

p 517-346-6300 June 29, 2011  
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Lansing, MI  
48933-2012

RE: ADM File No. 2011-05 – Proposed Amendments of Rules 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.9, 1.13, 1.14, 1.16, 1.17, 3.2, 4.1, 4.3, 5.2 and 8.4 of the Michigan Rules of Professional Conduct

Dear Clerk Davis:

At its June 10, 2011, meeting, the Board of Commissioners of the State Bar of Michigan considered the above rule amendments published for comment. The Board of Commissioners voted unanimously to adopt the position and comments of the State Bar's Standing Committee on Professional Ethics, as expressed in the attached memorandum, as the position of the State Bar. The position of the Standing Committee itself was unanimous. While the Board does not categorically reject the concept of elevating language from comment to rule status, it believes that the package published for comment introduces ambiguities and inconsistencies into the Michigan Rules of Professional Conduct rather than clarifying them.

Because of the breadth and detail of the Standing Committee's position, which the Bar has adopted as its own, I would like to offer you in this instance background on the members of the Standing Committee who unanimously arrived at this position. Collectively, the committee members have more than fifty years' experience on the committee and include representatives from large and small firms, a state and federal prosecutor, a solo practitioner, and two full-time law professors. Several members have professional ethics as the exclusive or primary focus of their legal work. Their names and professional affiliations are provided as an attachment.

I would like to remind the Court that the ongoing position of the State Bar on desirable changes to the MRPC, including changes to rules within the package published for comment under ADM 2011-05, continues to be the cumulative set of positions adopted by the Representative Assembly of the State Bar of Michigan in November 2003, May 2005, and March 2010.

We thank the Court for its publication of the proposed amendment. Please contact me with any further questions.

Sincerely,



Janet K. Welch  
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court  
W. Anthony Jenkins, President

## MEMORANDUM

**TO:** Public Policy, Image, and Identity Committee

**FROM:** Standing Committee on Professional Ethics

**DATE:** May 25, 2011

**RE:** **ADM File No. 2011-05 – Proposed Amendments of Rules 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.9, 1.13, 1.14, 1.16, 1.17, 3.2, 4.1, 4.3, 5.2 and 8.4 of the Michigan Rules of Professional Conduct**

The State Bar of Michigan Standing Committee on Professional Ethics (the “Committee”) met on Friday, May 13, 2011, at a specially-called meeting in order to review and vote to take positions on proposed changes to the Michigan Rules of Professional Conduct (the “Rules”) reflected in ADM File No. 2011-05. Except where noted, all votes were unanimous by the quorum of eight members present at the meeting.

### General Comments:

The proposed amendments contemplate moving portions of language currently in the commentary into the Rules, taking language that is currently intended as guidance and transforming it into language for the breach of which a lawyer can be disciplined. The Committee believes such an approach would be unique among all of the jurisdictions that have adopted some version of the ABA Model Rules and, if enacted, would magnify the extent to which Michigan’s rules differ from the ABA Model Rules, thereby simultaneously marginalizing the utility of Michigan’s case law construing its rules for application elsewhere and diminishing the usefulness of other jurisdictions’ jurisprudence in Michigan in this area. In addition, in some instances where portions of commentary on a subject have been carved out and placed in the rule, the language that remains in the commentary has been rendered less clear and less helpful by the deletions.

Where the Court adopts proposed changes, the Committee suggests that close attention be given to whether each statement is intended to be directive or merely suggestive. Because the commentary is intended as advisory, it uses “should” and “should not” rather than “shall” and “shall not,” which language clearly reflects compulsory statements. Moving “should” and “should not” language into the Rules creates an uncertainty about whether the statement is intended as mandatory or advisory. To the extent that the Court intends a mandatory statement or prohibition, the words “should” and “should not” should be changed to “shall” and “shall not.” “May not” creates a similar ambiguity and should be replaced with “must not” if the statement is intended as mandatory.

## Specific Comments:

### **Rule 1.1 Competence**

Comment: The Committee opposes the proposed amendment.

Rationale: The Committee believes the proposed language is intended to create an exception to the general requirements of competence and preparation adequate to the circumstances, but because the term “emergency” is not defined and word “should” rather than “shall” is used, the proposed rule change is likely to create confusion.

Suggested alternative: If the Court adopts the proposed amendment, the Committee suggests in place of the proposed sentence insertion of the following language (taken from the third paragraph of the commentary):

In an emergency, a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance shall be limited to that reasonably necessary in the circumstances.

