

ELDER LAW AND DISABILITY RIGHTS SECTION

February 26, 2010

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RE: MRPC 3.3(b)

To whom it may concern:

The Elder Law and Disability Rights Section of the State Bar of Michigan during our February 6, 2010 council meeting unanimously agreed to submit comments in regard to the proposed changes to the MRPC 3.3(b).

We oppose the suggested changes because they would, presumably unwittingly, make it virtually impossible for lawyers to comply with their ethical obligations. We have no objections to the rationale proposed for the rule and would support a narrowly tailored revision that met that rationale in a manner that does not create the problems detailed below.

The rule as written for Michigan would burden all types of lawyers, but elder law and disability rights attorneys would be particularly disadvantaged.

The rationale given is as follows:

Preserving Integrity of Adjudicative Process. *Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating, or otherwise unlawfully communicating with a witness, juror, court official, or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence, or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure, if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding. See Rule 3.4*

The rule as written goes far beyond ABA Model Rule:

(b) If a lawyer knows that the lawyer's client or other person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to an adjudicative proceeding involving the client, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

This would create unreasonable monitoring burdens on lawyers, would make conflict checks unreliable, and would require representative agreements that disclaim any expectations of confidentiality.

In the proposed rules, the lawyer need not be representing the client in the proceedings in question. The lawyer would be required to monitor all proceedings, presumably in any jurisdiction, that a client may be involved in. If the lawyer was told something in confidence that implicates criminal or fraudulent conduct related to that proceeding, the lawyer must disclose it. Perjury is certainly a criminal act, so if the lawyer learned something in confidence that indicates a false statement to a proceeding the lawyer is not involved in, but a client is, that must be disclosed. There is virtually no way to be sure that any confidential statement will never be relevant in demonstrating a possible criminal or fraudulent act in a proceeding. Client A admits a criminal act. The lawyer agrees to represent B in a family law matter, but B is later charged for the act A committed. The rule would require disclosure, especially if A provided false testimony without the lawyer's knowledge outside of any representation by the lawyer. How could the lawyer predict who would be falsely charged with the crime in conducting conflict checks for future clients?

The national version appears less because it only applies to proceedings in which the lawyer represents a client:

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Adjudicative proceedings extend well beyond criminal and civil trials to matters such as protective proceedings. The rule, if applied as written, would be extremely problematic.

Imagine Ann is accused of breach of fiduciary duties. If Ann did in fact breach his fiduciary duties, this is often fraudulent or criminal conduct. Any lawyer who unwittingly facilitated the breach is already required to take steps under the current parts of MRPC 3.3. Ann might well hire a new lawyer to defend himself, especially one well versed in criminal law. Normally, of course, a lawyer cannot disclose any confidential remarks in a criminal trial except, as allowed within constitutional bounds, to address perjury. The crime is the subject of the criminal proceedings but is not conduct related to the proceeding. The duty in a breach of fiduciary claim is related to the subject matter of the proceedings. The rule would require disclosure of the facts involving any true breach learned by the lawyer, even if this could subject

the client to future criminal actions. If clients realized this, they would logically forego representation or choose a lawyer who is unlikely to be sharp enough to realize the true facts.

Consider another example involving fiduciaries: Donna has been the conservator or representative payee (Social Security) of Edward, her son, a developmentally disabled adult. Donna became a bit confused and used some funds intended for Edward in repairing the house where she and Edward both live. Donna realizes that she is no longer up to the job and Fern, her daughter, volunteers to replace her. Fiona hires a lawyer to assist her and explains what has happened. What Donna had done is considered fraudulent because Edward received no ownership interest to reflect his expenditure. The rule would require Fern's lawyer to disclose this, even though Fiona did all of this to protect her family, not expose them to legal risks.

The Elder Law and Disability Rights Section is concerned that this rule change would have severe and unpredictable deleterious effects:

- It would make it harder for attorneys to act as counsel in fiduciary matters because they would be subject to great risk.
- Professional liability coverage would rise dramatically to cover the risks, further raising the cost of legal assistance.
- Potential clients would have to pay more or seek unqualified or oblivious lawyers.
- Representative agreements would need to be complicated to reflect the greater chance that the lawyer might be forced to disclose confidences.
- Clients would not be willing to talk as freely about past behaviors, including behaviors of other family members.
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Representing a client charged with breach of fiduciary duties would be especially difficult. Conflict checks would be greatly complicated, because lawyers would need to screen to discover whatever client confidences could be placed at risk by agreeing to represent some new client. The goal of avoiding attorney participation in perjury or other deceptive activity that might compromise the administration of justice, which is already addressed in the current rule, should be pursued in a manner that does not place attorneys in an untenable position.

Thank you for your time and consideration of the Section's comments.

Elder Law and Disability Rights Section

/s/ Don L. Rosenberg
Chair