

Use of Reprimand within MSILS:

**MSILS 4.6
Lack of Candor**

**MSILS 6.1
False Statements, Fraud and Misrepresentation to a Tribunal**

**MSILS 8.0
Practice of Law in Violation of an Order of Discipline**

**STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 16, 2005**

- (a) 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].
- (b) MSILS 4.6, 6.1 and 8.0 should state that reprimand is generally not an appropriate sanction when a lawyer engages in fraud, deceit, false statements or misrepresentation toward a client or tribunal or practices law in violation of the terms of a disciplinary order.

Synopsis

The Supreme Court version proposes an Alternative A and B for MSILS 4.6, 6.1 and 8.0, addressing whether reprimand is an available sanction. Alternative A (ADB version) provides for reprimand as an available sanction. Alternative B (Campbell version) states that reprimand is generally not an appropriate sanction.

ADB Version

The ADB version provides for reprimand as a lesser sanction for a lawyer's negligent actions.

Campbell Version

The Campbell version states that reprimand is "generally not appropriate" as an available sanction when a lawyer engages in fraud, deceit, false statements or misrepresentation toward a client or tribunal or practices law in violation of the terms of a disciplinary order.

MSILS 1.3

Purpose of These Standards

STATE BAR OF MICHIGAN POSITION By vote of the Representative Assembly on April 16, 2005

Should MSILS 1.3 state that the Proposed Standards are not intended to create independent grounds for determining culpability?

- (a) Yes
- (b) No

Synopsis

The Supreme Court Version does not specifically state that the Standards "are not intended to create independent grounds for determining culpability" as proposed by the ADB version.

Supreme Court Version (also Campbell Version)

The Supreme Court Version includes commentary to that the Standards are designed for use in imposing a sanction or sanctions following the entry of a finding of misconduct pursuant to MCR 9.115(J). These Standards are designed to promote fairness, predictability and continuity in the imposition of sanctions. They are also designed to provide a focus for appellate challenges concerning the appropriate level of discipline imposed upon a lawyer.

ADB version

The ADB provides the following commentary in support of its version:

These Standards are designed for use in imposing a sanction or sanctions following a determination by preponderance of the evidence or acknowledgement that a member of the legal profession has violated a provision of the Michigan Rules of Professional Conduct or subchapter 9.100 of the Michigan Court Rules. Descriptions in these Standards of substantive disciplinary offenses are not intended to create independent grounds for determining culpability. These Standards are designed to permit flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct, while also promoting consideration of all factors and their appropriate weight, and consistency in the imposition of disciplinary sanctions for the same or similar offenses.

**MSILS 2.6
Admonition**

**STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 16, 2005**

MSILS 2.6 should define and 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) Yes
- (b) No

Synopsis

The Supreme Court version provides 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. This is consistent with the ABA Standards.

ADB & Campbell Versions

Neither the ADB nor the Campbell version provide for admonition. Campbell's version focuses on reprimand, suspension and disbarment as available forms of discipline. Historically, admonitions have been private and have not been a traditional form of discipline because they are done by the AGC only (pursuant to MCR9.106(6)). The ADB acknowledges that, as the adjudicative arm of the discipline system, it does not have authority to impose or adopt admonition standards and therefore defers to the AGC and Supreme Court. More specifically, the ADB Drafting Notes state:

The Board's decision not to propose standards for admonitions. The ADB has not included the admonition standards in the text of its proposed standards. The Board does not have the experience the Commission has with regard to admonitions. The AGC sees all cases from intake to the stage of dismissal, admonition, formal proceedings or other disposition. It is in a better position to determine what the appropriate standards should be – assuming the Court decides that admonitions should be covered by standards at all.

No AGC comments have been published identifying its position on admonitions.

MSILS 4.1
Failure to Preserve Property Held in Trust

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 16, 2005

MSILS 4.1 should provide that disbarment is generally appropriate when a lawyer knowingly:

- (a) Fails to preserve property held in trust. [*Supreme Court and Campbell version*]
- (b) Converts client property. [*ADB version*]
* * * * *

MSILS 4.1 should provide that suspension is generally appropriate when a lawyer:

- (a) Fails to hold property in trust or commingles personal property with property that should have been held in trust. [*Supreme Court and Campbell version*]
- (b) Knowingly or negligently deals improperly with client property. [*ADB version*]

Synopsis

The Supreme Court version suggests that sanctions are generally appropriate for violation of MRPC 1.15, Safekeeping Property. The Supreme Court version refers to "property held in trust" while the ADB version states "client property".

Both proposed versions of MSILS 4.1 are quite similar, but have subtle and important distinctions. Proposed § 4.11 for both versions have scienter requirement, one appearing to be more stringent, the ADB version which sanctions malfeasance for a "knowing conversion of client property", as opposed to the Supreme Court/Campbell version, which sanctions, "knowing failure to preserve property held in trust."

