

**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.