



October 31, 2011

Corbin Davis  
Clerk of the Court  
Michigan Supreme Court  
Michigan Hall of Justice  
925 West Ottawa Street  
Lansing, MI 48915

**RE: ADM File No. 2002-24  
Comments on Proposed Amendment to  
Michigan Rules of Professional Conduct 7.3**

Dear Clerk Davis:

This letter is being sent as commentary on the proposed amendment to Michigan Rule of Professional Conduct 7.3, as authorized by court order ADM File No. 2002-24. Like our colleagues under separate correspondence of even date, we are currently attending Widener University School of Law in Wilmington, Delaware and are enrolled in Professor Francis Catania's Professional Responsibility course. We are enthusiastic to take this opportunity to share our thoughts with the Michigan Supreme Court. We hope the Court finds the material accurate, probing, and helpful.

**I. Constitutionality of 30-day Blackout Period as Set Forth in Proposed Rule 7.3(c)(2).**

As a preliminary matter, we would like to point out that the basis for regulating the conduct of lawyers is society's perception of the profession. Lawyers play many roles: advisor, advocate, negotiator and intermediary. They are responsible for representing clients, serving as officers of the legal system and ensuring the quality of justice. To fulfill these roles and meet our duties, we must set high standards and expectations for ourselves. We believe this is what the proposed rule is attempting to do. However, we believe that more information is required to support the proposed changes that relate to imposing a 30-day blackout period on solicitation to the person, or relative of such person, who has been injured or killed in an accident giving rise to a potential claim.

The type of speech the rule seeks to regulate in this provision is commercial speech, which in accordance with *Central Hudson Gas & Electric v. PSCNY*, 447 U.S. 557 (1980) may only be regulated if the regulation can pass intermediate scrutiny. A three prong test is applied. "First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be 'narrowly drawn.'" *Florida Bar v. Went-For-It*, 515 U.S. 618, 624

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(1995), citing *Central Hudson Gas & Electric v. PSCNY*, 447 U.S. 557, 564-565 (1980). See also, *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988).

The first prong requires a substantial interest in support of its regulation. In *Florida Bar*, the state interest was “in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers.” *Florida Bar*, 515 U.S. at 625. A second interest cited was interest in curbing activities that negatively affect the administration of justice. *Id.* at 639-40. Both of these interests would also apply in Michigan. Additionally, as pointed out in *Florida Bar*, states have “broad power to establish standards for licensing practitioners and regulating the practice of professions” in order to “protect the public health, safety and other...interests.” *Id.* at 625. As such, the first prong of the test would be met.

Skipping to the third prong, the regulation must be narrowly drawn. The regulation here, like in *Florida Bar*, passes this test. The speech being regulated is specifically that which is directed at accident victims and their families and is limited to thirty days. It is not an indefinite ban, nor does it affect individuals outside of this narrow classification.

Where we believe the proposed amendment to Rule 7.3(c)(2) has potential for failing the intermediate scrutiny test is with the second prong, which requires the government to demonstrate that the restriction on commercial speech “directly and materially advances that interest.” *Id.* at 640. In comparison, this is where *Shapero* failed, but this Court’s proposed amendment can be differentiated from that case in that (1) it is not attempting to control information – just the timing regarding delivery of that information to a narrowly tailored group; and (2) it is not a ban on all direct-mail solicitations. The proposed regulation here does have one common factor – like *Shapero*, there is scant evidence of actual harm. In *Florida Bar*, the State was able to provide results of a 2-year study of the effects of lawyer advertising on public opinion, which supported their proposed changes. *Id.* at 626-27. This substantial evidence is what allowed the regulation to pass intermediate scrutiny. It would be helpful to know if a similar study has been conducted in Michigan and if similar results were found.

## **II. Overly Broad Application of Rule 7.3(b)(4).**

First, as set forth in its amended language in the Court’s Order of July 19, 2011, this Court proposes that “a lawyer shall not solicit...when a significant motive for doing so is the lawyer’s pecuniary gain.” The Court then moves on to define the word “solicit” under the subtitle of “Prohibited Methods of Communication” that “...includes contact that is directed to a specific recipient” made “(1) in person, or (2) by telephone or telegraph, or (3) by letter or other writing, or (4) by other communications.” “Other communications” would most assuredly seem to include all other forms of communications, such as billboards, television advertisements, internet marketing, newspapers and phonebooks.

