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**The "Perfect Storm" of Michigan Lawyer Ethics and
Discipline -
Ten Things You May Not like About the New MRPC and
Standards for Sanctions**

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The "Perfect Storm" of Michigan lawyer ethics and discipline is brewing, but it is not yet on the radar screens of most Michigan lawyers. Time is short, and prompt action is required. At a minimum, more discussion and debate is warranted. The Michigan Supreme Court is seeking comments not later than June 1, 2005.

The **PROPOSED MICHIGAN STANDARDS FOR IMPOSING LAWYER SANCTIONS (ADM File No. 2002-29) ("MSILS")²**, were re-proposed by the Supreme Court on July 29, 2003, and may be found at:

<http://courts.michigan.gov/supremecourt/Resources/Administrative/2002-29.pdf>

If adopted, the MSILS will establish the classification of formal sanction (reprimand, suspension, disbarment) and mitigation criteria for professional conduct violations. As proposed, the MSILS vary markedly from those earlier proposed by the Michigan Attorney Discipline Board (ADB), and also reflect alternatives derived from an independent proposal from Michigan lawyer, Don Campbell. ADB's excellent comparison of all these proposals is found at: www.adbmich.org. In its most recent February 1, 2005 Order, the Supreme Court has also said that it will hold off on final publication of the MSILS, until after finalization of its proposals to amend the Michigan Rules of Professional Conduct (MRPC).

The **PROPOSALS TO AMEND THE MRPC** (ADM File No. 2003-62) are a comprehensive rewrite to MRPC, totaling 150+ changes.³ Included are material changes to the rules governing fees, nonrefundable retainers, conflicts and waivers, organizational representation, and trust accounts. It will change the definition of "protected information," and add new duties to "prospective" clients. It is the largest change to our conduct rules, since the MRPC were adopted in 1988.

The State Bar of Michigan is currently producing a "redline" version, showing changes from the current Michigan RPC. But there is little explanation of the reasons for the changes, nor of any competing policy considerations.

At its November 14, 2003 Special Meeting, the SBM Representative Assembly adopted several revisions to the Ethics Committee's proposals. The Supreme Court

accepted some of these revisions, and rejected others. The revised Michigan Supreme Court proposal was posted July 2, 2004 at:
<http://courts.michigan.gov/supremecourt/Resources/Administrative/2003-62.pdf>

For both the Amended MRPC and the Proposed MSILS, the Representative Assembly, and its able Chair, Elizabeth Jamieson, are maintaining an active Discussion Board at: <http://repassembly.michbar.org>, which also contains links to other proposals which would clarify the ownership of and access to lawyer files by clients, and the role of a fee agreement in a fee dispute.

MRPC is a strict (absolute) liability, quasi-criminal disciplinary code. *In re Woll*, 387 Mich 154, 161, 194 NW2d 835 (1972). Contributory or comparative negligence by the client or by others, lack of injury, and client consent are not defenses, and go only to mitigation of sanction (punishment), not culpability. The MRPC is a set of Disciplinary Rules, the violation of any of which may result in the loss of the professional license to practice.

This is why many persons believe MRPC is **not** the place for "better practices," or "what would be nice," or what would be "better public relations" for the Bench and Bar. A lawyer should know with reasonable certainty, and in advance, how to conform one's conduct to the requirements of the law. These are the rules which control our professional lives, and all of us have a vital interest in them.

Interested persons should consider the following actions:

- Review the proposals and discuss them with your colleagues;
- Marshal the resources of your local Bar to do the same;
- Contact your Circuit's representative in the Representative Assembly;
- Come to the April 16, 2005 Representative Assembly Meeting;
- Write or email the Michigan Supreme Court about the proposals;
- Attend the Public Hearing at the Michigan Supreme Court (date to be announced).

