

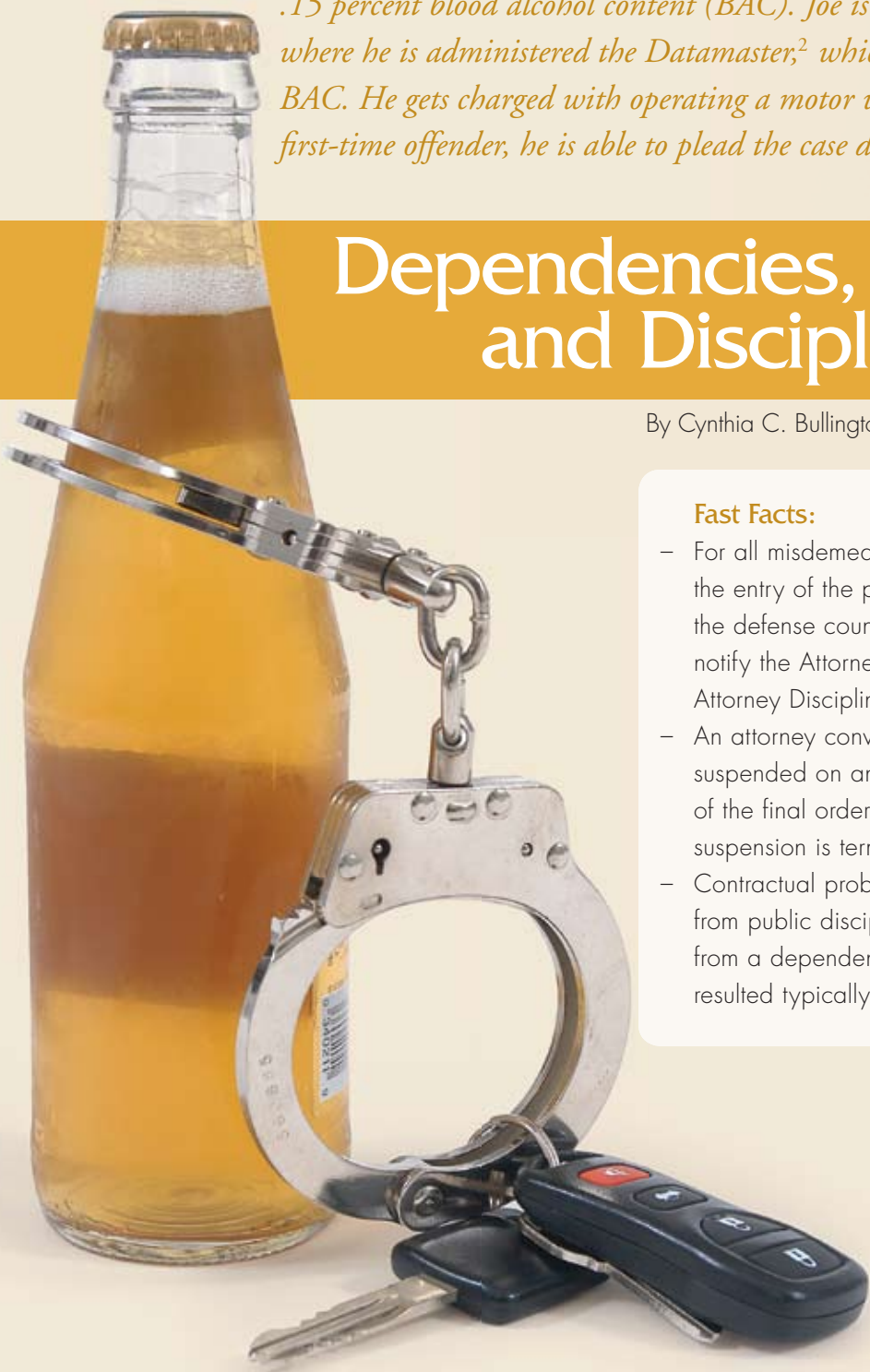
*Let's call him "Joe." Joe is having a great time at the summer golf outing sponsored by his local bar association.<sup>1</sup> It's hot, and he and his pals are enjoying the ice-cold beers brought around by the golf course staff. At the clubhouse where the lawyers gather afterwards, Joe drinks a few cocktails, just to be sociable. When Joe drives home, a police officer sees a little wobble, as Joe's tires edge over the fog line. Or let's say Joe's driving is perfect, but he has a taillight out. Either way, he gets pulled over. Joe tells the officer he hasn't been drinking, but the preliminary breath test shows a .15 percent blood alcohol content (BAC). Joe is arrested and taken to the station where he is administered the Datamaster,<sup>2</sup> which returns results of .16/.16 percent BAC. He gets charged with operating a motor vehicle while intoxicated. As a first-time offender, he is able to plead the case down to driving while impaired.*

## Dependencies, Disabilities, and Discipline

By Cynthia C. Bullington

### Fast Facts:

- For all misdemeanors and felonies, within 14 days of the entry of the plea or a verdict, the convicted attorney, the defense counsel, and the prosecutor must each notify the Attorney Grievance Commission and the Attorney Discipline Board of the conviction.
- An attorney convicted of a felony is immediately suspended on an interim basis until the effective date of the final order of discipline, unless the interim suspension is terminated on motion.
- Contractual probation is available as a diversion program from public discipline when the convicted attorney suffers from a dependency and the conduct would not have resulted typically in a lengthy suspension or disbarment.



