COMMENTS OF

THE STANDING COMMITTEE ON PROFESSIONAL ETHICS

OF THE STATE BAR OF MICHIGAN

ON

PROPOSED RULES OF PROFESSIONAL CONDUCT (ADM 2009-06)

This Memorandum discusses the text of the Rules of Professional Conduct proposed by the Supreme Court in ADM 2009-06. With a few exceptions, we provide no commentary with respect to the Comments to the Rules proposed in that Order. While we note that the proposed Comments do not track the Rules or explicate the Rules adequately, and delete many provisions inexplicably, our primary reason for not addressing the Comments is a concern that significant further work should be done on the Rules themselves, following which Comments could be produced that would complement the product. Members of the practicing Bar with expertise in the field of legal ethics, particularly members of the Professional Ethics Committee, are ready to assist in this developmental and creative process.

GENERAL COMMENTS

A. Perspective of a National Bar: Multi-Jurisdictional Practice and Uniformity. The purpose behind recommending changes to the Michigan Rules of Professional Conduct (the "Michigan Rules") based upon the American Bar Association 2002 Model Rules of Professional Conduct (the "Model Rules" or "2002 Model Rules") when first proposed in 2003 was to advance interpretive guidance gained from application of rules relatively common from state to state, thereby allowing Michigan to benefit from and contribute to the body of interpretative statement on application of the rules, aiding lawyers from other jurisdictions practicing in Michigan better to comply with rules reasonably familiar to them, and informing Michigan lawyers in adapting to rules more likely to be encountered in their out-of-state practice. As of January 1, 2010, 42 of the 49 states having Model Rule-based rules have adopted full scale changes to their rules, guided by and generally consistent with the 2002 Model Rules.[1] Although there are variations on the 2002 Model Rules in many jurisdictions – indeed, ADM 2003-62 provided thoughtful departures for Michigan's adoption[2] when first proposed -- they build on a common reference. The selective approach represented by ADM 2009-06 will place Michigan in an ever diminishing minority of jurisdictions with old and sometimes quirky rules, with resulting inconsistencies. There is no good reason for Michigan to move further out of step with the rest of the nation's lawyers.

B. Existing Models Reflect Extensive Knowledge, Accepted Standards. The 2002 Model Rules are a product of the work of learned practitioners and commentators over several years of studied effort, tested in extensive debate within the ABA Commission on Evaluation of the

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[1] Since their original adoption, the 2002 Model Rules have been amended by the ABA from time to time. This indicates that the Rules are not only dynamic, but require thoughtful attention on an ongoing basis.

[2] ADM 2003-62 was itself a product of independent and deliberate consideration by the Supreme Court, reflecting the recommendations of the State Bar of Michigan's Professional and Judicial Ethics Committee and of the State Bar of Michigan's Representative Assembly.

Model Rules of Professional Conduct (the "E2K Commission") and exposed to months of public comment and reaction before undergoing an arduous approval process of adoption in the ABA House of Delegates over several meetings. Within the State Bar of Michigan, the Professional and Judicial Ethics Committee considered over many months how the 2002 Model Rules should integrate with the principles of the Michigan Rules, themselves based on the 1982 ABA Model Rules. After its report, and that of the Representative Assembly, the Court produced its version of comprehensive proposed Rule changes after deliberate and independent review in ADM 2003-62, which in general followed the 2002 Model Rules with specific, limited variations. Not all changes proposed in ADM 2003-62 were unhesitatingly received, and some changes from recommendations of Bar representatives were questioned; but it would be unlikely that any single set of proposed Rules of Professional Conduct will win the approval of all members of the Bar while open for comment.

C. The Rules Proposed in ADM 2003-62, generally following the 2002 Model Rules are Superior to the Rules Proposed in ADM 2009-06. We will note below (see, Comments on Specific Rule Changes) specific concerns with specific proposed Rules. Several general comments about ADM 2009-06 are broadly applicable.

(1) **Diminished Client Protection**. The proposed Rules in most instances diminish the consultative or informative obligation of a lawyer's communication in seeking consent of a client from the present Rules and as proposed in ADM 2003-62.

