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September 15, 2014

Via email only to:

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Michigan Senate Judiciary Committee Chairman, Senator Rick Jones
Michigan Senate Judiciary Committee Members
Senator Tonya Schuitmaker
Senator Steven Bieda
Senator Tory Rocca
State Capital
Lansing, MI 48909

Re: *Senate Bill 981*
Senate Judiciary hearing date: September 16, 2014 @ 2:30 P.M.

Dear Chairman Jones and Committee Members Schuitmaker, Bieda and Rocca:

Although I had previously provided you information regarding Senate Bill 981, I believe the following will be helpful in your consideration of this matter.

Attached please find a letter dated September 13, 2014 from John Allen, Esq. to committee member Senator Tonya Schuitmaker, outlining constitutional and policy objections to the passage of such legislation. I believe reviewing this document prior to the hearing on this matter will be helpful to you in your consideration of this matter, this further substantiates opposition to this pending legislation setting criminal penalties for solicitation in a divorce action.

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It is my hope that when this material is considered by the committee, the committee will not vote to send this legislation out of committee and to the full Senate.

Please make this material part of the public record and should you have any additional questions, please feel free to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Merrill Gordon", written in a cursive style.

Merrill Gordon

MG/mmh

Enclosure

cc: Ms. Sandra McCormick, smccormick@senate.michigan.gov
Ms. Renee Edmondson, redmondson@house.mi.gov
Ms. Kate McClure, kmclure@senate.michigan.gov
Mr. Scott Bean, sbean@senate.michigan.gov
Ms. Arika Sinnott, asinnott@senate.michigan.gov

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September 13, 2014

sentschuitmaker@senate.michigan.gov

Senator Tonya Schuitmaker
P.O. Box 30036
Lansing, MI 48909-7536

Re: **Senate Bill 981 Should be Rejected; Hearing September 16, 2014;
IMMEDIATE Action Required.**

Dear Tonya:

Thank you for taking time to speak with me about this important issue. Senate Bill 981 is a bad idea, tucked into a package of bills most of which are very good ideas. Not only is SB 981 likely unconstitutional, but also it holds the prospect of harming the very persons it seeks to protect. It requires some detailed examination to see this, and why Senate Bill 981 should be rejected. In this very busy season, I appreciate your taking the time to do that.

It is my understanding that SB 981 is part of a package of Domestic Violence Bills that includes SB 980 and 981, and House Bills 5652-5659. The hearing on Senate Bill 981 is set for hearing before the Senate Judiciary Committee next Tuesday September 16, 2014 at 2:30 PM. Prompt action is required to avoid what will likely be a very bad law.

As you know, I am a partner with Varnum Riddering Schmidt & Howlett LLP (Varnum Attorneys), with over 40 years of experience in Michigan Family Law. In the past, I have also served as Chair of the State Bar of Michigan Special Committee on Grievance, and have served as the Chair of the State Bar of Michigan Standing Committee on Professional and Judicial Ethics (the "Ethics Committee").

I also served on the ABA Ethics 2000 Advisory Committee, and chaired the Ethics and Professionalism Committee of the ABA, Trial Tort and Insurance Practice Section (TIPS) through the ABA Ethics 2000 process. Currently, I serve as the TIPS Liaison to the ABA Committee on Professionalism. In all these capacities, I have had the honor of studying in depth the issues of lawyer solicitation in SB 981.

This letter contains the views of me only, not those of the Varnum Firm, the State Bar of Michigan, the ABA, nor their Committees.

Earlier Versions before the Michigan Supreme Court

Earlier, the Michigan Supreme Court rejected other versions of a very similar proposal, when proposed as amendments to the Michigan Rules of Professional Conduct (MRPC-, sometimes called the "Ethics Rules" for Michigan Lawyers). In 2012, the Court considered proposed amendments to MRPC 7.3 (Supreme Court ADM File No. 2010-22). Much like SB 981, ADM 2010-22 originated from the State Bar of Michigan Family Law Section, in a concern over the practice of "trolling" (that is, a lawyer's using the publicly available information of Family Law court commencement filings to solicit Defendants or Respondents as prospective clients). Most of the submitted Comment Letters supported the proposal, as did a committed group of individuals. In contrast, a smaller but vocal group (including me) opposed the amendment.

After months of careful consideration, the Court rejected the proposal. Among the likely reasons were that the proposal (like SB 981) infringed important Constitutional rights of both respondents and lawyers, and that ample protections already exist within the Michigan Court Rules to accomplish the stated goals. Like SB 981, the MRPC proposal also had very likely, and very bad, unintended consequences. This letter explains more fully those reasons.

