

**COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF THE
STATE BAR OF MICHIGAN**

**January 16, 2010
University Club
Lansing, Michigan**

Minutes

I. Call to Order

The Chair-elect of the Section, Doug Chalgian, called the meeting to order at 10:20 a.m.

II. Excused Absences

The following officers and members of the Council were in attendance:

Doug Chalgian, Chair-Elect	Rob Tiplady
George Gregory, Vice Chair	Ellen Sugrue Hyman
Mark Harder, Secretary	Josh Ard
Marilyn Lankfer, Treasurer	Rebecca Schnelz
David Kerr	Tom Sweeney
Amy Morrissey	Shaheen Imami
Hon. Darlene O'Brien	Robin Ferriby
James P. Spica	Bob Taylor
Marlaine Teahan	Richard Siriani
Patricia Ouellette	

The following ex-officio members of the Council also were in attendance:

Hon. Phil Harter
Doug Mielock
Henry Grix
John Bos
Susan Westerman

The following officers and members of the Council were absent with excuse:

Harold Schuitmaker, Chair
Hon. David Murkowski
James Steward
Susan Allan

III. Introduction of Guests

Members of the Council, officers, and guests introduced themselves. The following guests were in attendance:

Constance Brigman	Jeanne Murphy
Dan Cogan	Rhonda Clark
Kathleen Goetsch	Lorraine New
John Dresser	Serene Katranji-Zeni
Mark Kellogg	Melisa M. W. Mysliwicz
Karl Barr	Belinda Fitzpatrick
Jill Goodell	Chris Ballard
Derek Walters	Rebecca Bechler
Tess Sullivan	

IV. Minutes of December 12, 2009 Meeting of the Council

Minutes of the December 12, 2009, meeting of the Council had been previously distributed with the Agenda for the meeting. Upon motion by Mr. Harder, with support from Ms. Lankfer, the minutes were unanimously approved.

V. Treasurer Report – Marilyn Lankfer

Ms. Lankfer had distributed a financial report for November 2009 with the Agenda. More dues have been received since November. She also announced that a new reimbursement form is available for use. She reminded members of the Council that the rate for mileage reimbursement changed from \$.55 to \$.50 on January 1, 2010.

VI. Chairperson’s Report

In Mr. Schuitmaker’s absence there was no Chairperson’s Report.

VII. Report of the Committee on Special Projects – Amy M. Morrissey

Ms. Morrissey reported on the meeting of the Committee on Special Projects that preceded the Council meeting. The Committee discussed three matters.

First, the Uniform Adult Guardianship and Protective Proceedings Jurisdictional Act was discussed and the Committee approved recommended changes. The changes are described in **Attachment 1**. Ms. Morrissey moved to accept the Committee’s recommendation to delete subsection (b) from Section 207 and to approve revised language for Section 201(a)(2). The motion was approved.

The Committee on Special Projects also discussed whether Michigan should enact a rule of construction to deal with construction of existing wills and trusts in light of the repeal of the estate tax. Similar legislation has been introduced in the Virginia legislature. See **Attachment 2**. The Committee recommended the Council consider developing and proposing for enactment similar legislation. The matter was referred to the Transfer Tax

Committee, chaired by Mr. Sweeney. Interested persons were invited to participate in the Committee's review of this matter and to contact Mr. Sweeney if interested.

Finally, the Committee on Special Projects also considered two proposed changes to the Michigan Rules of Professional Conduct. See **Attachment 3**. Ms. Morrissey moved on behalf of the Committee to recommend that "Alternative A" to proposed Rule 1.5 be adopted and that "Alternative B" be rejected. The motion was approved by a vote of 12-5. Mr. Imami and Mr. Ard each abstained.

Ms. Morrissey also moved on behalf of the Committee that the Section oppose proposed Rule 3.3. The motion was approved unanimously with no abstentions.

VIII. Standing Committee Reports

A. Internal Governance

1. Budget – George Gregory
No report.
2. Bylaws – Marilyn Lankfer
No report.
3. Michael Irish Award – Brian Howe
No report.
4. Long Range Planning – Doug Chalgian/Nancy Little
No report.
5. Nominations – Doug Mielock
No report.
6. Relations with the State Bar – Thomas F. Sweeney
No report.
7. Annual Meeting – George Gregory
No report.

B. Education and Advocacy Services for Section Members

1. *Amicus Curiae* – Ellen Sugrue Hyman

Ms. Sugrue Hyman reported on the Section's submission of a letter to the Michigan Court of Appeals concerning the *Graves* case. A letter has been drafted asking the court to withdraw its opinion from publication and is being reviewed by the officers of the Section for comments before being submitted by the Chair of the Section.

2. Continuing Education and Annual Probate Institute – George Gregory

Mr. Gregory distributed a report concerning upcoming continuing education programs. See **Attachment 4**. There has been an unusual number of early registrations for the Institute. In addition, registration for the ICLE programs *The New Michigan Trust Code* and *Drafting Estate Planning Documents* (being conducted together as an integrated program) have exceeded expectations.

3. Section Journal – Nancy L. Little

Melisa Mysliwec gave a short report. The winter issue of the Probate and Estate Planning Journal is being mailed this week. The spring issue is being edited. The summer issue will be devoted to charitable issues. Two articles have been submitted; two or three additional articles are needed still.

4. State Bar Journal – Amy M. Morrissey

No report.

5. Pamphlets – Ellen Sugrue Hyman

No report.

6. Electronic Communications – Josh Ard

No report.

C. Legislation and Lobbying

1. Legislation – Harold G. Schuitmaker/John R. Dresser/George Gregory

A statute of repose is being discussed with Rep. Meadows office to determine whether he has any interest in sponsoring, or at least will not oppose it or prevent a hearing on it. Ms. Bechler advises that the window for legislative action this session is very limited due to the fall elections.

The legislature expects to adjourn in June and not return until after the election.

Mr. Siriani reported that legislation has been proposed for a sales tax on services. The State Bar is actively opposing.

2. Power of Attorney Act – Daniel P. Marsh

Ms. Bechler reported she has arranged a meeting with legislators regarding the Power of Attorney Act legislation.

3. Michigan Trust Code – Mark K. Harder

Mr. Harder presented proposed changes to sections 7401 and 7402. See **Attachment 5**. Judge Harter advised that MPJA is opposed to these changes and likely would oppose the entire package of technical amendments if included with them. Mr. Chalgian moved to approve the proposed changes as legislation separate from the remaining technical amendments; Mr. Kerr supported the motion, which was approved by a vote of 15-3. Mr. Ard abstained.

D. Ethics and Professional Standards

1. Ethics – J. David Kerr

No report

2. Unauthorized Practice & Multidisciplinary Practice – Bob Taylor

Mr. Taylor reports that the Attorney General's office is evaluating a case involving the unauthorized practice of law and the preparation of estate planning documents.

3. Specialization and Certification – James B. Steward

No report.

4. Practice Management – Patricia Ouellette

No report.

E. Administration of Justice

1. Contested and Uncontested Probate Proceedings – Shaheen I. Imami/Douglas G. Chalgian

No report.

2. Uniformity of Practice – Derek A. Walters
No report.

F. **Practice Issues, Related Areas & Liaisons**

1. Charitable Giving/Exempt Organizations – Robin D. Ferriby
No report
2. Transfer Tax – Thomas F. Sweeney
Mr. Sweeney distributed a one page summary concerning the Federal transfer and income tax rules and the prospects for reform. See **Attachment 6**.
3. Guardianships and Conservatorships – Constance Brigman
No report.
4. Business Law/Liaison to Business Law Section – John R. Dresser
No report.
5. Elder Law/Liaison to Elder Law Section – Amy R. Tripp
No report.
6. Family Law/Family Law Section Liaison – Patricia M. Ouellette
No report.
7. Real Property Law/Real Property Section Liaison – Daniel P. Marsh
No report.
8. State Bar Section to Section Action Team Liaison – Robert Tiplady
No report.
9. Tax and Taxation Section Liaison – Lorraine F. New
No report.
10. State Bar Liaison – Richard J. Siriani
No report.

11. Court Rules and Forms Committee Liaison – Marlaine C. Teahan

Ms. Teahan reported that the Supreme Court will hold a hearing on January 27 on the proposed MTC court rules. Ms. Teahan and Judge Murkowski will attend. No comments have been submitted so far and she still anticipates the Court will approve the rules. Because comments will be received after approval, there is a possibility of later changes.

12. Trust Institutions and Liaison with Michigan Bankers Association – Susan Allan

No report.

13. Michigan Probate Judges Association Liaison – Hon. Phillip Harter/Hon. David M. Murkowski/Hon. Darlene O'Brien

No report.

14. Law School Liaison – Josh Ard

No report.

IX. Other Business

None.

X. Hot Topics

None.

XI. Adjournment

There being no further business, the Council meeting was adjourned at 11:20 a.m.

Respectfully submitted

Mark K. Harder
Secretary

HD94611-4

ATTACHMENT 1

Uniform Adult Guardianship and Protective Proceedings Act Recommendations

Proposed Changes to Sections 201(a)(2) and 207(b)

The committee has recommends two changes to sections 201 and 207 as stated below. Otherwise the committee recommends approval of these sections.

A. Currently Section 201(a)(2) defines “home state” as follows:

(2) “Home state” means the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a protective order or the appointment of a guardian; or if none, the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition.

The committee proposed the adding the highlighted language as follows:

*(2) “Home state” means the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a protective order or the appointment of a guardian; or if none, the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition. **However, regardless of how long a respondent has been physically present in a state, that state will be the respondent’s “home state” if an agent appointed in a power of attorney created by the respondent and authorizing the agent to make decisions about the respondent’s care and placement so chooses; provided only that the power of attorney is unrevoked and valid under the laws of the state in which it is being exercised.***

B. Currently Section 207(b) provides:

(b) If a court of this state determines that it acquired jurisdiction to appoint a guardian or issue a protective order because a party seeking to invoke its jurisdiction engaged in unjustifiable conduct, it may assess against that party necessary and reasonable expenses, including attorney's fees, investigative fees, court costs, communication expenses, witness fees and expenses, and travel expenses. The court may not assess fees, costs or expenses of any kind against this state or a government subdivision, agency or instrumentality of this state unless authorized by law other than this [act].

The committee proposes to eliminate this provision entirely. The committee believes that (1) the court would have the authority under current law and court rule to assess most of the sanctions provided for in this section, (2) the creation of a new sanction provision is not necessary to accomplish the objectives of this act, and (3) Michigan courts have been careful to limit the circumstances in which fee shifting occurs out of a respect for the "American Rule" and it is not obvious to the committee that this act should serve as a basis for altering this important balance.

