

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.]