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**A FEW WORDS ABOUT THE USE OF THE
ABA SANCTION STANDARDS IN THE IMPOSITION OF DISCIPLINE . . .**

TERMINOLOGY

1. "The Standards"

Generally refers to the American Bar Association's Standards for Imposing Lawyer Sanctions, adopted by the ABA House of Delegates in 1986 and amended in 1992. Copies of the Standards were distributed to all ADB hearing panelists in 1986 and application of the ABA Standards in written opinions of the ADB appear as early as 1988. In *GA v Lopatin*, 462 Mich 235 (2000), the Supreme Court adopted the ABA Standards on an interim basis and directed the ADB to explore the adoption of Michigan Standards

2. "Proposed Standards" or "Published Standards"

On July 29, 2003, the Supreme Court published "Proposed Michigan Standards for Imposing Lawyer Sanctions." They are based, in part, upon recommendations submitted by the Attorney Discipline Board in June 2002 and, in part, on alternative recommendations submitted by Donald D. Campbell, then an associate at the Attorney Grievance Commission. These proposed standards have been published for comment. The comment period has been extended to June 1, 2005.

3. "The Rules"

Generally refers to the Michigan Rules of Professional Conduct (MRPCs). These rules, along with the "grounds for discipline" listed in MCR 9.104, are the rules which define professional misconduct in Michigan.

THE HEARING PROCESS

While not a perfect analogy, it may be helpful to compare an attorney discipline proceeding in Michigan to a criminal proceeding. In that analogy, the Grievance Administrator is the prosecuting attorney. The Administrator files a complaint with the Attorney Discipline Board only if authorized by the nine member Attorney Grievance Commission appointed by the Supreme Court. If the Grievance Administrator is the prosecutor in this model, then the Attorney Discipline Board ("ADB") is the court system. The three volunteer lawyer hearing panels are the trial level. The nine court appointed members of the ADB are the intermediate trial level, with a standard of review similar to that employed by the Court of Appeals.

As in a criminal proceeding, there are two phases. In much the same way that a prosecutor must establish beyond a reasonable doubt that a defendant has violated a criminal statute, the Grievance Administrator must establish by a preponderance of the evidence that a respondent attorney has violated specific provisions of the MRPCs. If the hearing panel finds that misconduct has not been established, the panel must enter an order of dismissal and the panel proceeding is concluded.

If misconduct is found, the panel then proceeds to a separate hearing to determine discipline. It is similar to the sentencing phase in a criminal case. Evidence which may not have been relevant in the misconduct phase may now be offered by the respondent and the Grievance Administrator to establish the attorney's state of mind, the degree of harm and aggravating or mitigating factors.

Since the Court's adoption of the ABA Standards in June 2000, the ADB has mailed to the parties and the panel members at the commencement of each case the attached checklist to assist in the application of the ABA Standards. It is not required that the checklist be filled out or filed with the panel's report; however, it is intended as a reminder to the panelists and the parties that analysis under the ABA Standards is expected to be an integral part of the process by which a panel arrives at an appropriate level of discipline for the misconduct which has been found.

It cannot be overemphasized that a hearing panel's consideration and application of the Standards for Imposing Sanctions occurs only after the hearing panel has made a determination that the respondent's acts or omissions violated one or more specific provisions of the Michigan Rules of Professional Conduct. The Standards, in and of themselves, do not define, limit, or expand the definitions of misconduct found in the MRPCs.

USING THE STANDARDS

Application of the ABA Standards by a hearing panel or the ADB is, itself, a two part process. First, the panel must identify the level of discipline which is "generally appropriate" for the type of misconduct which has been found. This process is aided first by use of Appendix 1 in the ABA Standards - a cross-reference table listing the type of misconduct under the Rules of Professional Conduct and the corresponding sanction standard. For example, the appendix suggests that a lawyer's violation of the conflict of interest provisions of MRPC 1.7 will require a sanction analysis under Standard 4.3 (failure to avoid conflicts of interest).

Each ABA Standard describes the circumstances under which disbarment, suspension, reprimand or admonition are generally appropriate. [Note: In Michigan, admonition is a confidential, non-disciplinary resolution available only to the Attorney Grievance Commission.]

The first phase of the sorting process to place the respondent's misconduct into one of the three broad categories of public discipline (disbarment, suspension or reprimand) is accomplished by considering the three factors listed in ABA Standard 3.0:

1. What ethical duty did the lawyer violate?

Did the lawyer violate a duty to a client, the public, the legal system or the legal profession? Obviously, there is a good deal of overlap among these duties.

2. What was the lawyer's mental state?

Did the lawyer act intentionally, knowingly or negligently? The AB A Standards define these terms as:

"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 but without the conscious objective or purpose to accomplish a particular result.

"Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

[Note: The ADB proposed a modification to the definition of "negligence." The Standards published for comment by the Supreme Court adopted the ADB's definition of "negligence" but omit any definition of "knowledge."]

3. What was the extent of the actual or potential injury caused by the lawyer's misconduct?

Was there a serious or potentially serious injury? Conversely, was there a negligible degree of injury or harm?

[Note: The Michigan Standards published for comment by the Supreme Court differ significantly from the ABA Standards and do not include consideration of the degree of harm or injury at this stage. For example, the presumptive sanction under proposed Standard 4.41 for a lawyer who "abandons the practice of law" is disbarment regardless of whether the resulting injury to clients is serious or negligible.

