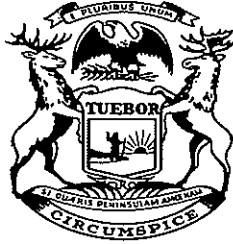


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February 24, 2011

Corbin R. Davis, Clerk
Michigan Supreme Court
P. O. Box 30052
Lansing, MI 48909

Re: ADM 2006-38
Proposed Amendments of Subchapter 9.100 et seq

Dear Mr. Davis:

On behalf of the Attorney Discipline Board, (ADB), I am submitting these comments to several proposed revisions of Chapter 9 of the Michigan Court Rules (the attorney disciplinary procedural rules) published for comment under ADM file no. 2006-38.

Prior to the revisions of subchapter 9.100 submitted to the Court in the fall of 2006 by the Attorney Grievance Commission (AGC), the Grievance Administrator and the ADB's Executive Director, together with members of their respective staffs, engaged in a series of discussions and meetings regarding many of the proposals contained in the AGC's submission. During the spring and summer of 2009, a work group appointed by the State Bar of Michigan (SBM) undertook a close examination of the proposed modifications. The ADB's Director and Deputy Director were active, voting members of that work group, as were the Grievance Administrator and the Assistant Deputy Grievance Administrator on behalf of the AGC. Finally, the Court's Administrative Counsel, Anne Boomer, has conducted joint discussions with staff members from the ADB and the AGC about these proposed modifications.

In light of these discussions over the last four and a half years, the ADB will not comment on all of these proposed rules, the majority of which are either technical in nature or have been submitted with the unanimous support of the AGC, ADB and SBM. However, as described in the memorandum submitted to the Court on April 7, 2010, by Robert Agacinski for the AGC and Janet Welch for the SBM (hereafter "AGC/SBM joint memo"), there are five key issues upon which there were substantial disagreements between the AGC and the majority of the SBM workgroup members. This letter contains the ADB's comments on those issues, followed by an additional comment to a proposal not addressed in the AGC/SBM joint memo.

I. MCR 9.104(A) - Grounds for Discipline**A. MCR 9.104(A) - Grounds for Discipline in General**

The ADB **SUPPORTS** published **Alternative B** (SBM proposal), provided that the deletion of certain grounds for discipline now listed in MCR 9.104(A) is accompanied by the addition to MRPC 8.4 of a new paragraph (f), making it professional misconduct to “*engage in any other conduct that adversely reflects on the lawyer’s fitness to practice law.*”

Taken together, these modifications to MCR 9.104(A) and MRPC 8.4 would put the substantive definitions of lawyer misconduct where most lawyers would think to look for them: in the Rules of Professional Conduct. Conceptually, it would seem to make sense to group the procedural rules governing the disciplinary agencies in Chapter 9.100 of the Court Rules and to group the ethical rules governing lawyer conduct in the aptly titled Michigan Rules of Professional Conduct. For example, no reason has been articulated to include duplicative language prohibiting conduct “prejudicial to the administration of justice” in both MCR 9.104(A)(1) and MRPC 8.4(c). Taken together, the proposal to remove archaic language (such as conduct exposing the legal profession to “obloquy”) from the court rules governing discipline procedure, coupled with the addition of broad language in MRPC 8.4 prohibiting conduct that adversely reflects on the lawyer’s fitness to practice law, is clearly intended to update and reorganize. The ADB does not view the modifications in version B as narrowing the scope of the ethical obligations of Michigan lawyers, or as an attempt to weaken the ability of the AGC or the Judicial Tenure Commission (JTC) to enforce the obligations imposed upon lawyers and judges.¹

B. MCR 9.104(A)(5) Grounds for Discipline - [Criminal Conduct]

The ADB **SUPPORTS Alternative B** (SBM proposal). MRPC 8.4(b) defines violations of the criminal law as professional misconduct and grounds for discipline “*where such conduct reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer.*” That language is based upon Rule 8.4(b) of the ABA’s Model Rules of Professional Conduct which make it professional misconduct for a lawyer to “*commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.*” In fact, the comment to Michigan’s MRPC 8.4(b) and the comment to Model Rule 8.4(b) are identical, including the comment that “*Although a lawyer is personally answerable to the entire criminal law, lawyers should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.*” The Court has, relatively recently, quoted with approval the commentary to Standard 5.1 which also states: “*Although a lawyer is personally answerable to the entire criminal law, a*