Ten Things You May Not like About the New MRPC and MSILS

1. **Conflict consents must be "confirmed in writing."**

[Proposed MRPC 1.0(b), 1.7 (b), 1.9 (b), 1.10(d), 1.11(a), 1.12, 1.18(d)]

In what is likely the most dramatic change, the proposal adds a burdensome and sometimes impractical requirement of written disclosure, as a condition for a valid conflict waiver and consent. This will increase expense, as well as the lawyer's exposure to civil liability.

Failure to have a writing will void any waiver/consent and is a *per se* violation, even if the client admits waiver and consent, and is not damaged. See ADM File No. 2002-29 Proposed MSILS 4.4 (Alternative A Strike Outs) and 9.32. Such a violation could also serve as evidence of a breach of the standard of care in a civil action against the lawyer, and a defense to the client's liability for any fee charged.

The new "confirmed in writing" requirement does little to provide the person/client with information material to the waiver decision, as it need be provided only **after** that decision is made. Ultimately, it is a requirement to create an "exhibit," fraught with special peril to the lawyer, because of yet another new requirement for "informed consent."

2. **A new "Informed Consent" concept is in twelve (12) rules.**

[Proposed MRPC 1.0(e)(definition), plus 1.2(c), 1.4(a)(1), 1.6(a), 1.7(b)(4), 1.8(a)(3), 1.9(b)(2), 1.10(d), 1.11(a)(2), 1.12(a), 1.18(d)(1) and 2.3(b).]

This concept is used pervasively throughout the amendments, but the term "informed" is not defined [*"reasonably adequate under the circumstances"*], even though it must include an *explanation "about the material risks... and reasonably available alternatives."*

According to the Proposed Comment, "A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person *assumes the risk* that the client is inadequately informed and *the consent is invalid.*"

Thus, the omission of any fact from the proposed "informed consent" disclosure will void the consent. To be compliant, "informed consent" disclosures may have to look like SEC proxy statements...and still always be subject to attack, after the fact. This is an undefined "negligence" in a strict liability code. Lawyers will not know in advance how to conform their conduct to the requirement of the law.

It is unclear whether ABA Rule 1.0 Comment 6 [which considers important factors such as whether the person is "experienced in legal matters generally," or

"represented by independent counsel."] will be construed as part of the Rule. In addition, in some instances [e.g., 1.9(a) and (b), 1.12(a) and 1.18(d)(a)], the proposal creates a new duty of disclosure to a **non-client** third party to whom the lawyer will be required to give advice.

3. Strength will be added to arguments that a civil liability cause of action against a lawyer is created for every violation.

[Former MRPC 1.0 (b), second sentence, is deleted.]

Amendments to MRPC must also be considered in light of the reality that the MRPC are used in Michigan, as well as almost every other state, (either directly or indirectly) as a platform for malpractice claims. *Cf.*, *Beattie v. Firnschild*, 152 Mich App 785 (1986); *Lipton v. Boesky*, 110 Mich App 589 (1981) (rebuttable presumption of negligence); Restatement of the Law Third, *The Law Governing Lawyers*, §52.

The Proposed Rule 1.0 deletes the admonition that MRPC are not intended to create a civil cause of action. Proposed MRPC, Preamble, Scope [20], confirms that ". . . the Rules do establish standard of conduct . . ." and ". . . violation of a Rule may be evidence of breach of the applicable standard of conduct." Even now and with that admonition, the MRPC are used to define the "standard of care" for lawyers in civil lawyer professional liability cases. Any change to MRPC has the potential to increase civil claims, and also to create new ones which do not now exist.

This is not merely theoretical, nor immaterial. It holds the prospect of vastly increasing the already growing number of not only lawyer liability claims, but also those complaints to the Attorney Grievance Commission (AGC), which, at base, are really civil claims for negligence. It will increase the cost of those proceedings and thus the SBM dues requirements to finance them. It will also increase the cost of lawyer professional liability insurance to all lawyers, and thus increase the cost of legal services to all persons. Most importantly, it will divert scarce AGC/ADB resources from those truly serious cases more deserving of their attention.