This is where Joe's path intersects the disciplinary process. The prosecutor, the defense attorney, and Joe himself must notify the Attorney Grievance Commission (AGC) and the Attorney Discipline Board (ADB) of the conviction within 14 days of the entry of the plea or verdict.<sup>3</sup> Sometimes, a lawyer will assume that the reporting requirement is satisfied if someone else has made the report. Nope. The prosecutor, the defense attorney, and Joe—all three of them—separately bear an obligation to report. Another common mistake is to suppose that the reporting requirement takes effect when the sentence is entered. No, the plea or verdict is the point at which a report must be made. Even pleas entered pursuant to MCL 333.7411 must be reported, because conviction occurs on entry of a guilty verdict or on the acceptance of a plea.<sup>4</sup>

After receiving notification that Joe was convicted of a misdemeanor offense,<sup>5</sup> the AGC staff reviews the material and determines whether to initiate an investigation.<sup>6</sup> Some types of offenses will not typically result in an investigation, e.g., hunting violations. Generally, the AGC staff will begin an investigation for misdemeanor convictions evidencing dishonest, assaultive, or fraudulent conduct, or when the possibility exists that a lawyer suffers from a substance dependency.<sup>7</sup> As the Michigan Supreme Court has explained, the consideration is whether the conviction may call into question the lawyer's honesty or fitness to practice.<sup>8</sup> *"It is the duty of every attorney to conduct himself or herself at all times in conformity with standards imposed on members of the bar as a condition of the privilege to practice law.* These standards include, but are not limited to, the rules of professional responsibility and the rules of judicial conduct that are adopted by the Supreme Court."<sup>9</sup>

The AGC currently investigates convictions for misdemeanor driving offenses involving the use of mind-altering substances, including alcohol, illegal drugs, or prescriptions. The goal is to determine whether the respondent is in the beginning stages of a dependency. If a dependency exists, steps must be taken to protect clients and the administration of justice from potential harm resulting from lawyer misconduct. In such circumstances, an investigation begins with a request for investigation issued in the name of the grievance administrator. The request for investigation will demand that certain information be provided, including the police report and a substance abuse assessment. The information provided by the respondent, as well as information gained during the independent investigation by the AGC staff, is used to determine whether the respondent suffers from a substance dependency.

In its investigation, the AGC staff seeks to determine whether this is a first-time conviction, whether the lawyer has a substance dependency, and whether there are aggravating factors.<sup>10</sup> If it is a first offense by a lawyer with no dependency and no aggravating factors, the practice of the AGC is to close the file and caution the respondent to

act in compliance with the law. When a lawyer is not dependent, but aggravating factors exist, the lawyer will be admonished.<sup>11</sup>

What about a lawyer who *does* suffer from a dependency? Perhaps the lawyer has been arrested and convicted, like Joe. Or perhaps the lawyer's drinking has not yet led to a conviction. Let's talk about another lawyer, and let's call her "Sara." Sara was capable and well liked, but she was drinking during the workday and embarrassing herself in court. The local judges reached out to Sara, and asked the State Bar Lawyers and Judges Assistance Program (LJAP) to supervise an intervention. Sara attempted to maintain sobriety, but was unable to do so. She started neglecting her clients. One of the judges then brought the matter to the attention of the AGC.

Under such circumstances, fellow practitioners have a reporting obligation pursuant to MRPC 8.3(a).<sup>12</sup> Similarly, judges have reporting obligations concerning lawyer misconduct.<sup>13</sup> For example, an appearance by a lawyer before a tribunal while intoxicated falls within the category of conduct that should be reported.

If a lawyer suffers from a dependency, the AGC attempts to divert the respondent into contractual probation.<sup>14</sup> Contractual probation is an agreement between the respondent and the AGC. A respondent may choose to tell others that he or she is on contractual probation, but the AGC will disclose neither the probation nor its terms.

The AGC has developed standardized contracts that are used when entering into a contractual probation agreement with a respondent. Some of the standard terms include a two-year term, abstinence, compliance with criminal probation requirements, notification of other arrests, etc. Other terms of a contractual probation vary, depending on the needs and circumstances of the lawyer. For instance, there might be monitoring by LJAP or other forms of therapy, attendance at Alcoholics Anonymous (AA)/Narcotics Anonymous (NA)-type meetings, or group therapy meetings. Approximately 69 lawyers are currently on contractual probation.