¹ It has been suggested that modification of the grounds for discipline currently listed in MCR 9.104(A) could impinge on the JTC’s ability to recommend discipline for judges. However, violation of MCR 9.104(A) is not currently listed among the “Grounds for Action” in MCR 9.205(B). Those grounds for action against a judge are specifically enumerated as 1) misconduct in office and, 2) “conduct in violation of the Code of Judicial Conduct or the *Rules of Professional Conduct.*” MCR 9.205(B)(2) (emphasis added). This simply reinforces the point that lawyers and judges, including the drafters of rules, look to the Rules of Professional Conduct for guidance.

lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.” *Grievance Administrator v Fink*, 462 Mich 198 (2000).

Michigan’s MCR 9.104(5), however, directs that it is misconduct and grounds for discipline for an attorney to engage in “conduct that violates a criminal law of a state or of the United States.” In *Grievance Administrator v Deutch and Howell*, 455 Mich 149; 565 NW2d 369 (1997)², two cases involving impaired driving convictions, the three-Justice lead opinion held that if the Grievance Administrator institutes a proceeding under MCR 9.104(5) for any act or omission described in a criminal statute, a hearing panel must find that professional misconduct has been established, “regardless of whether these convictions, on their face, reflect adversely on the attorney’s honesty, trustworthiness or fitness as lawyers under MRPC 8.4(b).” 455 Mich at 153. The other three justices participating (one concurring and two dissenting) read the rules to require an adverse reflection on fitness to practice before the lawyer crime would constitute professional misconduct.³ To date, the Board and panels have read MCR 9.104(A)(5) after *Deutch* to override MRPC 8.4(c) and strip panels, the Board and the Court of the authority to determine that specific conduct which may have been denominated as “criminal” by the legislature does not constitute professional misconduct. In other words, notwithstanding the particularized inquiry into fitness and other relevant factors articulated by Justice Boyle – and the plurality – in *Deutch*, the most common contemporary reading of *Deutch* requires a hearing panel to disregard the nature of the offense and the circumstances when a judgment of conviction is filed by the Grievance Administrator pursuant to MCR 9.104(A)(5) and enter a finding of misconduct. The *de facto* adjudication with respect to misconduct occurs when the Grievance Administrator decides whether or not to file a formal proceeding. Thus, lawyers could be disciplined for possession of fireworks, “foul hooking” a salmon,

² In the AGC/SBM joint memo, the summary of the AGC’s position includes the assertion that “In the [*Deutch and Howell*] opinion by Justice Weaver, the Court overturned the Board’s policy of dismissing all first time drunk driving offenses” This assertion was also made to the Court in the AGC’s brief in support of an application for leave to appeal in *Grievance Administrator v Dianne Baker*, ADB Case No. 07-189-JC (ADB 2010), lv den 486 Mich 1040 (2010). In response to a request from the ADB’s Executive Director to identify any cases evidencing such a policy, the AGC’s counsel replied by email on April 1, 2010, that “I think that you are misinterpreting the statement in my brief - it is referring to the internal case history of *Deutch and Howell*.” To be clear, the ADB has never had a policy of dismissing first-time drunk driving cases.

³ Justice Boyle concurred in the lead opinion but also wrote that the Court, in adopting the Rules of Professional Conduct in 1988, “did not indicate that any misdemeanor conviction, however attenuated, would constitute misconduct” but, rather, contemplated a case-by-case inquiry into whether a particular criminal violation reflected on the lawyer’s fitness to practice law. Thus, in *Deutch*, three of the six Justices participating believed that not all criminal conduct constituted professional misconduct, but only criminal conduct reflecting adversely on a lawyer’s honesty, trustworthiness, or fitness in other respects should be considered professional misconduct. Indeed, even the lead opinion, in one passage, seems to indicate that not all criminal conduct translates ineluctably to professional misconduct. *Deutch*, 455 Mich at 162 n 11 (even when a proceeding is based on a conviction, “neither the hearing panels nor the board are absolved of their duty, under [the rules], to make appropriate and sufficient findings of fact to determine in each case whether professional misconduct is committed”).

or walking a dog without a leash, and other conduct criminalized by legislative bodies, irrespective of the circumstances. See concurring opinion of ADB Members Kienbaum and Solak in *Grievance Administrator v David A. Reams*, 06-180-JC (ADB 2008).