(2) **Misperception of Proposed Changes**. Staff comment to the proposed Rules frequently claims similarity or consistency with ADM 2003-62, when there are changes of substance. This raises concern that the import of the proposed changes was not fully comprehended.

(3) **Stylistic Changes**. In many instances, changes to the text of Rules have been made for what appears to be stylistic preference, as a result of which, the Rules are in some cases less uniform and in others substantively altered, as we will note below. Although the Model Rules on which ADM 2003-62 were based may not be drafted to the most desirable current plain English standards, they are a work of art in which many drafting ideas were submerged into a cohesive whole. Changes to a model text should be avoided unless a substantive change is intended. By way of simple example, although a change from "shall" to "must" may seem pleasing to modern drafting conventions, it is entirely unnecessary; and change to some but not all instances in the text where "shall" appears creates a potentially confusing inconsistency. There is no need to venture into "better" than the model followed by most states.

(4) **Incorporation of Other Law**. The proposed Rules incorporate court rules, and in one instance, a rule of evidence, and in another, a statute on interest. The Rules should stand alone. If reference to court rules and other law as *guidance* is desirable, those references should appear in Comments to the Rules. If the Rule of Professional Conduct is to read substantively as an item of reference would read, the language should be incorporated verbatim. The court rules pertain to court matters, not other matters in which the profession is engaged. They are not a source of professional conduct principles. They are used by courts to control lawyers, but have no direct connection to ethics. Matters of law are ***always*** applicable – the Rules do not supersede them.

(5) **Comment Paragraphs**. One of the more obvious disadvantages of the piecemeal approach of ADM 2009-06 is continuation of unnumbered paragraphs in Comments to the Rules. In the Model Rules, the Bar recommendations preceding ADM 2003-62, and in ADM 2003-62, the Comments to the Rules are numbered, facilitating reference to them in opinions and analysis. All Comment paragraphs in the Michigan Rules should be numbered, regardless of whether there are Rule changes. It is more efficient to refer to numbered Comments, especially when a Rule contains many Comments, such as Rule 1.7 with over 30 Comments. This would eliminate the need to quote Comments extensively when referring to them in opinions and pleadings. It will also conform to national practice.

RECOMMENDATION

Recognizing that ADM 2003-62 itself may not be a perfect solution, we urge the Court to act on and within the following alternatives: (i) re-issue the content of ADM 2003-62 for a short comment period, with modifications to conform to intervening amendments to the 2002 Model Rules on which those proposed Rules were largely based, and commit to the issuance of a full set of Rules shortly thereafter; (ii) adopt all the proposed Rules published with ADM 2003-62 in their present form; (iii) propose adoption of the ABA 2002 Model Rules with all amendments to date; or (iv) take no action on amending Michigan's Rules at this time. We request the Court NOT to adopt the Rules as proposed in ADM 2009-06 for all the foregoing and the following reasons.

COMMENTS ON RULE CHANGES: SPECIFIC OBJECTIONS TO ADM 2009-06

Proposed Rule 1.5 Alternative A.

- 1.5(b), line 3, would require that scope of representation and basis or rate of the fee and expenses must be communicated in writing to the client. This is a significant change to Michigan's present Rule, and departs from a widely-accepted norm.[3] Both the Model Rule and ADM 2003-62 provide only that such information "preferably" be communicated in writing. This change means that failure to have a written scope and fee agreement (two elements) could result in discipline – a serious consequence.

- 1.5(b), line 2, refers to communicating the scope of representation "under Rule 1.2". Rule 1.2 does not define or determine the scope of representation, nor does anything in Rule 1.2 require or suggest that scope of representation be in writing. Rule 1.2 defines a lawyer's ethical duties about scope, and allocates authority between the client and the lawyer; permits a limitation on scope; and cautions a lawyer dealing with a client engaged in fraud or criminal conduct. That is not what is meant by "scope of representation" in Model Rule 1.5(b). Reference to Rule 1.2 is irrelevant and

[3] Only 5 jurisdictions (AZ, CT, DC, NJ, PA) require a written communication as to scope and fees in all circumstances. One (CO) requires a writing only when the client has not been regularly represented; and 3 (AK, IA, WI) require a writing when the fees are expected to exceed a given amount. We also note that this extensive client protection choice appears in the context of significantly lessened client communication and consent requirements under other Rules proposed in ADM 2009-06, indicating a philosophical conflict as to the aim of the Rules.

