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May 31, 2005

Hon. Clifford W. Taylor
Chief Justice
Michigan Supreme Court
Michigan Hall of Justice
925 W. Ottawa
Lansing, MI 48909

RE: ADM 2002-29 Proposed Standards for Imposing Lawyer Sanctions
ADM – 2003-62 - Proposed New Rules of Michigan Rules of Professional Conduct

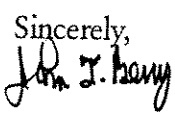
Dear Chief Justice Taylor:

At its meeting on April 16, 2005, the State Bar of Michigan's Representative Assembly considered several of the proposed Standards for Imposing Lawyer Sanctions, as published for comment by the Court. The Assembly also considered several of the published, proposed Michigan Rules of Professional Conduct.

Attached is a comprehensive report prepared by the Representative Assembly, summarizing its recommendations. We request that the Court give consideration to the comments and recommendations contained in the report.

Thank you for the opportunity to provide the Court with the State Bar of Michigan's position on these important matters. If we can provide any additional input to the Court, please let me know.

Sincerely,



John T. Berry
Executive Director

cc: Michael F. Gadola, Legal Counsel
Corbin R. Davis, Clerk
Mark Gates, Deputy Legal Counsel
Elizabeth Jamieson, Chair of the Representative Assembly

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CLERK SUPREME COURT

STATE BAR OF MICHIGAN REPRESENTATIVE ASSEMBLY REPORT TO THE MICHIGAN SUPREME COURT ON AO 2003-62 (MRPC) and AO 2002-29 (MSILS)

Introduction

In response to the American Bar Association's publication of Model Rules of Professional Conduct, the State Bar of Michigan Standing Committee on Ethics ("the Ethics Committee") issued a proposed set of revised Michigan Rules of Professional Conduct ("MRPC"). The State Bar of Michigan Representative Assembly ("the Assembly") reviewed the Ethics Committee's proposed, revised MRPC, and in November 2003 took action and issued 23 recommendations to the Michigan Supreme Court.[1] On July 2, 2004, the Supreme Court published for comment proposed MRPC (AO 2003-62), which incorporated 19 of the Assembly's 23 recommendations. The comment period was ultimately extended to June 1, 2005. On April 16, 2005, the Assembly took additional action on the proposed MRPC, resulting in this report.

In response to the Supreme Court's Order in *Grievance Administrator v Lopatin*, 462 Mich 235 (2000), the Attorney Discipline Board ("ADB") prepared proposed Michigan Standards for Imposing Lawyer Sanctions ("MSILS") because Michigan has never adopted its own Standards and instead has relied upon the American Bar Association's Model Standards. Donald D. Campbell also submitted proposed MSILS. On July 29, 2003, the Supreme Court published for comment proposed MSILS (AO 2002-29) and extended the comment period to June 1, 2005. On April 16, 2005, the Assembly took action on the proposed MSILS, resulting in this report.

It is with a solemn sense of responsibility that the Assembly, as the unified voice of more than 37,000 members of the State Bar of Michigan, issues this report regarding a lengthy and complex series of rules covering the delivery of legal services and self-governance.

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[1] http://courts.michigan.gov/supremecourt/Resources/Administrative/2002-29-StateBar.pdf

Background

Due to blizzard conditions in January 2005, the Assembly chose to postpone debate on these issues and is grateful to the Supreme Court for extending the comment period from February 5, 2005 to June 1, 2005. This allowed the Assembly to convene a panel of expert attorneys[2] who traveled around the state, presented information to, and answered questions of, over 1,000 interested lawyers.[3] Then, on April 16, 2005, the Assembly reconvened to address these substantive issues with a full, and therefore representative, body present.

With regard to the Rules, the Assembly maintains the positions outlined in its November 25, 2003 Report (including but not limited to MRPC Scope, "in writing" and "informed consent" requirements). Additionally, the Assembly requests this Court to publish a revised version of the Proposed Rules to solicit final commentary and ensure a thorough and comprehensive rewrite of Michigan's Rules. With regard to the Standards, the Assembly maintains its request that the court finalize the Rules before the Standards to ensure consistency. The Assembly respectfully requests that a revised version of the Proposed Standards be published for comment, to allow further analysis in response to the enacted MRPC.

As noted in the Assembly's prior Report, the Assembly recognizes its responsibility to provide this Court with majority and minority opinions where informed, well-reasoned opinions of Bar members are sufficiently divergent. Therefore, this report provides majority opinions (more than 50%) and, when relevant, minority opinions (more than 25% but less than a majority).