MINUTES AND REPORT

GUARDIANSHIP AND CONSERVATORSHIP COMMITTEE MEETING

Wednesday, Jan. 6, 2010 at 4:30 PM

Telephone conference only

Dial-in number 805-309-0010

Access code 152-477-265

1. Roll call:

Connie Brigman X
Doug Chalgian X
Jim Steward ABSENT
Rhonda Clark-Kreuer X
Rebecca Schnelz X
Valerie Ferrero Lafferty X
Hon. David M. Murkowski ABSENT
Josh Ard X
Michael McClory X

2. Review of Probate Council meeting on Dec. 12, 2009. Jim Steward and Valerie Lafferty presented a quick run-down of Sec. 201(d) and Sec. 203(b), since the meeting was running behind on time.

+Temporary absence definition was accepted as well as the explanation:

It protects persons who routinely stay in Michigan for less than six months each year but still declare Michigan as their home state. (snowbirds)

+Explained that Sec. 203(b)(i) does not eliminate multiple jurisdiction for a person who does not have a home state because the first in time rule is not included in Sec. 203(b)(i). No revisions to Sec. 203(b) were presented for approval nor were they solicited.

+Connie asked Doug Chalgian and Judge Murkowski to present for next PEPC meeting concerning Sec. 207 sanctions imposed on patient advocates who move patients to a different jurisdiction to obtain medical care.

3. New business. Preparation for Jan. 16, 2010 Probate Council meeting. Discussion points:

+UAGPPJA Sec. 207 and Sec. 201(b) are reproduced as Exhibit A.

+Doug proposes to amend Sec. 201(b). Exhibit B.

The objective is to ensure that a patient advocate who fairly acts pursuant to the instructions and authority of a valid patient advocate designation is not made to pay the fees, costs, or expenses of a party who challenges their authority under Sec. 207.

EXAMPLE: Ronald's home state is Maryland. Ronald was in an auto accident and he is in a persistent vegetative state. His wife Deanna is his patient advocate. The

instructions in Ronald's PAD are that he should not be placed on life support if he is in a persistent vegetative state.

Ronald's family opposes Deanna's decision to remove life support. Family argues that (1) Ronald is not truly in a persistent vegetative state; (2) Ronald's statements in his patient advocate designation are not clear and convincing evidence of his wish to terminate life support; and (3) food and fluids are not *medical* treatment that fall within the authority of a patient advocate to decide.

Deanna argues that (1) Ronald's patient advocate designation was prepared at an informational seminar at a library that thoroughly explained all the terms in a patient advocate designation and it is legally valid in its execution. (2) The doctors that examined Ronald stated that he is in a persistent vegetative state and that his tube feedings and fluids are medical treatment.

Deanna moves to Florida, because she believes that in Florida she can remove Ronald's nutrition and hydration as Ronald wished. She secretly moves Ronald to Florida *with his doctor's full assistance and support*.

After admitting Ronald to a Florida facility, Deanna immediately petitions for guardianship in Florida. Deanna states that wherever a patient advocate takes a patient *for medical care* – that state is their home state. (Doug's suggestion)

Ronald's father petitions for guardianship of Ronald in Maryland. Maryland court agrees with Father: Maryland is Ronald's home state. "Moving a patient to another state to remove their food and fluids is not a move to obtain *medical care*."

Ronald's father successfully opposed the Florida petition using the same argument that he used in Maryland.

Ronald's father also successfully argued that Florida acquired jurisdiction because of Deanna's unjustifiable conduct, so Deanna should pay his attorney's fees, costs and expenses. He refers to Sec. 207(2).

SUMMARY OF DISCUSSION'S HIGH POINTS:

JOSH: What will happen if we have a guardianship order transferred to Michigan and the person had a patient advocate designation? What can Michigan do about it?

CONNIE: Michigan would have two choices: (1) Refuse to accept the petition to transfer the order under Sec. 302(8). This would force the guardian to file a petition in Michigan. (2) Accept the petition to transfer the order and then modify the order. Sec. 302 (6) provides that NLT 90 days after issuance of a final order accepting the guardianship, the court shall determine whether the guardianship needs to be modified to conform to the law of this state. There are only two things that the transferee state must recognize under Sec. 302(7) if transferee state accepts a transfer. Those two things are (1) that the person is incapacitated and (2) the guardian has been appointed. If Michigan would have ordered a partial rather than full guardianship because the incapacitated person has a PAD, then it is within Michigan's authority to modify the order accordingly.

DOUG: Why do we need to have sanctions in the UAGPPJA? Michigan follows the American rule and the probate code has addressed awards of attorney's fees.¹

BECKY: The idea is that the sanctions deter persons from taking an incapacitated person to another state just to avoid losing custody here.

JOSH: Is that really a deterrent? Do those persons even know about the sanctions?

CONNIE: Agreed. This is probably an area where the party in question believes they are right and does not care about laws that tell them otherwise. The UAGPPJA sanctions are harsh and could be mis-used against a patient advocate. Becky, does the UCCJEA have similar provisions and are they ever used?

BECKY: I am checking Westlaw. Yes, the UCCJEA does. Caselaw concerning sanctions is very sparse.

DOUG: Rather than modify Sec. 207 to not apply to patient advocates, should we do away with UAGPPJA sanctions and let the judge use the law that we already have?

CONNIE: I think we can do that.

BECKY: Will it make the UAGPPJA too much out of conformity with other states?

JOSH: Probably not.

CONNIE: Sanctions are not part of the framework for deciding interstate jurisdiction. So uniformity here is not really required. We can put it to the Council to consider only adopting Sec. 207(1). That would leave us with this: If a person is brought to this state because of unjustifiable conduct, then the court can take jurisdiction for the purpose of creating an order to return the person to their original state safely, OR the court can decline to exercise jurisdiction altogether.

¹ Recovery of attorney's fees in Michigan is governed by the American Rule. *Matras v Amoco Oil Co*, 424 Mich 675; 385 NW2d 586 (1986). Attorney fees are not allowed, either as costs or as damages, unless recovery of those fees is authorized expressly by statute, by court rule or by a recognized court-made exception. *Burnside v State Farm Fire & Casualty Co*, 208 Mich App 422; 528 NW2d 749 (1995); *In re Swantek Estate*, 172 Mich App 509; 432 NW2d 307 (1988). *But see Persichini v. William Beaumont Hosp*, 238 Mich App 626, 639; 607 NW2d 100 (1999). "[A] trial court has inherent authority to impose sanctions on the basis of misconduct of a party or an attorney." *Id.* Contempt for a court order can be punished by an order to pay the other party's attorney's fees. *See MCL 600.1721*. Domestic relations court rules allow the court to order a party to pay the other party's attorney's fees if their unreasonable conduct forced the other party to incur them. *MCR 3.206(C)(2)(c)*. Any time a fiduciary is partly to blame for bringing about unnecessary litigation, the fiduciary is responsible for paying the attorney's fees. *In re Valentino Estate*, 128 Mich App 87 (1996). But if not found guilty of wrongdoing, the fiduciary does not pay their own attorney's fees. The estate does. "It is well established that attorney fees incurred by a personal representative to defend against a petition for his removal are properly chargeable against the estate where no wrongdoing is proven." *In re Hammond Estate*, 215 Mich App 379, 387; 547 NW2d 36 (1996). A patient advocate shall act in accordance with the standards of care applicable to fiduciaries in exercising their powers. *MCL 700.5509(1)(a)*.

DOUG: I was under the impression that we were looking at having the patient advocate decide the home state. I wrote new language for the home state definition that gives the patient advocate the authority to decide the home state.

CONNIE: If the patient advocate moves a person to another state for the purpose of medical care, then that removal would be considered a temporary absence. It wouldn't alter the person's home state. Guardians decide legal residence, not patient advocates.

JOSH: Changing their legal residence will change domicile.

DOUG: Yeah, I know the PAD statute is about medical care but if I want my patient advocate to decide my care and custody then that is what I told them to do.

CONNIE: Agreed that some patient advocate designations are written to that effect and this is an area where the patient advocate designation statute could use some work. Long term care that is residential care and not medical care is not within the patient advocate designation statute but the trend is to use a patient advocate designation for residential placement to avoid guardianship. Doug can write up the home state definition and we can put it to the Council that if a patient advocate is acting pursuant to instructions in a valid patient advocate designation when they move the person to another state then that state is the person's home state. Mike, should there not be a (i) if there is no (ii) in Doug's Sec. 201(1)(b)?

MIKE: That is correct. You could bump it up to make it all one long Sec. 201(1)(b).

DOUG: I'll get that done and present on this to Council. We all have time to think more about this before the 16th.

Connie: The idea is to present all sides of the argument to better inform the Council for their decision.

EXHIBIT A:

Sec. 207. (1) If at any time a court of this state determines that it acquired jurisdiction to appoint a guardian or issue a protective order because of unjustifiable conduct, the court may do any of the following:

(a) Decline to exercise jurisdiction.

(b) Exercise jurisdiction for the limited purpose of fashioning an appropriate remedy to ensure the health, safety, and welfare of the respondent or the protection of the respondent's property or prevent a repetition of the unjustifiable conduct, including staying the proceeding until a petition for the appointment of a guardian or issuance of a protective order is filed in a court of another state having jurisdiction.

(c) Continue to exercise jurisdiction after considering all of the following:

(i) The extent to which the respondent and all persons required to be notified of the proceedings have acquiesced in the exercise of the court's jurisdiction.

(ii) Whether it is a more appropriate forum than the court of any other state under the factors set forth in section 206(3).

(iii) Whether the court of any other state would have jurisdiction under factual circumstances in substantial conformity with the jurisdictional standards of section 203.

(2) If a court of this state determines that it acquired jurisdiction to appoint a guardian or issue a protective order because a party seeking to invoke its jurisdiction engaged in unjustifiable conduct, it may assess against that party necessary and reasonable expenses, including attorney fees, investigative fees, court costs, communication expenses, witness fees and expenses, and travel expenses. The court may not assess fees, costs, or expenses of any kind against this state or a governmental subdivision, agency, or instrumentality of this state unless authorized by law other than this act.

Sec. 201. (1) As used in this article:

(a) "Emergency" means a circumstance that likely will result in substantial harm to a respondent's health, safety, or welfare, and for which the appointment of a guardian is necessary because no other person has authority and is willing to act on the respondent's behalf.

(b) "Home state" means the state in which the respondent was physically present, including any period of temporary absence, for at least 6 consecutive months immediately before the filing of a petition for a protective order or the appointment of a guardian; or if none, the state in which the respondent was physically present, including any period of temporary absence, for at least 6 consecutive months ending within the 6 months prior to the filing of the petition.

EXHIBIT B: Revise Sec. 201(b).

