

INFORMATIONAL PAGE
RE: ATTORNEY SOLICITATION PROPOSAL

I. Summary of Issue

At the State Bar Representative Assembly Meeting in September 2009, the Family Law Council intends to propose to the Representative Assembly an Amendment to the Michigan Rules of Court to add a new court rule restricting an attorney's contact with potential clients known to face particular legal problems. Notwithstanding the provisions of Michigan Rules of Professional Conduct 7.3 (Exhibit A), the Family Law Council proposes that no attorney shall contact any person known to the attorney to be a defendant in any action filed in any trial court in this state for the purpose of soliciting that person as a client unless the prospective client has been served with process in the action.

II. Problem

The Family Law Council has received numerous complaints from clients who received "solicitation packets" from attorneys they had never heard of soliciting legal representation of them in lawsuits before they have even learned of the lawsuit or have even been served with legal process. In certain circumstances, a pre-existing attorney-client relationship existed. The Family Law Council believes this practice is a growing problem, which is commonly referred to as "trolling" for clients and regarded as offensive.

Information regarding case filings is readily available to attorneys through personal inspection of public filings, newspapers, and the internet. At this time, however, no restrictions exist that prevent attorneys from contacting and soliciting prospective clients who have been named as party-defendants in a lawsuit.

Individuals named as party-defendants in a lawsuit are particularly vulnerable, especially when their first notification of a pending lawsuit is a communication from an unknown attorney—and they have not even seen the legal papers referred to in the solicitation. While attorneys have commercial free speech rights, these rights are not unlimited, and can be the subject of regulation by the State Bar of Michigan and the Supreme Court.

III. Possible Resolution

The Family Law Council plans to propose to the 2009 September meeting of the Representative Assembly an amendment to Chapter 8 of the Michigan Court Rules to include a new court rule regarding "Restrictions on Attorney Contact With Potential Clients Known to Face Particular Legal Problems." Although still in its drafting stages, the proposed amendment may read as follows: "*Notwithstanding the provisions of Michigan Rules of Professional Conduct 7.3, no attorney shall contact any person known to the attorney to be a defendant in any action filed in any trial court in this state for the purpose of soliciting that person as a client unless the prospective client has been served with process in the action.*"

IV. Prior Representative Assembly Action

On November 13, 2003, the Representative Assembly voted to adopt a version of the Michigan Rules of Professional Conduct 7.3 for inclusion in a proposed revision of the Michigan Rules of Professional Conduct, consistent with a similar recommendation made by the Standing Committee on Professional and Judicial Ethics, as set forth in the attached (Exhibit B).

Exhibit A

Rule 7.3 Direct Contact with Prospective Clients.

(a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful, nor does the term "solicit" include "sending truthful and nondeceptive letters to potential clients known to face particular legal problems" as elucidated in *Shapero v Kentucky Bar Ass'n*, 486 US 466; 108 S Ct 1916; 100 L Ed 2d 475 (1988).

(b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

- (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation involves coercion, duress or harassment.

COMMENT:

There is a potential for abuse inherent in direct contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to evaluate fully all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

However, the U.S. Supreme Court has modified the traditional ban on written solicitation. Shapero v Kentucky Bar Ass'n, 486 US 466; 108 S Ct 1916; 100 L Ed 2d 475 (1988). Paragraph (a) of this rule is therefore modified to the extent required by the Shapero decision.

The potential for abuse inherent in direct solicitation of prospective clients justifies its partial prohibition, particularly since lawyer advertising and the communication permitted under these rules are alternative means of communicating necessary information to those who may be in need of legal services.

Advertising and permissible communication make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to impermissible persuasion that may overwhelm the client's judgment.

The use of general advertising and communications permitted under Shapero to transmit information from lawyer to prospective client, rather than impermissible direct contact, will help to assure that the information flows cleanly as well as freely. Advertising is out in public view, thus subject to scrutiny by those who know the lawyer. The contents of advertisements and communications permitted under Rule 7.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false or misleading communications, in violation of Rule 7.1. The contents of some impermissible direct conversations between a lawyer and a prospective client can be disputed and are

not subject to third-party scrutiny. Consequently they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior family or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 7.3(a) is not applicable in those situations.

This rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for its members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of, and detail concerning, the plan or arrangement that the lawyer or the lawyer's firm is willing to offer. This form of communication is not directed to a specific prospective client known to need legal services related to a particular matter. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under these rules.

Exhibit B

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

- (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
- (1) is a lawyer; or
 - (2) has a family, close personal, or prior professional relationship with the lawyer.
- (b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
- (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation involves coercion, duress or harassment.
- (c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside of a mailing envelope, if any, and at the beginning and ending of any recorded, ~~or~~ electronic, or written communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).
- (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] *There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.*

[2] *This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.*

[3] *The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under*

Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal- service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[7] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).