- inappropriate. Model Rule 1.5(b) refers only to disclosure of the scope of representation along with the basis of fees and expenses, and neither Model Rule 1.5 nor Model Rule 1.2 attempt any correlation between the two Rules.

- 1.5(b), lines 5-6, refers to a basis or rate "previously agreed upon". Nothing in the Rule proposed (or the Model Rule or ADM 2003-62) requires anything to be or have been "agreed upon" at any time as to fees. Only a written communication from the lawyer is mentioned.

- 1.5(b), last sentence, requires a change in basis or rate to be communicated in writing. We do not support the requirement of a writing. [The words "from that previously communicated" might be added to follow the word "expenses" for additional clarity.]

- There is a reference in 1.5(c) to a court rule. Any reference to a court rule should appear in a Comment, not the Rule.

- 1.5(e) codifies the *Cooper* decision. As a special Michigan Rule, it would better appear as (f), as it was presented in ADM 2003-62, to avoid confusing reference when our opinions speak of a Rule 1.5(e) which does not correlate with anyone else's 1.5(e). The Comment to this section of Rule 1.5 might refer to the *Cooper* decision for clarity.

- The content of 1.5(f) should be placed as 1.5(e), to correlate with Model Rules.

- 1.5(f) not only requires that the fee be reasonable, but also that the fee not be increased because of the sharing arrangement. Paragraph (e) proposed in ADM 2003-62 and Model Rule requires only that the fee be reasonable. There is no reason for controlling fees beyond "reasonable". The fee may very well, and properly, increase by the need to retain expert advice, for example. The Model Rule is preferred.

- 1.5(f) concludes with a new sentence pertaining to payments under agreements with lawyers formerly associated in the firm. The sentence stating that "nothing precludes" such agreement is meaningless, since nothing preceding would possibly preclude it. If the intent is that such an arrangement is "not subject" to the foregoing requirements, that may be different but equally unnecessary. This thought might be expressed in a Comment, if at all.

Proposed Rule 1.5 Alternative B

- We oppose consideration of Alternative B. It introduces solutions to problems the proposer perceives, and decides them the way it wants the result to come out. Rather than a Rule of conduct, it is a complaint, brief and decision in the guise of a Rule. It is much too unusual a formulation for a Rule of Professional Conduct and deals with many extraneous matters, incorporating definitions for terms that do not appear elsewhere, and addressing matters covered under Rule 1.15 and substantive law. The statement in (c)(4) that a lawyer may not enhance a fee is a substantive change from a rule that a fee must be

reasonable.[4] Legislation that a fee is unreasonable per se, or (as drafted) simply illegal ethically, if "enhanced" is out of the clear blue, and without precedent. Paragraph (d) rewrites 1.15, inappropriately. If a change should be proposed to Rule 1.15, it should be addressed there. Paragraph (e) limits interest to 7%, and incorporates a specific statute into the rule, as opposed to referring to legal interest in a Comment to the Rule. The proposal ignores the validity of a time-price differential, which is not subject to interest rate regulation or governed by MCL 438.31. The proposal also ignores that the 7% ceiling is not applicable to corporations, LLCs, limited partnerships, or in "business transactions". The mindset here pertains to individual clients, not entities or commercial matters. What if the law changes – do we still have 7% for ethics? As an operating principle, the law always applies; the ethics rules do not trump it. No limitation other than "legally permissible charges" need be imposed, and that always goes without saying.

Proposed Rule 1.7

- Staff Comment to 1.7 states that the proposed rule is "similar in many respects" to ADM 2003-62. That is incorrect.

