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December 5, 2011

Mr. Corbin R. Davis  
Clerk, Michigan Supreme Court  
P.O. Box 30052  
Lansing, MI 48909

Re: AM 2010-22 & MRPC 7.3:  
Controlling Family Law Attorney "Trolling"

Dear Mr. Davis:

The Family Law Council, representing the Family Law Section of the State Bar of Michigan, unanimously voted 19-0 to support AM 2010-22 at its December 3, 2011 meeting. The proposed Court Rule Amendment is carefully tailored to restrict an attorney's targeted solicitation of a party to a divorce case for the lesser of fourteen (14) days or service of process on the other party.

The Family Law Section has been a strong proponent of controlling the increasingly widespread practice of attorneys soliciting the representation of prospective clients prior to a party having been served with a copy of a Complaint, Injunctions against Transfer of Assets, Temporary Custody Orders, Personal Protection Orders or other initial pleadings in a Divorce case.

This practice is commonly referred to as "trolling" for Divorce clients. It typically involves an attorney inspecting the case filings in a County and immediately soliciting the representation of a client by mail or otherwise. These are "targeted" solicitations because they are directed to persons who have actually been named as defendants or parties in a family law case.

Because *ex parte* relief, injunctions, temporary restraining Orders, Personal Protection Orders may still be in process, a party in receipt of a targeted solicitation prior to being served with the pleadings and Orders in a family law case, is not yet subject to the jurisdiction of the court, and advance notice furnishes the opportunity to transfer assets, change beneficiary designations, remove the children from their custodial environment, or otherwise avoid and evade Court process prior to being served with the Complaint, Injunctions, Restraining Orders, Personal Protection Orders or other pleadings.

This is a matter of grave concern to the Family Law Section because “tipping off” a Defendant in a family law case to a divorce or family law case filing before a party can be served with the Complaint, or a Personal Protection Order, or an Ex Parte Order substantially increases the risk of physical or economic harm to the Plaintiff or the children involved in a *high conflict* divorce. Michigan law is clear that prior to issuance of an injunction, or an *ex parte* order, or an order restraining the transfer of assets, the trial Court must make a specific determination, based upon well pled facts, that *irreparable harm* in the form of physical or economic injury is imminent.

Our Michigan statutes and common law authorize PPOs, injunctions, temporary Custody Orders, asset restraining Orders, and other injunctive relief which may clearly be frustrated when the a party receives advance notice through a targeted solicitation from an unknown attorney prior to service of a Complaint, or service of an injunction, restraining Order, personal protection order or other ex parte Order from a trial court. Until an injunction or restraining Order is served upon a Defendant there is **nothing**: (1) prohibiting a party from seizing children and passports and fleeing the County; (2) from emptying out bank accounts, and fleeing the jurisdiction; (3) from changing beneficiary insurance designations, transferring money or assets into the hands of third parties; (4) from assaulting, wounding, molesting or beating the other party.

Justice Hathaway has requested that *Shapero* issues be addressed in any commentary to AM 2010-22. Constitutional restrictions upon commercial free speech are a relevant consideration in this discussion.

### ***SHAPERO v KENTUCKY BAR ASSOCIATION***

The case of *Shapero v Kentucky Bar Association*, 496 U.S. 466 (1988) is neither a bar nor an impediment to controlling lawyer *trolling* in family law cases. *Shapero* involved a foreclosure proceeding, not a family law case. Injunctions, ex parte orders, restraining orders, and personal protections orders are neither regular nor routine in foreclosure cases. These were not considerations in the *Shapero* case.

*Shapero* challenged a **total ban** on targeted, direct mail solicitation by attorneys. Contrast this with AM 2010-22, which restricts attorney solicitation to the **first to occur** of either service of process of the Complaint and other pleadings, or fourteen (14) days. This temporary waiting period is the **opposite** of a total ban on attorney solicitation. This temporary ban could be a minimal as a day or two, depending upon service upon the Defendant, and not longer than a maximum period of fourteen (14) days.

Moreover, *Shapero, id* at 476, reaffirmed the power of the State to regulate abuses, which might require attorneys to file their proposed solicitation letter with the state:

*“The state can regulate such abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency.”*

However, the *Shapero* suggestion of “filing a letter with the State” ignores the stark reality that providing prior advance notice to a party who may be served with an Injunction or Restraining may invite the very conduct sought to be restrained by Court Order. Approving the generic content of a targeted solicitation to a prospective defendant utterly fails to address to issues of prior notice to a party about to be served with a Complaint for Divorce and *ex parte* restraining orders, injunctions, or a personal protection order.

