

RULE 3 CONCERNING THE STATE BAR EMERITUS ATTORNEY REFERRAL FEES

Issue

Should emeritus members of the State Bar of Michigan be entitled to receive referral fees so long as the emeritus members do not engage in the practice of law?

Synopsis

Membership in the State Bar of Michigan includes a class called “Emeritus Membership.” Emeritus attorneys must be at least 70 years of age and are exempt from the payment of annual dues. Attorneys who elect emeritus status may not engage in the practice of law. The State Bar of Michigan has taken an informal position that emeritus attorneys may not receive referral fees. The Senior Lawyers Section has taken a position that emeritus attorneys should be entitled to collect referral fees provided they are not engaging in the practice of law.

Background

The Supreme Court created a new emeritus membership status for senior lawyers effective October 1, 2004. The order states that an active or inactive State Bar member who is 70 years or older or who has been a member for at least 30 years, may elect emeritus status so long as there are no pending disciplinary actions against the member in any state. Emeritus status members are exempt from paying Bar dues. They cannot practice law in Michigan but are eligible to receive other member benefits.

The addition of this class arose as the result of a combined effort of many lawyers to provide an alternative that would alleviate the consequence of action by the Supreme Court to terminate the previously fee-exempt lawyer status, which worked a financial hardship on the SBM because such lawyers were still able to practice law but not be required to pay the customary dues upon reaching the age of 70.

In July 2005, the State Bar took the informal position that the receipt of referral fees by an attorney having the emeritus status was a right limited to lawyers who are licensed to practice law. Thus the receipt of such referral fees was a violation of the rule prohibiting emeritus attorneys from practicing law.

The indicia of the practice of law customarily involves the following components: the existence of an attorney and a client relationship; the rendition of legal advice or counsel; the receipt of remuneration for that representation which customarily is the result of a verbal or written agreement; an explicit understanding by the attorney of the service to be rendered on behalf of the client; an expectation by the client that the attorney is providing specific advice and counsel to the client on the problem brought to the attention of the attorney; a disclosure by the attorney to the client and to third parties that the attorney is in fact representing the client and providing legal advice, representation and/or counsel to the client. If those features properly describe the practice of law, how can the mere acceptance of a referral fee mean anything more? Significant to the Rule is the overriding application of the grievance rules. Hence the public is protected.

In reality, if an attorney refers a client to another attorney to be represented by that attorney, what potential adverse consequence arises to the person being referred? None. The referral, if successful, customarily results in a formal engagement between the person being referred and the attorney to whom the referral was made. The legal service to be provided is established between the lawyer and the client and not by the referring attorney. The expectation of the client is that the service to be provided is by the attorney consulted and not the referring attorney. All correspondence or communication is from the attorney and not the individual who referred the client. The expectation of payment to the emeritus attorney is a matter between the two attorneys and not the client. Any grievance that may arise from the representation is from the service rendered and not the referral. Ideally, that is how the referral should work, but practice may provide some exceptions. If those exceptions do exist, they are sufficiently diluted by the language of the proposed rule, the definition of practicing law in part 1 of the Rule and the application of the grievance procedure to the emeritus attorney.

Practically speaking, a commonsense approach must be applied to address the issue. If the ingredients in the traditional concept of the practice of law are absent from the referral, it is hard to conceive how the simple giving of the name of a lawyer to a former client, friend, family member or acquaintance can be the practice of law. In the world of reality well known, trusted or respected attorneys within the community now on an emeritus status will certainly be consulted by lay people for the names of lawyers that they would recommend to address a particular problem that individual may have. If by chance, the referring attorney offers a referral fee or other gratuity at the conclusion of the representation, what is the harm that must be protected by saying the emeritus attorney cannot accept that referral fee or gratuity? Even if there is a formal agreement between the referred attorney and the referral attorney for the payment of a referral fee, once again what is the harm that is to be protected or injury to be avoided?

What is being missed in the summary application of the prohibition is the experience factor. There is no question a lawyer who for years has practiced in the trenches is one of the best to refer an attorney to those who seek the knowledge and experience of that emeritus attorney. That experience factor can be critical by seeing the client goes to competent counsel. There are safeguards presently are in the Rules to protect the client if something goes awry.

Doherty v Lockwood 259 Mich App 38, 672 NW2d 884 (2003) concluded that an inactive attorney was no longer a lawyer and thus could not receive a referral fee because to allow such a fee to be paid would violate MRPC 5.4(a) - prohibition against the sharing of legal fees with one not permitted to practice; i.e. inactive members of the State Bar. The emeritus rule was not in place when this decision was rendered. This case does not apply to the emeritus status because the person is still recognized as a lawyer within the membership of the State Bar of Michigan, whereas an inactive member is not. Further, the emeritus lawyer still can serve as a mediator, and the Representative Assembly has taken a position that the emeritus lawyer should be permitted to serve as a pro bono attorney under the supervision of an active legal services provider. "Inactive" is not a membership status recognized in Rule 3 dealing with Membership Classes. An emeritus lawyer is not a "nonlawyer." To suggest otherwise insults the integrity of the status and the person holding that membership status.

The Senior Lawyers Section believes the prohibition creates a harsh consequence that has no relationship to the circumstances arising from a traditional referral. The SLS further believes

sufficient protection exists in the rules as presently exist and only require clarification to avoid confusion that presently arises from the present position of the SBM.

Fiscal Impact on State Bar of Michigan

None known.

**STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on September 14, 2006**

Emeritus members of the State Bar of Michigan should be entitled to receive referral fees so long as the emeritus members do not engage in the practice of law.

(a) Yes

or

(b) No