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[2] Expert panelists included: John F. Van Bolt and Mark A. Armitage (Attorney Discipline Board), Robert L. Agacinski, Robert E. Edick and Karen Q. Valvo (Attorney Grievance Commission), Donald D. Campbell (Collins Einhorn Farrell & Ulanoff), John W. Allen (SBM Grievance Committee), John T. Berry (SBM Executive Director), Joan P. Vestrand (Cooley Law School) and Hon. Elwood L. Brown (SBM Ethics Committee).

[3] Panel Discussions were hosted by the following bar associations: Grand Rapids; Detroit Metropolitan; Genesee County; Washtenaw County; Oakland County; Kalamazoo County and Ingham County.

POSITIONS REGARDING AO 2003-62 (MRPC)

MRPC 1.0.2 – Transition Provision

All engagements existing as of the effective date of the amendments shall be controlled by the law in effect at the inception of the engagement, unless otherwise agreed by both the lawyer and the client.

The Assembly unanimously voted that the Rules should include this transition provision to address the effectiveness of amended or new Rules on existing engagements.

MRPC 1.4 - Ownership and Copying of Lawyers' Files

A majority of the Assembly (57/48/0) were opposed to including a rule about file ownership within the Rules. However, a strong minority was in favor of including the following language into the Rules:

(1) A lawyer's file is owned by the lawyer maintaining the file, including ay document, film, tape or other paper or electronic media. A client ahs the fight of access to information contained in a file relating to that client's representation.

(2) The lawyer is entitled to the original, physical material in the file, unless the client has a special need or a pre-existing proprietary right in the original.

(3) When necessary for full use of a document, the client's "access" may include at least temporary custody or non-destructive use of the original document, film, tape or other paper or electronic media.

(4) Unless specifically agreed or required by law, the client is not entitled to the lawyer's internal records, such as accounting ledgers, checking account records, and "draft" statements or bills, as well as time records for lawyer's work.

(5) The client is responsible to pay the reasonable cost of copying and delivering copies of the file records.

(6) A lawyer shall have in place a "plan or procedure" governing safekeeping and disposition of "client property," including those parts of the representation file which belong to the client or for which the client has a need.

(7) Issues relating to file ownership and access, copy charges for information requests, and file destruction practices, may be described by the lawyer, and agreed by the client, in the terms of engagement or some other disclosure.

MRPC 4.2 – Communication with Party Represented by Counsel

In November 2003, the Assembly debated the language proposed by the Ethics Committee (i.e. prohibiting communications with a represented "person" rather than "party"). In response, the Assembly recommended that the Court not change the language from "party" to "person" BUT if the Court did change the language, to also provide for a law enforcement exception to the prohibition on communications with a represented "person", recognizing that U.S. and Michigan constitutional provisions govern such contacts. In response to the proposed MRPC 4.2 published for comment, the Court did not change the language from "party" to "person". Therefore, the Assembly debated whether the Rules should provide for any law enforcement exception to the prohibition on communications with a represented "party".

A majority of the Assembly (64/37/2) were opposed to the Rules including any law enforcement exception in either the Rules or the commentary. However, a minority was in favor of including the law enforcement exception. In light of the majority position, the Assembly did not address whether an exception, if included, should be in the Rule itself or the commentary.

MRPC 1.5 - Fees

A lawyer and a client may agree to a lump sum or nonrefundable fee arrangement that is earned by the lawyer at the time of engagement or at the time of the agreement, provided that the fee

agreement is in writing, signed by the client, and states that the fee is nonrefundable.

In November 2003, the Assembly recommended that the Rules "expressly permit reasonable and earned nonrefundable retainers". In response, the Court proposed subparagraph (f) (1)-(4). The Assembly now unanimously recommends substituting the above-noted language for Rule 1.5(f), to specifically provide for enforceable nonrefundable retainers that are clearly identified as such and to which the client has consented in writing.

MRPC 1.15 – Safekeeping Property

In November 2003, the Assembly recommended that the Rules provide that nonrefundable retainers be placed in the lawyer's account. In response, the Court proposed adding the last sentence to Rule 1.15(c): "[n]onrefundable fees that comply with Rule 1.5(f) are fully earned when received and should not be deposited in a client trust account". In light of the Assembly's position with regard to Rule 1.5(f), the Assembly supports the proposed language in Rule 1.15(c) but unanimously recommends that nonrefundable fees should comply with the factors set forth in the Assembly's recommendation regarding Rule 1.5(f).

AO 2003-62 (MRPC) – Publish Again For Comment

The Proposed New Michigan Rules of Professional Conduct, after consideration of comments submitted to the Supreme Court prior to the June 1, 2005 comment period, should be published for more comment.