The opposing positions of the AGC and SBM are summarized on pages five and six of the AGC/SMB joint memo. The ADB agrees with the SBM that the conflicting provisions of MCR 9.104(A)(5) and MRPC 8.4(b) may be appropriately addressed by deleting MCR 9.104(A)(5). The MRPC qualifier that criminal conduct warranting professional discipline should be related to fitness as a lawyer is not prohibitively restrictive and would not prohibit a finding that "fitness" may be impacted by drug or alcohol offenses.

C. MCR 9.104 Grounds for Discipline - [multiple acts showing lack of fitness]

With the exception of Board members Carl E. Ver Beek and William L. Matthews, whose separate statement appears below, the ADB **SUPPORTS Alternative B** (SBM proposal).

The AGC's published comment in ADM 2006-38 states:

The Commission recommends inclusion of a new rule under MCR 9.104(B) allowing prior discipline to be charged in the formal complaint. The inclusion of a respondent's prior disciplinary record is to show a pattern of misconduct and goes to the overall issue of fitness of a recidivist respondent.

Presentation of a respondent's prior disciplinary record is **required** under the existing rules upon a finding of misconduct and it is unquestioned that a pattern of misconduct is relevant to the question of fitness of a recidivist respondent. Moreover, the proposed rule says nothing about including "prior discipline" in a complaint. As pointed out by the SBM, the proposed rule is apparently intended to permit the introduction of prior conduct - not necessarily prior *misconduct* - before the fact-finder has received any evidence pertaining to the currently alleged acts or omissions. As written, the proposed rule provides no guidance as to how or when it would be employed, or which prior "acts or omissions" could be included in a formal complaint. Instead, the rule states only that "prior acts and omissions of the lawyer are admissible."

Again, a respondent lawyer's prior acts and omissions are admissible under the existing rules. First, the Administrator may offer evidence to a hearing panel of the respondent's prior crimes, wrongs or acts for all purposes recognized under Michigan Rule of Evidence 404(b), which applies in a discipline proceeding, MCR 9.115(I)(1); *Grievance Administrator v Murdoch Hertzog*, 06-76-JC; 06-77-GA (ADB 2009), as well as in both criminal and civil actions, *Lewis v LeGrow*, 258 Mich App175 670 NW2d 675 (2003). One of the problems with the proposal, as interpreted by its proponents, is its uncertain purpose. As an evidentiary approach it is unnecessary and would contravene MRE 404. As a substantive law change it would, again, violate MRE 404, but also notions of constitutional fairness embedded in that Rule.

In 1981, this Court held in *In re Daggs*, 411 Mich 304, 314-315; 307 NW2d 66 (1981), that “only after a decision on the merits of the alleged misconduct is evidence of prior misconduct relevant for the formulation of an order of discipline.” Similarly, Rule 11(D)(5) of the ABA’s Model Rules for Disciplinary Enforcement provides:

- (5) Information concerning prior discipline of the respondent shall not be divulged to the hearing committee until after the committee has made a finding of misconduct unless that information is probative of issues pending in the matter.

However, once the misconduct charged in the complaint has been established by a preponderance of the evidence in a Michigan discipline proceeding, MCR 9.115(J)(2) directs that a hearing panel must conduct a separate hearing to determine the appropriate discipline and MCR 9.115 further provides:

In determining the discipline to be imposed, any and all relevant evidence of aggravation or mitigation shall be admissible, including previous admonitions and orders of discipline, and the previous placement of the respondent on contractual probation.
MCR 9.115(J)(3). (Emphasis added)

Furthermore, it is firmly established that a respondent’s prior disciplinary offenses, a pattern of misconduct and multiple offenses are recognized as aggravating factors affecting the level of discipline and that evidence in support of those aggravating factors is admissible.⁴

Neither the proposed rule nor the proponent’s commentary identifies a problem that this rule is designed to correct, nor does the language of the rule itself provide a clear picture of how it would be used.