### ***FLORIDA BAR v WENT FOR IT***

The United States Supreme Court specifically **upheld** a 30 day “blackout period” prohibiting the solicitation victims of accidents in *Florida Bar v Went For It*, 515 U.S. 618 (1995). The Supreme Court noted that “pure commercial advertising” has “...always reserved a lesser degree of protection under the First Amendment”, *id.* at 635.

The Supreme Court concluded:

*“We believe that the Bar’s 30 day restriction on targeted direct mail solicitation of accident victims and their relatives withstands scrutiny under the three pronged Central Hudson test that we have devised for this context. The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and preventing the erosion of confidence in the profession that such repeated invasions have engendered.”*

The *Florida Bar v Went For It* case is good law today.

Significantly, AM 2010-22 is **even less restrictive** than the Florida rule: (1) It only applies only to family law cases; (2) the longest period of restriction is fourteen (14) days — less than half the thirty (30) days in Florida; (3) the restriction disappears if the other party is served with process, which may only involve a day or two delay; (4) AM 2010-22 is carefully and precisely constructed to impose minimal limitation upon direct or targeted lawyer solicitation, and does not deal with the content of the solicitation. .

### ***RESTRICTIONS ON COMMERCIAL FREE SPEECH ARE SUBJECT TO A FOUR PRONG FREE SPEECH TEST***

The *Shapero* case has frequently been suggested as standing for the proposition that it is “unconstitutional” to impair the free speech/commercial advertising rights of attorneys. A careful reading of *Shapero* makes clear it did **not** stand for this proposition. Subsequently, *Florida Bar v Went For It* confirmed the right of the State to impose a 30 ban on direct, targeted solicitation to accident victims.

When dealing with regulation of commercial free speech, which the *Florida Bar* case held was subject to “lesser” standards of protection. Moreover, and even prior to *Shapero*, the United States Supreme Court had enunciated the four prong test to regulate

commercial speech in *Central Hudson Gas & Electric v Public Service Commission*, 447 U.S. 557 (1980) which **can** be regulated if (1) If the advertising is not accurate it can be suppressed. (2) If the Government has a *substantial interest* in the restrictions, speech can be restricted. (3) A showing that the restriction is something more than “ineffective” or “remote support” for the asserted purpose. (4) If the restriction could be the subject of a more limited restriction, it may be subject to challenge.

Subsequent to the *Central Hudson Gas* case, the United States Supreme Court relaxed this test, and held in *Board of Trustees v Fox*, 492 U.S. 469 (1980) ruled that there must only be a “reasonable fit” between the goals and the restriction.

Clearly there is a “reasonable fit” between the goal of preventing advance notice of a filing of a complaint, restraining orders, personal protections orders, and other injunctions in a family law case and prohibiting the targeted solicitation. What valid public policy goal can possibly be asserted in arguing that persons who are the subject of Court Orders are entitled to “advance notice” prior to their being effective?

What about “suppressing all family law files”? This is not a reasonable solution because: (1) it is overbroad, (2) it would make it more difficult for attorneys to exercise their commercial free speech rights, (3) would interfere with the rights of the public to access court files and records; and (4) it would impose a significant additional cost upon counties, courts, and clerks who are already resource strained. Is there any conceivable lesser period of time for the restriction to be meaningful or effective? Hardly. It is common place in divorce cases, particularly in the larger population areas, for **ex parte** orders to take several days to enter. It may take even longer for them to be returned to counsel for service of process. Moreover, the advent of “e-filing” in many counties makes it impossible for counsel to personally deliver the proposed orders and injunctions to the assigned judge.

Significantly, AM 2010-22 does **not** preclude either the attorney or the public from examining and inspecting public files and records; it does **not** prohibit the direct solicitation of the prospective client. It does not prevent the soliciting attorney from drafting the solicitation letter and putting postage on it — it only delays the mailing! ADM 2010-22 does impose an absolute minimal period of time prior an attorney being able to forward the direct, targeted solicitation. This “waiting period” of fourteen (14) days will be even shorter if the attorney for the Plaintiff files a Proof of Service, further reducing the impact of the restriction.