- The attempt to preserve the present Michigan Rule while incorporating elements of the Model Rule results in a serious misstatement of long established principles in the conflicts area. Proposed 1.7(a)(1) continues a Michigan formulation about lawyer's reasonable belief, but applies it to the question of whether there is a conflict at all rather than to whether the representation will be adversely affected, as under the present Michigan Rule, the Model Rule and ADM 2003-62. This misses the point. There has never been a "belief" test as to whether there is a conflict. This proposal introduces a new concept to conflict rule principles. The problem created is likely unintended. ADM 2003-62 gets the order of fact on the one hand and belief on the other right.

- 1.7(a)(1) further changes the examination of adversity from client-focused to representation-focused. As a result, unrelated matter conflicts may no longer be conflicts. Thus, where a lawyer represents A against B in litigation, the proposed change appears to allow the lawyer to represent C against A in an unrelated matter without A's consent. Because this would be a sea change in conflict principles presented without explanation, it is probably unintended.

- The reference to paragraph (2) in the first line of 1.7(a) should be to paragraph (b).

- 1.7(b)(4) refers to the consent required for representation in the face of conflict. In its formulation, the elements of "informed consent", defined in ADM 2003-62 Rule 1.0, are incorporated. We note that this is the only place in ADM 2009-06 that the concept of informed consent is adopted, despite its uniform application in ADM 2003-62 and the Model Rules.

[4] In RI-346, the Professional Ethics Committee opined that an enhanced fee in a divorce case constituted a contingent fee, in violation of present Rule 1.5(d). Otherwise, an enhanced fee would be treated as a contingent fee, and be subject to specific rules governing contingent fee agreements.

- As 1.7(b)(4) is drafted, the lawyer must obtain written consent from the client when the lawyer provides the information that would qualify for informed consent, but needs only confirm an oral consent without *any* information required to obtain it. Why would the burden to obtain written consent be greater than that to obtain oral consent? This makes no sense, and certainly departs from ordinary client protection standards.

Proposed Rule 1.8

- The version of 1.8(a)(2) proposed in ADM 2003-62 required the lawyer to advise a client in writing of the "desirability" of seeking advice of other counsel when entering into a business transaction with a lawyer. Apparently motivated by some perceived more modern English usage, the ADM 2009-06 proposal diminishes desirability to "that it is appropriate". It's a difference between "should" and "might". If the change were intended to be only more wordsmithing, we note that the intent has changed. If the intent were purposefully changed, this is an objectionable shift in the policy expressed by the Model Rules to require at least some encouragement that the client seek independent counsel.

- Also in 1.8(a)(2), the word "transaction" has been changed to "matter", thus missing the point of the requirement of the Rule. It is the *business transaction* that is the subject here, not the matter in which the lawyer represents the client. The term "matter" is used throughout the Rules to refer to the subject of the representation.

- 1.8(a)(3) in ADM 2003-62 required that the client give "informed consent" to the terms of the transaction between the lawyer and the client, and called out specifically consent to the lawyer's representing the client in the transaction. The proposed rule requires only consent in writing – there is no informational standard imposed; and there is no mention of a specific concern that the lawyer may be also representing the client in the same transaction. This effectively preserves the present rule, which is well short of the standard adopted by the national bar for transactions between a client and a lawyer, and that previously recommended by the Michigan Bar.

- The lessening of standards for obtaining client consent is most glaring in 1.8(b), where not only does the requirement not rise to a level of "informed consent" as in the Model Rule and ADM 2009-62, it now omits "after consultation" – meaning that no explanation is required. Consultation is required by the present rule, so the proposal diminishes the required conduct of lawyers. Note that terminology in the Comment to present Rule 1.0 defines what it means to consult. If the "informed consent" standard is adopted, the definition of "consult" can be omitted.

- The omission of consultation or requirements about informative communication to obtain client consent again appears in 1.8(f), but the "uninformed" or un-consulted about consent now has to be in writing ("just sign here, don't ask why"), in contrast to the present Rule and ADM 2003-62.

- Consultation is again omitted in 1.8(g), and the information that the lawyer must convey to the client is limited to less than required by the present Rule or ADM 2003-62.