Supreme Court/Campbell proposed §4.12 pertains to any property held in trust or commingled with personal property that should have been held in trust, where the ADB version is concerned with knowingly or negligently dealing improperly with client property, only.

Supreme Court Version (also Campbell Version)

The Supreme Court version has broader application with regard to what property a lawyer is required to preserve. The Supreme Court version refers to "property held in trust". The Supreme Court version provides sanctions for 'failure to preserve' which is also broader than the ADB version proposing sanctions for 'conversion' or 'negligence'.

ADB Version

The ADB version more narrowly refers to "client property" and proposed sanctions for 'conversion' and 'negligence'.

Campbell Version II

Mr. Campbell issued a supplemental commentary proposing additional revisions, primarily to achieve consistency with Michigan case law:

- 1) “Disbarment” is replaced with “Revocation”.
- 2) The standard for suspension adds, "but does not act with the knowledge required under 4.11" [qualifying for disbarment].
- 3) The standard for suspension also adds "for knowingly or negligently" and "dealing with client property in general"

MSILS 4.3
Failure to Avoid Conflicts of Interest

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 16, 2005

MSILS 4.3 should provide for suspension when:

- (a) A lawyer knowingly violates MRPC 1.8 (c)-(j) or knows of a conflict of interest and does not seek to obtain consent after consultation with the client.
- (b) A lawyer knows of a conflict of interest and does not make a full disclosure to the client of the possible effect.

* * * * *

MSILS 4.3 should provide for reprimand when:

- (a) A lawyer engages in a conflict of interest in violation of the MRCP 1.7, 1.8 or 1.9(a) or (b) but does not knowingly violate the rules.
- (b) A lawyer is negligent in determining whether the representation of a client may adversely affect another client or be materially affected by the lawyer's own interests.

Synopsis

Both the Supreme Court and ADB versions recommend reprimand, suspension or disbarment for varying degrees of a lawyer's failure to obtain "informed consent". However, the ADB version provides for suspension when a lawyer knows of a conflict but does not disclose the possible effect to the client. The Supreme Court version provides for suspension when a lawyer does not consult with and seek to obtain consent from a client. The Supreme Court version is broader.

The ADB version provides for reprimand when a lawyer negligently creates a conflict of interest. The Supreme Court version provides for reprimand for unknowingly creating a conflict of interest. The Supreme court version is broader.

Supreme Court Version (also Campbell version)

The Supreme Court version recommends suspension when a lawyer does not consult with the client and seek to obtain consent, unlike the ADB version which only requires lack of disclosure of the possible effect of the conflict. Reprimand is

recommended for conflict of interest violations even if a lawyer doesn't know that a rule is being violated, unlike the ADB version which requires negligence.

Attorney Discipline Board Version

Suspension is recommended for failure to disclose the possible effect of the conflict to a client (as opposed to consulting with and seeking consent from a client as proposed by the Supreme Court). Reprimand is recommended for negligently creating a conflict (as opposed to creating a conflict and unknowingly violating the rules (as proposed by the Supreme Court).

MSILS 4.5

Alternative A -- Lack of Competence

Alternative B -- Charging Illegal or Clearly Excessive Fees

STATE BAR OF MICHIGAN POSITION

By vote of the Representative Assembly on April 16, 2005

- (a) MSILS should provide sanctions for illegal or clearly excessive fees in addition to (not to the exclusion of) MSILS 4.5 Lack of Competence.
- (b) MSILS should provide sanctions for failing to provide competent representation to a client without reference to illegal or clearly excessive fees.

Synopsis

The Supreme Court version proposes two separate and exclusive versions of MSILS 4.5. Alternative A (Lack of Competence) is consistent with the ADB version. Alternative B (Charging Illegal or Clearly Excessive Fees) is consistent with the Campbell version.

ADB Version

The ADB version (Alternative A) provides sanctions for a lawyer's failure to provide competent representation without specific reference to fees.

Campbell Version

The Campbell version does not address a lawyer's failure to provide competent representation but focuses specifically on illegal or excessive fees in violation of MRPC 1.5.

MSILS 5.1
Failure to Maintain Personal Integrity

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 16, 2005

MSILS 5.1 should contain the sanction provisions outlined in the:

- (a) Campbell version, including "Alternative A" for Standard 5.13 providing for reprimand for certain criminal conduct.
- (b) 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.

Synopsis

Criminal Conduct. In Standard 5.12(a), Campbell's version recommends suspension for criminal conduct by a lawyer when it reflects adversely on the lawyer's fitness to practice to any degree. However, "Alternative A" of Standard 5.13 would seem to recommend reprimand even where there is no adverse reflection upon the lawyer's fitness to practice.