**TEMPORARY RESTRICTIONS ON TARGETED SOLICITATIONS ARE  
COMMON THROUGHOUT THE UNITED STATES.**

A recent case from the 2<sup>nd</sup> Circuit Court of Appeals has exhaustively analyzed the constitutionality of 30 day “moratoriums” applicable to personal injury or wrongful death cases in the State of New York; *Alexander v Cahill*, 598 F. 3<sup>rd</sup>. 79 (2010) **affirmed** the 30 day moratorium on targeted solicitations of accident victims.

In the course of its analysis, the Court of Appeals noted, *id* at p. 98, the following states that have banned direct, targeted solicitation in personal injury or wrongful death cases: (1) Ariz. Rules of Prof'l Conduct R. 7.3(b)(3) (prohibiting "written, recorded or electronic communication or by in-person, telephone or real-time electronic" solicitation where "the solicitation relates to a personal injury or wrongful death and is made within thirty (30) days of such occurrence"); (2) Conn. Rules of Prof'l Conduct R. 7.3(b)(5) (imposing a forty-day moratorium on "written or electronic communication concern[ing] an action for personal injury or wrongful death"); (3) Ga. Rules of Prof'l Conduct R. 7.3(a)(3) (imposing a thirty-day moratorium on "written communication concern[ing] an action for personal injury or wrongful death"); (4) La. Rules of Prof'l Conduct R. 7.3(b)(iii)(C) (imposing a thirty-day moratorium on communication "concern[ing] an action for personal injury or wrongful death"); (5) Mo. Rules of Prof'l Conduct 7.3(c)(4) (prohibiting written solicitation, including by e-mail, "concern[ing] an action for personal injury or wrongful death ... if the accident or disaster occurred less than 30 days prior to the solicitation"); (6) Tenn. Rules of Prof'l Conduct R. 7.3(b)(3) (prohibiting solicitation of "professional employment from a potential client by written, recorded, or electronic communication or by in-person, telephone, or real-time electronic contact" if "the communication concerns an action for personal injury, worker's compensation, wrongful death, or otherwise relates to an accident or disaster involving the person to whom the communication is addressed ... unless the accident or disaster occurred more than thirty (30) days prior to the mailing or transmission of the communication.

### ***CONGRESS HAS MIRRORED STATE RESTRICTIONS ON ATTORNEY SOLICITATION IN AIRLINE CASES.***

A paramount example of Federal concern over the rights of parties to be free from improper solicitation by attorneys or their representatives has occurred in airline cases. It is illegal under Federal Law to solicit victims or the families of victims of airline crashes for a period of time after a crash. The Aviation Disaster Federal Assistance Act of 1996, Pub. L. No. 104-264, 110 Stat. 3213 (codified at 49 U.S.C. 1136 (2006)). This Act was amended in 2000 and the moratorium extended to 45 days. No challenge has ever been brought to this Statute.

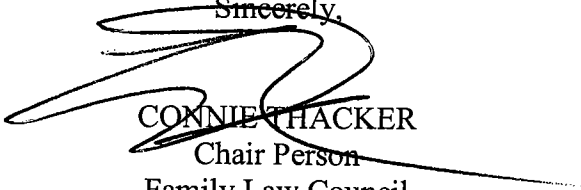
### ***CONCLUSION***

Not all divorces are *high conflict* divorces. Not all divorces involve assault, battery, mayhem, murder, misappropriation of assets, kidnapping of children out of the Country, or pillaging of a marital estate. However, our Statutes specifically provide for orderly processes designed to prevent irreparable harm to parties and children.

These processes involve *ex parte* relief, injunctions, restraining orders, temporary custody orders, and personal protection orders. The public policy of the State of Michigan is subverted by *family law trolls* who provide advance notice to litigants, prior to their being served with legal process. The public policy of the State of Michigan is sabotaged when a party to a divorce case is able to act with impunity because of advance knowledge of a pending injunction or restraining order.

When this issue first came to the Family Law Council nearly four (4) years ago, Circuit Judge John Hammond, Berrien County, forcefully and passionately argued that “one dead body is too many”. If a single irreparable injury is prevented by approval of ADM 2010-22, then this goal will have been accomplished. The family law section, and the Michigan Supreme Court, should not have to wait for “one dead body” prior to taking action on this critical issue.

Sincerely,



CONNIE HACKER  
Chair Person  
Family Law Council  
Family Law Section - State Bar of Michigan