- 1.8(h)(1) again falls prey to the premium on wordsmithing, substituting the word "make" for "enter into" an agreement, while ignoring the later usage of "making" an agreement in the same sentence. This is a needless change, as well as inconsistent.

- 1.8(h)(2) uses the term "matter" when it should use "claim". It is important to comprehend that "matter" is used to refer to the representation of the client, while other words – "transaction" or "claim" – are used to describe other conflict situations.

- In place of a concept of encouraging a client to seek independent counsel, 1.8(h)(2) -- as in 1.8(a)(2), noted above -- requires a lawyer only to tell a client it is "appropriate" to seek other counsel to give advice about something. It is not clear what that something is. The "matter" is the word used as the object in the sentence; but does it refer to the claim, the settlement, or the advice to seek independent counsel? As the sentence is drafted, any of these is possible. The Model Rule and ADM 2003-62 used that non-plain English "therewith", which was redrafted here to "such advice". "Therewith" could only relate to settlement of the claim. The problem is there is no clear precedent to what "such advice" is about. In addition, this is another instance in which client protection is lessened by the proposed change.

- 1.8(i) incorporates a court rule. This is misplaced – it should be in a comment, used for explication of the Rules. The Rules should not adopt extraneous laws as the rules themselves, and that is what results from reference to the court rule. You can see how this can be done appropriately, as in the Comment on sexual relations with clients.

- A Comment on imputation proposed in ADM 2003-62, to relate to proposed 1.8(j), is not included in this Order.

Proposed Rule 2.4

- Same as ADM 2003-62.

Proposed Rule 3.1

- Same as ADM 2003-62, except for modification of Comment.

Proposed Rule 3.3

- 3.3(a)(2) follows the present Michigan Rule 3.3(a)(3) but deletes reference to "in the jurisdiction". The Model Rule, as proposed by ADM 2003-62, has a different order of words than Michigan's present (a)(2), changing Michigan's "controlling legal authority in the jurisdiction" to requiring disclosure of "legal authority in the controlling jurisdiction". There are two significant differences. One is that the emphasis should not be on local legal authority, which may or may not be applicable, but on the applicable legal authority to be applied. The difference may be between application of Michigan's law or the law of a chosen jurisdiction. Removal of the words "in the jurisdiction" may seem an elegant solution to achieve the effect of the Model Rule on this point. However, that change

preserves the second problem, Michigan's reference to "controlling legal authority". There is no definition or comment explaining what is meant by "controlling" legal authority, or how it is determined. Is a lawyer not obligated to disclose any authority that is directly adverse – only that which qualifies as "controlling" authority? The Model Rule and ADM 2003-62 require disclosure of adverse legal authority that applies to the case, not that which arguably controls the outcome. We believe the proper formulation is as stated in the Model Rule and ADM 2003-62.

- The re-wording of 3.3(b) from ADM 2003-62, apparently driven by the stylistic purpose of avoiding the format "a lawyer who", results in an unintended substantive Rule change. The Rule proposed in ADM 2003-62, as with the Model Rule, pertained to a lawyer representing a client in a proceeding. The Rule proposed in ADM 2009-06 merely requires that the lawyer have a client relationship with a person who is involved in a proceeding – and applies whether or not the lawyer represents the client in that proceeding. That is a much broader rule than the one originally proposed. This also would be likely an inadvertent change, as nothing in Staff Comment or the proposed Comment to the Rule explains this purpose.

Proposed Rule 3.4

- 3.4(f)(1) refers to a specific rule of evidence pertaining to hearsay. The effect of this addition appears to limit the Rule of Professional Conduct to hearsay evidentiary matters. That is not the intended scope or purpose of either the Model Rule or the existing Michigan Rule. This reference is not appropriate. Other law determines who is encompassed in this Rule for whatever purpose is applicable.

Proposed Rule 3.5

- 3.5(d) continues the present Rule's "undignified and discourteous conduct" instead of "conduct intended to disrupt" as proposed in ADM 2003-62 and as used by the Model Rule. This Rule should not be perpetuated in this form. To the extent the concept of Rule 3.5(d) is to be preserved, Rule 6.5(a) is more than sufficient.

