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BILL ANALYSIS



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Senate Bill 351 (as passed by the Senate)
Sponsor: Senator Rick Jones
Committee: Judiciary

Date Completed: 9-16-15

RATIONALE

Attorneys licensed to practice in Michigan are subject to the Michigan Rules of Professional Conduct (MRPC). The MRPC guide various areas of legal practice and conduct with other attorneys, clients, and courts. The rule governing the solicitation of clients is related to an issue that has been raised by family law attorneys and others. Specifically, Rule 7.3 of the MRPC prohibits a lawyer from soliciting professional employment from a client with whom the lawyer has no family or prior professional relationship when a significant motive for the solicitation is pecuniary gain. "Solicit" includes in-person contact, or contact by phone, telegraph, letter or other writing, or other communication directed to a specific recipient. That term does not include letters addressed or advertising distributed generally to people who are not known to need legal services in a specific matter, but might find such services useful, and also does not include "sending truthful and nondeceptive letters to potential clients known to face particular legal problems", as specified by the United States Supreme Court in *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988).

Apparently, notwithstanding Rule 7.3, some attorneys are reviewing court records for divorce proceedings and sending direct mail solicitations to defendants, at times before a divorce complaint is served. Detractors of this practice referred to it as "trolling". Some believe that this activity can increase the risk of domestic violence or abuse, putting the spouse, children, and marital estate in jeopardy. To address those concerns, it has been suggested that attorney solicitations during divorce proceedings should be limited by statute.

CONTENT

The bill would amend the Revised Judicature Act to prohibit a person from intentionally contacting an individual whom the person knew to be a party to a divorce action filed with a court, or an immediate family member of that individual, with a direct solicitation to provide a legal service until the expiration of 21 days after the date the summons was issued.

A knowing violation of the bill would be a misdemeanor punishable by a maximum fine of \$1,000 for a first offense. A second or subsequent violation would be a misdemeanor punishable by up to one year's imprisonment and/or a maximum fine of \$5,000.

The bill would take effect 90 days after it was enacted.

Proposed MCL 600.914

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bill would address the practice of divorce trolling. Some attorneys search court databases for new divorce filings and solicit the defendants in those actions, sometimes before a defendant has been served with process. In situations in which domestic abuse might be a factor, trolling can inform an abusive spouse about the divorce proceedings before the victim has a chance to file for protective orders or arrange for his or her safe exit from the home. Such solicitations are likely in violation of the Michigan Rules of Professional Conduct, but apparently have not been addressed adequately by the Attorney Grievance Commission, in spite of complaints against the practice.

The bill would prohibit attorneys from soliciting a party to a divorce action, or his or her immediate family, until 21 days after the summons was issued. This would balance the need to give an abused spouse sufficient time to prepare for the divorce and leave the house in a safe manner, and the commercial speech rights of attorneys to solicit prospective clients who might need legal assistance.

Also, the prohibition would apply to anyone, not just attorneys. Employees of a law practice, such as paralegals, investigators, and legal secretaries, therefore, would not be able to solicit clients on behalf of an attorney in violation of the bill.

Opposing Argument

The United States Supreme Court has held that commercial speech, including attorney advertising and solicitation, is protected under the First Amendment to the U.S. Constitution.¹ Such speech, as long as it is not false or deceptive and does not concern illegal activities, may be restricted only if the government can demonstrate that the restriction serves a substantial interest, the restriction directly and materially advances the stated interest, and the restriction is "narrowly drawn".² While the U.S. Supreme Court held in *Florida Bar v. Went For It, Inc.* that states have a compelling interest in regulating the practice of professions within their borders, any restriction must materially advance its stated compelling interest. A government body seeking to restrict commercial speech must demonstrate that the stated harm is real and that the restriction will alleviate it to a material degree.³

In *Florida Bar*, the alleviation requirement was satisfied through a two-year study conducted by the Florida Bar in support of a 30-day restriction on direct-mail solicitations pertaining to personal injury or wrongful death actions targeted to accident victims or their relatives. There have not been any analogous surveys in Michigan to show the harm of directly soliciting parties to a divorce action, how many divorces involve personal abuse or improper use of the marital estate, or how many incidents could be prevented by enacting a restriction on solicitation. The Michigan Supreme Court mentioned the absence of any such survey when it declined to amend the MRPC to do essentially what this bill proposes, but with a 14-day restriction.⁴

In addition, the bill's restriction is likely not "narrowly drawn" for several reasons. The bill would apply to all parties in all divorce cases, not just those cases in which abuse is indicated or there are other harmful circumstances. Although the bill could help a spouse filing for divorce to escape an abusive marriage, it also could hurt a similarly situated spouse whose abuser files for divorce. Under such circumstances, the advantage could go to the abuser for 21 days. On the other hand, when there is no abuse or malfeasance, solicitation can put the parties on equal footing and prevent surprise for the litigants.

