of legal knowledge and skill.” *State ex rel. Frieson v. Isner*, 168 W.Va. 758, 767, 285 S.E.2d 641, 649 (1981). The practice of law “includes services rendered outside court.” *Id.*, 168 W.Va. at 768, 285 S.E.2d at 650.

On that standard, Simoni unabashedly claims to have engaged in the practice of law. His own countercomplaint alleges:

- Simoni “met with . . . potential plaintiffs **for the purpose of discussing a potential civil action.**” JA141 ¶ 16 (emphasis added).
- Simoni “continued to investigate and share” information regarding “sources of both liability and damages.” JA145 ¶ 37.
- Simoni arranged a meeting “to discuss the Spelter environmental contamination problem and possible solutions, including the possibility of litigation.” JA149-50 ¶ 62.
- Simoni “served as an indispensable liaison between the legal team . . . and the large number of plaintiffs. In West Virginia, at the local level, **Dr. Simoni was the face of the lawyers.** He was the person whom potential plaintiffs called when they had information or questions.” JA145-46 ¶ 38 (emphasis added).
- Simoni “**performed legal research** regarding mass litigation, court filing fees, statutes of limitations and other legal issues.” JA146 ¶ 39, JA156 ¶ 102 (emphasis added).
- Simoni even acted as *Rich’s* attorney, calling Rich’s business partner “to remind him that he had agreed to a seventy/thirty (70/30) fee split agreement with Mr. Rich,”

JA147 ¶ 46, and “serving as Mr. Rich’s advisor and consultant with regard to another lawyer, Mr. Dan Marino,” JA147 ¶ 48.

- Simoni claims he was engaged in the “development and management of complex litigation.” JA158 ¶ 118.

On his own admission, Simoni, “the face of the lawyers,” clearly engaged in the unauthorized practice of law—which, as this Court has pointed out, is a serious matter that can be enjoined or even criminally prosecuted. *Frieson*, 168 W.Va. at 769, 285 S.E.2d at 650. The bar on the unauthorized practice of law protects the public from “undisciplined persons over whom the courts could exercise little, if any, control.” *Id.*

Fourth, Simoni arguably violated W. Va. Code § 30-2-4. That section makes it illegal for a person to “make it a business to solicit employment for any attorney.” Simoni claims he held “meetings with potential plaintiffs,” where “anyone who wanted to sign a retainer agreement with Mr. Rich was able to do so.” JA152-53 ¶ 76. The problem is that the “approximately 100 Spelter area residents [who] signed retainer agreements,” did so “*with the assistance of Dr. Simoni.*” *Id.* (emphasis added). Violations of W. Va. Code § 30-2-4 are misdemeanors.

* * *

Simoni knew his agreement was not ethical. Moreover, he took affirmative steps to conceal it—such as not reducing it to a proper written contract, contemplating funneling money through a Florida land deal or through sham loans, removing the battery from his cell phone to avoid detection, and silently tracing the terms of his deal with Rich on notes at a city park. These steps, while perhaps not unethical *per se*, are strong evidence of his knowledge of wrongdoing.

Because Simoni engaged in all this unethical conduct, the Court should be unconcerned with the outcome in this case if it answers Yes to the certified question. Simoni is simply not a deserving equity plaintiff.

C. Simoni is also not entitled to leniency just because he is a non-lawyer.

Apart from his admitted misconduct, Simoni may also argue that because he is a non-lawyer, he is entitled to some leniency from this Court. But “[e]very person . . . is presumed to know the law, and ignorance of it does not excuse unlawful behavior.” *Abbott*, 722 N.W.2d at 167 (unlawful fee-splitting agreement). And compliance with law “is not something we can only expect of lawyers.” *Id.* There should be no leniency or sympathy for non-lawyers, particularly those who know what they are doing.

In *Fisher v. Carron*, No. 289687, 2010 WL 935742, at *2 (Mich. Ct. App. Mar. 16, 2010) (unreported case attached to this brief), the plaintiff claimed an ongoing relationship under which she referred several cases to an attorney and was entitled to a split of fees. *Id.* at *1. Michigan’s RPC 5.4 barred the claim as against public policy, even though the non-lawyer plaintiff said the lawyer misled her into believing fee splits were ethically permissible. *Id.* at *2, *1. Because the plaintiff “elected to do business with a lawyer,” she “exposed herself to the machinations of the rules that govern that profession.” *Id.* at *2.

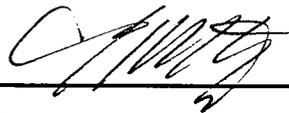
By definition, in any illegitimate fee-splitting arrangement, “such agreements will always involve an attorney and a nonattorney.” *O’Hara*, 537 N.E.2d at 737-38. If the Court grants leniency on this ground, such deals will always be *de jure* illegal, *de facto* enforceable. Unscrupulous lawyers will feel free to keep making them—and make no mistake, *both lawyer and non-lawyer* do benefit from such illicit agreements. Answering Yes to the certified question will discourage the next attorney tempted to enter into such an arrangement.

