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February 18, 2020

Michigan House of Representatives  
Families, Children and seniors Committee  
Hon. Kathy Crawford, Chair  
Hon. Daire Rendon, Majority Vice Chair  
Hon. Diana Farrington  
Hon. Michele Hoitenga  
Hon. Douglas Wozniak  
Hon. LaTanya Garrett, Minority Vice Chair  
Hon. Frank Liberati  
Hon. Brenda Carter  
Hon. Cynthia Johnson

Re: State Bar of Michigan Family Law Council support of the underlying purpose of House Bill 5296 and Council's proposed amendment.

Hearing date: Wednesday, February 19, 2020 @ 9:00 a.m.

House Office Building Room 308, Lansing Michigan

Dear Chairwoman Crawford, Vice Chairwoman Rendon, Minority Chairwoman Garrett, and Representatives Farrington, Hoitenga, Wozniak, Liberati, Carter and Johnson,

I am writing on behalf of the State Bar of Michigan Family Law Section Council. The Family Law Council has long supported efforts to put reasonable limits on attorney solicitation of Defendants in family law cases, and applauds Rep. Pamela Hornberger and this Committee for taking on this problem with House Bill No. 5296. While several attempts over the last 10 years to enact protective rules to govern such conduct have been attempted as either a modification of the Michigan Rules of Professional Conduct or legislation, they were not successful. But that does not mean that it is impossible to craft a rule that passes constitutional muster, while reasonably addressing unreasonable solicitation of legal services in family law matters.

This legislature has for years, crafted laws to protect Michigan's citizens, and particularly so when they are experiencing one of the most difficult, vulnerable times of their lives. There are numerous examples throughout Michigan's statutes, but one, while not dealing with family law matters, is directly on point in terms of putting reasonable limits on solicitation.

In the weeks immediately following an automobile accident, the injured party is in a vulnerable position. While they may require legal assistance, they should not be unreasonably pursued by lawyers seeking their business. This legislative body decided there needed to be limits. In what many call the “ambulance-chaser” statute, in 2013, this legislative body passed and the Governor signed legislation to do just that. Effective January 1, 2014, MCL 750.410b of Michigan’s Penal Code prohibits a person’s intentional contact with a person they know has sustained a personal injury as a direct result of a motor vehicle accident, or an immediate family member of that individual, with a direct solicitation to provide a service until the expiration of 30 days after the date of that motor vehicle accident. The exception being if the accident victim or their immediate family members acting on their behalf, request such contact, or the contact is by a person acting on behalf of an insurance company attempting to adjust a claim.

A first violation for such solicitation, can result in a fine of not more than \$30,000. A second or subsequent violation, can result in imprisonment for not more than 1 year or a fine of not more than \$60,000, or both, in addition to the cost of prosecution. This is established Michigan law, and has been for over 6 years now.

While the State Bar of Michigan Family Law Council is supportive of the intent of House Bill No. 5296, there is concern that it may have some of the same constitutional defects that prevented prior attempts to limit solicitation from being enacted. In order to try to better meet the United States Supreme Court’s three-part test outlined in Central Hudson Gas and Elec Corp v Public Serv Comm of NY, 477 US 557 (1988), the Family Law Council crafted the following proposed language that may better stand the constitutional challenges that are sure to be made.

On Monday February 17<sup>th</sup>, 2020, the State Bar of Michigan Family Law Council voted 18-0 (3 members not voting) to present the following proposal to this committee in order to provide reasonable limits on solicitation in family law matters:

**LIMITS ON ATTORNEY SOLICITATION IN FAMILY LAW MATTERS  
REQUESTING EX-PARTE RELIEF**

**A lawyer shall not directly or indirectly, individually or by their agent or anyone working on their behalf, solicit a person with whom the lawyer has no family or prior professional relationship, who is named as a Defendant and/or Respondent in a family law matter with a circuit court case code of DC**

**(Custody), DM (Divorce, with minor children), DO (Divorce, no children), DP (Paternity), DS (Other Support), or DZ (Other Domestic Relations Matters), or PP (Personal Protection Matter) seeking to provide a service to the Defendant and/or Respondent for a fee or other remuneration where the Complaint or Petition filed in that matter seeks ExParte Relief, unless and until 21 days have elapsed from the filing of such case, or after service of the Complaint or Petition seeking Ex-Parte Relief in such case, whichever is less.**

**The term “solicit” does not include letters addressed or advertising distributed by a lawyer generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but are so situated that they might in general find such services useful.**

It is the decided hope of the Family Law Council that the aforesaid proposed language may better address the constitutional challenges that have faced prior attempts at putting reasonable limits on solicitation at this most difficult time of a person life, while still being within the parameters of the US Supreme Court’s 3 prong analysis in the Central Hudson Gas case.

**1. Does the proposed regulation protect a substantial interest?**

- a. The proposal doesn’t apply to every family law case filed, because it’s not just any family law matter that requires specific limits on solicitation. It seeks to protect a Plaintiff/Petitioner in a family law case from harm at a particularly vulnerable time. For that reason, it’s directed at family law cases that are filed where an ExParte Order is being sought.

Getting an ExParte Order under Michigan Court Rule 3.207 is not easy. It’s typically done at the very outset of the family law case, contemporaneous with the case filing. There have to be specific facts set forth in an affidavit or verified pleading that irreparable injury, loss, or damage will result from the delay required to give notice to the Defendant that a Court Order is being sought, or that Defendant’s notice of the Plaintiff seeking that relief will itself precipitate the adverse action sought to be avoided before an order can be issued.

For example, the Plaintiff is justly fearful that the Defendant may take off with the children, cause physical harm to them personally or to their children or the marital property, cancel health or auto insurance, transfer assets to third parties to prevent the Court from reaching them for division between the parties, etc.