While there are variations among the standards, this sorting process will generally lead to a recommendation that, absent aggravating or mitigating factors, disbarment is generally appropriate when the lawyer acted intentionally and the misconduct resulted in serious injury or potential injury; that suspension is generally appropriate when the lawyer acted knowingly and caused injury or potential injury; and that reprimand is generally appropriate when the lawyer was negligent and caused injury or potential injury.

Having determined that disbarment, suspension or reprimand is deemed to be the "generally appropriate" sanction for a particular type of misconduct under the Standards, the panel then moves to the second and final phase of the sanction process - consideration and application of aggravating and mitigating factors. The list of aggravating and mitigating factors which appear in ABA Standard 9.0 are not exhaustive and the ADB has recognized that the relative weight given to individual

aggravating or mitigating factors may vary from case to case (for example, a lawyer's prior unblemished record may be a significantly mitigating factor if the lawyer has negligently failed to comply with a court rule with little or no injury to the client or the judicial process while an unblemished record may warrant little or no consideration for a lawyer who has intentionally embezzled client funds). Depending upon the combination of aggravating and/or mitigating factors, the sanction in a particular case can be "aggravated up" or "mitigated down." For example, a lawyer's negligent conduct resulting in relatively minor injury to a client which would otherwise warrant a reprimand could nevertheless result in the lawyer's suspension on consideration of the lawyer's prior discipline for similar misconduct, his or her deceptive or obstructive practices during the discipline process, etc. Consideration of aggravating and mitigating factors are also important in determining the length of a suspension, which can range from 30 days to five years.

PRECEDENT OF THE ATTORNEY DISCIPLINE BOARD AND THE SUPREME COURT

In its opinion adopting the ABA Standards, the Supreme Court directed that hearing panels and the Board must consider whether the ABA Standards have led to an appropriate recommended level of discipline in light of factors such as Michigan precedent and whether the Standards adequately address the effects of the misconduct or the aggravating and/or mitigating circumstances. (Lopatin, 462 Mich at 248 n 13). In this regard, the panels are aided by the "research" section of the ADB's website - www.adbmich.org - which includes a searchable database containing all ADB opinions since 1978 and all notices of discipline and reinstatement since 1989. In addition to this resource, panels can, and do, request the parties to provide written sanction briefs with a proposed analysis under the ABA Standards as well as citations to relevant opinions of the ADB, the Michigan Supreme Court, or the courts in other jurisdictions.

WORKSHEET - ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS

NAME OF CASE: _____

ADB CASE NO.: _____

DATE: _____

A. INITIAL INQUIRY [ABA Standard 3.0].

a. The ethical duty violated? (Duty to a client, the public, the legal system, or the profession?): _____

b. The lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?): _____

c. What was the extent of the actual or potential injury caused by the lawyer's misconduct? (Was there a serious or potentially serious injury?): _____

B. DETERMINATION OF THE RECOMMENDED SANCTION [ABA Standards 4.0 through 8.0]. (The Michigan Rules of Professional Conduct correspond generally to the ABA Model Rules of Professional Conduct. Appendix 1 in the ABA Standards is a cross reference table matching provisions of the Rules of Professional Conduct to the suggested standard.)

- Disbarment - Standard: _____
- Suspension - Standard: _____
- Reprimand - Standard: _____

C. RELEVANT AGGRAVATING AND MITIGATING FACTORS. [ABA Standard 9.0.]

9.22 - Factors which may be considered in aggravation include:

- a. Prior disciplinary offenses.
- b. Dishonest or selfish motive.
- c. A pattern of misconduct.
- d. Multiple offenses.
- e. Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency.
- f. Submission of false evidence, false statements or other deceptive practices during the disciplinary process.
- g. Refusal to acknowledge wrongful nature of conduct.
- h. Vulnerability of victim.
- i. Substantial experience of law.
- j. Indifference to making restitution.

9.32 - Factors which may be considered in mitigation include:

- a. Absence of a prior disciplinary record.
- b. Absence of a dishonest motive.
- c. Personal or emotional problems.
- d. Timely good faith effort to make restitution or to rectify consequences of misconduct.
- e. Full and free disclosure to disciplinary board or cooperative attitude towards proceedings.
- f. Inexperience in the practice of law.
- g. Character or reputation.
- h. Physical disability.
- i. Mental disability or chemical dependency including alcoholism or drug abuse when:
 - 1. There is medical evidence that the respondent is affected by a chemical dependency or mental disability;
 - 2. The chemical dependency or mental disability caused misconduct;
 - 3. The respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
 - 4. The recovery arrested in the misconduct and recurrence of that misconduct is unlikely.
- j. Delay in disciplinary proceedings.
- k. Imposition of other penalties or sanctions.
- l. Remorse.
- m. Remoteness of prior offenses.

D. OTHER FACTORS.

- 1. Precedent of the Michigan Supreme Court: _____

- 2. Precedent of the Attorney Discipline Board: _____

- 3. Other: _____

E. RECOMMENDED DISCIPLINE: _____

F. RESTITUTION (?): _____

G. OTHER CONDITIONS (?): _____