Dishonesty. The Supreme Court published Campbell's version for comment. It heightens the recommended sanctions for dishonest conduct above those recommended by the ABA and the ADB by deleting "intentional" from proposed Standard 5.11(b), deleting "knowing" before "misrepresentation" in 5.12(b), and not expressly providing for reprimand for any dishonest conduct. The ADB's draft comments suggest that the original ADB proposed 5.13(b) be revised to read as follows (strikeouts and underlines show deletions and additions from the original ADB proposal):

a lawyer knowingly engages in any conduct that involves dishonesty, fraud, deceit, or ~~knowing~~ misrepresentation and that adversely reflects on the lawyer's fitness to practice law to a slight degree; or . . .

Mishandling of Property. The Supreme Court published Campbell's version in its entirety, which does not specifically identify the lawyer's mishandling of property but instead provides sanctions for "criminal conduct", "misappropriation", "theft" or "conduct involving dishonesty". Campbell's version would also deal with lawyer mishandling of third party (i.e., non-client) property in Standard 4.1. The ADB version treats sanctions for this conduct entirely in Standard 5.1 and expressly provides recommended sanctions at each level (disbarment, suspension, and reprimand).

Discriminatory Mistreatment of Persons. The Supreme Court published Campbell's version in its entirety, providing sanctions for violation of current MRPC 6.5(a) [proposed MRPC 6.6(a)]. The ADB version does not propose sanction standards for violations of this Rule of Professional Conduct.

Discourteous/Disrespectful Conduct Toward Tribunal. The Supreme Court published Campbell's version in its entirety, providing sanctions for violation of MRPC 3.5(c) Impartiality and Decorum of the Tribunal. The ADB version does not address violations of MRPC 3.5(c).

Supreme Court Version (also Campbell Version)

No comments regarding the version published by the Supreme Court exist with regard to the proposed Standards for criminal and dishonest conduct in published Standard 5.1.

Both the published and the ADB versions propose standards dealing with lawyer mishandling of third party (i.e., non-client) property held by a lawyer in a fiduciary capacity (e.g., funds held by a lawyer in his or her capacity as a club treasurer). Campbell's version treats this conduct together with failure to preserve client funds in Standard 4.1. Campbell's version recommends treating "failure to preserve property held in trust" under a single Standard (Standard 4.1). Campbell's version also provides standards for criminal conduct including "misappropriation", "theft" or "conduct involving dishonesty" and thus would also reach some mishandling of client property under this Standard as well as 4.1.

The Standards, as proposed by the Supreme Court, provide standards for violations of MRPC 6.5, 6.6 and 3.5 and recommend severe sanctions. This version provides for disbarment when such conduct aims "to gain an advantage in the litigation for the lawyer or another" and suspension when such mistreatment occurs "without the purpose of gaining an advantage".

ADB Version

The ADB's lengthy draft comment on the Campbell version published for comment discusses what the ADB views as substantive and drafting problems with the proposed Standard. Some of these comments are quoted or summarized below.

Criminal Conduct. The ADB draft comments state, in part: "The ADB believes that the ADB/ABA proposal most appropriately captures the ranges of discipline for criminal conduct by lawyers. The [ADB] supports published Standard 5.11(a), but does not believe Standards 5.12(a) or 5.13(a) (Alternative A) are workable or reflective of sanctions sought by the AGC or consistent with decisions by hearing panels, the ADB or the Court."

Dishonesty. The ADB draft comment contends that "The published standard's departures from ADB/ABA proposal will cause and various problems in application and are not necessary to deal severely with lawyer dishonesty."

Mishandling of Property. The ADB proposed sanction standards for lawyer mishandling of a non-client's property in Standard 5.1 instead of 4.1. The ADB's reasons are set forth in its comments to Proposed Standard 4.1 and include unavoidable overlap with Standard 5.1 (which deals with criminal and dishonest conduct), unwarranted departure from the organizational structure of the standards, and arguments about the coverage of MRPC 1.15. The ADB would also stay closer to the ABA language in dealing with lawyer mishandling of both client and non-client property under Standards 4.1 and 5.1 respectively.

Discriminatory Mistreatment of Persons and Discourteous/Disrespectful Conduct Toward Tribunal. The ADB version does not address violations of MRPC 6.5/6.6 or 3.5. The ADB urges the Court to adopt its version of Standard 5.1 and allow the development of caselaw for these rule violations.

