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September 22, 2011

Corbin Davis
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2002-24 – Amendment of Rule 7.3 of the Michigan Rules of Professional Conduct

Dear Clerk Davis:

The State Bar of Michigan appreciates the opportunity to comment upon the proposed amendments to Michigan Rules of Professional Conduct (MRPC 7.3) published for comment by order entered July 19, 2011. We commend the Court on its decision to rescind its prior order in advance of the scheduled September 1 implementation date, and to invite comment on the changes.

As indicated previously, the Board of Commissioners and the Bar staff have received a great deal of input from members objecting to the content of the proposed changes, both as to the breadth of the labeling requirement and as to the scope and impact of the 30-day ban on advertising.

Due to its placement in the rule, the 30-day ban applies only to targeted solicitations. Although the ban may have been intended to apply only to plaintiffs' personal injury lawyers,¹ as worded it could also apply to lawyers who might represent potential defendants in other civil matters as well as criminal defense lawyers whose potential clientele might be accused of causing an injury, death, or accident. There are objections concerning the complications the rule could create within each of those contexts. Some members have also expressed concern that a probate lawyer learning of the death of a testator or testatrix would be prohibited by the proposed language from contacting family members of the deceased because the lawyer had no prior professional relationship with the family members. The prohibition would be especially problematic for a lawyer who retains original documents, such as a will, needed by the decedent's family. Banning targeted solicitations to putative civil or criminal defendants, or to family members of a probate lawyer's recently-deceased client cannot be justified as a reasonable restraint of otherwise protected commercial free speech on the same basis as more narrowly drawn language clearly intended to protect the privacy of persons who have recently suffered a death or trauma.

¹ Many of our members believe that even this restriction would be inappropriate in providing a 30-day unencumbered access by defense lawyers and insurance companies to seek to settle claims before unrepresented persons have identified a need for legal representation relative to the claim.

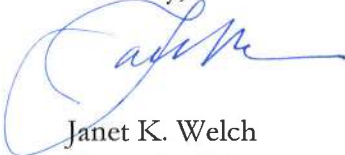
Assuming that the proposed language is intended to protect the privacy of grieving or traumatized persons within a personal injury context, it falls short of that end because it impacts neither generalized mailings nor mass media advertising by personal injury lawyers. Those forms of communication will continue to reach those the language seeks to protect, but they will be made aware only of the lawyers and law firms who can afford such advertising. Given that the only difference in content between a generalized mailing and a targeted solicitation might be the recitation of a person's name rather than "Resident," it is difficult to see how the public interest is served by prohibiting only one type of advertising. To be clear, we are not advocating that the prohibition be extended to all forms of advertising, which would clearly raise commercial free speech concerns. If the proposed solicitation ban is put in place, Michigan would join a small minority of jurisdictions that restrict targeted solicitations for a limited period of time.²

With respect to the labeling requirement, we believe the language remains overly broad in requiring both non-targeted and targeting mailings to be labeled as advertising. The ABA Model Rule confines a labeling requirement to targeted solicitations. While targeted letters specifically referencing an actual matter might be misconstrued as having some legal significance by an unsophisticated recipient absent being labeled as advertising, no such confusion accompanies something more generically worded and addressed.

Even mandating the labeling of non-targeted mailings can be troublesome because of existing language in paragraph (a) referencing solicitation generally, "when a significant motive for doing so is the lawyer's pecuniary gain." For example, a lawyer seeking to educate the public about recent changes in the law or to warn about recently-popular scams might wish to send letters. Because the lawyer, in doing so, might additionally hope that some business might eventually flow from the mailing, it would have to be labeled. An "advertising" label could cause many recipients to toss the letter without reading it, thereby losing the value of information that might have benefited them.

The State Bar respectfully requests that the Court decline to adopt the proposed changes to MRPC 7.3 set forth in the July 19, 2011 order.

Sincerely,



Janet K. Welch
Executive Director

² We note that a related topic is the proposed amendment to MRPC 7.3 advanced by the Representative Assembly at its March 27, 2010, meeting, the substance of which remains pending under the Court's Administrative File No. 2010-22. The proposed additional paragraph (c) would proscribe a lawyer's initiating contact with or solicitation of a party in a family law case until the earlier of service of process or the elapse of fourteen (14) days from the date of filing. The distinguishing rationale for that change was laid out in our letter of April 30, 2010. Further elaboration is found in the transcript of the March 27, 2010, meeting.