(b) "Home state" means the state in which the respondent was physically present, including any period of temporary absence, for at least 6 consecutive months immediately before the filing of a petition for a protective order or the appointment of a guardian; or if none, the state in which the respondent was physically present, including any period of temporary absence, for at least 6 consecutive months ending within the 6 months prior to the filing of the petition. **However, regardless of how long a respondent has been physically present in a state it will be the respondent's "home state," if it is the state chosen by respondent's agent appointed under a legally valid, unrevoked power of attorney that authorizes the agent to make respondent's care and placement decisions.**

ATTACHMENT 2

Rule of Construction for Wills and Trusts in Light of Repeal of Federal Estate Tax

Proposed Virginia Rule of Construction

Certain formula clauses to be construed to refer to federal estate and generation-skipping transfer tax rules applicable to estates of decedents dying on December 31, 2009

A. A will or trust of a decedent who dies after December 31, 2009 and before January 1, 2011, that contains a formula referring to the "unified credit," "estate tax exemption," "applicable exemption amount," "applicable credit amount," "applicable exclusion amount," "generation-skipping transfer tax exemption," "GST exemption," "marital deduction," "maximum marital deduction," or "unlimited marital deduction," or that measures a share of an estate or trust based on the amount that can pass free of Federal estate taxes or the amount that can pass free of Federal generation-skipping transfer taxes, or that is otherwise based on a similar provision of Federal estate tax or generation-skipping transfer tax law, shall be deemed to refer to the Federal estate and generation-skipping transfer tax laws as they applied with respect to estates of decedents dying on December 31, 2009. This provision shall not apply with respect to a will or trust that is executed or amended after December 31, 2009, or that manifests an intent that a contrary rule shall apply if the decedent dies on a date on which there is no then-applicable Federal estate or generation-skipping transfer tax. The reference to January 1, 2011 in this subsection shall, if the Federal estate and generation-skipping transfer tax becomes effective before that date, refer instead to the first date on which such tax shall become legally effective.

B. The personal representative or any affected beneficiary under the will or other instrument may bring a proceeding to determine whether the decedent intended that the references under subsection A be construed with respect to the law as it existed after December 31, 2009. Such a proceeding must be commenced within twelve months following the death of the testator or grantor, and not thereafter.

ATTACHMENT 3

Proposed Changes to the Michigan Rules of Professional Conduct

ETHICS
January 16, 2010

On November 24, 2009, the Michigan Supreme Court issued ADM File No. 2009-06 which is a 50 page rendition of proposed amendments and additions to the Michigan Rules of Professional Conduct. The author sees two matters of interest to probate and estate planning attorneys.

1. The Court has printed two different proposed amendments to rule 1.5 to apply to Fees: Alternative A and Alternative B. The Court would appear to be open to comments since it has published these amendments to rules in the alternative.

2. Rule 3.3 Candor Toward the Tribunal - Amendment requiring an attorney to “RAT” on the client

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal **or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;**

If the client informs an attorney of different facts, adverse to the client

(b) **If a lawyer knows that the lawyer’s client or other person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to an adjudicative proceeding involving the client, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.**

Fees Rule 1.5

The author does not know the background to these alternatives; but, it does appear that the Attorney Grievance Commission desires to modify the result in *Attorney Grievance Commission v. Cooper*, 482 Mich. 1079; 757 N.W.2d 867; 2008 Mich. LEXIS 2505 (2008) in which a non-refundable fee in a divorce case was approved reversing the Attorney Grievance Commission.

Alternative A

The author believes a client would be able to contract for a non-refundable flat fee with an attorney for defined work because such a fee is not prohibited provided other ethical considerations are met.

In addition a non-refundable fee to take a matter may also be paid:

(e) A lawyer and a client may agree that the client will pay the lawyer a fee at the time of engagement for the sole purpose of committing the lawyer to represent the client and not as payment for services, provided that the fee is reasonable and that the agreement is in writing, is signed by the client, and clearly states that the fee will not be returned to the client at any time or under any circumstance, and that it is not payment for services to be rendered.

Alternative B Attorney Grievance Commission Proposal

This alternative essentially prohibits a flat fee for taking on a matter because the fee cannot be booked immediately, but rather withdrawals are made as the work progresses. Essentially, this proposed rule turns a flat fee into an hourly fee or a staged fee

1.15(b) (4) A “flat fee” is one that embraces all services that a lawyer is to perform, whether the work is to be relatively simple or complex.

1.15 (d)(3) *Withdrawal of flat fees.* A lawyer and client may agree as to the timing, manner, and proportion of fees the lawyer may withdraw from an advance fee payment of a flat fee. The agreement, however, must reasonably protect the client’s right to a refund of unearned fees if the lawyer fails to complete the services or the client discharges the lawyer. In no event may the lawyer withdraw unearned fees. See Rule 1.15(d) for further requirements when there is a dispute over disbursement of fees.

Rule 3.3

Rule 3.3 creates an unfortunate inroad into the attorney client privilege.

Recommendation

It is recommended that a letter be sent to the Michigan Supreme Court by the Probate and Estate Planning Section recommending Alternative A of Rule 1.15 and recommending that Rule 3.3 not be adopted.

Order

Michigan Supreme Court
Lansing, Michigan

November 24, 2009

Marilyn Kelly,
Chief Justice

ADM File No. 2009-06

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

Proposed Amendment of Rules 1.5,
1.7, 1.8, 3.1, 3.3, 3.4, 3.5, 3.6, 5.4,
5.5, and 8.5 of the Michigan Rules of
Professional Conduct, and the addition
of Rules 2.4, 5.7, and 6.6

On July 2, 2004, at the request of the State Bar of Michigan, this Court published for comment proposed changes to the Michigan Rules of Professional Conduct in ADM File No. 2003-62. In large part, the proposed modifications were similar to changes that had been made by the American Bar Association in 2002 to its Model Rules of Professional Conduct. Following the period for comment, this Court held a public hearing in September 2005 concerning the published proposals. After careful consideration, the Court closed ADM File No. 2003-62 on January 22, 2009, and opened this administrative file to further consider certain proposals that had been included in ADM File No. 2003-62.

On order of the Court, this is to advise that the Court has determined to publish for comment a number of proposed modifications to the Michigan Rules of Professional Conduct. Many of the proposals are similar to those published for comment on July 2, 2004. The manner in which the current rules would be modified is shown by overstriking (deletions) and underlining (additions). With regard to proposed new Rules 2.4, 5.7, and 6.6, which have no equivalent in the current MRPCs, there is no overstriking or underlining.

Before determining whether these proposals should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposals. In some instances, alternative language is presented.

The Court welcomes the views of all. In addition, this matter will be considered at a public hearing before the Court makes a final decision. The notices and agendas for public hearings are posted on the Court's website, www.courts.michigan.gov/supremecourt.

Publication of these proposals does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposals in their present form.

Rule 1.5 Fees (Alternative A)

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee or an unreasonable amount for expenses. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) ~~When the lawyer has not regularly represented the client,~~ The scope of the representation under Rule 1.2, and the basis or rate of the fee and expenses for which the client will be responsible, must shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate previously agreed upon. Any changes in the basis or rate of the fee or expenses must also be communicated to the client in writing.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or by other law. For a A contingent-fee agreement to be valid, it must shall be in writing and signed by the client, and shall it must state the method by which the fee is to be determined, including the percentage that will accrue to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly identify any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent-fee matter, the lawyer shall provide the client with a written statement of that describes the outcome of the matter and, if there is a recovery, shows the remittance to the client and the method of its determination. See also MCR 8.121 for additional requirements applicable to some contingent-fee agreements.

(d) A lawyer shall not enter into an arrangement for, charge, or collect: ~~a contingent fee in a domestic relations matter or in a criminal matter.~~

(1) any fee in a domestic-relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony, support, or property settlement; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A lawyer and a client may agree that the client will pay the lawyer a fee at the time of engagement for the sole purpose of committing the lawyer to represent the client and not as payment for services, provided that the fee is reasonable and that the agreement is in writing, is signed by the client, and clearly states that the fee will not be returned to the client at any time or under any circumstance, and that it is not payment for services to be rendered.

(f) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client is given written notice of the fee arrangement advised of and consents to the arrangement in writing does not object to the participation of all the lawyers involved; and

(2) the total fee is not increased solely by reason of the provision for division of fees and is otherwise reasonable.

Nothing in this paragraph precludes payment under a separation or retirement agreement to a lawyer who formerly was with the firm.

Comment

Reasonableness of Fee and Expenses. Paragraph (a) requires that all fees and expenses charged by lawyers be reasonable under the circumstances. The factors specified in subparagraphs (1) through (8) are not exclusive, and all factors may not be relevant in all situations. A lawyer may seek reimbursement for services performed in-house, such as copying, or for other costs incurred in-house, such as telephone expenses, either by charging a reasonable amount to which the client has agreed or by charging an amount that reflects the cost incurred by the lawyer.

Basis or Rate of Fee. When the lawyer has regularly represented a client, ~~they~~ the lawyer and the client ordinarily will have ~~evolved~~ reached an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to ~~the fees and expenses~~ must should be promptly established promptly, as directed by paragraph (b). ~~It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. So as to reduce the possibility of misunderstanding, the lawyer minimally must give the client a simple memorandum or a copy of the lawyer's customary fee schedule that states the general nature of the services to be provided, the basis, rate, or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.~~

A contingent fee, like any other fee, is subject to the reasonableness standard of paragraph (a). In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable. See MCR 8.121.

Paragraph (d) prohibits a lawyer from charging a client a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony, support, or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of postjudgment balances due under support, alimony, or other financial orders because such contracts do not implicate the same policy concerns involved in securing a divorce or in the amount of alimony, support, or property settlement.

Paragraph (e) permits a lawyer and a client to agree that the client will pay the lawyer a reasonable fee at the time of engagement for the sole purpose of committing the lawyer to represent the client and not as payment for services. In order to be valid, such an agreement must be in writing and signed by the client, and clearly state that the fee will not be returned to the client at any time or under any circumstance, and that it is not payment for services to be rendered.

Terms of Payment. A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(ji). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client ~~special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.~~

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. ~~When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may~~

~~impose limitations on contingent fees, such as a ceiling on the percentage. See MCR 8.121.~~

Division of Fee. *A division of fee under paragraph (f) is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1. Paragraph (e) permits the lawyers to divide a fee on agreement between the participating lawyers if the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive.*

Paragraph (f) does not prohibit or regulate a division of fee to be received in the future for work done when lawyers previously were associated in a law firm.

Disputes over Fees. *If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, ~~of~~ a class, or ~~of~~ a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.*

Staff Comment: Alternative A is similar to the proposed revision of MRPC 1.5 that was published for comment on July 2, 2004, in ADM File No. 2003-62. It differs from the current rule in several ways (indicated by overstriking and underlining). For example, paragraph (b) would require a written communication regarding fees and expenses, and paragraphs (c) and (d) contain more specific requirements regarding contingent fees, including the requirement that all contingency fee agreements be signed by the client. Under paragraph (e), a lawyer and a client could agree to payment of a nonrefundable fee that is fully earned when received and is for the sole purpose of committing the lawyer to represent the client, even though the lawyer may perform no additional work. Proposed paragraph (f) would require that the client be given written notice of any fee-sharing arrangement agreed upon by attorneys from different firms, that the client consent in writing, and that the total fee not be increased solely because of the division of fees.