MRPC 6.5 [Proposed Rule 6.6] – Discriminatory Treatment of Persons. As to these violations, the ADB comments:

Michigan’s Rule of Professional Conduct 6.5(a), which does not have a precise counterpart in the ABA Model Rules, directs that “a lawyer shall treat with courtesy and respect all persons involved in the legal process.” The rule continues by warning that a lawyer shall take particular care to avoid discourteous or disrespectful conduct based on race, gender, or other protected personal characteristic. The word “mistreats” does not appear in MRPC 6.5. Published Standard 5.1 contemplates only two levels of discipline for a lawyer who knowingly “mistreats” a person involved in the legal process because of the person’s race, gender, or other characteristic: (1) disbarment if the lawyer was attempting to gain an advantage in the litigation; or (2) suspension if the lawyer was not attempting to gain an advantage. Published Standard 5.1 does not contemplate the imposition of a reprimand for such conduct. Further, the proposed standard suggests no sanction for conduct which may be described as discourteous or disrespectful but is not based on race or gender.

Most of the Michigan cases in which discipline has been imposed under MRPC 6.5 involve incivility toward opposing counsel or witnesses in depositions or other legal settings without an explicit reference to race, gender or other characteristics.

MRPC 3.5 -- Discourteous/Disrespectful Conduct Toward Tribunal. The ADB’s draft comments state, in part:

MRPC 3.5(c) prohibits a lawyer from engaging in “undignified or discourteous conduct toward the tribunal.” Published standard 5.1 contemplates that a lawyer who exhibits discourtesy toward a tribunal will be disbarred if he or she was attempting to gain an advantage in the litigation or will be suspended if there was no attempt to gain an advantage. The published standard sets forth no circumstances in which a reprimand would be appropriate when a lawyer engages in conduct found to be “undignified” or “discourteous” toward a tribunal.

**MSILS Definitions
Knowledge**

**STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 16, 2005**

MSILS Definitions should:

- (a) Incorporate the language proposed by the ADB defining knowledge.
- (b) Not incorporate a specific definition but rely upon Section 1.0 of the Proposed MRPC.

Synopsis

The Supreme Court version incorporates a more general definition of “knowledge” as proposed by the ADB. ~~This definition is not consistent with the definition in the Proposed MRPC.~~ The MRPC definition governs a finding with respect to whether a MRPC was violated. The definitions as to 'states of mind' in the Standards only kick in after a finding of misconduct and they serve a different purpose, to wit, sorting out the lawyer's intent for purposes of imposing a sanction. Many states (approximately 30) use both the Standards and the MRPC without a clash in definitions. Campbell maintains that “knowledge” should be consistently defined as “actual knowledge”.

Supreme Court Version (also ADB Version)

The Supreme Court version defines knowledge more generally as “the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result”.

The ADB supplied the following Commentary in support of their version:

Are the definitions of “intent” and “knowledge” sufficiently helpful to draw distinctions regarding a lawyer’s mental state? If not, what terms might be better?

Generally, “intent” “is the mental resolution or determination to do” something, Black’s Law Dictionary (7th ed, 1999), p 813, and “knowledge” is an “awareness or understanding of a fact or circumstance.” *Id.*, p 876. Some other definitions may cause these two concepts to overlap. The Standards’ definitions seem faithful to the foregoing definitions and drawn with the determination to avoid overlap. The Standards define “intent” as “the conscious objective or purpose to accomplish a particular result,” and define “knowledge” as “the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” Experience with the application of the ABA Standards so far has not revealed significant problems with these definitions.

Campbell Version

Donald Campbell recommends that “knowledge” be defined consistently as “actual knowledge” in the MRPC and the MSILS. The Proposed MRPC 1.0 (Terminology) defines knowledge:

(f) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

Campbell supplied the following Commentary in support of his version:

The definitions for “intent” and “knowledge” in the ADB’s proposed Standards cannot be squared with the definitions of “knowingly”, “known”, or “knows” in MRPC 1.0. Adding to the confusion, the ADB uses the word “knowingly” dozens of times without an express definition of the term, but does not use the word “knowledge” in the proposed Standards, except to define it.

Finally, the ADB’s distinction between the terms “intent” and “knowledge” is not consistent with the approach taken by the MRPC. The term “intent” is not used at all in the MRPC, instead the MRPC adopted “knowingly”, “known”, or “knows” to mean “actual knowledge of the fact in question.” MRPC 1.0 adds, “A person’s knowledge may be inferred from circumstances.”

MSILS Definitions
"Injury"
"Potential Injury"

MSILS 2.3
Suspension

MRPC 1.01, Terminology.

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 16, 2005

- (a) MSILS Definitions should specifically define "injury" and "potential injury" as:

“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.

- (b) The definitions of "injury" and "potential injury" should be left to the ADB Hearing Panels to define.

* * * * *

- (a) MSILS 2.3 should use the following definition of "suspension" [*Supreme Court version*]:

“suspension”: 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.

- (b) MSILS 2.3 should use the following definition of "suspension" [*Campbell version*]:

“Suspension”: Suspension, as that term is used in these Standards, means the loss of the privilege to practice law for a term of no less than 180 days and until the lawyer is reinstated under MCR 9.124.