Once the Court has a chance to review the request for ExParte relief, if the Court believes that the allegations have merit, an ExParte Order can be entered by the Court restraining certain types of conduct, without notice to the Defendant/Respondent. This is because the Michigan Supreme Court, in adopting this Court Rule over 25 years ago, recognized that there is a substantial interest in preserving the status quo because irreparable injury, before the parties can even get to court, is not a desired outcome. Further, that while due process must be followed in every other instance of seeking entry of an Order, if giving the other side notice will precipitate the very adverse action sought to be prevented, the court has the discretion to enter an ExParte Order without notice to the other side, and restrain harmful conduct. But again, this can happen only if certain things exist.

- i. The Petition must allege the facts under oath,
- ii. Not just any general statements, but specific facts indicating that irreparable injury, loss or damage will result in delay of entry, or...and most important here...
- iii. That notice itself will precipitate adverse action before the order can be issues.

The State Bar of Michigan Family Law Council's proposal is designed to protect substantial interests of those filing a family law case.

**2. The regulation must directly and materially advance that interest.**

- a. Implicitly, MCR 3.207 recognizes that if a Defendant is tipped off that a Plaintiff has sought an ExParte Order to prevent Defendant from causing irreparable injury, loss or damage, giving the Defendant notice that protection from such harm is being sought may trigger them doing that harmful action BEFORE the Court order is entered and the Defendant served with it. To prevent this foreseeable problem, it's prudent to protect the legal process and implement reasonable steps to prevent notice to the Defendant prematurely, so that the Court has time to enter an appropriate ExParte Order and the Defendant be served with it.
- b. Of course, the Court Rule allows for due process immediately thereafter. In fact, the Court Rule requires that a detailed "Notice" be included in the ExParte Order informing the Defendant of their right

to object to the order, and directions of when and how to effectuate their objections being heard by the Court or the issue resolved by the friend of the court. **The problem is, while under MCR 3.207 (B)(3) the ExParte Order is technically in effect upon entry, it is only enforceable upon service.** Council's proposal is directly related to the substantial interests sought by both the Plaintiff and the Court, and permitted under Michigan's Court Rules; specifically, to prevent notice that may precipitate irreparable injury, loss or damage.

Even if the requisite elements of the Court Rule for an ExParte Order are met, thus satisfying the substantial interests of preventing irreparable harm under prong 1 of the Central Hudson Gas case, that substantial interest is undermined if a lawyer, trolling the court's records to solicit business, tips off the Defendant that an ExParte Order is being sought before its entry and a reasonable time for it to be served on the Defendant. This solicitation undermines the very purpose of a valid ExParte Court Order, entered after the Court has reviewed the Plaintiff's sworn-to factual allegations, and concluded that the Defendant must be restrained from certain conduct by its ExParte Order.

**3. The regulation, in this case briefly delaying an attorney's right to solicit Defendants in a family law case when a ExParte Order is sought to prevent irreparable harm, must be narrowly drawn to meet the substantial interest.**

- a. This is where many prior attempts to put reasonable limits on attorney solicitation in family law cases, fail. They are drag net rules, sweeping every type of family law case in, even though many do not involve allegations of impending irreparable harm.
- b. The proposal Council has submitted, narrowly restricts itself to family law cases where the risk of irreparable harm has been alleged, and an ExParte Order sought.
- c. Additionally, the proposed legislation makes clear that this limitation on solicitation will not continue indefinitely...something that prior opponents of such legislation have alleged can happen not only by a meritorious litigant, but someone using the rule to game the system...and it also makes clear what is is not intended to do:

- i. It does not prevent a lawyer's protected commercial speech or prevent them from providing legal information given generally.
- ii. It will not result in penalties if a lawyer inadvertently sends legal information to the public generally and it gets into the hands of a Defendant in a family law case, so long as the lawyers actions were not directed at a specific Defendant. It's specifically designed to limit solicitation to where the lawyer seeking a fee or other remuneration in a family law matter involving a request for an ExParte Order, tries to solicit a prospective new client.
- iii. It also addresses arguments that pose the ethical dilemma: what if a lawyer already has a prior professional relationship with the Defendant, or the Defendant is a member of the lawyers own family. This proposed rule exempts solicitation if there is a prior attorney-client relationship, or involves a member of the lawyer's own family.
- iv. Lastly, it can't be gamed, or go on forever. Once filed, the petitioner has a reasonable period of time...21 days... to get it served. Beyond that limited time period, a lawyer can solicit a Defendant in a family law matter for a fee or other remuneration.

Accordingly, the State Bar of Michigan Family Law Council supports this Committee's addressing harmful solicitation of family law clients, suggests the proposed statutory language stated above, and is interested in working with this Committee's members, as well as the sponsor of this legislation, in whatever way necessary to ensure that eventually, and hopefully soon, Michigan's legislature gives Plaintiff's in family law cases where ExParte relief is sought to prevent irreparable harm, a chance to get the protection the court has found that they deserve.

Respectfully Submitted,



Carlo J. Martina

Carlo J. Martina is a former Chair of the State Bar of Michigan Family Law Council, former President of the Wayne County Family Law Bar Association, former President of the Collaborative Practice Institute of Michigan, has served on various State Court Administrative Office committees, written and lectured on various family law topics for the Institute for Continuing Legal Education over the years, and testified before the Michigan Supreme Court on attorney ethics.

## **STATE BAR OF MICHIGAN FAMILY LAW COUNCIL PROPOSAL**

### **LIMITS ON ATTORNEY SOLICITATION IN FAMILY LAW MATTERS REQUESTING EX-PARTE RELIEF**

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