

Order

Michigan Supreme Court
Lansing, Michigan

May 19, 2011

Robert P. Young, Jr.,
Chief Justice

ADM File No. 2002-24

Michael F. Cavanagh
Marilyn Kelly
Stephen J. Markman
Diane M. Hathaway
Mary Beth Kelly
Brian K. Zahra,
Justices

Amendment of Rule 7.3
of the Michigan Rules of
Professional Conduct

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment is adopted, effective September 1, 2011.

[The present language is amended and reformatted. The changes are indicated below in underlining to indicate new text and in strikeover to indicate text that has been deleted.]

Rule 7.3 Direct Contact With Prospective Clients

- (a) Except as otherwise allowed under this rule, ~~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 doing so is the lawyer's pecuniary gain.
- (b) Prohibited methods of communication. For purposes of this rule, ~~the~~ term "solicit" includes contact that is directed to a specific recipient:
- (1) in person, or
 - (2) by telephone or telegraph, or
 - (3) by letter or other writing, or
 - (4) by other communication, ~~directed to a specific recipient, but does not include~~
- (c) Allowable forms of communication. With the exception of those circumstances absolutely prohibited in subsection (d), for purposes of this rule, the term "solicit" does not include:

- (1) letters addressed or advertising circulars distributed generally to persons who are 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 or~~
- (2) "[t]ruthful and nondeceptive letters to potential clients known to face particular legal problems," as elucidated in *Shapero v Kentucky Bar Ass'n*, 486 US 466 (1988). If the written solicitation concerns an action, or potential claim, that pertains to the person to whom a communication is directed, or a relative of such person, the communication shall not be transmitted less than 30 days after the injury, death, or accident occurred that has given rise to the action or potential claim.
- (3) Every written communication from a lawyer described in subsections (1) and (2) shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any written communication, unless the lawyer has a family or prior professional relationship with the recipient. If a written communication is in the form of a self-mailing brochure, pamphlet, or postcard, the words "Advertising Material" shall appear on the address panel of the brochure, pamphlet, or postcard. The requirement to include the words "Advertising Material" shall apply regardless whether the written communication is transmitted by regular United States mail, private carrier, electronically, or in any other manner.

~~(b)~~(d) 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.

Staff Comment: MRPC 7.3 has been reformatted and describes the general prohibition regarding a lawyer's solicitation, and also describes the types of communication that are allowed, including a lawyer's general advertising, and a lawyer's targeted communications to possible clients who are facing legal problems (as protected by *Shapero v Kentucky Bar Ass'n*, 486 US 466 [1988]). The amendment of MRPC 7.3 requires that inclusion of the term "Advertising Material" applies only to written materials, including e-mailed communications, but not to television or radio

advertisements. The amendment also requires a 30-day period to pass before an attorney may contact a potential client after a death, injury, or accident.

The staff comment is not an authoritative construction by the Court.

MARILYN KELLY, J. (*dissenting*). I oppose the rule change because it is overbroad, ambiguous and likely to create confusion. I would adopt instead ABA Model Rule of Professional Conduct 7.3 which states, in relevant part,

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 envelope, if any, and at the beginning and ending of any recorded electronic communications, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

MARKMAN, J. (*dissenting*). Although I am not unsympathetic with the sentiments underlying the new rule, the more I reflect upon the rule, the more I am inclined to believe that it will simply add to the clutter of court rules that have already been sufficiently cluttered over the past decade, and without doing anything significant to address particular problems of lawyer advertising. Essentially, as in other states, the floodgates have been opened in Michigan concerning lawyer advertising, with fortunes now spent in this regard on television, radio, billboards, and 1-800-LAWSUIT telephone numbers. In the face of this transformation of the advertising environment, this Court now issues a new rule focused upon which of the four corners of a postcard soliciting clients the words “advertising material” must appear. The upshot is that those lawyers, and law firms, which engage in client solicitation by the hundreds of thousands will continue to engage in business as usual, while those lawyers, and law firms, which engage in client solicitation one person at a time will become more heavily regulated. Further, the latter group will be prohibited during a 30-day period from soliciting business from certain categories of potential clients, while the former group will be allowed to continue soliciting such business during the same period. For better or for worse, the United States Supreme Court has redefined the rules of the game for lawyer advertising, and I would not indulge in the illusion that by the measure this Court adopts today, we are doing anything of consequence to improve upon these rules. Instead, all that we are doing is placing the small law firm at an increasing economic disadvantage to the large law firm in terms of client solicitation. I see little point to the new rule, and would not adopt it.

HATHAWAY, J. (*dissenting*). I would decline to adopt.



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 19, 2011

A handwritten signature in cursive script that reads "Corbin R. Davis".

Clerk