Synopsis

The proposed MSILS do not define “injury” or “potential injury”. However, the Supreme Court version proposes that injury and potential injury may be considered in deciding what sanction to impose via the application of aggravating or mitigating standards set forth in MSILS 9.1 through 9.4. It appears that without the added definitions of “injury” and “potential injury” in the MSILS, individual Attorney Discipline Board hearing panels will be charged with defining those terms on a case by case basis.

Supreme Court Version

MSILS 9.2 Aggravation identifies factors that may be considered to justify an increase in the degree of discipline to be imposed, including the degree of harm to a client, opposing party, the bar, bench of public. MSILS 9.3 Mitigation identifies factors that may be considered in mitigation to justify a decrease in the degree of discipline to be imposed, including the absence of any degree of harm to a client, opposing party, the bar, bench, or the public.

The Supreme Court version relies upon and refers to the definitions provided in the Commentary to Rule 1.0 of the Michigan Rules of Professional Conduct (MPRC) and in Michigan Court Rule 9.101, which are incorporated by reference. Additionally, specific definitions are provided for "intent" and "negligence":

“Intent” is the conscious objective or purpose to accomplish a particular result.

“Negligence” is the failure of a lawyer to exercise the degree of care that a reasonable lawyer would exercise in the situation.

ADB Version

The ADB version proposes that “injury” and “potential injury” be defined within the Standards.

“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.

The ADB also proposes including definitions within the Standards for "intent", "knowledge" and "negligence":

“Intent” is the conscious objective or purpose to accomplish a particular result.

“Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct without the conscious objective or purpose to accomplish a particular result.

“Negligence” is the failure of a lawyer to exercise the degree of care that a reasonable lawyer would exercise in the situation.

Campbell Version

The Campbell version proposes referring to the relevant definitions contained in MRPC 1.0. However, the Campbell version does include a definition for "suspension":

“Suspension”, as that term is used in these Standards, is defined under Standard 2.3 below. [See additional commentary, below.]

Additional Commentary

Standards proposed for comment by the Supreme Court, incorporate by reference the terminology provision in MRPC 1.0 and the definitions as contained in MCR 9.101.

MRPC 1.0 Terminology:

“Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.

“Consult” or “consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

“Firm” or “law firm” denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization, and lawyers employed in a legal services organization. See comment, Rule 1.10.

“Fraud” or “fraudulent” denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

“Knowingly,” or “known” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

“Partner” denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

“Reasonable” or “reasonably,” when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer.

“Reasonable belief” or “reasonably believes,” when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

“Reasonably should know,” when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

“Substantial,” when used in reference to degree or extent, denotes a material matter of clear and weighty importance.

MCR 9.101 Definitions.

As used in subchapter 9.100:

- (1) "board" means the Attorney Discipline Board;
- (2) "commission" means the Attorney Grievance Commission;
- (3) "administrator" means the grievance administrator;
- (4) "investigator" means a person designated by the administrator to assist him or her in the investigation of alleged misconduct or requested reinstatement;
- (5) "attorney" means a person regularly licensed or specially admitted to practice law in Michigan;
- (6) "respondent" means an attorney named in a request for investigation or complaint;
- (7) "request for investigation" means the first step in bringing alleged misconduct to the administrator's attention;
- (8) "complaint" means the formal charge prepared by the administrator and filed with the board;
- (9) "review" means examination by the board of a hearing panel's final order on petition by an aggrieved party;
- (10) "appeal" means judicial reexamination by the Supreme Court of the board's final order on petition by an aggrieved party;
- (11) "grievance" means alleged misconduct;
- (12) "investigation" means fact-finding on alleged misconduct under the administrator's direction;

(13) "disbarment" means revocation of the license to practice law.

Definition of Suspension:

It was also suggested that the proposed Michigan Standards For Imposing Lawyer Standards include the definition of "suspension." "Suspension" and "Interim Suspension" are already included and defined in Standards 2.3 and 2.4.

At the onset; it should be noted that the Supreme Court Standard and the ADB Standard defining suspension (2.3) are identical, with the Standard recommended by Donald D. Campbell differing. The Standard defining interim suspension is identical in all three proposed Standards.

Standard 2.3 in both the Supreme Court and Attorney Discipline Board versions defines suspension as:

(T)he 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.

Donald D. Campbell definition of suspension in Standard 2.3:

The definition of suspension, as submitted by Donald D. Campbell, differs from the above definitions, as such:

Suspension, as that term is used in these Standards, means the loss of the privilege to practice law for a term of no less that 180 days and until the lawyer is reinstated under MCR 9.124.