Rule 1.5 Fees (Alternative B: Attorney Grievance Commission Proposal)

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee

is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

(b) Definitions:

(1) "Advance fee" payments are payments for contemplated services that are made to a lawyer prior to the lawyer having earned the fee.

(2) "Advance expense" payments are payments for contemplated expenses in connection with the lawyer's services.

(3) A "general retainer" is a fee a lawyer charges for agreeing to provide legal services on an as-needed basis during a specified time period. Such a fee is not payment for the actual performance of services, but only to engage the attorney's availability. A lawyer and client may agree that a general retainer is earned by the lawyer when paid by the client. Written notice must be promptly provided to the client that the general retainer is paid solely to commit the lawyer to represent the client and not as a fee to be earned by future services.

(4) A "flat fee" is one that embraces all services that a lawyer is to perform, whether the work is to be relatively simple or complex.

(5) The definitions of "advance fee," "advance expense," "general retainer," and "flat fee" guide the application of the later provisions of this rule, even if different terminology is employed by lawyer or client.

~~(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.~~

(c) Agreements for Legal Services.

(1) The scope of the representation shall be agreed upon with the client pursuant to Rule 1.2(a).

(2) The basis or rate of the fee for which the client will be responsible must be disclosed and agreed upon with the client at the beginning of the representation and confirmed in a writing to the client within a reasonable time, except when the lawyer will charge a regularly represented client on the same basis or rate, or the fee is less than \$1,000.

(3) Any changes in the basis or rate of the fee or expenses must be agreed upon and confirmed in the manner described in paragraph (2) prior to the change being effected.

(4) A fee agreement shall not give sole discretion to an attorney to enhance a fee.

(d) Deposits and Withdrawals of Fees.

(1) *Deposit and withdrawal.* A lawyer must deposit advanced costs, fees and retainers, other than a general retainer, into an IOLTA or non-IOLTA client trust account and may withdraw such payments only as the fee is earned or the expense is incurred. See Rule 1.15 for further requirements concerning trust accounts.

(2) *Notification upon withdrawal of fee or expense.* A lawyer accepting advance fee or expense payments must notify the client in writing of the time, amount, and purpose of any withdrawal of the fee or expense, together with a complete accounting. The lawyer must transmit such notice no later than the date of the withdrawal.

(3) *Withdrawal of flat fees.* A lawyer and client may agree as to the timing, manner, and proportion of fees the lawyer may withdraw from an advance fee payment of a flat fee. The agreement, however, must reasonably protect the client's right to a refund of unearned fees if the lawyer fails to complete the services or the client discharges the lawyer. In no event may the lawyer withdraw unearned fees. See Rule 1.15(d) for further requirements when there is a dispute over disbursement of fees.

(4) *When refundable.* Notwithstanding any contrary agreement between the lawyer and client, advanced fees, including flat fees, and expense payments are refundable to the client if the fee is not earned either in whole or in part, or the expense is not incurred.

(5) *Unearned fees.* A lawyer may not withdraw unearned fees from the IOLTA or non-IOLTA client trust account.

(6) *General retainers.* A general retainer fee is earned upon receipt. A general retainer fee shall not be deposited into an IOLTA or non-IOLTA trust account, but is considered the property of the lawyer or law firm. If a general retainer fee is found to be clearly excessive, Rule 1.15(d) is not violated unless the lawyer or law firm does not refund the excess portion of the fee by the effective date of an applicable order of restitution.

(e) *General provisions:*

(1) A fee agreement may include a charge for interest on the unpaid balance of fees where the parties stipulate in writing for the payment of interest not exceeding 7% per annum. See, also, MCL 438.31 for additional requirements applicable to charging interest.

(2) ~~(e)~~ A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph ~~(d)~~ (e)(3) or by other law. A contingent-fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses are to be deducted before the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent-fee matter, the lawyer shall provide the client with a written statement of the outcome of the matter and, if there is a recovery, show the remittance to the client and the

method of its determination. See also MCR 8.121 for additional requirements applicable to some contingent-fee agreements.

~~(3) (d)~~ A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee in a domestic relations matter or in a criminal matter.:

(A) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce, or upon the amount of alimony, support or property settlement in lieu thereof; or,

(B) a contingent fee for representing a defendant in a criminal case.

~~(4) (e)~~ A division of a fee between lawyers who are not in the same firm may be made only if:

(A) (1) the client is advised of and does not object to lawyer who will be representing the client advises the client of the participation of all the lawyers involved and the client provides informed consent in writing; and

(B) (2) the total fee is reasonable.

Comment from Attorney Grievance Commission about its proposal

The proposed changes to MRPC 1.5(b) are definitional and are included to provide structure to subsequent rule provisions and apply even where other terminology is employed between a lawyer and client. Definitions are included for advanced fees and expenses, a general retainer, and flat fees. A lawyer would be able to charge an engagement fee, with a client's informed, written consent. The writing must contain a notice that the engagement fee is paid solely to have the lawyer represent the client and not to be charged as a fee for future services.

The proposed changes to MRPC 1.5(c) clarify that the scope of the lawyer and client representation is not to be set solely by the lawyer but agreed upon with the client in accordance with MRPC 1.2(a). Additionally, the timing of the lawyer's duty to communicate the lawyer's fees to a client is made clear. Where a lawyer has not previously represented a client, the lawyer has the duty to communicate the basis or rate of his fees within a reasonable time from the outset of the representation, and any subsequent changes to the fee rate, and the client must agree. Fee agreements over \$1,000 must be in writing.

*MRPC 1.5(c)(4) is designed to eliminate the practice of lawyers awarding themselves discretionary "bonuses." The practice of certain lawyers in awarding themselves a "bonus" creates confusion to clients as to the precise amount of fees that the client may expect to pay. The practice appears to have gained ground of late, particularly with "high end" divorce practitioners. See *Olson v Olson*, 256 Mich App 619 (2003). Essentially, the practice of divorce lawyers awarding themselves bonuses makes the fee charged a contingent fee that is prohibited under these rules as against public interest.*

Proposed MRPC 1.5(d) provides guidance on fee handling. MRPC (d)(1) requires advanced fees and costs, other than a general retainer, to be placed into a trust account where it would be retained until earned. Fees cannot be withdrawn from the account until the lawyer has sent a fee statement to the client. See, generally, MRPC 1.15(b)(3). Under MRPC 1.5(d)(4), fees described as "flat" or "non-refundable" still must be

earned through the performance of service. This is in accord with MRPC 1.16(d), which provides that unearned fees shall be returned to a client upon the termination of a lawyer's representation.

Proposed MRPC 1.5(e) contains general fee provisions. 1.5(e) allows a lawyer to charge the statutory 7% interest rate where the parties stipulate in writing. On numerous occasions, lawyers have come to the attention of the Attorney Grievance Commission where the lawyer has charged a client a usurious rate of interest. The changes to the contingent fee rule are in line with other court rules, disciplinary rules and case law. A contingent fee must be in writing and signed by a client. Where there is a recovery, costs and expenses shall be deducted before the fee is calculated, in accord with case law and MCR 8.121(C).

The changes to MRPC 1.5(e)(3) subdivide the prohibitions against charging contingent fees in criminal and divorce matters. They further clarify that a lawyer may charge a contingent fee to collect on outstanding divorce judgments or settled alimony and support. MRPC 1.5(4) retains the ability of lawyers to collect a referral fee, but clarifies the duty to have the informed consent of the client, confirmed in writing.

Staff Comment: Alternative B is a new revision of MRPC 1.5 that has been proposed by the Attorney Grievance Commission. Changes in the existing rule are indicated by overstriking and underlining. The accompanying comment from the commission explains the proposed changes.

Rule 1.7 Conflict of Interest: General Rules Involving Current Clients

(a) Except as provided in paragraph (2), a A lawyer shall not represent a client if the representation involves a conflict of interest, which exists if ~~of that client will be directly adverse to another client, unless:~~

(1) the lawyer reasonably believes that the representation of one client will not be directly adversely affect the relationship with the to the lawyer's representation of another client; and or

(2) there is a significant risk that each client consents after consultation. ~~(b) A lawyer shall not represent a client if the representation of that one or more clients will~~ may be materially limited by the lawyer's responsibilities to another client, a former client, or to a third person, or by a personal interest of the lawyer. the lawyer's own interests, unless:

(b) Notwithstanding the existence of a conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; the representation will not be adversely affected; and

(2) the representation is not prohibited by law; the client consents after consultation. ~~When representation of multiple clients in a single matter is undertaken, the consultation~~

shall include explanation of the implications of the common representation and the advantages and risks involved.

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding before a tribunal; and

(4) each affected client consents in writing after the lawyer discloses the material risks presented by the conflict of interest and explains any reasonably available alternatives, or the lawyer promptly affirms a client's oral consent in a writing sent to that client.

Comment

***Loyalty to a Client.** Loyalty and independent judgment are ~~is an~~ essential elements of a ~~in the~~ lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. ~~The~~ A lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and nonlitigation matters the parties and issues involved in a matter and to determine whether there are actual or potential conflicts of interest. A conflict of interest may arise from the lawyer's responsibilities to another client, a former client, or a third person, or from the lawyer's own interests.*

If a lawyer determines that there is a conflict of interest such a conflict arises after representation has been undertaken, the lawyer ~~must should~~ decline the representation or withdraw from the representation, unless each affected client consents to the representation in writing, following full disclosure of the conflict by the lawyer in a manner that can be reasonably understood by the client, or the lawyer promptly affirms the client's oral consent in a writing sent to the client. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client lawyer relationship exists or, having once been established, is continuing, see comment to Rule 1.3 and Scope, ante.

Developments such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client who is represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option of withdrawing from one of the representations in order to avoid the conflict. Where necessary, the lawyer must seek court approval and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9.

***Identifying Directly Adverse Conflicts of Interest.** ~~As a general proposition,~~ Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as an advocate in one matter against a ~~person~~ client the lawyer represents in some other matter, even if ~~it is~~ the matters are wholly unrelated.*

Otherwise that client is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to provide effective representation. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue the client's case less effectively out of deference to the other client. A similar conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client. On the other hand, simultaneous representation in unrelated matters of clients whose interests are ~~only generally~~ not directly adverse, such as competing economic enterprises, does not ordinarily require the consent of the respective clients. Where the lawyer and potential client have addressed these issues before establishing a client-lawyer relationship by appropriate agreement on future conflict, as discussed below, these concerns are minimized.