VII. CONCLUSION

The Third-Party Law Firms—Levin Papantonio, The Cochran Firm, and Baron & Budd—ask this Court to answer Yes to the certified question.

We also ask the Court to reject Rich’s invitation to go outside the bounds of the certified question, because that implicates our third-party defenses, which we have not yet presented to the federal court. See n.2 above.

Respectfully submitted,



Christopher J. McCarthy
West Virginia Bar No. 7079
Booth & McCarthy
Post Office Box 4669
901 West Main Street, Suite 201
Bridgeport, West Virginia 26330
Phone: 304-842-0460
cjmcCarthy@booth-mccarthy.com
Counsel for All Third-Party Defendants

William F. Cash III
Levin, Papantonio, Thomas, Mitchell,
Rafferty & Proctor, P.A.
316 South Baylen Street, Suite 600
Pensacola, Florida 32502
Phone: 850-435-7059
bcash@levinlaw.com
Counsel for Levin Papantonio

Angela J. Mason
The Cochran Firm-Dothan, P.C.⁵
163 West Main Street
Dothan, Alabama 36301
Phone: 334-673-1555
amason@cochranfirm.com
Counsel for The Cochran Firm

Cary McDougal
Baron & Budd, P.C.
3102 Oak Lawn Avenue, Suite 1100
Dallas, Texas 75219
Phone: 214-521-3605
cmcdougal@baronbudd.com
Counsel for Baron & Budd

⁵ This party was incorrectly identified in the federal court and in the caption. The federal court and parties have been notified but the caption has never been amended. The proper entity is The Cochran Firm-Dothan, P.C.

Exhibit

Fisher v. Carron,
No. 289687 (Mich. Ct. App. Mar. 16, 2010)

Not Reported in N.W.2d, 2010 WL 935742 (Mich.App.)
(Cite as: 2010 WL 935742 (Mich.App.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
Shalaan D. FISHER, Plaintiff-Appellant,
v.
Patrick CARRON, Defendant-Appellee.

Docket No. 289687.
March 16, 2010.

West KeySummaryChamperty and Maintenance 74 ↪5(8)

74 Champerty and Maintenance

74k5 Contracts and Transactions with Attorneys

74k5(8) k. Operation and Effect. Most Cited Cases

Nonlawyer working under an alleged contract to refer clients to a lawyer was not entitled to the payments demanded because the contract was unenforceable. The nonlawyer asserted that the lawyer had told her that their contract was legal and alleged a breach of contract because the lawyer had allegedly not paid the full amount due for a referral. The alleged contract was unethical, against public policy, and unenforceable because a lawyer was prohibited from sharing fees with a nonlawyer. The nonlawyer was not exempt from the statute simply because she was not a lawyer and equitable estoppel did not provide her a remedy because she could not be entitled to compensation from a contract that was unenforceable. MRPC 5.4(a).

Wayne Circuit Court; LC No. 07-730538-CK.

Before: SERVITTO, P.J., and BANDSTRA and FORT HOOD, JJ.

PER CURIAM.

*1 Plaintiff appeals by right from the trial court's order granting summary disposition to defendant and dismissing the case. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a nonlawyer, filed suit seeking to recover amounts due from defendant, a licensed Michigan attorney, in connection with an alleged agreement to compensate plaintiff for a referral by way of a share of the resulting legal fees earned. According to the complaint, since 1995 defendant had assured plaintiff that Michigan law, including the Michigan Rules of Professional Conduct governing attorneys, permitted an attorney to share legal fees with a non-attorney for referral matters. Plaintiff alleged that she referred several clients to defendant under those terms, including the victim of a serious automobile accident. The complaint as-

Not Reported in N.W.2d, 2010 WL 935742 (Mich.App.)
(Cite as: 2010 WL 935742 (Mich.App.))

serts that defendant subsequently informed plaintiff the latter's case was settled for a certain amount and tendered payment to plaintiff of an amount allegedly reflecting her share of his contingency fee. Plaintiff subsequently learned that the settlement and defendant's fee was actually much higher.

Plaintiff brought suit to recover the remainder of her share of the fee, under theories of breach of contract, misrepresentation, breach of fiduciary relationship, and unjust enrichment. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). The trial court declared the contract unenforceable, stated "I cannot make a lawyer pay a non-lawyer legal fees," and granted the motion.

"We review a trial court's decision with regard to a motion for summary disposition de novo as a question of law." *Ardt v. Titan Ins. Co.*, 233 Mich.App. 685, 688, 593 N.W.2d 215 (1999). "When reviewing an order of summary disposition under MCR 2.116(C)(10), we examine all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ ." *Id.* "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Smith v. Stolberg*, 231 Mich.App. 256, 258, 586 N.W.2d 103 (1998). We accept as true all factual allegations in the claim "to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Id.*

MRPC 5.4(a) states that, but for exceptions not here at issue, "A lawyer or law firm shall not share legal fees with a nonlawyer...."