Standard 2.4 in all three versions defines interim suspension as:

(T)he temporary suspension of a lawyer from the practice of law pending imposition of final discipline. Interim suspension includes:

- (a) automatic suspension upon conviction of a felony (MCR 9.127[A]) or,
- (b) suspension of a lawyer who fails to comply with the lawful order of a hearing panel, the Board or the Supreme Court (MCR 9.127[A]).

As it appears that the terms suspension and interim suspension are defined in the proposed Supreme Court standards, it appears unnecessary to place their definition in the definition section.

**MSILS “Consent” Orders / Judgments of Misconduct
(Application within MSILS)**

**STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 16, 2005**

The MSILS should:

- (a) Apply to consent orders/judgments of misconduct.
- (b) Not apply to consent orders/judgments of misconduct and therefore the words “or acknowledgment” should be deleted from the “Preface.”

Synopsis

Robert Agacinski recommends that the MSILS should not apply to “consent” orders/judgments of misconduct and therefore that the language “or acknowledgment” be removed from the Preface. His letter indicates that he is writing on his own behalf and is not speaking for the AGC. This recommendation is not incorporated in the Supreme Court Version.

Supreme Court Version (also ADB & Campbell Version)

The Supreme Court Version includes the “or acknowledgment” language in the Preface.

Agacinski Version

The “Preface” to the Proposed MSILS currently reads that the Standards ‘are intended for use by the ADB and hearing panels in imposing discipline following a finding or acknowledgment of professional misconduct.’ Mr. Agacinski believes the language “or acknowledgment” would require that ADB panels apply the MSILS standards to situations where attorneys “consent” to orders/ judgments of misconduct. He suggests the MSILS should not apply to a consent order/judgment of misconduct. (Under MCR 9.115(F)(5), a consent discipline proposal must first be approved by the AGC and then by a hearing panel.) “Consent judgments, like plea bargains in criminal cases (which are not governed by the sentencing standards – or rather which are justification for deviation from those standards) are frequently based on factors outside the record. Reasons for consent judgments, which are not covered by the mitigation and aggravation factors within the proposed Standards, include perceived weakness of the case, availability of the witnesses, and certainty of a finding. These variables do not exist when there has been a full hearing and a judgment has been made. They only exist during the pre-hearing stage when consents are formulated.” As a consequence, he suggests that the word “or acknowledgment” be removed from the “Preface.”

Mr. Agacinski further believes that earlier “consent” orders/judgments of misconduct should not be considered “precedent” for determining discipline in later or “other” ADB hearings, because “the factors that went into the consent are usually outside the record. These are valid reasons, but reasons not made public.”

ADB Arguments for Applying Standards to All Discipline Orders

The ADB’s Executive and Associate Directors have submitted the following response to Mr. Agacinski’s recommendations:

The following comments have not been formally adopted by the ADB, but we believe they are in accord with the ADB's reasons for drafting proposed standards applicable to all orders of discipline, including discipline by consent.

When a hearing panel exercises its discretion to approve or deny a proposed order of discipline by consent it should presumably be acting in accordance with some point of reference other than the subjective opinions of the members as to the appropriate level of discipline. Today, panelists use the ABA Standards and the precedent of the Board, Court, and perhaps of other panels. If panels are not to use the Standard in assessing whether to approve an order of discipline, what external reference should be used? Panel, Board and Court precedents as to the level of discipline all will be based on the Standards. As a practical matter, it will be impossible to prohibit a panel from employing its knowledge of the Standards when the panel discharges its responsibility to determine whether the stipulated proposal for discipline before it is appropriate. And, it is difficult to understand why this would be viewed as good policy.

Other jurisdictions use the Standards whether discipline is imposed following a contested hearing or a consent proposal. State and Federal judges most definitely do (and must) consider criminal sentencing guidelines when imposing sentences arising from plea-based convictions. In some schemes, consideration may be given to the willingness of the defendant to cooperate. Nothing in the ADB's proposal would prohibit such consideration with respect to consent discipline. Indeed, articulation of this factor would be helpful.

Mr. Agacinski also contends that consent disciplines should not be "considered as precedent" in subsequent cases. The Board has issued opinions explaining that consent orders of discipline do not constitute the presumptively appropriate level of discipline for the misconduct involved in light of the various factors that may lead to a stipulation. Beyond this, we respectfully submit, there is nothing more that can or should be done to prevent members of the bar, the public and the courts from consulting and referring to previous cases in which the AGC was willing to stipulate to a certain level of discipline for a given disciplinary offense. (Notices of discipline, whether by consent or by ADB or panel decision, are published on the ADB's website and in the Michigan Bar Journal.)

If the Grievance Administrator is concerned that citation of consent disciplines will be used to "lower the bar," we submit that the best defense against this is greater articulation in the stipulated orders of discipline as to the applicable standards and the appropriate aggravating and mitigating factors that led to the agreed upon level of discipline.