Furthermore, by using the term “includes,” the rule is not limited to those communications that are directed to a particular person. By including “other communications,” the Court has placed a blanket prohibition over a wide variety of means of communications. Under *Central Hudson*, “Commercial speech that is not false or deceptive and does not concern unlawful activities...may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.” *Central Hudson Gas & Electric Corp v. Public Service Comm’n of New York*, 447 U.S. 557, 566 (1980). Therefore, under the proposed amended Rule 7.3, the Court has made it unethical for an attorney to honestly advertise about his or her services in the most basic of ways, including billboards and newspaper advertisements. It is difficult to discern a substantial governmental interest for restricting such commercial speech that has been universally accepted and historically used by lawyers and law firms to solicit clients.

Thirdly, the Court moves on to define what “solicit” does not entail. The term “solicit” specifically excludes mass mailings “to persons who are not known to need legal services of the kind provided by the lawyer in a particular matter...” It also excludes, “truthful and nondeceptive letters to potential clients known to face particular legal problems, as elucidated in *Shapero v. Kentucky Bar Ass’n*, 486 U.S. 466, 466 (1988).” This criterion is so ambiguous that it leads the reader to believe that *Shapero* simplistically sets forth a standard that might describe such letter. However, that is not the case. A review of *Shapero* reveals that the case concerned an attorney who wished to send solicitation letters directly to potential clients concerning foreclosure litigation which had been initiated against these potential clients. *Id.* at 469. Prior to doing so, the attorney submitted his proposed letter for approval to the Kentucky Attorneys’ Advertising Commission, which subsequently denied his request. *Id.* At the time, the Kentucky Rules of Professional Conduct prohibited the sending of any solicitation to any particular person that was “precipitated by a specific event or occurrence.” *Id.* In finding the rule unconstitutional, the Court stated what the letters are not, instead of what they are. Specifically, the court found that permitted targeted mail solicitation letters did “[1] not over estimate the lawyer’s familiarity with the case...[2][they] cannot implicitly suggest that the recipient’s legal problem is more dire than it really is...[3][they] cannot lead the recipient to believe she has a legal problem that she does not; or [4][they] cannot offer erroneous legal advice.” *Id.* at 476. Upon a review of *Shapero*, one may also infer that targeted mail solicitation “[letters]...are not false or deceptive and [do] not concern unlawful activities...” *Id.* at 476. In the final part of the *Shapero* opinion, upon which only three justices joined in, the Court went on to further define what constitutes “misleading letters” as “unduly emphasizes trivial or ‘relatively uninformative facts’...[and] offers overblown assurances of client satisfaction.” *Id.* at 479.

The difficulty with this particular subsection of amended Rule 7.3 is that while the Michigan Supreme Court is attempting to say what these letters *are*, in doing so it refers to *Shapero*. However, *Shapero* elucidates what these letters *are not*, instead of what they are. This circular logic only invites confusion and frustration on the part of

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ethical attorneys who are attempting to follow the Rules of Professional Conduct; frustrates the objectives of the disciplinary authorities whose responsibilities are to enforce these rules; and fails to promote the public's confidence in the legal profession. Furthermore, although as attorneys we must all be at least fairly comfortable with constitutional principles, not every lawyer is a constitutional lawyer. *Shapero* may be clear to some attorneys and disciplinary authorities; however, *Shapero* may change, or the Supreme Court may overrule it altogether. In the event of this happenstance, Michigan rules will reference a defunct law that may require Michigan to go through the amendment process. Lastly, the Supreme Court may amend the *Shapero* doctrine in a way that offends other language in the proposed Michigan rule.

Thank you for the opportunity to comment on the proposed amendment to Rule 7.3. We would also like to give credit to our professor, Francis J. Catania Jr., Esquire, for his guidance in the project from conception to completion. Your consideration of our analysis is appreciated.

Respectfully submitted,

*/s/ Harrison Carpenter*  
Harrison Carpenter  
J.D. Candidate, 2013

*/s/ Sharon Kim*  
Sharon Kim  
J.D. Candidate, 2013

*/s/ Reneé Mundy*  
Reneé Mundy  
J.D. Candidate, 2013

*/s/ Elizabeth H. Thompson*  
Elizabeth H. Thompson  
J.D. Candidate, 2013