Directly adverse conflicts also can arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer in an unrelated matter, the lawyer could not undertake the representation without the consent of each client.

Identifying Conflicts of Interest; Material Limitation. Even if there is no directly adverse conflict, a conflict of interest still may exist if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for a client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, if a lawyer represents several individuals seeking to form a joint venture, the lawyer's ability to recommend or advocate all possible positions for each individual client is likely to be materially limited by the obligation of loyalty to all clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

~~Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the each client. Paragraph (b) addresses such situations. A possible~~ The mere possibility of a conflict does not itself preclude the representation or require disclosure and consent. The critical questions are the likelihood that a conflict will eventuate arise and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Lawyer's Responsibilities to Former Clients and Other Third Persons. In addition to conflicts involving current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor, or corporate director.

~~**Consultation and Consent.** A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on~~

~~representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.~~

Conflicts Arising from Lawyer's Personal Interests. ~~The A lawyer's own interests should not be permitted to have an adverse effect on the lawyer's representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. For example, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. Likewise, a A lawyer may not allow related business interests to affect the representation of a client, for example, by referring the clients to an enterprise in which the lawyer has an undisclosed interest.~~

~~When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyers' family relationships will interfere with their loyalty to their clients and their independent professional judgment. In such a circumstance, each client is entitled to know of the existence and implications of the relationship between the lawyers before representation is undertaken. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated.~~

Conflicts in Litigation. ~~Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.~~

~~Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are~~

~~circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.~~

Interest of Person Paying for a Lawyer's Service. ~~A lawyer may be paid from a source other than the client if the client consents after being is informed of that fact ~~and consents~~ and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). If payment from another source would present a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person making the payment or by the lawyer's responsibilities to a payer who is also a client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation. For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. ~~So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.~~~~

Prohibited Representations. Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), the existence of some conflicts precludes a lawyer from undertaking or continuing to represent a particular client. When a lawyer is representing more than one client, the question of whether consent can be given notwithstanding a conflict must be resolved as to each client. The critical question is whether the interests of the clients will be adequately protected if the clients are permitted to consent to the representation.

Under some circumstances, it may be impossible to make the disclosure necessary to obtain a client's consent to representation notwithstanding a conflict. For example, when a lawyer represents different clients in related matters and one client refuses to allow the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In such a circumstance, each party may have to obtain separate representation.

Revoking Consent. A client's consent to an existing or future conflict constitutes consent both to the lawyer's representation of the client and to the lawyer's representation of other existing or future clients. With regard to the former, the client is free to revoke the consent and terminate a lawyer's representation at any time. The question of whether the client may revoke the consent as to other existing or future clients

is another matter. The answer is to be determined under contract law if the lawyer has relied upon the client's consent when undertaking or continuing representation of the client, and the consent is a material term of the representation. In other circumstances, whether the lawyer is precluded from continuing to represent other clients depends on the circumstances, including the nature of the conflict; the reason the client revoked consent, e.g., because of a material change in circumstances; the reasonable expectations of the other existing or future clients; and the likelihood that the other clients or the lawyer would suffer a material detriment.

Consent to Future Conflict. The effectiveness of a client's consent to representation notwithstanding a conflict that might arise in the future generally depends on the extent to which the client understands the material risks and benefits. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences, the greater the likelihood that the client will have the necessary understanding. For example, if the client consents to a particular type of conflict with which the client is familiar, then the consent ordinarily will be effective with regard to that type of conflict. On the other hand, if the consent is general and open-ended and is given by an unsophisticated client without the advice of independent counsel, then it is unlikely that the client understood the material risks involved and the consent may not be effective. Consent to representation notwithstanding a conflict that might arise in the future will not be effective if the circumstances that actually materialize would preclude representation under paragraph (b).

Conflicts in Litigation. A lawyer may not represent opposing parties in the same litigation. Even when the simultaneous representation of parties is not precluded, conflicts may arise. For example, there may be substantial discrepancy in the parties' testimony, the parties' positions may be incompatible in relation to an opposing party, or there may be substantially different possibilities of settlement of claims and liabilities. The common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met. The potential for a conflict of interest in a criminal case is so grave, however, that a lawyer ordinarily should decline to represent more than one codefendant.

A lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest does exist, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case, e.g., when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. The factors to be considered in determining whether clients need to be advised of the risks include (a) where the cases are pending, (b) whether the issue is substantive or procedural, (c) the temporal relationship between the matters, (d) the significance of the issue to the immediate and long-term interests of the clients, and (e) the clients' reasonable expectations in retaining the lawyer. If there is a significant risk of material limitation,

then the lawyer must decline one of the representations or withdraw from one or both matters unless the clients consent to representation notwithstanding the conflict.

When a lawyer represents or seeks to prosecute or defend a class-action lawsuit, unnamed members of the class ordinarily are not considered to be the lawyer's clients under paragraph (a)(1) of this rule. The lawyer thus does not need to obtain the consent of such a person before representing a client who is suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class-action lawsuit does not need to obtain the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Other Nonlitigation Conflicts Situations. Conflicts of interest may exist in contexts other than litigation sometimes may be difficult to assess. Relevant factors to be considered in determining whether there is significant potential for adverse effect or material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

~~For example, a lawyer may not represent multiple parties in a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.~~

Conflict questions may ~~also~~ arise in estate planning and estate administration. For example, a lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction a question of law. Under one view, the client is the fiduciary; under another view, the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

Whether a client may consent to representation notwithstanding a conflict depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible if the clients are generally aligned in interest, even though there are some differences among them. Thus a lawyer may help to organize a business in which two or more clients are entrepreneurs, work out the financial reorganization of an enterprise in which two or more clients have an interest, or arrange a property distribution in connection with the settlement of an estate.

Special Considerations in Common Representation. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because of potentially adverse interests, the result can be additional cost, embarrassment, and recrimination. In some situations, the risk of failure is so great that multiple representation is impossible. For example, a lawyer cannot undertake common representation of clients if contentious litigation or negotiations between them are imminent or contemplated. Moreover, representation of multiple

clients is improper when it is unlikely that the lawyer can maintain impartiality. Generally, if the relationship between the parties already is antagonistic, it is unlikely that the clients' interests can be adequately served by common representation. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

An important factor in determining whether common representation is appropriate is the effect on the attorney-client privilege and client-lawyer confidentiality. With regard to the attorney-client privilege, the prevailing rule is that the privilege does not attach as between commonly represented clients, and the clients should be so advised. With regard to client-lawyer confidentiality, continued common representation almost certainly will be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. Thus, at the outset of the common representation, the lawyer should advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the common representation if the clients agree, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and, with the consent of both clients, agree to keep that information confidential.

Organizational Clients. A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent a constituent or affiliated organization such as a parent or a subsidiary. Thus the lawyer is not precluded from representing another client in an unrelated matter, even though that client's position is adverse to an affiliate of the organizational client, unless (a) the circumstances are such that the affiliate should be considered a client of the lawyer, (b) there is an understanding between the lawyer and the organizational client that the lawyer will avoid representing another client whose position is adverse to the client's affiliates, or (c) the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

A lawyer ~~for~~ who represents a corporation or other organization and who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual roles will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should not act as the corporation's lawyer if a conflict of interest arises. The lawyer should advise the other members of the board that some matters discussed at board meetings while the lawyer is present in the capacity of

director might not be protected by the attorney-client privilege, and that the lawyer might not be able to participate as a director or might not be able to represent the corporation in certain matters because of a conflict of interest.

~~**Conflict Charged by an Opposing Party.** Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. See MCR 6.101(C)(4). Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope, ante.~~

Staff Comment: The proposed changes in current MRPC 1.7 are similar in many respects to the version of MRPC 1.7 that was published for comment on July 2, 2004, in ADM File No. 2003-62. The additions to the current rule and the expanded commentary (indicated by overstriking and underlining) are intended to provide additional guidance to lawyers and to make the conflict-of-interest doctrine less difficult to understand and apply with regard to current clients. For example, proposed paragraph (b) contains more specific requirements regarding the circumstances in which a lawyer may represent a client despite the existence of a conflict of interest, including the requirement of written consent.

Rule 1.8 Conflict of Interest: Specific Rules Involving Current Clients ~~Prohibited Transactions~~

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed to the client ~~and transmitted~~ in writing ~~to the client~~ in a manner that can be reasonably understood by the client;

(2) the client is advised in writing that it is appropriate to seek the advice of independent legal counsel concerning the matter and is given a reasonable opportunity to seek the such advice of independent counsel in the transaction; and

(3) the client consents in writing ~~thereto~~ to the essential terms of the transaction and the lawyer's role in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents in writing ~~after consultation~~, except as permitted or required by these Rules 1.6 or Rule 3.3.

(c) A lawyer shall not solicit a substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any a substantial gift, from the client,

~~including a testamentary gift, except where the client is related to the donee unless the lawyer or other intended recipient is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other person with whom the lawyer or client maintains a close familial relationship.~~

(d) ~~Prior to the conclusion of~~ Before concluding the representation of a client, a lawyer shall not ~~enter into~~ make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which ~~shall ultimately be the responsibility of the client~~ may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents in writing after consultation;

(2) there is no interference with the lawyer's independent~~tee~~ of professional judgment or with the client-lawyer relationship; and

(3) information relating to the representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or, in a criminal case, an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents in writing after consultation, including the lawyer disclosures of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) ~~make~~ enter into an agreement prospectively limiting the lawyer's liability to a client for malpractice unless ~~permitted by law and~~ the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client ~~unless without first advising that person~~ first is advised in writing that it is appropriate to seek the advice of independent legal counsel ~~representation is appropriate in connection concerning the matter and is given a reasonable opportunity to seek such advice therewith.~~

(i) ~~A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.~~

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation that the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized ~~granted~~ by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case, as permitted by Rule 1.5 and MCR 8.121.

(j) While lawyers are associated in a firm, a prohibition in this rule that applies to any of them applies to all of them.

Comment

~~***Business Transactions Between Client and Lawyer.** As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment.*~~

A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property, or financial transaction with a client. The requirements of paragraph (a) apply even when the transaction in question is not closely related to the subject matter of the representation, e.g., when a lawyer drafting a will learns that the client needs money for unrelated expenses and offers the client a loan. The rule also applies to lawyers engaged in the sale of goods or services related to the practice of law, such as title insurance and investment services, and to lawyers who wish to purchase property from estates they represent. The rule does not apply, however, to ordinary fee arrangements between a client and a lawyer, although the rule requirements do pertain if a lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. Neither does the rule Paragraph (a) does not, however, apply to standard commercial transactions between the a lawyer and the a client for products or services that the client generally markets to others, for example, such as banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction or when the lawyer's financial interest in the transaction otherwise poses a significant risk that the representation of the client will be materially limited. In such a circumstance, the lawyer must comply not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that rule, the lawyer must disclose the risks associated with the lawyer's dual role of legal adviser and participant in the transaction, for example, the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

If the client is represented by independent counsel in the transaction, the requirement of full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was represented by independent counsel is relevant in determining whether the agreement was fair and reasonable to the client.