This is also in the best interest of the Bar, the public, and the Courts. In *Grievance Administrator v Lopatin*, 462 Mich 235, 239; 612 NW2d 120 (2000), the Court explained the benefits of using the ABA Standards:

Their use will further the purposes of attorney discipline, help to identify the appropriate factors for consideration in imposing discipline and establish a framework for selecting a sanction in a particular case, and promote consistency in discipline. Application of the standards will produce reasoned decisions that will also facilitate our review

We submit that half of the discipline orders entered (consent disciplines constituted 51% of the discipline orders entered in 2003) should not be entirely exempt from salutary effects of the Standards.

**Use of “Injury” within MSILS:
MSILS 3.0
Generally**

**MSILS 4.1
Failure to Preserve Property Held in Trust**

**MSILS 4.3
Failure to Avoid Conflicts of Interest**

**MSILS 4.4
Lack of Diligence**

**MSILS 4.5
Lack of Competence**

**MSILS 6.2
Abuse of the Legal Process**

**MSILS 6.3
Improper Communications with Individuals in the Legal System**

**MSILS 7.0
Violations of Other Duties Owed as a Professional**

**MSILS 9.2
Aggravation**

**MSILS 9.3
Mitigation**

**STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 16, 2005**

- (a) 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. (ADB Proposal; based on existing ABA Standard 3.0.)
- (b) After a finding of lawyer misconduct, potential or actual injury should not 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. Instead, the degree of harm may be considered along with other

aggravating factors under Standard 9.22(a) and “absence of any degree of harm to a client, opposing party, the bar, bench or public” may be considered as a mitigating factor under Standard 9.32(a). (Published MSILS 3.0).

Synopsis

Under ABA Standard 3.0, employed by the ADB and hearing panels since 1986, the process to determine an appropriate sanction after there has been a determination of misconduct, starts with three questions: 1) What was the duty violated? (duty to a client, the public, the legal system or the legal profession); 2) What was the lawyer’s mental state? (intentional, knowing or negligent); and, 3) What was the degree of actual or potential injury caused by the lawyer’s misconduct? These factors are to be considered in determining whether, in the absence of specific aggravating or mitigating factors, the conduct in question should generally result in disbarment, suspension or reprimand. Having made that initial determination under Standard 3.0, the panel then considers the aggravating [Standard 9.2] or mitigating [Standard 9.3] factors unique to that case.

The Michigan Standards proposed to the Court by the ADB recommended changing “duty violated” to “nature of the misconduct” and recommended consideration of precedent of the Court and the ADB as a factor but otherwise retained the general structure of ABA Standard 3.0. Campbell's version recommends that potential or actual injury should not be considered in the initial formulation of the degree of discipline but that the degree of harm (or lack of harm) should be considered along with the other aggravating and mitigating factors listed in Standard 9.2 and Standard 9.3. The Standard 3.0 published for comment by the Supreme Court adopts the wording suggested by the ADB but also adopts Mr. Campbell’s suggestion that injury be removed from this stage of the analysis.

Supreme Court Version (also Campbell Version)

The Supreme Court version does not include injury as a factor for determining whether an act of misconduct should generally result in disbarment, suspension or reprimand in the absence of aggravating or mitigating factors. In proposing this revision to the Court, Mr. Campbell stated:

My recommendation omits the ADB’s proposal that “injury” be considered a factor at this stage. “Injury” or harm is a factor better suited for consideration during the aggravation/mitigation state. Also omitted is the ADB’s proposal that precedent be considered a factor equal to the other considerations when imposing discipline. As proposed, ADB Standard 3.0(e) would swallow the entire rule. To be blunt, any attempt to improve the disciplinary system to produce reasoned decisions, fairly arrived at, in a reviewable format would be greatly jeopardized if the ADB Standard 3.0(e) were to be adopted.

ADB Version

The Attorney Discipline Board version retains the general structure of ABA Standard 3.0 by directing that “potential or actual injury” be considered initially, along with the nature of the misconduct and the lawyer’s mental state in determining whether, in the absence of aggravating or mitigating factors, the conduct would generally result in disbarment, suspension or reprimand under Standards 4.0 – 8.0.

In its draft comments to the Supreme Court, the ADB also notes that in the published standards (based on the proposals from Mr. Campbell), the degree of injury or potential injury to a client, the courts, the legal profession, etc. would no longer be ranked in a hierarchy in each standard, with “serious injury” generally corresponding to a greater sanction than “injury” or “little or no injury.” Instead, the published standards would place “degree of harm” in a list of unweighted aggravating and mitigating factors. Moreover, the ADB notes that while the published standards would consider the “degree of harm to a client, opposing party, the bar, bench or public” [Published Standard 9.22(a)] to be an aggravating factor, a panel or the Board could consider mitigating effect only in the “absence of any degree of harm to a client, opposing party, the bar, bench or public.” [Published Standard 9.32(a)].