If a contractual probation is successful, no further action is taken by the AGC. This is true even if an OUIL (operating under the influence of liquor) conviction was the event that began the process.

The disposition is not public and will not be published in the *Michigan Bar Journal*. However, if the lawyer engages in unrelated misconduct in the future, the contractual probation can be used by the ADB as an aggravating factor in the formulation of discipline,<sup>15</sup> in the same manner that an admonishment is nonpublic unless there is subsequent misconduct.



The disciplinary process is concerned with ensuring that lawyers are not only ethical, but able to represent the public and appear before the courts free of active dependencies and with any disabilities under control.

Sometimes, a respondent refuses to enter into contractual probation. And, unfortunately, some who have accepted contractual probation fail to comply with its terms. In these situations, the ADB begins public disciplinary proceedings, which may be initiated by (1) a formal complaint pursuant to MCR 9.115, (2) involuntary transfers to inactive status pursuant to MCR 9.121, or (3) judgment of conviction proceedings pursuant to MCR 9.120.

A formal complaint, which is a public document, is the most common vehicle for the imposition of discipline. After a formal complaint is filed under the name of the grievance administrator, the ADB conducts adversarial proceedings to determine whether and to what extent professional discipline is imposed. Less familiar are the proceedings that lead to involuntary transfer to inactive status and the proceedings that follow the filing of a judgment of conviction.

Proceedings may be initiated under MCR 9.121(A) when the lawyer has been judicially declared incompetent or has been involuntarily committed. Under 9.121(B), the grievance administrator may allege in a complaint that a lawyer has become incapacitated to practice law because of a dependency and mental or emotional disabilities. In such circumstances, a hearing panel will have the lawyer examined by qualified medical experts designated by the ADB.<sup>16</sup> If determined to be incapacitated pursuant to MCR 9.121(A) or (B), the lawyer is transferred to inactive status for an indefinite period and until further order of the ADB.

Judgment of conviction proceedings begin with the filing of a certified copy of the judgment, which constitutes conclusive proof of professional misconduct.<sup>17</sup> It is then up to the respondent to show cause why discipline should not be imposed.<sup>18</sup> At the hearing, questions as to the validity of the conviction, alleged trial errors, and the availability of appellate remedies are not considered.<sup>19</sup>

Once misconduct has been established, the Michigan Supreme Court requires<sup>20</sup> that the American Bar Association's Standards for Imposing Lawyer Sanctions (ABA Standards) be used to determine the degree of discipline.<sup>21</sup> The ABA Standards are applied in two stages: The first-stage analysis involves a consideration of the ethical duty violated, the lawyer's mental state, and harm. Once these factors have been determined, the second stage involves an examination of any factors in aggravation and mitigation, and any other factors that may make the results of the foregoing analytical process inappropriate for a stated reason.<sup>22</sup>

A conviction involving substance abuse during the commission of an offense will typically result in an order of discipline placing the respondent on public probation or a reprimand with conditions. An emotional disability or substance dependency may constitute mitigation.<sup>23</sup> Aggravating factors may exist, warranting increased discipline of a suspension. For example, a lawyer may possess prior discipline. Or a lawyer may have chosen not to answer or appear (this refusal typically earns a suspension of at least 180 days).<sup>24</sup>

Conditions relevant to the misconduct may be imposed as part of the discipline.<sup>25</sup> In a matter involving substance abuse, the conditions imposed by a hearing panel are generally curative measures, such as requiring therapy or attendance at AA/NA-type meetings. A respondent must verify compliance with conditions. Failure to adhere to imposed conditions may result in a show-cause proceeding initiated by the grievance administrator. Failure to adhere can also affect the respondent's ability to be reinstated to the practice of law following a suspension.

Discipline is issued against respondent lawyers to ensure the protection of the public, the courts, and the legal profession.<sup>26</sup> These orders are public and are published in the *Michigan Bar Journal*. The types of discipline range from public probation to revocation of license (disbarment).<sup>27</sup>

The disciplinary process is concerned with ensuring that lawyers are not only ethical, but able to represent the public and appear before the courts free of active dependencies and with any disabilities under control. With Joe, the AGC concluded that the incident was isolated, and closed his file while cautioning him concerning his duty to comply with the laws. Sara was transferred to inactive status, and a receivership proceeding was begun concerning her client files.<sup>28</sup> The AGC hopes to address such issues before active harm has resulted not only to the public, the courts, and the legal profession, but to the lawyer as well. If you are a lawyer with a dependency or suffering from an emotional crisis, the AGC urges you to call the State Bar Lawyers and Judges Assistance Program.<sup>29</sup> ■