Proposed Rule 3.6

- 3.6 is presented in ALT A and ALT B forms. ALT A omits the right to disclose identity of a person in 3.6(b)(1); and omits subsection (c) of the Rule relating to disclosures to counter adverse publicity; and otherwise permits lawyers to make permitted statements "without elaboration" – a new ethical gag rule. ALT A offers another example of stylistic changes that are unnecessary. ALT B follows ADM 2003-62 and the Model Rule, and should be adopted – as part of a comprehensive set of Rule changes.

Proposed Rule 5.4

- The only change in 2009-06 from -62 in 5.4 is the addition in (d)(2) of the unnecessary words "one who". The two verbs in the original sentence – "is" and "occupies" – are adequate, and more words are not necessary.

Proposed Rule 5.5

- Model Rule 5.5 was developed by the ABA after many years of drafting and refinement, and needs to be adopted as it is written, not changed for stylistic purposes -- particularly those resulting in substantive difference, as in ADM 2009-06. Proposed 5.5(c) changes the phrase "provide legal services on a temporary basis" to "provide temporary legal services." The purpose of this change is unclear. The obvious meaning of "temporary legal services" would pertain to the nature of the services themselves rather than the way services are provided (e.g., a temporary filling of a tooth vs. a permanent filling by someone not your regular dentist). The latter is what is intended to be permitted by Model Rule 5.5, as followed by ADM 2003-62. The point of the Rule seems to be lost.

Proposed Rule 5.7

- Same as ADM 2003-62.

Proposed Rule 6.6

- ADM 2003-62 proposed to insert the Model Rule 6.5 in place of Michigan's unique present Rule 6.5, which would then become Rule 6.6. The purpose is to keep Rules that have generally accepted references in other jurisdictions in their customary place to avoid confusion in opinions and research. Non-uniform rules should follow in sequence. For this reason, the text of Rule 6.6 should appear as Rule 6.5, and Michigan's present Rule 6.5 should become Rule 6.6. Adoption of ADM 2003-62 would achieve this result.

Proposed Rule 8.5

- Same as ADM 2003-62. However, the word "lawyer's" is dropped from the first line of (b)(2) preceding the word "conduct".

General Editorial Changes

- The term "Rules of Professional Conduct" survives with initial caps in proposed 5.7 and 6.6 – in contrast to editorial changes of "Rules" to "rules" throughout ADM 2009-06. The present Rules use lower case for "rules" and title case for "Rules of Professional Conduct", and initial capital "Rule" when referring to a specific Rule. Usage should be uniform. All references to the "Rules" in any form when referring to these Rules of Professional Conduct should be capitalized: they are easier to spot that way. This is the format of ADM 2003-62 and the Model Rules.

OMISSIONS: RULES NOT INCLUDED IN PROPOSED CHANGES

The selective approach to amending the Michigan Rules pursued by ADM 2009-06 has omitted changes that we consider highly relevant and important. Some of the more important are:

- In the process leading to ADM 2003 -62, a change to the structure of Michigan's Rule 1.0 and a separation of content from Comment accompanying that Rule into a separate Preamble and Scope, in the manner of the Model Rules, was debated. Since their inception in 1982, the Model Rules have been introduced by a section on Preamble and Scope, which incorporates the material presently located in Michigan's Rule 1.0 and its Comment up to the portion on Terminology. (The Model Rules, as followed by ADM 2003-62, place Terminology in a stand-alone Rule 1.0.) In debate over this structure preceding the recommendation of the Representative Assembly to the Supreme Court in 2003, some expressed concern that placing the content of present Michigan Rule 1.0(b) and placing it in a prefatory Scope section would weaken the principle there stated that the Rules are not intended for other than disciplinary purposes, since it was no longer "in a Rule". This fear is unfounded. In virtually all jurisdictions having Rules of Professional Conduct patterned on the Model Rules since 1982, that principle is in the prefatory Scope section, with the same effect without exception. The wording proposed in ADM 2003-62 (which made some adjustments from "should" to "does" for reassurance, though without substantive difference) is easily understood, and applies a uniform principle more clearly than present Michigan Rule 1.0(b). Accordingly, the Preamble and Scope as proposed in ADM 2003-62 should be adopted.