Furthermore, the bill does not contain an exception for former or current clients. For the latter, the bill would create a contradiction between rule and statute, as there would likely be a professional obligation for an attorney to inform his or her client if the attorney saw a filing adverse

¹ *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988).

² *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), citing *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1988).

³ *Id.*

⁴ Letter to Janet Welch, Executive Director of the State Bar of Michigan, from Robert P. Young, Jr., Chief Justice of the Michigan Supreme Court, 4-5-2012.

to his or her client in court records. The MRPC recognizes this, and includes family and former and current clients as an exception to the MRPC's general prohibition of direct solicitation.⁵

Also, the need for the proposed regulation can likely be satisfied by other means. For instance, under Michigan Court Rules (MCR) Rule 8.119(I), a court may enter an order that seals court records in any action or proceeding upon the filing of a written motion identifying the specific interest to be protected, and after the court has made a finding of good cause.⁶ Such an order could temporarily seal the records of a divorce with evidence of domestic abuse from public view until the parties have been served. Legislation, or the MRPC, also could prohibit solicitation of individuals for a limited time when a personal protection order is filed. Alternatively, by rule or by statute, family law cases could be automatically sealed from public disclosure. Each of these options would achieve the same end as the bill, but would not burden attorneys' First Amendment rights.

Moreover, the bill would use the threat of criminal prosecution to prohibit attorney commercial speech regarding matters that are public record. A defendant to a recently filed divorce action could glean the same information from a search of court records. A more appropriate avenue to proscribe undesirable solicitation would be through the rules that govern attorney conduct.

Response: The bill's provisions would not amount to a total ban on direct solicitation, which likely would violate the First Amendment as described by *Shapero* and other cases. The bill would not preclude an attorney from reading through public records and court documents, nor would it ban the direct solicitation of a prospective client in a divorce action. The bill simply would set forth a waiting period on the solicitation for a reason that is clearly within the State's interest: to protect potential victims of domestic abuse. Similar prohibitions already exist in statute. For example, the Michigan Penal Code generally prohibits an attorney from intentionally contacting an individual whom the attorney knows to have sustained a personal injury as a result of a motor vehicle accident until 30 days after the accident (MCL 750.410b). The ability of another person to investigate public filings and disclose them to an interested party does not change the fact that, in exchange for the privilege of practicing law, attorneys are held to heightened restrictions and ethical standards, such as self-reporting misconduct.

The State Bar of Michigan did not conduct an empirical study, as suggested by the Michigan Supreme Court, because the Representative Assembly (of the State Bar) supports measures designed to reduce the practice of trolling. That support, combined with the evidence and complaints provided, should carry as much weight as any empirical study.

While other solutions might help keep domestic abuse victims safe in the beginning stages of a divorce, there are a number of problems with those options, as well. Personal protection orders take time to issued, and there must be specific factual allegations of irreparable harm if an order is issued without notice to the other party. The proposed 21-day period would allow sufficient time for these orders to be issued and served on the defendant/respondent. Also, sealing, or suppressing, all family law cases would be unreasonable and expensive. Few cases would benefit from such treatment, and suppression of public filings directly affects the availability of public information. The bill would be a simple solution to the problem of trolling.

Legislative Analyst: Jeff Mann

⁵ MRPC Rule 7.3(a).

⁶ MCR 8.119(I)(2) specifies that in determining whether good cause has been shown, the court must consider the interests of the parties, including, where there is an allegation of domestic violence, the safety of the alleged or potential victim of the domestic violence.

FISCAL IMPACT

The bill could result in an increase in the number of misdemeanor violations as individuals were prosecuted for direct solicitation to provide a legal service before the expiration of 21 days after a summons was issued by the court in a divorce action. The possible increase in misdemeanors could increase the requirements on local court systems and jails. Any associated fine revenue would be provided to public libraries.

Fiscal Analyst: John Maxwell

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.