

**PROPOSED AMENDMENT OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT TO ADD NEW RULE 1.18 AND ITS COMMENTS AND AMEND RULE 7.3 AND ITS COMMENTS FOR CONSISTENCY**

**Issue**

Should the State Bar of Michigan support amendment of the Michigan Rules of Professional Conduct (MRPC) to add new Rule 1.18 and its comments and revise Rule 7.3 and its comments for consistency with the terminology of Rule 1.18?

RESOLVED, that the Representative Assembly approves of the proposed amendment to of the MRPC to add new Rule 1.18 and its comments and revisions to Rule 7.3 and its comments for consistency with the terminology of Rule 1.18.

**Rule 1.18 – Duties to Prospective Client**

- (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
  - (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
  - (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
    - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
    - (ii) written notice is promptly given to the prospective client.

*Comments:*

Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on

the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer

may not receive compensation directly related to the matter in which the lawyer is disqualified.

Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

*Please note that there are some deleted internal cross-references in the above.*

### Rule 7.3 ~~Direct Contact With Prospective Clients~~ Solicitation

(a) A lawyer shall not solicit professional employment from a ~~person prospective client~~ with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons 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 truthful and nondeceptive letters to potential clients known to face particular legal problems" as elucidated in *Shapero v Kentucky Bar Ass'n*, 486 US 466, 468; 108 S Ct 1916; 100 L Ed 2d 475 (1988).

(b) A lawyer shall not solicit professional employment from a ~~person 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~~ person has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation involves coercion, duress or harassment.

#### *Comment:*

There is a potential for abuse inherent in direct contact by a lawyer with a ~~person prospective client~~ known to need legal services. These forms of contact ~~between a lawyer and a prospective client~~ subject ~~the a~~ layperson to the private importuning of the trained advocate in a direct interpersonal encounter. ~~The A~~ A ~~person prospective client~~, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to evaluate fully all available alternatives with reasoned judgment and appropriate self-interest in the face of ~~the a~~ a lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

However, the United States Supreme Court has modified the traditional ban on written solicitation. *Shapero v Kentucky Bar Ass'n*, 486 US 466; 108 S Ct 1916; 100 L Ed 2d 475 (1988). Paragraph (a) of this rule is therefore modified to the extent required by the *Shapero* decision.

The potential for abuse inherent in direct solicitation ~~of prospective clients~~ justifies its partial prohibition, particularly since lawyer advertising and the communication permitted under these rules are alternative means of communicating necessary information to those who may be in need of legal services.

Advertising and permissible communication make it possible for a ~~prospective client person~~ to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting ~~the a person prospective client~~ to impermissible persuasion that may overwhelm ~~the a person's client's~~ judgment.

The use of general advertising and communications permitted under *Shapiro* ~~to transmit information from lawyer to prospective client~~, rather than impermissible direct contact, will help to assure that the information flows cleanly as well as freely. Advertising is out in public view, thus subject to scrutiny by those who know the lawyer. The contents of advertisements and communications permitted under Rule 7.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false or misleading communications, in violation of Rule 7.1. The contents of some impermissible direct conversations ~~between a lawyer and a prospective client~~ can be disputed and are not subject to third-party scrutiny. Consequently they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior family or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 7.3(a) is not applicable in those situations.

This rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for its members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of, and detail concerning, the plan or arrangement that the lawyer or the lawyer's firm is willing to offer. This form of communication is not directed to a specific ~~prospective client person~~ known to need legal services related to a particular matter. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become ~~prospective~~ clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under these rules.

### Synopsis

Technology has made it easier for members of the public to identify and solicit legal services from State Bar members. Lawyers frequently receive unsolicited invitations from strangers to provide legal services. Some of these invitations are fraudulent phishing attempts; others can be bona fide requests. ABA Model Rule 1.18 and its comment address these concerns and there is no counterpart in the MRPC.

Rule 1.18 clarifies that a lawyer has no professional obligation to such strangers. In other situations, lawyers have initial consultations with prospective clients. Rule 1.18 clarifies a lawyer's duties to such prospective clients when no attorney-client relationship results from the preliminary

communications. Rule 1.18 also provides clear guidance on how a law firm may take steps to avoid imputed disqualification.

If Rule 1.18 is adopted as recommended, Rule 7.3 and its comments would require revision inasmuch as Rule 7.3 uses the term “prospective client” in a manner that is inconsistent with proposed Rule 1.18. The subcommittee suggests revision of Rule 7.3 by changing the title to “Solicitation” (consistent with ABA Model Rule 7.3), replacing “prospective client” with “person,” and making other cosmetic changes to avoid confusion.