The Assembly voted unanimously in favor of the Court publishing a revised version of the Rules for further analysis and comment to ensure a more thorough and comprehensive rewrite of Michigan's Rules. The Assembly recognizes that it is not a drafting consortium and is therefore an ineffective body for deliberating the specific verbiage of so lengthy and complex a series of Rules, a task better delegated to Sections, Committees or a Task Force similar to what has been done in other states. Additional time and review would ensure Michigan's historical leadership and prestige in the area of ethics rules.

POSITIONS REGARDING AO 2002-29 (MSILS)

MSILS 1.3 - Purpose of These Standards

MSILS 1.3 should state that the Standards are not intended to create independent grounds for determining culpability.

The proposed Standards define their purpose within the disciplinary system. However, the Assembly unanimously agreed that the Standards should also specifically state that a finding of misconduct within the disciplinary system is not intended to create independent grounds for determining culpability in a civil malpractice action.

MSILS Definitions - Knowledge

MSILS Definitions should incorporate the language proposed by the ADB defining knowledge, except that "actual knowledge" should be used instead of "knowledge".

A majority of the Assembly favored the ADB definition of knowledge throughout the Standards, noting that "actual knowledge" should be used instead of "knowledge".

MSILS Definitions - Definition of Injury and Potential Injury

"Injury" is harm to a client, the public, the legal system or the profession which results from a lawyer's misconduct. The level of injury can range from "serious" injury to "little or no" injury; a reference to "injury" alone indicates any level of injury greater than "little or no" injury.

"Potential injury" is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyers' misconduct. The likelihood and gravity of the potential injury are factors to be considered in deciding the level of discipline.

A majority of the Assembly voted in favor of specifically defining "injury" and "potential injury" within the MSILS Definitions, as proposed by the ADB.

Suspension is the removal of a lawyer from the practice of law for not less than 30 days. See MCR 9.106(2). An attorney suspended for 180 days or more is not eligible for reinstatement until the attorney has petitioned for reinstatement under MCR 9.124, has established by clear and convincing evidence the elements of MCR 9.123(B), and has complied with other applicable provisions of MCR 9.123.

A strong majority of the Assembly voted in favor of the version of MSILS 2.3 as proposed by the Supreme Court and ADB.

MSILS – Use of "Injury" within MSILS

After a finding of lawyer misconduct, potential or actual injury caused by the lawyer's misconduct should be considered by the ADB or a hearing panel as part of the process to determine whether that conduct should generally result in disbarment, suspension or reprimand in the absence of aggravating or mitigating factors unique to that case.

The Assembly unanimously agreed that injury should be considered in the first phase of the disciplinary system, when determining whether misconduct has in fact occurred, rather than only in the second (sanction) phase. This is consistent with the ADB Proposal, which is based upon ABA Standard 3.0. Injury is used throughout the Standards, including MSILS 3.0 (Generally), 4.1 (Failure to Preserve Property Held in Trust), 4.3 (Lack of Diligence), 4.5 (Lack of Competence), 6.2 (Abuse of the Legal Process), 6.3 (Improper Communications with Individuals in the Legal System), 7.0 (Violations of Other Duties Owed as a Professional), 9.2 (Aggravation) and 9.3 (Mitigation).

MSILS – Use of –Reprimand within MSILS

MSILS 4.6, 6.1 and 8.0 should provide for reprimand as a sanction when a lawyer negligently: (i) fails to provide a client with accurate or complete information [MSILS 4.6], (ii) determines whether statements or documents submitted to a tribunal are false or takes remedial action when material information is being

withheld [MSILS 6.1], and (iii) practices law in violation of the terms of a disciplinary order [MSILS 8.0].

A strong majority of the Assembly agreed that reprimand should be a disciplinary option for the three forms of misconduct that are recognized by the Rules. This is Alternative A (the ADB Version) published by the Court.

MSILS Preface - "Consent" Stipulations/Orders/Judgments of Misconduct

MSILS should not apply to consent stipulations or orders/judgments of misconduct and therefore the words, "or acknowledgment" should be deleted from the "Preface."

The Assembly unanimously voted in favor of striking consent judgments from being governed by the Standards. Similar to plea bargains in criminal cases (which are not governed by the sentencing standards), consent disciplinary stipulations are frequently based on factors outside the record for reasons not covered by the mitigation and aggravation factors within the Standards (including perceived weakness of a case, availability of the witnesses and certainty of a finding). This version was proposed to the Court by Robert Agacinski personally rather than on behalf of the AGC.

MSILS 2.6 – Admonition

MSILS 2.6 should neither define nor provide for admonition, also known as a private reprimand, as a form of non-public discipline that declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.

A strong majority of the Assembly voted against providing for admonitions within the Standards. Michigan does not currently recognize admonishments as public discipline. Admonitions are considered a warning or an agreement between the parties to close a case with an understanding that if the attorney is in trouble again, the admonishment can be used in aggravating punishment the next time. Once a formal complaint is issued, it is on the record and anyone can learn about the prosecution. The Assembly is against changing the use of admonitions in Michigan. This is the position favored by both the ADB and AGC.