1. It is a dangerous custom to single out one area of law practice (i.e., Family Law) for specific prohibitions under the criminal law. SB 981 would impose strict criminal liability (First Offense- Misdemeanor- \$30,000 fine; Subsequent Offenses- Misdemeanor- 1 year in jail, plus \$60,000 fine). The criminal law is a strict liability, penal system. It does not rely on "fault" or "causation" to determine strict culpability; other facts such as care in the past or lack of earlier violations does not enter that finding. If you did it, it is a violation -- it is just that simple.

Moreover, any such criminal violation would certainly result in Disciplinary Proceedings against the lawyer by the Attorney Grievance Commission (AGC) before the Attorney Discipline Board (ADB). Thus, even if some violation were the result of negligence or with lack of direct intent or knowledge, nevertheless, some discipline (ranging from Informal Reprimand to full Revocation of License—see MCR 9.106) must almost always be imposed. This is why attempting to regulate the Practice of Law by the Criminal Law is such a bad idea. The real penalty is not "just" the loss the financial fine, nor even "just" the jail term. It is the loss of a career and the other jobs created by that career. Any proposed criminal penalty, to regulate what is now accepted and legal conduct, must be taken with the utmost seriousness. Momentary political popularity should not be a criterion.

It is also a bad idea to single out one area of Law Practice for statutory regulation, or criminal penalties. If SB 981 becomes law, Family Law practitioners might likely be singled out for other such criminal prohibitions or rules in the future, applicable only to Family Law matters. If "trolling" is really that bad, then the prohibitions should apply to **all** lawyers in **all** cases—something which would not likely ever be approved, and certainly would be unconstitutional. [In fact, an earlier broader proposal to amend MRPC to limit solicitation more generally was once adopted by the Michigan Supreme Court, then quickly rescinded because of protests by many clients and lawyers, and threats of constitutional challenges. Eventually that proposal was unanimously rejected and withdrawn from Supreme Court consideration. See Supreme Court ADM 2002-24.]

2. There are serious Constitutional Defects in SB 981, under Prong 2 of the *Central Hudson* Test. Like it or not, attorney solicitation is **protected commercial speech** under the U.S. Constitution, Amendment I, and correlative provisions of the several State Constitutions, including Michigan. *Central Hudson v. PSC*, 447 U.S. 557 (1980). In the comments for ADM 2010-22, the State Bar of Michigan Family Law Section correctly noted the applicability of *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), and *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466 (1988) as controlling U.S. Supreme Court Cases, all of which determine whether the restriction or prohibition upon lawyer solicitation is constitutionally permissible by applying the ***Central Hudson* 4-Prong test:**

- 1) The government must have a substantial/ compelling interest to justify the restriction, such as protecting the clients or wronged businesses (protecting the legal profession will likely not suffice);
- 2) The government regulation must further the identified substantial/ compelling interest;
- 3) The regulation must be a reasonable fit, not too broad in its results.
- 4) The regulation must be the "least restrictive means" of accomplishing the above objectives.

First, under **Prong 2 of *Central Hudson***, the "**substantial interest**" must be empirically proven with admissible evidence (competent like any other expert evidence or survey under *Davis v Frye or Daubert*). A collection (even a large collection) of anecdotal stories from Family Law attorneys does not provide that evidence to constitutional satisfaction. The law requires more. In *Went-For-It* (cited and adopted by the Family Law Section before the Michigan Supreme Court), the Florida Bar spent over \$200,000 conducting a scientifically sound survey and interview procedure to prove mass tort personal injury plaintiffs were harmed by early solicitation.

In rejecting ADM 2010-22, the Michigan Supreme Court suggested that the proponents develop like evidence. The State Bar of Michigan decided not to do that. Nothing like that appears before the legislature as part of the background of SB 981. This makes any resulting statute vulnerable to attack by anyone charged with its violation. And trust me, it will be challenged. These are lawyers you are dealing with. Such vulnerabilities also could make the Attorney Grievance Commission and Attorney Discipline Board more reluctant to pursue even convictions as violations of the MRPC.

3. Contrary to its proponents, SB 981 also has issues under the 4th Prong of *Central Hudson*, which requires that the solicitation speech restriction be the "least restrictive" measure which is effective to accomplish the stated purpose. SB 981 apply to ALL family law matters, whether or not the matter presented the concerns expressed for preventing domestic violence or dissipation of assets. Moreover, the same result could be obtained simply by sealing

the file (or even **all** Family Law files¹) until expiration of 14 days or service of process, whichever is earlier. The court has the power to do this in any case. See MCR 8.119(F)—which does require a Motion and a small additional burden on both the filing party and the court—but would have a better chance to obtain the protection desired by SB 981, and be much "less restrictive" under *Central Hudson*. Sealing such files, and **only** those files which present issues of domestic violence concern, is a much "less restrictive" means of obtaining the desired result. It also provides an opportunity for the judge (locally located with "boots on the ground") to review whether the specific case actually presents those concerns. After all, without such a sealing order, even under SB 981, the commencement of the action is still public information and easily available to any Defendant, all the more so with the advent and increase of electronic filing and internet-based information systems.