4. The current Michigan concept of "protected information" is abandoned.

[Proposed MRPC 1.6.]

The proposal will delete the current Michigan concept of "protected information" [described in the current Rule 1.6 to include both privileged information and "secrets"], in favor of "information relating to the representation," which is not precisely defined.

There is concern that this will blur the duty of confidentiality, and could encourage further assaults upon the attorney-client privilege.

5. There is no transition provision, despite the addition of many new requirements.

As an example, by the effective date, each client in every multiple representation must receive a “written confirmation” of any waiver/consent. Conflicts of interest are continuing status offenses, and this will immediately affect thousands of existing engagements on the day the Amended MRPC and new MSILS become effective; there is no "transition" provision and no "grandfathering" of earlier engagements obtained under the current, and much different, rules.

Present MRPC 2.2 (Intermediary) disappears; current intermediaries are left with no direction. The deletion of MRPC 2.2 also diminishes the role of lawyers in amicably resolving disputes between clients.

6. The Comments are extensively relied upon to give meaning to the Rule, even though that has not been their function.

The Comments to MRPC are **not** the law.

"This court allows publication of the comments only as "an aid to the reader," but they are not "authoritative statement[s]." **The rules are the only authority.**" *Grievance Administrator v Deutch*, 455 Mich 149, 164, 565 NW2d 369 (1997). (Emphasis added.)

Even the proposed MRPC take the same position at Preamble, Scope, Comment [21]:

"The Preamble and this note on Scope are only intended to provide general orientation and are **not to be interpreted as Rules**. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." (Emphasis added.)

Thus, little solace may be taken from what is in the Comments. Important matters should be in the Rule.

7. Scienter: Actual Knowledge (Not just Negligence) should be required. MRPC is not the place to attempt regulation of isolated acts of negligence or general lawyer competence.

The Rules of Professional Conduct are quasi-criminal, strict (absolute) liability, professional disciplinary rules. See ADM File No. 2002-29, Proposed MSILS 4.41 – 4.43 (Alt. A) and 9.32. Those sanctions may result in the end of a career, and always result in damage to it.

As such, those Rules should penalize only **knowing** conduct, not negligent ("should" or "should have known") conduct based on a "reasonable lawyer" standard. Such terms are not intended to be in the Rules, but only in the Comments, which do not add obligations. [See Proposed Preamble, Scope, Clause 14]. Otherwise, the Rules lack the specificity necessary for the lawyer to define, in advance, how to conform one's conduct to the requirements of the law.

Moreover, if we view our only tool as a hammer, then we tend to view every issue as a nail. All issues of professional practice need not be a subject of the Rules of Professional Conduct. For instance, there are effective civil law remedies for ordinary negligence.

This illustrates the difficulty of attempting to use a strict liability, quasi-criminal code as a tool for establishing favored "good practices" or standards of care. "Negligence" is a concept incompatible with strict liability. Mere mistakes should not result in discipline. In MRPC 1.1 and 1.3, actual knowledge should be required. [See ADM File No. 2002-29, Proposal B to 6.1]

A single misdirected fax or email, or a single inadvertent mis-deposit into the trust account, should not result in public discipline. When the breaches of the "negligence" standard of care are serious, or the damages real, the civil justice system already provides remedies.

In view of the proposed MSILS, ADM File No. 2002-29, only extraordinary incompetence (MRPC 1.1 and 1.3) should be regulated by AGC/ADB. Isolated instances of lack of skill or diligence, as well as negligence, have no place in a strict liability, quasi-criminal discipline code.

In reality, disciplinary authorities in most jurisdictions, including Michigan, have exercised common sense, and do not attempt to bring disciplinary proceedings based on an isolated act of negligence, instead demanding strong evidence of a course of conduct or negligence combined with other factors, which when taken in the aggregate, provide a basis for discipline. See *The Professional Lawyer*, Bradley Tellam, "Isolated Instances of Negligence as a Basis for Discipline," July, 2003, 149-152. But the protections of due process, as well as the principles of common sense, should not rest entirely on prosecutorial discretion.