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## FOOTNOTES

1. A fair number of drunk-driving convictions involve conduct occurring at bar association events or office holiday parties.
2. The Datamaster is an alcohol test instrument administered at a police station to test the level of alcohol in a person's system.
3. MCR 9.120(A).
4. MCR 9.120(B)(1).
5. If Joe had been convicted of a felony, he would have been immediately suspended on an interim basis until the effective date of his final order of discipline, unless the ADB terminated the interim suspension on his motion. MCR 9.120(B)(1).
6. In 2007, a total of 3,293 grievances were filed; of that number, 130 files were based on misdemeanor convictions of attorneys: 5 disorderly conduct, 6 drug offenses, 4 domestic violence, 1 PPO violation, 12 OUIL, 75 OWI, 2 UBAL, 9 reckless driving; and 16 other.
7. MCR 9.104(5) specifically targets transgressions of the criminal law, while MRPC 8.4(b) focuses on conduct that reflects adversely on a person's honesty, trustworthiness, or fitness as an attorney, including but not limited to violations of the criminal law. The blanket prohibition of criminal conduct protects the professional from the appearance of impropriety and hypocrisy, while also attempting to protect the judicial system and the public by ferreting out undeserving officers of the court. MRPC 8.4(b) is a more direct prohibition against conduct that would affect an attorney's legal practice, such as theft, or other conduct that undermines one's trustworthiness and, therefore, one's ability to effectively serve as a fiduciary. While the two prohibitions are not mutually exclusive, they are distinct and target different conduct. *Grievance Adm'r v Deutch*, 455 Mich 149, 165; 565 NW2d 369 (1997).
8. "A lawyer is a professional 'twenty-four hours a day, not eight hours, five days a week.'" *In re Grimes*, 414 Mich 483, 495; 326 NW2d 380 (1982), quoting *State v Postorino*, 53 Wis 2d 419, 193 NW2d 1 (1972). "We cannot stress too strongly the responsibility of members of the bar to carry out their activities, both public and private, with circumspection." *Deutch, supra* at 169, quoting *Grimes, supra*.
9. *Deutch, supra* at 157, quoting MCR 9.103(A). (Emphasis in the original.)
10. Aggravating factors may include such factors as lying to the police, an unusually high BAC, or prior, unrelated discipline or admonishments.
11. Following the conclusion of an investigation, the AGC may issue an admonishment with the consent of the respondent. MCR 9.114(A)(2).
12. MRPC 8.3(a). "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."
13. Code of Judicial Conduct, Canon 3(B) "A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware."
14. MCR 9.114(B), which is currently limited to dependency situations. The AGC has submitted a proposed change to the Court for an expansion of the contractual probation program.
15. MCR 9.115(J)(3).
16. MCR 9.121(B)(1).
17. MCR 9.120(B)(2).
18. "Hearing panels have the discretion to issue orders of discipline under MCR 9.115(J)(3) that effectively impose no discipline on respondents. Such an order, however, can only be issued after a finding of misconduct under MCR 9.115(J)(1) and (2), and after both parties have an opportunity to present 'any and all relevant evidence of aggravation or mitigation' under MCR 9.115(J)(3)." *Deutch, supra* at 169.
19. MCR 9.120(B)(3).
20. *Grievance Adm'r v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000).
21. *Grievance Adm'r v Che A. Karega*, 2002 ADB 00-192-GA (Attorney Discipline Board Opinion).
22. *Grievance Adm'r v Ralph E. Musilli*, 2000 ADB 98-216-GA (Attorney Discipline Board Opinion).
23. ABA Standards for Imposing Lawyer Sanctions (Amended 1992), Standard 9.32(i), available at <[http://www.adbmich.org/download/ABA%20STANDARDS%20\(1992\).pdf](http://www.adbmich.org/download/ABA%20STANDARDS%20(1992).pdf)> (accessed March 30, 2008).
24. *Grievance Adm'r v Peter Moray*, 1987 ADB Case Nos. DP 143/86; DP 157/86; *Grievance Adm'r v Deborah Carson*, 2001 ADB Case Nos. 00-175-GA; 00-199-FA (Attorney Discipline Board Opinions).
25. MCR 9.106.
26. MCR 9.105.
27. This article has addressed the situation in which a lawyer's primary challenge lies in the realm of substance abuse or substance dependency. Experience also teaches that these problems are present in the lives of lawyers who commit very serious breaches of their obligations to clients, and for whom the discipline is primary based on those acts of misconduct.
28. Joe and Sara are not real individuals, but are representative of issues faced by the disciplinary system.
29. For more information about the State Bar Lawyers and Judges Assistance Program, visit <<http://www.michbar.org/generalinfo/ljap/>> or call the confidential helpline at (800) 996-5522.