Thus, *in toto*, the Amendment fails two prongs of the *Central Hudson* tests, and is unlikely to survive a constitutional challenge.

4. The proposed Amendment will hurt those it seeks to help, because it assumes that it is always the Non-filing Party who is the evil doer. "Intentionally contact" and "directly solicit" are not well defined, and SB 981 will certainly go beyond classic "trolling" practices (e.g., who "initiated" the conversation at the social event? Is responding to that social event conversation "solicitation" if client engagement is the object? Is it "solicitation", even if the person is a "former client"? A "present client"?). If a lawyer sees a court filing adverse to a former or present client, the lawyer may likely have a duty to contact and inform them. Is that now to be a crime? These questions present substantial issues regarding "overbreadth" under the First Amendment.

With such questions not answered in SB 981, allegations of "wrongful solicitation" might become more common, if only to disqualify Defendant's chosen and preferred counsel (much the way bogus "conflict" claims have become more common for the same purpose). If adopted, the new "Rule" might deter a Michigan Attorney from engaging in any Family Law matter (even on behalf of a victim of domestic violence who was **not** the "first to file") until after the proof of

¹ Sealing all Family Law Matters is a worthy consideration. With the advent of electronic filing and internet access to public court files, every 9-year old with an iPad can read the file of their parents' divorce, and the file of the divorce of all of their friends. This is not good. But, like SB 981, such regulation of court administration is better left to the Michigan Supreme Court, not the legislature.

service is filed, just to be safe and simply to avoid any chance of a violation of this ambiguous criminal statute.

An aggressive and abusive Plaintiff, bent on domestic violence or dissipation of assets, could purposely be the "first to file" and then become the "protected" party, with a "free ride" period (until the filing party decides to file the Proof of Service).² Also, SB 981 prohibits solicitation contact until after the "Proof of Service" is filed. But it is the filing party who controls that, and could purposely delay that event for 90 days. See MCR 2.102(D). This would allow the filing party to do his or her evil for three (3) months(!), while the non-filing party would face an impossible task attempting to obtain legal advice or representation. If enacted, SB 981 could become a very formidable tool for the abuser. That makes no sense.

Such "unintended consequences" commonly occur when the legislature attempts to use the criminal law to regulate what is properly a matter for the Michigan Supreme Court and the more specific constitutional power of the judicial branch to regulate courts and lawyers. Regulation of lawyer solicitation should be done, if at all, through the MRPC, and is best when it occurs with the support of similar adoptions in other States, or with the endorsement which comes from provisions having been placed into the Model Rules of Professional Conduct by the American Bar Association. This Amendment has neither of those *bona fides*, and would put Michigan in further departure from the ABA Model Rules and laws adopted by other States.

5. When we think our only tool is a hammer, we tend to view every issue as a nail. The Criminal Law is not the solution to every problem and issue presented. Domestic Violence is a serious issue, with a deserved high public profile. It would not be wise to use limited resources to fight a losing battle over an unconstitutional statute, which will only end up being used by abusers to inflict further abuse on the very victims the legislature is attempting to protect.

Other already available tools, such as a Sealing Order under MCR 8.119(f), should be used first, to determine if that method gives the desired protection to those who need it, without amending the Criminal or other laws. Maybe ALL Family Law files should be sealed. But those determinations, if made at all, should be supported by valid, admissible evidence, and constitutional validity under *Central Hudson*. This would be a more thoughtful approach, and

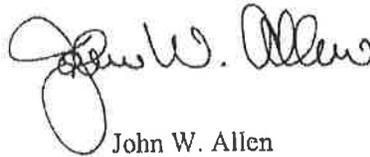
² During my 42 years' experience as a Michigan Family Law lawyer, it is common for the aggressive, abusive party if the "first filer" Plaintiff. Given their more aggressive, more controlling and more plotting nature, this is not a surprise.

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would protect not only the rights of all parties and the commercial speech of all lawyers from further intrusions, but also the interests of those Family Law Defendants and victims of domestic violence who truly need and desire it.

As always, thank you for your kind consideration.

God Bless America,

A handwritten signature in black ink, appearing to read "John W. Allen". The signature is written in a cursive style with a large, looping initial "J".

John W. Allen

JWA/jwa

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