Dissenting statement of Carl E. Ver Beek, joined by William L. Matthews - I respectfully disagree with my colleagues on this issue. I **support** the proposed Rule 9.104(B) contained in **Version A** (AGC proposal). Specifically, I support the AGC’s request for a broader ability to plead other acts as part of the initial formal complaint. Such complaints are considered and ruled upon by lawyers who are able to decide the relevance and probative value of prior conduct. Consequently, if the AGC pleads irrelevant or inapplicable prior conduct, that will be recognized by the hearing panel.

However, there are circumstances in which prior conduct (which may or may not result in a finding of professional misconduct) is probative. Such information should be made available to the panel at the outset. For example, if there are other pending allegations of misconduct which have not been consolidated for hearing in a single complaint, that should be disclosed to the panel. Or if, for example, neglect

⁴ Standards 9.22(a), (c) and (d) of the ABA Standards for Imposing Lawyer Sanctions, to be followed by the hearing panels and the ADB. *Grievance Administrator v Lopatin*, 462 Mich 235 (2000).

of client matters is charged in the complaint and respondent has demonstrated a pattern of neglect culminating in prior discipline, that information is germane to the panel's inquiry and should be disclosed.

The discipline system in Michigan is a self-regulating professional process which requires transparency to assure both the public and the profession that it operates with a good measure of common sense. I believe that MCR 9.104(B), as proposed by the AGC, fosters that concept by providing a way for hearing panels to consider whether respondent's prior acts are pertinent to the questions of misconduct as well as the appropriate sanction. Hearing panel members are trusted with this information at the sanction phase under MCR 9.115(J)(3). I believe panelists can be trusted with this information at the initial stage of the proceeding.

Board member William L. Matthews joins in this statement.

II. MCR 9.112 - Ability to Obtain Medical Records

The ADB **SUPPORTS Alternative B** (SBM proposal). The proposed language in Alternative A would allow the Grievance Administrator to request that a respondent waive any privileges "where there is a genuine issue as to material fact containing the physical, mental or emotional condition of respondent." The ADB agrees with the SBM comments in the AGC/SBM joint memo, page 11.

The ADB agrees that the Grievance Administrator should have appropriate tools to obtain information on the underlying causes of alleged misconduct and to make an assessment as to whether the lawyer is currently fit to represent the public. However, it has not been shown that the Administrator cannot use the existing rules to obtain medical and psychological information in appropriate situations.

III. MCR 9.115 - Mutual Disclosure of Relevant Information

The ADB **SUPPORTS** the proposed amendment [MCR 9.115(F)(4)(ii)] which states:

Within 21 days following the filing of an answer, the Administrator and respondent shall exchange the names and addresses of all persons having knowledge of relevant facts and comply with reasonable requests for 1) non-privileged information and evidence relevant to the charges against the respondent and 2) other material upon good cause shown to the chair of the hearing panel.

The proposed language to allow mutual pre-trial disclosure of non-privileged information "relevant to the charges against the respondent" employs language similar to that found in Rule 15(A) of the ABA's Model Rules for Lawyer Disciplinary Enforcement. (The proposed rule does not go so far as the ABA Model Rule and the procedural rules of more than 30 other jurisdictions to allow civil-like discovery in the form of depositions and/or interrogatories.) Similar language regarding the exchange of names of persons known to have relevant information is commonly found in other jurisdictions. The proposal to require the exchange of non-privileged information relevant to the charges is, as characterized by the Bar, a modest change involving the minimum level of pre-trial disclosure found in virtually every other jurisdiction.