Plaintiff argues that she should be able to enforce her contract for part of defendant's contingency fee because the Legislature has not prohibited such action. We disagree. Our legal system recognizes legislation as but one of several sources of law. Others include the common law, and regulation, which includes our Supreme Court's rules governing the practice of law. Accordingly, such regulatory and common-law rules against fee sharing of the sort that this case involves is properly applied in the absence of superior authority to the contrary.

*2 A contract that calls for violating the Michigan Rules of Professional Conduct is an unethical one, and "unethical contracts violate our public policy and, therefore, are unenforceable." *Evans & Luptak, PLC v. Lizza*, 251 Mich.App. 187, 189, 650 N.W.2d 364 (2002). This includes a contract to split fees between a lawyer and a lawyer rendered a nonlawyer for that purpose by inactive licensing status. *Morris & Doherty, PC v. Lockwood*, 259 Mich.App. 38, 51-52, 672 N.W.2d 884 (2003).

Plaintiff protests that MRPC 5.4(a) applies to lawyers, and that because she is a nonlawyer, it should not bar her claim for the share of defendant's fee to which she is entitled according to the terms of the parties' alleged agreement. However, to the extent that plaintiff elected to do business with a lawyer, plaintiff thereby exposed herself to the machinations of the rules that govern that profession. Because MRPC 5.4(a) prevents defendant from making payments in accord with an agreement to share a fee with a nonlawyer, that rule prevents plaintiff from collecting that share by way of an enforcement action.

Not Reported in N.W.2d, 2010 WL 935742 (Mich.App.)
(Cite as: 2010 WL 935742 (Mich.App.))

Plaintiff invokes the doctrine of equitable estoppel to argue that, because defendant had earlier assured her that their fee sharing arrangements were legal, he should be estopped from changing positions now in defense of her claim for proceeds due from such an agreement. “Equitable estoppel arises where one party has knowingly concealed or falsely represented a material fact, while inducing another’s reasonable reliance on that misapprehension, under circumstances where the relying party would suffer prejudice if the representing or concealing party were subsequently to assume a contrary position.” *Adams v. Detroit*, 232 Mich.App. 701, 708, 591 N.W.2d 67 (1998). However, plaintiff identifies no prejudice from having been misled to believe that the fee-sharing agreement was enforceable, other than her assertion that she has been underpaid according to that agreement. However, not receiving the balance of a share of a lawyer’s contingency fee where she was not legally entitled to receive anything in the first place hardly qualifies as prejudice. Further, the doctrine that an unethical contract is unenforceable would mean little if such a contract could be rendered enforceable upon a showing that one contract partner misled the other.

For these reasons, the trial court properly refused to enforce the alleged fee-sharing agreement.

Plaintiff alternatively argues that, even where a contract for a lawyer to share fees with a nonlawyer may not be enforced, the nonlawyer remains nonetheless entitled to collect in the matter under the theories of misrepresentation, breach of fiduciary relationship, and unjust enrichment. We need not reach that question, however, because plaintiff’s pleadings and evidence fails to establish any basis for recovery under those alternative theories.

The facts as pleaded provide little basis for gleaning what injury or damages plaintiff might have incurred in the matter. She reports that she “took [defendant] to visit” the client, assisted him in the initial claim stages, and had numerous telephone conversations concerning the matter. However, plaintiff does not claim any damages as compensation for such industry or expenses, but instead asks for relief in the form of only the dollar amount she claimed as due from the referral agreement. Plaintiff’s affidavit closely mirrors the factual allegations in the complaint, and thus likewise fails to support any claims for damages under plaintiff’s alternative theories of recovery.

*3 We note that plaintiff did not seek reconsideration of the decision below, or request an opportunity to amend her pleadings, or to conduct additional discovery, in connection with her alternative theories. Plaintiff’s failure to plead damages, or request relief, other than in the form of frustrated expectations of payment pursuant to the unenforceable contract, left the trial court with no basis for considering whether relief might be appropriate under plaintiff’s theories of misrepresentation, breach of fiduciary relationship, and unjust enrichment.

For these reasons, we reject these alternative theories of recovery as well.

Affirmed.

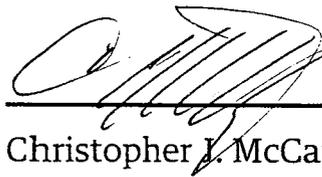
Mich.App.,2010.

Fisher v. Carron

Not Reported in N.W.2d, 2010 WL 935742 (Mich.App.)

CERTIFICATE OF SERVICE

I certify that a copy of this brief will be served on counsel for all other parties. Service will be made by U.S. mail and e-mail pursuant to consent, today, January 29, 2015.



Christopher J. McCarthy