The ADB’s draft comments to the Court state:

Yanking the injury factor from [Standard 3.0 and Standards 4.0 – 8.0] yields some questionable, and perhaps unintended, results and may afford hearing panels less, rather than more, guidance.

According to the ADB, examples include:

- Standard 4.41(a) - The ABA Standards and the standards proposed by the ADB suggest that, absent aggravating or mitigating circumstances, disbarment is generally appropriate when a lawyer abandons the practice of law “and causes serious or potentially serious injury to a client.” By contrast, both alternatives to Standard 4.41(a) published by the Court eliminate consideration of the degree of harm at this stage. Thus, before applying aggravating or mitigating factors, a hearing panel following the published standards would be directed to consider disbarment for an attorney who has abandoned a caseload of hundreds of files as well as for a lawyer who has abandoned a practice of law consisting of one or two matters requiring only follow-up letters. Under Proposed Standard 9.32 [mitigation], the panel could find mitigation in the second case only if it found that there was an “absence of any degree of harm.”
- Published Standards 5.11 and 5.12 - By eliminating the degree of injury in the initial analysis under Standard 3.0, the standards published for comment result in a recommendation that disbarment is generally appropriate when a lawyer knowingly engages in conduct that is discourteous or disrespectful toward a tribunal in order to gain an advantage in the litigation [Published Standard 5.11(d)] and that suspension is generally appropriate when the lawyer engages in that conduct without intent to gain

an advantage. [Published Standard 5.12(d)]. Thus, under the published standards, disbarment is the recommended sanction for the attorney whose gross discourtesy to the tribunal results in a mistrial as well as the attorney whose single, discourteous facial expression causes no interruption in the proceeding, provided it can be shown that both attorneys intended to “gain an advantage.” If degree of injury is removed from Standard 3.0, there is no differentiation between the two cases unless it can be shown that there was an “absence of any degree of harm.”

- Published Standard 6.1 – Under the published standard, disbarment is recommended as the generally appropriate sanction when a lawyer has knowingly failed to disclose adverse controlling authority to a tribunal in order to obtain a benefit or advantage. By stripping the concept of injury from Standard 3.0, disbarment would be the recommended sanction whether the failure to cite controlling authority had a significant impact on the proceeding or a negligible impact. Indeed, a finding that there was as little as a slight or negligible harm would preclude the panel from finding an “absence of any degree of harm,” and consideration of that factor in mitigation would not be appropriate under Published Standard 9.32(a). [Note: Published Standards 6.11 and 6.12 envision disbarment as generally appropriate when a lawyer knowingly fails to disclose a material fact or adverse controlling authority to obtain a benefit or advantage and suspension for that conduct if the lawyer does not do so to obtain a benefit or advantage. Published Standard 6.1 apparently does not envision a reprimand for knowing failure to disclose adverse controlling authority.]

Use of "Interference or Potential Interference with a Legal Proceeding or the Outcome of the Legal Proceeding" within MSILS:

MSILS 6.2

Abuse of the Legal Process

MSILS 6.3

Improper Communications with Individuals in the Legal System

**STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 16, 2005**

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 disbarred 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. [*ADB version*]

- (a) Yes.
- (b) No.

* * * * *

- (a) 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 **suspended** 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. [*ADB version*]
- (b) MSILS 6.2 and 6.3 should provide that **prejudice to the administration of justice** is sufficient grounds for **suspension** when a lawyer knowingly violates a court order or rule without the intent to obtain a benefit or advantage for the lawyer or another. [*Supreme Court and Campbell version*]

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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 **reprimanded** 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. [*ADB version*]

- (a) Yes.
- (b) No.

Synopsis

The versions proposed by the Supreme Court do not require interference with a legal proceeding or interference with the outcome of a the legal proceeding as a prerequisite to the issuance of sanctions pursuant to MSILS 6.2 and 6.3 The ADB version incorporates a two-prong test requiring (1) injury or potential injury; or (2) interference or potential interference with a legal proceeding. One of the prongs must be met before the relevant sanction may be imposed.

Supreme Court Version (also Campbell Version)

The Supreme Court version does not include interference with a legal proceeding or interference with the outcome of the legal proceeding as a prerequisite to imposing sanctions for violating MSILS 6.2 and 6.3. The only reference to the effect of a violation of these standards is found in MSILS 6.22(a), which permits suspension when the result of a lawyer's knowing violation of a court order or rule without the intent to obtain a benefit or advantage for the lawyer or another results in prejudice to the administration of justice.

ADB Version

The above proposals outline the ADB version.