### **Rule 1.2 Scope of Representation**

Comment: The Committee opposes the proposed amendment.

Rationale: Because the proposed language pertains to communication between lawyer and client, it would be better placed, if at all, in Rule 1.4. The Committee believes the language is confusing and does not provide sufficient guidance to educate about what is being proscribed. In addition, adoption of the additional paragraph would mark a further departure from the ABA Model Rule.

### **Rule 1.3 Diligence**

Comment: The Committee opposes the proposed amendment.

Rationale: The amendment pertains to communication between the lawyer and client which is better addressed by Rule 1.4 and would represent a further departure from the ABA Model Rule. The proposed language originates from a commentary paragraph addressing when an existing representation *concludes* and yet as incorporated in the Rule would seem to impact when a client-lawyer relationship is *established*. If the intent is to place the lawyer in control of declaring when a client-lawyer relationship exists and edging toward a requirement that such a declaration be in writing in order for such a relationship to exist, it would mark a major shift in the Rules. Heretofore, the Rules have been silent about what establishes a lawyer-client relationship, leaving that question to substantive law to determine based upon individual circumstances in a given case. If what’s intended is simply noting an ability to limit the scope of representation, the language would be more appropriate in Rule 1.2.

## **Rule 1.4 Communication**

Comment: The Committee opposes the proposed amendment.

Rationale: The proposed language is too broad as it generally refers to withholding “information” from the client, a term that is not defined or qualified, thereby giving no guidance about what types of information cannot be withheld. Additionally, this language may conflict with the latitude afforded a lawyer in Rule 1.2(a) (“A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of the client...”), which would seem to imply an ability to take such steps without obtaining client consent in advance.

Suggested alternative: If enacted, the word “solely” or “only” should be inserted between the word “client” and the word “to” because there could be instances where the lawyer’s conduct in withholding information may serve the client’s interests as well as the lawyer’s interest.

## **Rule 1.5 Fees**

Comment: The Committee opposes the proposed amendment, by a vote of 6 to 2.

Rationale: The first sentence may conflict with a lawyer’s ability to limit the scope of representation as authorized by Rule 1.2. The meaning of new paragraph (b) is unclear as several terms are not defined and, as a result, are likely to create confusion.

## **Rule 1.6 Confidentiality of Information**

Comment: The Committee opposes the proposed amendment of the rule, but approves in the commentary striking the first sentence of the second paragraph under the heading “Withdrawal.”

Rationale: The proposed sentence inserted before paragraph (c) creates confusion by not cross-referencing exceptions included in other rules besides Rule 1.6, including Rules 1.13 and 3.3. The first paragraph in the commentary under the heading “Dispute Concerning Lawyer’s Conduct” as presently written provides useful guidance about how to limit disclosure to what is reasonably necessary to thwart the harm that would result from nondisclosure. However, placing a portion of that language in paragraph (c)(5) would likely create confusion.

Suggested alternative: The Committee would insert the word “reasonably” between “secrets” and “necessary” in the first line of paragraph (c)(5) and delete the proposed second sentence.

## **Rule 1.7 Conflict of Interest: General Rule**

Comment: The Committee opposes the proposed amendment.

Rationale: The proposed language is unnecessary and confusing. The proposed paragraph (c) uses the new phrase “business interests” without defining it, leaving unanswered how this differs from the lawyer’s “own interests” already used in paragraph (b). Also undefined is what is meant by “affect” the lawyer’s representation of a client. Where representation of multiple clients in a single

matter takes place in a criminal setting, the proposed paragraph (d) adds the additional requirement of a “minimal” adverse effect to the requisites that already exist in paragraphs (b)(1) and (2) without giving guidance about what a “minimal” adverse effect is.

Suggested alternative: If paragraph (c) is adopted, consider inserting “adversely” between “to” and “effect.”

#### **Rule 1.9 Conflict of Interest: Former Client**

Comment: The Committee opposes the proposed amendment.

Rationale: The language to be included in proposed new paragraphs (c) and (e) pertains to procedural matters – specifically, who would carry the burden of proof in a motion to disqualify a lawyer and how a judge should handle a motion to disqualify predicated on an imputed disqualification resulting from a lawyer’s move from one firm to another. The Committee believes these matters should be addressed, if at all, in court rules pertaining to motions to disqualify.

#### **Rule 1.13 Organization as Client**

Comment: The Committee agrees with the concept of including a reference to a governmental organization, but opposes amending the Rule to include the proposed sentence in paragraph (a) and the new paragraph (b).