MSILS – Use Of Interference/ Potential Interference With A Legal Proceeding Or The Outcome Of The Legal Proceeding Within MSILS

MSILS 6.2 and 6.3 should provide that serious/significant or potentially serious/significant interference with a legal proceeding or the outcome of the legal proceeding must be found before a lawyer may be <u>disbarred</u> for: (i) knowingly violating a court order or rule with the intent to obtain a benefit for the lawyer or another; (ii) intentionally tampering with a witness, (iii) making an ex parte communication with a judge or juror with intent to affect the outcome of the proceeding; and (iv) improperly communicating with someone in the legal system other than a witness, judge or juror with the intent to influence or affect the outcome of the proceeding.

MSILS 6.2 and 6.3 should provide that interference with a legal proceeding or the outcome of the legal proceeding must be found before a lawyer is <u>suspended</u> from the practice of law for: (i) knowingly violating a court order or rule; and (ii) engaging in communication with an individual in the legal system when the lawyer knows that such communication is improper.

MSILS 6.2 and 6.3 should provide that interference or potential interference with a legal proceeding or the outcome of the legal proceeding must be found before a lawyer is <u>reprimanded</u> for: (i) negligently failing to comply with a court order or rule; and (ii) being negligent in determining whether it is proper to engage in communication with an individual in the legal system.

A strong majority of the Assembly voted in favor of incorporating a two-prong test within the Standards that would require (1) injury or potential injury; or (2) interference or potential interference with a legal proceeding. This would be a prerequisite to the issuance of sanctions (disbarment, suspension and reprimand) pursuant to MSILS 6.2 and 6.3. This is the ADB Version.

MSILS 4.1 – Failure to Preserve Property Held in Trust

MSILS 4.1 should provide that disbarment is generally appropriate when a lawyer knowingly converts client property.

MSILS 4.1 should provide that suspension is generally appropriate when a lawyer knowingly or negligently deals improperly with client property.

A strong majority of the Assembly favored limiting disbarment under MSILS 4.1 to a knowing "conversion" of "client property" rather than a failure to hold anyone's property in trust. Neither Michigan case law nor the Rules currently refer to the phrase "failure to hold in trust". Additionally, this is consistent with the ABA Standards which set forth sanctions for misappropriation of client funds within a section addressing violations of duties to clients while sanctions for misappropriation of other people's funds are set forth within a section addressing violations of duties to third persons. This is the ADB Version.

A majority of the Assembly also favored limiting suspension to improper handling of client property that is knowingly or negligently improper. This is the ADB version. A slim minority (29) voted in favor of the broader Campbell/Supreme Court Version which would provide for suspension for the failure to hold property in trust or commingling personal property with property that should have been held in trust.

MSILS 4.3 - Failure to Avoid Conflicts of Interest

MSILS 4.3 should provide that suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

MSILS 4.3 should provide that reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

The Assembly unanimously agreed that a suspension sanction should require injury or potential injury to a client while reprimand should require the conflict to adversely affect another client and cause injury or potential injury to a

client. This is the ADB Version. The Assembly was opposed to a suspension sanction regardless of any degree of harm as proposed by the Campbell/Court Version.

MSILS 4.5 – Lack of Competence

MSILS 4.5 should provide sanctions for failing to provide competent representation to a client without reference to illegal or clearly excessive fees.

The Assembly was unanimously opposed to providing sanctions for illegal or clearly excessive fees within MSILS 4.5, which is a Standard addressing competence rather than diligence issues involving fees. This is the ADB Version, which is the "Alternative A" published by the Court.

MSILS 5.1 – Failure to Maintain Personal Integrity

MSILS 5.1 should contain the sanction provisions outlined in the ADB version, including "Alternative B" for Standard 5.13 (modified pursuant to recommendation by the SBM Special Committee on Grievance) providing for reprimand for certain criminal and other conduct.

The Assembly unanimously agreed that, consistent with the current MRPC 8.4(b), only the violation of a law that reflects adversely on a lawyer's fitness to practice should be the subject of discipline. The Assembly was opposed to expanding the Standards to provide that violation of any law is misconduct and therefore subject to discipline. This is the ADB Version.

Conclusion

This Report of Assembly Action on AO-2003-62 (MRPC) and AO 2002-29 (MSILS) is presented to the Michigan Supreme Court on behalf of the State Bar of Michigan Representative Assembly.

Dated: May 31, 2005

Elizabeth A. Jamieson
Assembly Chairperson

Lori A. Buiteweg
Assembly Vice Chairperson

Edward L. Haroutunian
Assembly Clerk