Use of Information Related to Representation. A lawyer violates the duty of loyalty by using information relating to the representation of a client to the disadvantage of the client. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or recommend that another client make such a purchase. A lawyer does not violate the duty of loyalty, however, if the lawyer uses the information but not to the disadvantage of the client. For example, a lawyer who learns of a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients.

Gifts to Lawyers. A lawyer may accept a gift from a client if the transaction meets general standards of fairness. For example, a simple gift such as a present given presented at a holiday or as a token of appreciation is permitted. If the gift is substantial, however, and effectuation of a substantial the gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. The sole Paragraph (e) recognizes an exception to this rule is where if the client is a relative of the donee or the gift is not substantial.

Literary Rights. An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i) (j) of this rule.

Financial Assistance. Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses. The risk is that clients would be encouraged to pursue lawsuits that they might otherwise not pursue and that such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant precluding a lawyer from lending a client court costs and litigation expenses, however, including expenses related to medical examinations and the costs of obtaining and presenting evidence. Such costs and expenses are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, lawyers should be permitted to pay the court costs and litigation expenses of indigent clients regardless of whether the money will be repaid.

Person Paying for a Lawyer's Services. Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7

~~concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court supervised procedure. Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company), or a co-client (such as a corporation sued along with one or more of its employees). Third-party payers may have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing. Accordingly, a lawyer is prohibited from accepting or continuing such representation unless the client consents and the lawyer determines that the lawyer's independent professional judgment will not be compromised. See also Rule 5.4(c), which prohibits interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another, and Rule 1.6, which concerns confidentiality.~~

Aggregate Settlements. ~~Before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement or plea bargain, including what the other clients will receive or pay if the settlement or plea offer is accepted. Lawyers representing a class of plaintiffs or defendants must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.~~

Limiting Liability and Settling Malpractice Claims. ~~Paragraph (h) is not intended to apply to customary qualifications and limitations in legal opinions and memoranda. Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is represented by independent counsel because such agreements are likely to undermine competent and diligent representation. A lawyer is not prohibited from entering into an agreement with a client to arbitrate legal malpractice claims, however, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor is a lawyer prohibited from entering into an agreement to settle a claim or a potential claim for malpractice, although the lawyer must advise the client that it would be appropriate to seek the advice of independent counsel regarding such an agreement and give the client a reasonable opportunity to obtain such advice.~~

Family Relationships Between Lawyers. ~~Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated.~~

Acquisition of Acquiring Proprietary Interest in Litigation. ~~Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This The general rule, which has its basis in common-law champerty and maintenance, and is designed to avoid giving the lawyer too great an interest in the representation. There also is concern that it is difficult for a client to discharge a lawyer who acquires an ownership interest in the subject of the representation. is subject to §Specific exceptions to the general rule have developed in decisional law and are~~

continued in these rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e).

Client-Lawyer Sexual Relationships with Clients. *After careful study, the Supreme Court declined in 1998 to adopt a proposal to amend Rule 1.8 to limit sexual relationships between lawyers and clients. The Michigan Rules of Professional Conduct adequately prohibit representation that lacks competence or diligence, or that is shadowed by a conflict of interest. With regard to sexual behavior, the Michigan Court Rules provide that a lawyer may be disciplined for “conduct that is contrary to justice, ethics, honesty, or good morals.” MCR 9.104(3). Further, the Legislature has enacted criminal penalties for certain types of sexual misconduct. In this regard, it should be emphasized that a lawyer bears a fiduciary responsibility toward the client. A lawyer who has a conflict of interest, whose actions interfere with effective representation, who takes advantage of a client’s vulnerability, or whose behavior is immoral risks severe sanctions under the existing Michigan Court Rules and Michigan Rules of Professional Conduct.*

Staff Comment: Proposed MRPC 1.8 is a similar but shorter version of the proposal that was published for comment on July 2, 2004, in ADM File No. 2003-62. The proposed rule is substantially similar to current MRPC 1.8, although the title has been changed and the accompanying commentary has been expanded considerably. In addition, proposed paragraph (a)(2) would require that a client be advised in writing of the desirability of seeking the advice of independent legal counsel in a transaction, and paragraph (j) clarifies that a prohibition that applies to one lawyer in a firm applies to all lawyers in the firm.

Rule 2.4 Lawyer Serving as Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral must inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter, the lawyer must explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.

Comment

Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as

third-party neutrals. A third-party neutral is a person, such as a mediator, an arbitrator, a conciliator, or an evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, an evaluator, or a decision maker depends on the particular process that is selected by the parties or mandated by a court.

The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals also may be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association, or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution.

Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

Lawyers who represent clients in alternative dispute resolution are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration, the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Staff Comment: There is no equivalent to proposed MRPC 2.4 in the current Michigan Rules of Professional Conduct. The proposal is virtually identical to the version that was published for comment on July 2, 2004, in ADM File No. 2003-62. The proposed rule is designed to help parties involved in alternative dispute resolution to better understand the role of a lawyer serving as a third-party neutral.

Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous. A lawyer may offer a good-faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may so defend the proceeding as to require that every element of the case be established.

Comment

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also has a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good-faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the ~~client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person.~~ ~~Likewise, the action is frivolous if the lawyer is unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification, or reversal of existing law.~~

Staff Comment: Proposed MRPC 3.1 is similar to the proposed revision that was published for comment on July 2, 2004, in ADM File No. 2003-62. The proposal makes no changes in the current rule, but modifies the accompanying commentary to clarify that a lawyer is not responsible for a client's subjective motivation.

Rule 3.3 Candor Toward the Tribunal

- (a) A lawyer shall not knowingly:
- (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - ~~(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;~~

(32) fail to disclose to a tribunal controlling legal authority ~~in the jurisdiction~~ known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(43) offer evidence that the lawyer knows to be false.

If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(b) If a lawyer knows that the lawyer's client or other person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to an adjudicative proceeding involving the client, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

~~(b)~~ The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

~~(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.~~

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts that are known to the lawyer ~~and~~ that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

This rule governs the conduct of a lawyer who is representing a client in a tribunal. It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, subrule (a) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

As officers of the court, lawyers have special duties to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. ~~The advocate's task is to present the client's case with persuasive force.~~ Performance of that duty while maintaining confidences of the client is qualified, however, by the advocate's duty of candor to the tribunal. ~~However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.~~ Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer. An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, because litigation documents ordinarily present assertions by the client or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the

basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(c), see the comment to that rule. See also the comment to Rule 8.4(b).

Misleading Legal Argument. Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly controlling adverse authority ~~in the jurisdiction which~~ that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

~~**False Evidence.** When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.~~

~~When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.~~

~~Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth finding process which the adversary system is designed to implement. See Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.~~

Offering Evidence. Paragraph (a)(3) requires that a lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this rule if the lawyer offers the evidence for the purpose of establishing its falsity.

If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness' testimony will be false, the lawyer may call the witness to testify but may not

elicit or otherwise permit the witness to present the testimony that the lawyer knows is false. A lawyer's knowledge that evidence is false can be inferred from the circumstances. Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

~~**Perjury by a Criminal Defendant.** Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.~~

~~The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.~~

~~Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence, but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution, but makes the advocate a knowing instrument of perjury.~~

~~The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify, and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(e).~~

~~**Remedial Measures.** If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the lawyer's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal,~~

and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the lawyer advocate should seek to withdraw if that will remedy the situation must take further remedial action. If withdrawal will not remedy the situation or is impossible, from the representation is not permitted or will not remedy the effect of the false evidence, the advocate should lawyer must make such disclosure to the court tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the court tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, the second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

The disclosure of a client's false testimony can result in grave consequences to the client, including a sense of betrayal, the loss of the case, or perhaps a prosecution for perjury. However, the alternative is that the lawyer aids in the deception of the court, thereby subverting the truth-finding process that the adversarial system is designed to implement. See Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer must remediate the disclosure of false evidence, the client could simply reject the lawyer's counsel to reveal the false evidence and require that the lawyer remain silent. Thus, the client could insist that the lawyer assist in perpetrating a fraud on the court.

Constitutional Requirements. *The general rule that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. The obligation of the advocate under these rules is subordinate to such a constitutional requirement.*

Preserving Integrity of Adjudicative Process. *Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating, or otherwise unlawfully communicating with a witness, juror, court official, or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence, or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure, if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding. See Rule 3.4.*

Duration of Obligation. *A practical time limit on the obligation to rectify the presentation of false evidence or false statements of law and fact must be established.*

The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

~~**Refusing to Offer Proof Believed to Be False.** Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may be denied this authority by constitutional requirements governing the right to counsel.~~

Ex Parte Proceedings. Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts that are known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal. Normally, a lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this rule or as otherwise permitted by Rule 1.6.

Staff Comment: The proposed changes in MRPC 3.3 are similar to those in the proposal that was published for comment on July 2, 2004, in ADM File No. 2003-62. The manner in which the current rule would be modified (indicated by overstriking and underlining) includes specifying in paragraph (a)(1) that a lawyer shall not knowingly "fail to correct a false statement of material fact or law," and substituting proposed paragraph (b) for current paragraph (a)(2), which deals with a disclosure that is "necessary to avoid assisting a criminal or fraudulent act by the client."

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party;

(e) during trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party, unless:

(1) the person is ~~a relative or~~ an employee or other agent of a client for the purposes of MRE 801(d)(2)(D); and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improper influence of witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. Other law makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

With regard to paragraph (b), it is not improper to pay a witness' expenses or to compensate an expert witness on terms permitted by law. It is, however, improper to pay an occurrence witness any fee for testifying beyond that authorized by law, and it is improper to pay an expert witness a contingent fee.

~~*Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, because the employees may identify their interests with those of the client. See also Rules 4.2 and 4.3.*~~

Staff Comment: Proposed MRPC 3.4 and the accompanying commentary are nearly identical to the current Michigan rule and to the proposed revision that was published for comment on July 2, 2004, in ADM File No. 2003-62. One difference is the clarification in proposed paragraph (f)(1) that a lawyer may not ask someone other than a client to refrain from voluntarily giving relevant information to another party unless the person is “an employee or other agent of a client for the purposes of MRE 801(d)(2)(D).”

Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;

(b) communicate ex parte with such a person concerning a pending matter, ~~except as permitted by law; or~~ unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication constitutes misrepresentation, coercion, duress or harassment;

or

~~(e)~~(d) engage in undignified or discourteous conduct toward the tribunal.