- ADM 2003-62 followed the Model Rule by placing all terminology in a new Rule 1.0 itself. This places Terminology above the level of interpretative guidance into obligatory conduct. Rule 1.0 as proposed in ADM 2003-62 should be adopted.

- The Terminology under present Michigan Rules is outdated, and in some cases tautological (e.g., "a 'firm' denotes … a … firm …."). ADM 2003-62 proposed a new set of Terminology in a new Rule 1.0, which should be adopted. We recognize that adopting new Terminology as proposed in ADM 2003-62 requires a change to all the Rules, which we support in the form of ADM 2003-62.

- The concept of "informed consent" is not adopted (it should be as a part of Rule 1.0). As noted above, client consent requirements are actually lessened in ADM 2009-06. The Ethics Committee backed a slight revision to the Model Rules definition that appeared in ADM 2003-62, which provided a scalable standard of conduct in context, replacing a concept of "consult" in 1.0 that offers no explicit guidance and adopts a subjective standard – requiring the client to appreciate the significance of the information – which is impossible to satisfy objectively. The new terminology is much clearer and capable of satisfying.

- Absence of new Rule 1.0 also eliminates the new definition of "confirmed in writing". The Rules proposed in 2009-06 also generally omit a requirement for a writing, as noted above. This contrasts with the imposition of a *required* writing of scope and fee agreement under ADM 2009-06 Rule 1.5, as to which there is no definitional standard suggested.

- Present Rule 1.2(c) refers to a lawyer's assisting a client in conduct the lawyer knows is "illegal" or fraudulent. ADM 2003-62 conforms to the Model Rules' terminology, "criminal" or fraudulent. Beyond the obvious concern that illegal conduct is much broader than criminal, the rest of the Michigan Rules do not coordinate with this usage. Rule 1.16 permits withdrawal when a client is engaged in "criminal" conduct, not when the conduct is illegal. Nor is illegality a standard used elsewhere. 8.4(b) refers to the lawyer's "criminal" conduct in defining misconduct. The Michigan Rule's inconsistency with the mainstream of ethics rules is a trap for the unwary.

- The Bar-proposed change to Rule 1.6, as did ADM 2003-62, departed from the concept of "confidences and secrets" in defining what was protected as confidential information, substituting "information pertaining to the representation"; and deleted knowingness from the prohibition on disclosure. The changes conformed to the Model Rule. Clearly, more information is protected as confidential under the Rule proposed by ADM 2003-62 than under the present Rule, preserved by ADM 2009-06. The ADM 2003-62 proposed rule generated controversy; however, the question of whether Michigan's Rule 1.6 should remain entirely unchanged is a matter that would be addressed properly, along with all other Rules, in new hearings. We take no position on change at this time.

- ADM 2009-06 omits Rule 1.18, Duties to Prospective Clients. This Rule was submitted without controversy by the Bar, and should be included. Not only does it afford assurance to persons seeking legal counsel that their communications are subject to confidentiality, it establishes the boundaries of responsibility for lawyers – allowing lawyers to know what their obligations are to prospective clients.

- Rule 7.2 has not been changed as proposed in ADM 2003-62, action that would bring the Michigan Rules into conformity with present national standards for lawyer advertising. There is no reason to stand alone with a Rule that requires constitutional scholarship to interpret. The ADM 2003-62 proposed Rule provides all the concepts in a simple sentence, and effectively produces the result of the complex version that would be left in place if ADM 2009-06 is adopted.

- ADM 2009-06 does not propose to change Michigan's unique version of Rule 8.4(b), which combines Model Rule 8.4(b) and (c), and makes all conduct described subject to a "reflects adversely" standard, as opposed to the absolute standard of the Model Rule for dishonesty, fraud, deceit, and misrepresentation. ADM 2003-62 follows the Model Rule formulation.