IV. MCR 9.121 - Procedure to Obtain Medical or Psychological Examination

The ADB **SUPPORTS Alternative B** (SBM proposal). The ADB agrees with the AGC and the SBM that the current rule regarding the procedures to be followed when the Grievance Administrator has alleged mental or physical incapacity under MCR 9.121(B) needs substantial revision. However, for the reasons set forth by the State Bar in the AGC/SBM joint memo, Alternative B is a more workable solution.

V. MCR 9.128 [Limitations on Assessment of Costs]

Under MCR 9.115(A), the rules governing practice and procedure in a non-jury civil action apply to a proceeding before a hearing panel, except as otherwise provided in Sub-chapter 9.100. Under MCR 2.114(E) and (F), and MCR 2.625(A)(2), a party, including a public entity, may be subject to monetary sanctions for conduct enumerated in MCR 2.114. Similar sanctions may be imposed in federal litigation under Rule 11(B) of the Federal Rules of Civil Procedure. The acts or omissions for which a party or attorney may be sanctioned under state and federal rules may not necessarily rise to a level of professional misconduct requiring investigation or discipline proceedings, but may result in an order for costs or other monetary sanction as a deterrent or as a means of reimbursing the opposing party.

As acknowledged by the AGC, it does not appear that sanctions have been ordered against either the Administrator or a respondent in a Michigan discipline proceeding since the current system was created in 1978. As noted by the ADB in a 2009 order affirming a hearing panel order denying sanctions,

An examination of the Board's records gives us no basis to disagree with the Administrator's assertion that sanctions have never been imposed in discipline proceedings in Michigan. In fact, we have found fewer than 10 requests for sanctions by a party, two of which were by the Attorney Grievance Commission.⁵ [*Grievance Administrator v Doyle O'Connor*, ADB Case 07-125-GA (Order Affirming Hearing Panel Denying Sanctions, November 13, 2009).]

Notwithstanding the expressed concern by the AGC that the burden of sanction motions would "bog down the system and would result in the need for increased staff at the AGC," the fact that fewer than ten motions have been filed since 1978, under rules that do not prohibit either party from seeking sanctions, would appear to cast doubt on that concern. Finally, although earlier comments have focused on the desire to prohibit motions for monetary sanctions under MCR 2.114, the proposed rule would also strip hearing panels and the Board of the authority granted to tribunals to impose monetary sanctions for violations of MCR 2.114.

As a matter of policy and public perception, the ADB questions the need for a rule that would exempt lawyers engaged in prosecuting or defending attorney discipline cases from sanctions applicable to all other lawyers engaged in civil litigation in Michigan.

⁵ Footnote omitted. In the omitted footnote, the Board quoted from the requests for sanctions under MCR 9.114(E) submitted to the Board by two prior Grievance Administrators. The Board's order denying sanctions in *O'Connor* is appended as **Attachment A**.

STATE OF MICHIGAN ♦ ATTORNEY DISCIPLINE BOARD

February 23, 2011

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VI. ADB Comment to MCR 9.115(F)(5) - Discipline by Consent

The ADB **OPPOSES** the proposal to delete the requirement that "*at the time of the filing [of a consent discipline stipulation] the Administrator shall serve a copy of the proposed stipulation upon the complainant.*"

A hallmark of Michigan's discipline system is the degree to which a complainant has rights to be informed and to participate in various stages of the discipline process.⁶ No rationale for the deletion of the notice requirement to complainants when a stipulation for consent discipline is filed has been offered nor has it been suggested that the current notice requirement has created any problems.

The members of the Attorney Discipline Board join me in thanking the Court for its consideration of these comments and we trust that the Justices will not hesitate to contact the Board if they have any questions about the views expressed.

Respectfully submitted,


William J. Danhof, Chairperson

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Robert L. Agacinski, Grievance Administrator, Attorney Grievance Commission
Cynthia C. Bullington, Assistant Deputy Administrator, Attorney Grievance Commission
Kent J. Vana, Chairperson, Attorney Grievance Commission
Janet Welch, Executive Director, State Bar of Michigan
Paul J. Fischer, Executive Director, Judicial Tenure Commission

⁶ A complainant must be notified of the rejection of a request for investigation [MCR 9.112(C)(1)(a)] or the dismissal of an investigation by the AGC [MCR 9.114(D)]. Once a complaint has been filed with the ADB, the complainant is entitled to a notice of the initial hearing [MCR 9.115(G)] and complainants have the right to petition the ADB for review [MCR 9.118(A)(1)] or to file an Application for Leave to Appeal with the Supreme Court [MCR 9.122(A)(1)].