Rationale: The additional language proposed to be added in paragraph (a) is unnecessary in the sense that Rule 1.2(a) addresses communication with a client pertaining to decisionmaking. The Rule as written clearly communicates the lawyer’s duty to governmental clients. The second sentence of new paragraph (b) provides no guidance about what is required or what is proscribed.

Suggested alternative: The Committee proposes to include the phrase “including a governmental organization” in the first sentence of paragraph (a) after the word “organization.”

#### **Rule 1.14 Client Under a Disability**

Comment: The Committee opposes the proposed amendment.

Rationale: The proposed new paragraph (c) as worded is contrary to the legal duties of a fiduciary under existing Michigan law and does not reflect the current state of the law regarding persons with disabilities. Such phrases as “should ordinarily,” “often must act,” and “may have an obligation” do not give clear guidance about what is required or what is proscribed.

### **Rule 1.15 Safekeeping Property**

Comment: The Committee opposes the proposed amendment.

Rationale: The proposed amendment to paragraph (g) is unclear. If the harm sought to be rectified is preventing delay, Rule 1.15(b)(3) already requires prompt delivery and rendering a full accounting upon request. The commentary as written provides helpful guidance.

### **Rule 1.16 Declining or Terminating Representation**

Comment: The Committee opposes the proposed amendments to paragraphs (a), (c), and (d).

Rationale: The proposed amendments are already addressed elsewhere in the Rules. The language should remain in the commentary for guidance.

### **Rule 1.17 Sale of Law Practice**

Comment: The Committee agrees with the proposed amendment with the following modifications: (1) change “participating” at the beginning of the first new sentence to “sell or purchase,” and (2) delete the last new sentence that begins with “[h]owever.”

Rationale: For the most part, the proposed language serves to clarify the ethical duties of lawyers when selling or buying a law practice. However, use of the word “participating” in the first sentence may create confusion and, therefore, encompass conduct that does not pertain to the actual “sale” or “purchase” of a law practice. The language of the Rule makes it clear that it pertains to the sale or purchase of a law practice and that the individual, piecemeal sale of individual files is not ethically permissible. The last sentence of the proposed language should remain in the commentary for guidance.

### **Rule 3.2 Expediting Litigation**

Comment: The Committee opposes the proposed amendment.

Rationale: The language of the Rule is clear and already precludes “delay” for the mere purpose of delay. The first proposed sentence may conflict with Rule 1.2(a) (“A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of the client...”). The second proposed sentence provides no guidance about what the import is of determining that delay in litigation is not a “legitimate interest” of a client. The language of the commentary to the Rule should remain unchanged as it provides useful guidance.

### **Rule 4.1 Truthfulness in Statements to Others**

Comment: The Committee opposes the proposed amendment.

Rationale: The proposed language fails to address circumstances where silence is required by other Rules, such as Rule 1.6, and provides no guidance about when silence would be deemed equivalent

to making a statement. The addition of this language would render Michigan's rule unique amongst the jurisdictions that have adopted a version of the ABA Model Rules.

Suggested alternative: The Committee proposes the Court consider the adoption of the ABA Model Rule 4.1, which includes as a paragraph (a) the current language in Michigan's Rule 4.1 and a paragraph (b) that articulates when failures to disclose are prohibited and cross-references Rule 1.6:

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

### **Rule 4.3 Dealing With an Unrepresented Person**

Comment: The Committee opposes the proposed amendment.

Rationale: The proposed new paragraph (a) is overbroad as it appears to encompass more than legal advice.

Suggested alternative: The Committee proposes the Court consider the adoption of the ABA Model Rule 4.3, which includes the concept of not giving legal advice to unrepresented persons:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

### **Rule 5.2 Responsibilities of a Subordinate Lawyer**

Comment: The Committee opposes the proposed amendment.

Rationale: Because it speaks about the supervisor's assumption of responsibility as an option by using "may," the proposed language could be construed as inappropriately lessening the supervising lawyer's ethical duty to a subordinate lawyer that is articulated in the existing Rule 5.1(c).

Suggested alternative: The Committee recommends that, to the extent clarifying language is needed, it be added to Rule 5.1, which describes the ethical duties of a partner or supervisory lawyer.

### **Rule 8.4 Misconduct**

Comment: The Committee opposes the proposed amendment.

Rationale: The proposed language refers to “legal” rather than “ethical” responsibilities of lawyers who hold public offices. The phrase “legal responsibilities” is vague and the entire sentence gives no guidance about what is required or proscribed. While the statement itself may be true, such language should not be included in the Rules.

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