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Mr. Corbin R. Davis
Michigan Supreme Court Clerk
PO Box 30052
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MSC_clerk@courts.mi.gov
-AND-
FIRST CLASS MAIL

Re: ADM File No. 2002-24

Dear Clerk Corbin:

I am General Counsel of Varnum LLP and submit these comments respectfully requesting that the Court decline to adopt the proposed amendments to MRPC 7.3 and close this file. The proposed amendment is overly broad and ambiguous in its application; is likely to deprive the public of truthful and useful information on a timely basis; is unlikely to improve the content of lawyer communications with the public, thus failing to advance the purpose of MRPC 7.3; and unduly exposes lawyers to discipline for no reason other than the failure to inscribe the magic words "advertising material" on otherwise proper communications. As more fully described below, I join in and support the comments of others, including those of Mr. Kemsley, Mr. Kohl, Mr. Stern, and Mr. Hartmann, whose firms and lawyers deal with similar realities of client service, public service (public speaking, community service, etc), and marketing as Varnum.

There Has Been No Demonstrated Need for Changes in MRPC 7.3.

I have reviewed the comments submitted to the Court and find a striking absence of any convincing evidence supporting the need to make the proposed changes. The comments do not reference any studies suggesting that Michigan lawyers routinely engage in improper client solicitation. There is no evidence that Michigan residents are regularly misled by lawyer solicitations. Indeed, the few comments that present anecdotal evidence support the conclusion that Michigan residents are not befuddled by lawyer solicitations nor do Michigan residents seem to object in any meaningful way to such communications. Indeed, the general consensus seems to be that Michigan residents know lawyer advertng when they see it and are quite capable of discarding unwanted mail.

Recent reports from the Attorney Grievance Commission and Attorney Discipline Board likewise fail to justify a tinkering with MRPC 7.3. The 2009 Joint Annual Report of those bodies identifies the subject matter of the most prevalent grievances in 2009 at Table 2, p 4. If one assumes the stereotype that personal injury lawyers are more likely to use potentially improper solicitations, the fact that personal injury law accounted for only 5% of the total grievances in 2009 strongly suggests that more restrictions on solicitations are unlikely to have

any meaningful impact. The Attorney Discipline Board's 2010 Annual Report does not call out improper solicitation in violation of MRPC 7.3 at all in its table reporting sanctions by type of misconduct. See Attorney Discipline Board 2010 Annual Report, Appendix B. The proposed rule change seems to address a non-existent problem.

Varnum supports the intent and purpose of MRPC 7.3 to control the potential for abuse inherent in direct solicitation of prospective clients. The rule must strike a balance between the public's desire to be free of undue influence, intimidation and overreaching and a lawyer's constitutionally protected free speech. The proposed changes are quite unlikely to improve the quality of the content of lawyer solicitations. I respectfully suggest to the Court that no amendments to MRPC 7.3 should be adopted in the absence of a clear and concise determination of the activity of concern; an analysis of the extent of the problem; and, narrow and well-defined changes in the rule that will not expose good and truthful lawyers to the gut-wrenching risk of disciplinary action. The failure to create an appropriate record may well embroil the Court in constitutional challenges to MRPC 7.3

The Proposed Changes Are Vague, Ambiguous and Potentially Detrimental to the Public.

Several writers have illuminated the challenges arising from the vague and ambiguous changes that are proposed, including:

- What is "advertising material?" Will client advisories; ICLE seminar materials; blogs; newsletters; public service publications; etc; be subject to the rule? Lawyers sponsor many community activities for altruistic and advertising purposes. Must the "advertising material" disclaimer appear on placards that acknowledge lawyers for their charitable contributions?
- The rules may well have a chilling effect on the dissemination of truthful, helpful and non-misleading information to the public, as lawyers steer clear of unknown disciplinary shoals.
- The rules do not appear to have considered the needs of some practice areas for prompt response to a potential action or claim. The needs of estate planning lawyers and beneficiaries is an oft-seen remark. There may well be other practice areas with similar concerns.
- The amendments do not distinguish between the sophisticated Fortune 500 client and the individual with no high school diploma. The sophisticated client has no need of the protections afforded by MRPC 7.3.
- The 30-day "no contact" rule could prevent potential clients from acquiring timely and necessary information regarding statutorily mandated claim notices; filing deadlines; defenses; strategy; claim avoidance; etc. If the rule is intended to apply only to limited areas of practice, e.g., personal injury or family law, a more precise rule is necessary.


- It has been pointed out that the "no contact" rule may advantage lawyers or firms with large advertising budgets and disadvantage smaller firms or solo practitioners, with no evidence that this imbalance works to the benefit of the public.
- The proposed changes may place Michigan firms at a competitive disadvantage in seeking client work.

It is unclear where the evil lies that the proposed changes are intended to correct, because the changes are too vague to identify the evil. Adding the phrase "advertising material" to an envelope is not going to improve the truthfulness of the solicitation. A few writers have pointed out that the "no contact" rule may be useful in family law cases to prevent unwanted disclosure to the opposing party that an action has been filed. If there truly is a concern for the safety or welfare of family members in such a situation, a more focused solution outside of the ethics rules may be in order.

We cannot lose sight of the fact that the proposed changes will be enforced through threat of disciplinary action. Lawyers will face an increased risk of censure, without a corresponding increase in the protection of the public from false or misleading solicitations. In times of budget constraints, is there a need to add further regulation or, worse, to create rules that will not be enforced? The current and proposed rule recognize that constitutional freedoms are also implicated whenever free speech is curtailed, or the manner of speech dictated from above. The lack of evidentiary support for the proposed changes warrants extreme caution in proceeding further.

I greatly appreciate the opportunity to provide comments to the Court regarding the proposed changes to MRPC 7.3. For the reasons stated above, and those of other commentators raising similar issues, I respectfully request that the Court decline to adopt the proposed amendments and close ADM 2002-24.

Very truly yours,

VARNUM


Teresa S. Decker

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