If we think our only tool is a hammer, then we sometimes wrongly see every issue as a nail. While some of the Model Rules (i.e., Rule 1.1) reference "neglect," the MRPC is not a proper mechanism with which to remedy every lawyer error. Attempting to regulate lawyer competence with the MRPC, is like trying to teach driver education by using only speeding tickets. Lawyer competence is better addressed by training, continuing education, and specialized programs such as certification.

8. A lump-sum or non-refundable fee that is earned at the time of engagement is still left in a doubtful status.

The proposed amendments purport to authorize non-refundable fees, earned at the time of engagement (proposed MRPC 1.5(f)), and would permit immediate deposit of such fees in the lawyer's own account (proposed MRPC 1.15(c)). This is necessary, if only to restrict the abuse of scheduling an initial interview with a lawyer, not for the

purpose of engaging the lawyer, but rather for the purpose of communicating sufficient "protected information" to disqualify the lawyer and firm from representing an opponent.

But, under the current proposal, in order for such a fee to be "earned," it is mandatory that the lawyer "in fact . . . turns down other cases, and marshals law firm resources in reliance on the fee agreement." (Proposed MRPC 1.5(f)(4).) This requires an after-the-fact determination which is not only impossible, but also is inconsistent with MRPC 1.5(a)(2), which requires only a "likelihood" that other employment will be precluded. If existing engagements are "in fact" disregarded to obtain the newer "lump sum" fee, the lawyer may be violating the "hot potato" principle of MRPC 1.7. Likewise, "in fact" marshalling firm resources does not reasonably occur until after the inception of the engagement, when the fee is already earned.

9. The proposed amendments do not speak sufficiently to two (2) of the areas most frequently encountered in grievances in Michigan:

- **Fee Disputes** [Proposed MRPC 1.2(c) limits "scope of engagement" restrictions, and Proposed MRPC 1.5 makes fee agreements subject to more, not fewer, attacks];
- **Disputes over File Ownership and Cost of Access** [Proposed MRPC 1.4 does not treat this issue].

Additional proposals have been made to clarify both of these issues. Those, and others, may be viewed on the SBM Representative Assembly Discussion Board website at <http://repassembly.michbar.org>.

10. ADM File No. 2002-29 (MSILS) together with ADM File No. 2003-62 (Amended MRPC) create the "Perfect Storm" of uncertainty.

The proposed amendments to MRPC were drafted without reference to the MSILS; and the MSILS were drafted without reference to the proposed amendments to MRPC. If allowed to develop separately, they create the "Perfect Storm" of uncertainty.

Rules should not be amended without knowing the potential sanctions. Sanctions should not be proposed without reference to the Rules to be enforced. Neither the Amended MRPC nor the MSILS should be proposed or adopted until both can be proposed and adopted together.

By its most recent February 1, 2005 Order, the Supreme Court has said that it will hold off on final publication of the Standards for Sanctions, until after finalization of its proposals to amend the MRPC. This priority sets a more logical progression, and should be retained.

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² The proposed Standards are based upon, but vary materially from, the ABA Model Standards. Though not intended as “sentencing guidelines,” the Standards recite disciplinary sanctions “generally” applicable for various MRPC or other rule violations.

³ Most of the changes bring MRPC into closer conformity with more of the ABA Model Rules, as revised after ABA’s “Ethics 2000.” The original proposals were created by the State Bar of Michigan Standing Committee on Professional and Judicial Ethics.

The State Bar of Michigan Special Committee on Grievance issued its own Majority and Minority Reports, on both the proposed MRPC Amendments, and on the proposed MSILS, which are posted at the SBM Representative Assembly Discussion Board: <http://repassembly.michbar.org> .