### Background

In keeping with its jurisdictional mandate, the Professional Ethics Committee reviewed amendments to the ABA Model Rules of Professional Conduct and identified ABA Model Rule 1.18 as providing clarification on when a lawyer’s professional obligation is triggered when receiving communications from prospective clients. To provide greater guidance to SBM members on this issue, the Professional Ethics Committee recommended amending the MRPC to include new Rule 1.18 and comments as presented above. The Professional Ethics Committee’s recommendation was reviewed and embraced by the Professional Standards Committee of the Board of Commissioners. During its July 22, 2016 meeting, the Board of Commissioners referred proposed new Rule 1.18 to the Representative Assembly for review.

Rule 1.18 is generally consistent with Section 15 of the Restatement (Third) of Law Governing Lawyers.<sup>1</sup> Restatement Section 15 is similar to Model Rule 1.18 in providing for a lawyer’s duties to a prospective client with whom the lawyer has consulted but with whom no attorney-client relationship is formed. Under subsection (1), a lawyer generally must not use or disclose confidential information gained during the course of the consultation, protect client property, and exercise reasonable care. *Id.* Subsection (2) provides that, after the consultation, a lawyer may not represent a client adverse to the prospective client in the same or substantially related matter if the lawyer has “received from the prospective client confidential information that could be significantly harmful to the prospective client in the matter . . .” Other lawyers in the lawyer’s firm may represent a client adverse to the prospective client if the lawyer is screened from any participation in the matter. *Id.* Restatement Section 15 provides:

#### § 15 A Lawyer’s Duties to a Prospective Client

(1) When a person discusses with a lawyer the possibility of their forming a client-lawyer relationship for a matter and no such relationship ensues, the lawyer must:

- (a) not subsequently use or disclose confidential information learned in the consultation, except to the extent permitted with respect to confidential information of a client or former client as stated in §§ 61-67;
- (b) protect the person’s property in the lawyer’s custody as stated in §§ 44-46; and

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<sup>1</sup> The Restatement has been cited by Michigan courts as persuasive authority in deciding legal ethics issues. E.g., *Island Lake Arbors Condo Ass’n v Meisner & Assocs PC*, 301 Mich App 384; 837 NW2d 439 (2013); *Rymal v Baergen*, 262 Mich App 274; 686 NW2d 241 (2004).

(c) use reasonable care to the extent the lawyer provides the person legal services.

(2) A lawyer subject to Subsection (1) may not represent a client whose interests are materially adverse to those of a former prospective client in the same or a substantially related matter when the lawyer or another lawyer whose disqualification is imputed to the lawyer under §§ 123 and 124 has received from the prospective client confidential information that could be significantly harmful to the prospective client in the matter, except that such a representation is permissible if:

(a) (i) any personally prohibited lawyer takes reasonable steps to avoid exposure to confidential information other than information appropriate to determine whether to represent the prospective client, and (ii) such lawyer is screened as stated in § 124(2)(b) and (c); or

(b) both the affected client and the prospective client give informed consent to the representation under the limitations and conditions provided in § 122.

The comments to proposed new Rule 1.18 are being modified to comport with the manner in which comments are presented in the MRPC (no numerical numbering of comments) and inconsistencies between the MRPC and the ABA Model Rules. The MRPC 1.0 does not include the definitions referenced in the comments to ABA Model Rule 1.18 and comment [9] of ABA Model Rule 1.18 was stricken to avoid possible confusion and as unnecessary. The comments to MRPC 7.3 are being modified for consistency and to avoid confusion with the use of the term “prospective client” in new Rule 1.18. For these reasons, the word “person” replaces “prospective client.”

The addition of Rule 1.18 to the MRPC would provide needed guidance to practitioners regarding their ethical duties to prospective clients, how to fulfill those duties and avoid imputation of conflicts, and clarify that uninvited communications from persons to a lawyer does not necessarily make them a prospective client.

### **Opposition**

None known.

### **Prior Action by Representative Assembly**

None known.

### **Fiscal and Staffing Impact on State Bar of Michigan**

None.

**STATE BAR OF MICHIGAN POSITION**  
**By vote of the Representative Assembly on September 22, 2016.**

Should the State Bar of Michigan adopt the above resolution to support amendment of the Michigan Rules of Professional Conduct (MRPC) to add new Rule 1.18 and its comments and revise Rule 7.3 for consistency with the terminology of Rule 1.18?

The above Resolution should be adopted.

(a) Yes

or

(b) No