Comment

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Michigan Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters, or jurors, unless authorized to do so by law or court order.

A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so, unless the communication is prohibited by law or a court order, but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

The advocate’s function is to present evidence and argument so that the cause may be decided according to law. Refraining from undignified or discourteous conduct is a corollary of the advocate’s right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge, but should avoid reciprocation; the judge’s default is no justification for similar dereliction by an advocate. An advocate can present the cause,

protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Staff Comment: Proposed MRPC 3.5 is similar to the proposed revision that was published for comment on July 2, 2004, in ADM File No. 2003-62. It differs from the current rule primarily because of the addition of paragraph (c), which addresses the issue of lawyers contacting jurors and prospective jurors after the jury is discharged.

Rule 3.6 Trial Publicity (Alternative A)

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to the lawyer knows or reasonably should know will be disseminated by means of public communication if the lawyer knows or reasonably should know that it and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer who is participating or has participated in the investigation or litigation of a matter may state without elaboration:

- (1) the nature of the claim, offense, or defense involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case, also:
 - (i) the identity, residence, occupation, and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the fact, time and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party ~~prior~~ ~~to~~ before trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of

forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

~~No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. Moreover, the confidentiality provisions of Rule 1.6 may prevent the disclosure of information which might otherwise be included in an extrajudicial statement. In addition, special rules of confidentiality may validly govern proceedings in juvenile, domestic relations, and mental disability proceedings, and perhaps in addition to other types of litigation. Rule 3.4(c) requires compliance with such rules.~~

~~For guidance in this difficult area, one may consider the following language adapted from the American Bar Association's Model Rule 3.6:~~

Rule 3.6 sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been, involved in the investigation or litigation of a case, and their associates.

~~(a)~~ A statement referred to in Rule 3.6 ordinarily is likely to have ~~such a prejudicial effect~~ a substantial likelihood of materially prejudicing an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation, or criminal record of a party, of a suspect in a criminal investigation or of a witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, ~~or~~ the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

~~(b) Notwithstanding Rule 3.6 and paragraphs (a) (1-5) of this portion of the comment, a lawyer involved in the investigation or litigation of a matter may state without elaboration:~~

- ~~(1) the general nature of the claim or defense;~~
- ~~(2) the information contained in a public record;~~
- ~~(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;~~
- ~~(4) the scheduling or result of any step in litigation;~~
- ~~(5) a request for assistance in obtaining evidence and information necessary thereto;~~
- ~~(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and~~
- ~~(7) in a criminal case:~~
 - ~~(A) the identity, residence, occupation and family status of the accused;~~
 - ~~(B) if the accused has not been apprehended, information necessary to aid in apprehension of that person;~~
 - ~~(C) the fact, time and place of arrest; and~~
 - ~~(D) the identity of investigating and arresting officers or agencies and the length of the investigation.~~

See Rule 3.8(e) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Staff Comment: Alternative A is a similar but abbreviated version of the proposed revision of MRPC 3.6 that was published for comment on July 2, 2004, in ADM File No. 2003-62. It expands the current rule considerably by moving substantial portions of the current commentary into the rule itself. See, for example, proposed paragraph (b). Paragraph (a) is substantially the same as the current rule, except that the “reasonable lawyer” standard is substituted for the “reasonable person” standard.

Rule 3.6 Trial Publicity (Alternative B: State Bar of Michigan Proposal)

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment proposed by State Bar of Michigan

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. Moreover, the confidentiality provisions of Rule 1.6 may prevent the disclosure of information which might otherwise be included in an extrajudicial statement. In addition, special rules of confidentiality may validly govern proceedings in juvenile, domestic relations, and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(e) requires compliance with such rules.

~~For guidance in this difficult area, one may consider the following language adapted from the American Bar Association's Model Rule 3.6:~~

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations, mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been, involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly (a) A statement referred to in Rule 3.6 ordinarily is likely to have such a prejudicial effect when ~~it~~ they refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration ~~and the statement relates to~~. These subjects relate to:

(1) the character, credibility, reputation, or criminal record of a party, ~~of a~~ suspect in a criminal investigation, ~~or of a witness;~~ ~~or~~ the identity of a witness; ~~or~~ the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense ~~or~~; the existence or contents of any confession, admission, or statement given by a defendant or suspect; ~~or~~ that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, ~~or~~ the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

~~(b) Notwithstanding Rule 3.6 and paragraphs (a)(1-5) of this portion of the comment, a lawyer involved in the investigation or litigation of a matter may state without elaboration:~~

- ~~(1) the general nature of the claim or defense;~~
- ~~(2) the information contained in a public record;~~
- ~~(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;~~
- ~~(4) the scheduling or result of any step in litigation;~~
- ~~(5) a request for assistance in obtaining evidence and information necessary thereto;~~
- ~~(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and~~
- ~~(7) in a criminal case:

 - ~~(A) the identity, residence, occupation and family status of the accused;~~
 - ~~(B) if the accused has not been apprehended, information necessary to aid in apprehension of that person;~~
 - ~~(C) the fact, time and place of arrest; and~~
 - ~~(D) the identity of investigating and arresting officers or agencies and the length of the investigation.~~~~

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(e) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Staff Comment: Alternative B is the proposed revision of MRPC 3.6 that was submitted by the State Bar of Michigan and published for comment on July 2, 2004, in ADM File No. 2003-62. The proposed changes in the current rule are indicated by overstriking and underlining. Alternative B is longer than Alternative A and includes several additional provisions, including proposed paragraph (c), which specifically would

allow a statement “that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client,” and proposed paragraph (d), which specifies that a lawyer associated with a lawyer subject to paragraph (a) may not make a statement prohibited by paragraph (a). Alternative B also includes longer accompanying commentary than Alternative A.

Rule 5.4 Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer’s firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer’s death, to the lawyer’s estate, or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price ~~pursuant to the provisions of Rule 1.17; and~~

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof, or one who occupies a position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

The provisions of this rule express traditional limitations on sharing fees. These limitations are to protect the lawyer’s professional independence of judgment. Where someone other than the client pays the lawyer’s fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer’s obligation to

the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

This rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

~~A lawyer does not violate this rule by affiliating with or being employed by an organization such as a union sponsored prepaid legal services plan, provided the structure of the organization permits the lawyer independently to exercise professional judgment on behalf of a client.~~

Staff Comment: Proposed MRPC 5.4 is similar to the proposed revision that was published for comment on July 2, 2004, in ADM File No. 2003-62. It differs from the current rule primarily because of the addition of proposed paragraph (a)(4), which specifically allows a lawyer to “share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter.”

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not: (a) practice law in a jurisdiction where doing so violates in violation of the regulation of the legal profession in that jurisdiction; or assist another in doing so.

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law. A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by law or these rules, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction may provide temporary legal services in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer or a person the lawyer is assisting is authorized by law to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in

which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not covered by paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized by law to provide in this jurisdiction.

Comment

A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by law, order, or court rule to practice for a limited purpose or on a restricted basis. See, for example, MCR 8.126, which permits, under certain circumstances, the temporary admission to the bar of a person who is licensed to practice law in another jurisdiction, and Rule 5(E) of the Rules for the Board of Law Examiners, which permits a lawyer who is admitted to practice in a foreign country to practice in Michigan as a special legal consultant, without examination, provided certain conditions are met.

Paragraph (a) applies to the unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This rule Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for it their work. See Rule 5.3.

Likewise it does not prohibit A lawyers from providing may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law, for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

Other than as authorized by law or this rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present

here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

There are occasions in which a lawyer admitted to practice in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of clients, the public, or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not indicate whether the conduct is authorized. With the exception of paragraphs (d)(1) and (d)(2), this rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted here to practice generally.

There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction and, therefore, may be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any jurisdiction of the United States, including the District of Columbia and any state, territory, or commonwealth. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice and is in good standing to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who, while technically admitted, is not authorized to practice because, for example, the lawyer is on inactive status or is suspended for nonpayment of dues.

Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice, such as MCR 8.126, or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a law or court rule of this jurisdiction requires that a lawyer who is not admitted to practice in this jurisdiction obtain admission pro hac vice before appearing before a tribunal or administrative agency, this rule requires the lawyer to obtain that authority.

Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice under MCR 8.126. Examples of such conduct include meetings with a client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer

admitted only in another jurisdiction may engage temporarily in this jurisdiction in conduct related to pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction, provided that those services are in or are reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction and the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice under MCR 8.126 in the case of a court-annexed arbitration or mediation, or otherwise if required by court rule or law.

Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction if they arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not covered by paragraphs (c)(2) or (c)(3). These services include both legal services and services performed by nonlawyers that would be considered the practice of law if performed by lawyers.

Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors indicate such a relationship. The lawyer's client previously may have been represented by the lawyer or may reside in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work may be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship may arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of the corporation's lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise, as developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally uniform, foreign, or international law.

Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another jurisdiction of the United States and is not disbarred or suspended from practice in any jurisdiction may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as to provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a

lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. This paragraph applies to in-house corporate lawyers, government lawyers, and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by statute, court rule, executive regulation, or judicial precedent.

A lawyer who practices law in this jurisdiction is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may be required to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, such disclosure may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

Paragraphs (c) and (d) do not authorize lawyers who are admitted to practice in other jurisdictions to advertise legal services to prospective clients in this jurisdiction. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

Staff Comment: Proposed MRPC 5.5 is essentially the same proposal that was published for comment on July 2, 2004, in ADM File No. 2003-62. Both the rule and the accompanying commentary are much longer than the current rule and commentary. The rule sets specific guidelines for out-of-state lawyers who are appearing temporarily in Michigan, and is intended to work in conjunction with MRPC 8.5. See, also, MCR 8.126 and MCR 9.108(E)(8).

Rule 5.7 Responsibilities Regarding Law-Related Services

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comment

When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed, and regardless of whether the law-related services are performed through a law firm or a separate entity. This rule identifies the circumstances in which all the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, this rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made, preferably in writing, before law-related services are provided or before an agreement is reached for provision of such services.

The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances, the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the rule cannot be met. In such a case, a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls, comply in all respects with the Rules of Professional Conduct.

A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical, or environmental consulting.

When a lawyer is obliged to accord the recipients of such services the protections of those rules that apply to the client-lawyer relationship, the lawyer must take special care

to heed the proscriptions of the rules addressing conflicts of interest, and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

When the full protections of all the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest, and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

Staff Comment: There is no equivalent to proposed MRPC 5.7 in the current Michigan Rules of Professional Conduct. The proposal is substantially the same as the version that was published for comment on July 2, 2004, in ADM File No. 2003-62. The underlying presumption of the proposed rule is that the MRPCs apply whenever a lawyer performs law-related services or controls an entity that does so. The accompanying commentary explains that the presumption may be rebutted only if the lawyer carefully informs the consumer which services are which and clarifies that no client-lawyer relationship exists with respect to ancillary services.