STATE OF MICHIGAN

Attorney Discipline Board

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ATTORNEY DISCIPLINE BOARD

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GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v

Case No. 07-125-GA

DOYLE O'CONNOR, P 32141,

Respondent

ORDER AFFIRMING HEARING PANEL ORDER DENYING SANCTIONS

Issued by the Attorney Discipline Board
211 W. Fort St., Ste. 1410, Detroit, MI

Respondent has filed a petition seeking review of the hearing panel's order denying sanctions pursuant to MCR 2.114. Petitioner has also filed a petition for review requesting "a ruling from the Board that it does not have the authority to sanction counsel by the imposition of attorney fees pursuant to MCR 2.11[4](E) or MCR 2.625(A)(2)." The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118.

With respect to the respondent's petition for review of the panel's January 9, 2009 order denying his motion for sanctions, we cannot conclude that the decision of the panel is clearly erroneous. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002).

The Administrator's petition for review seeks a general ruling as to the applicability of MCR 2.114 in discipline proceedings notwithstanding the fact that the Administrator prevailed below. No violation of that rule was found by the panel and no sanctions were imposed. An examination of the Board's records gives us no basis to disagree with the Administrator's assertion that sanctions have never been imposed in discipline proceedings in Michigan. In fact, we have found fewer than 10 requests for sanctions by a party, two of which were by the Attorney Grievance Commission.¹ Though the Administrator asserts that a ruling is needed, we are not persuaded that this is so, or that we should decide this question when it is not necessary to the disposition of a case. This Board is a judicially-created agency without the power to grant declaratory or injunctive relief.

¹ See *Grievance Administrator v Leonard R. Eston*, DP 7/84, April 7, 1987 Brief in support of Motion for Sanctions, p 1: "MCR 9.115(A) makes applicable to these proceedings 'the rules governing practice and procedure in a nonjury civil action.' Accordingly, Petitioner seeks sanctions, including costs and attorney fees, from Respondent and/or his counsel pursuant to MCR 2.114(E)." See also, *Grievance Administrator v James J. Rostash*, 02-108-GA, February 16, 1995 brief, at p 5: "MCR 9.115(A) is a court rule which states that, except as otherwise provided, the rules governing practice and procedure in a nonjury civil action apply to proceedings before a hearing panel. . . . MCR 2.114(E), MCR 2.114(F) and MCR 2.625(A)(2) and MCL 600.2591 are provisions of law that permit a hearing panel to impose sanctions for frivolous claims and defenses."

Grievance Administrator v James A. Tucker, 94-12-GA (ADB 1995), lv den 449 Mich 1206 (1995). Moreover, our affirmance of the panel's order denying sanctions renders the Administrator's petition for review moot. *Commercial Union Ins Co v Liberty Mut Ins Co*, 426 Mich 127, 139; 393 NW2d 161 (1986).

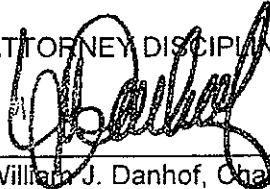
NOW THEREFORE,

IT IS ORDERED that the hearing panel's order denying sanctions is **AFFIRMED**.

IT IS FURTHER ORDERED that the Administrator's petition for review is **DENIED** for the reasons set forth above.

ATTORNEY DISCIPLINE BOARD

By:



William J. Danhof, Chairperson

Dated: November 13, 2009

Board members William J. Danhof, Thomas G. Kienbaum, Andrea L. Solak, Carl E. Ver Beek, Craig H. Lubben, Rosalind E. Griffin, M.D., and James M. Cameron, Jr., concur in this decision.

Board Member William L. Matthews, C.P.A., and Sylvia P. Whitmer, Ph. D, did not participate.