Rule 6.6 Nonprofit and Court-Annexed Limited Legal Services Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this rule.

Comment

Legal services organizations, courts, and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services, such as advice or the completion of legal forms, that will help persons address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics, or pro se counseling programs, a client-lawyer relationship may or may not be established as a matter of law, but regardless there is no

expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

A lawyer who provides short-term limited legal services pursuant to this rule must secure the client's consent to the scope of the representation. See Rule 1.2. If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

Because a lawyer who is representing a client in the circumstances addressed by this rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

If, after commencing a short-term limited representation in accordance with this rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

Staff Comment: There is no equivalent to proposed MRPC 6.6 in the current Michigan Rules of Professional Conduct. The proposal is substantially the same as the proposal that was published for comment as MRPC 6.5 on July 2, 2004, in ADM File No. 2003-62. The proposed rule addresses concerns that a strict application of conflict-of-interest rules may deter lawyers from volunteering to provide short-term legal services through nonprofit organizations, court-related programs, and similar other endeavors such as legal-advice hotlines.

Rule 8.5 ~~Jurisdiction~~ Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer licensed admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of whether where the lawyer's is engaged in practice elsewhere conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be who is licensed to practice in another jurisdiction and who is admitted to practice in this jurisdiction is subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct; a lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment

In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5. A lawyer admitted to practice in Michigan pro hac vice is subject to the disciplinary authority of this state for actions and inactions occurring during the course of the representation of a client in Michigan.

If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.

Disciplinary Authority. *It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this rule. The fact that a lawyer is subject*

to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer in civil matters.

Choice of Law. A lawyer potentially may be subject to more than one set of rules of professional conduct that impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interests of clients, the profession, and those who are authorized to regulate the profession. Accordingly, paragraph (b) provides that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct; makes the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions; and protects from discipline those lawyers who act reasonably in the face of uncertainty.

Paragraph (b)(1) provides, as to a lawyer's conduct relating to a proceeding pending before a tribunal, that the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred or, if the predominant effect of the conduct is in another jurisdiction, the lawyer shall be subject to the rules of that jurisdiction. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be either where the conduct occurred, where the tribunal sits, or in another jurisdiction.

When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear initially whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct actually did occur. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this rule.

If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct and should avoid proceeding against a lawyer on the basis of inconsistent rules.

The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties, or other agreements between regulatory authorities in the affected jurisdictions provide otherwise.

Staff Comment: Proposed MRPC 8.5 is similar to the proposed revision that was published for comment on July 2, 2004, in ADM File No. 2003-62. It differs considerably from the current rule, primarily by the addition of a separate section on choice of law. The proposed rule specifically gives discipline authorities jurisdiction to investigate and prosecute the ethics violations of attorneys temporarily admitted to practice in Michigan. The rule is intended to work in conjunction with MRPC 5.5. See, also, MCR 8.126 and MCR 9.108(E)(8).

The staff comments that appear throughout this proposal are intended to provide explanation, but are not authoritative constructions by the Court.

A copy of this order will be given to the Secretary of the State Bar of Michigan and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposals may be sent to the Clerk of the Michigan Supreme Court in writing or electronically by March 1, 2010, at P.O. Box 30052, Lansing, Michigan 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2009-06. Your comments and the comments of others will be posted at www.courts.michigan.gov/supremecourt/resources/administrative/index.htm



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 24, 2009

Corbin R. Davis

Clerk

Troublesome Scenarios under proposed MRPC 3.3(b)

Josh Ard
January 16, 2010

I cannot believe that the rule drafters thought much about, if at all, fiduciary proceedings in drafting this rule. The proposed Michigan rule is

(b) If a lawyer knows that the lawyer's client or other person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to an adjudicative proceeding involving the client, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

The current national, ABA, rule is better, but not by much

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Note that the Michigan rule doesn't even require that the lawyer know that his client is involved in an adjudicative proceeding. It would create duties for an attorney representing a client on one matter who happens to be an interested person or party in an adjudicative proceeding.

Scenario 1

John Doe must defend himself in a claim before the probate court that he breached his fiduciary duties. He hires a new lawyer, Darrow, to represent him. Darrow learns that Doe engaged in wrongful conduct. Darrow seems to have a duty to report this to the court and is hardly in a position to provide a reasonable defense.

Scenario 2

Mary Roe performed some wrongful act as a fiduciary for her mother. Her attorney learned about this and withdrew. Roe hires Bailey as her new attorney. She does nothing wrong while Bailey is representing her, but Bailey figures out what happened before his representation began. Bailey seems to have a duty to report this to the court.

Scenario 3

Fitch is a noted probate lawyer. He drafted an estate plan for Bigbucks. He learned that Bigbucks is a minority owner of Ripoff Mortgage Services. Jane Dowager has required care assistance for years. A petition for conservatorship was filed by APS. Cyndi Coe, her niece, is an interested party. Coe is a client of Fitch's (in Michigan in an unrelated matter; in other states she lives out of state and Fitch represents her in the proceedings). Fitch learns that Ripoff refinanced her mortgage two years ago, probably in a manner involving deception. Fitch would be required to report this.

Upshot

What kinds of representation agreements would be necessary to inform clients that the lawyer might have to disclose information told in confidence or learned by the lawyer? Would this discourage clients from seeking competent counsel? What would lawyers have to do to check conflicts to avoid getting in similar quandaries?

ATTACHMENT 4

Continuing Education and Annual Probate Institute Report

Continuing Education and Annual Probate Institute

Committee Report to the

Council of the Probate & Estate Planning Section

January 16, 2010

The brochure for the **50th Annual Probate & Estate Planning Institute** (May 6-8 in Traverse Coty and June 18-19 in Plymouth) is at the printers and the first version should be in your mailboxes in the middle of February. Demonstrating that incentives do affect behavior the **\$50** for the first **50** participants to sign up is gone. Half of the **\$50** for the first **50** new lawyers is about half gone. This is based on word of mouth and two e-mails. I found the following interesting:

	<u>Last Year</u>	<u>This Year</u>
Sixteen weeks out	42	75
Total	697	

The **New Michigan Trust Code** and **19th Annual Drafting Estate Planning Documents** with a Michigan Trust Code emphasis (1/2 day each running in tandem) have the following record enrollments:

	<u>MTC</u>	<u>DEPD</u>
Grand Rapids 1/21	224	148
Plymouth	379	262

Mark Harder's EPIC/MTC commentary will be on sale for \$ 95 at the seminar.

Other Items of Note

The Section is co-sponsoring the following upcoming seminars:

Estate Planning for Retirement Assets (2/4 in Plymouth)

2010 Medicaid and HealthCare Planning Update (4/7 in Grand Rapids and 4/22 in Plymouth)

Drafting an Estate Plan for an Estate Under \$5 Million (2/25 in Plymouth)

Part of the limited enrollment Certificate Program

Michigan Trust Code Preview Series of Eight Webcasts featuring two presenters, one being Mark Harder in each case

ATTACHMENT 5

Revisions to MTC Sections 7401 and 7402

700.7401 Creating trust; methods.

Sec. 7401.

(1) A trust may be created by any of the following:

- (a) Transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death.
- (b) Declaration by the owner of property that the owner holds identifiable property as trustee.
- (c) Exercise of a power of appointment in favor of a trustee.
- (d) A promise by 1 person to another person, whose rights under the promise are to be held in trust for a third person.

(2) The instrument establishing the terms of a trust is not rendered invalid because property or an interest in property is not transferred to the trustee or made subject to the terms of the trust concurrently with the signing of the instrument. Until property or an interest in property is transferred to the trustee or made subject to the terms of the trust, the person nominated as trustee has no fiduciary or other obligations under the instrument establishing the terms of the trust except as may have been specifically agreed by the settlor and the nominated trustee.

(3) In addition to the methods otherwise described in subsection (1) an agent under a power of attorney may create an inter vivos trust on behalf of the agent's principal or with the principal's property to the extent the terms of the power of attorney expressly authorize the agent to do so and the exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject.

700.7402 Creating trust; requirements.

Sec. 7402.

(1) A trust is created only if all of the following apply:

- (a) The settlor has capacity to create a trust.
- (b) The settlor indicates an intention to create the trust.
- (c) The trust has a definite beneficiary or is either of the following:
 - (i) A charitable trust.

(ii) A trust for a noncharitable purpose or for the care of an animal, as provided in section 2722.

(d) The trustee has duties to perform.

(e) The same person is not the sole trustee and sole beneficiary.

(2) A trust beneficiary is definite if the trust beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.

(3) A power in a trustee to select a trust beneficiary from an indefinite class is valid only in a charitable trust.

(4) Notwithstanding that a person does not have capacity to create a trust, an agent for that person acting under a power of attorney to whom the authority to create an inter vivos trust has been given may do so if the power of attorney is a durable power of attorney as defined in Section 5501 and if the requirements of Section 7401(3) have been satisfied.

ATTACHMENT 6

Tax Notes

FROM: Thomas F. Sweeney
DATE: January 15, 2010
SUBJECT: Probate and Estate Planning Council – January 2010

The failure of Congress in 2009 to resolve the inconsistencies in estate, generation skipping and gift taxation raises multiple questions, a few of which are the following:

1. Will the congressional dysfunction lead to no enactment in 2010 of any legislation resulting in the imposition of the pre-2002 transfer tax rules with the \$1 million credit shelter, 55% top tax rate and the catch up tax rate for the super wealthy.
2. If Congress passes a new tax law in 2010 it is likely to be retroactive. Will the retroactivity be constitutional based on the Carlton case or unconstitutional based on the 1920s era gift tax cases.
3. The constitutionality of estate, GST and gift transfers prior to enactment will likely not be determined for years leading to uncertainty.
4. Will taxable gifts made in early 2010, prior to any legislation being enacted be only subject to the 35% tax rate and only 35% gross up for transfers within three years of death.
5. Will the House of Representatives which passed an extension of the \$3.5 million credit shelter and 45% tax rate agree to expanded estate and/or gift tax relief including one or more of the following forms:
 - a. COLA on the credit shelter amount.
 - b. Increased credit shelter amount.
 - c. Reduced flat rate or reduced graduated rate of taxation.
 - d. Increase lifetime credit shelter amount.
 - e. Portability of unused credit shelter from one spouse to another.
 - f. Elimination of carry over basis and special allocations of basis.

Practitioners face a number of problems including:

- a. The problem with formula clauses when there are charitable and individual beneficiaries or blended or non-blended family beneficiaries which include both spouse and children/grandchildren.
- b. Refreshing one's understanding of the carry over basis rules and incorporating this into the planning process while the law remains uncertain.
- c. Clients with wealth whose continued life is tenuous.

TFS:jk