

*SPECIAL COMMITTEE ON GRIEVANCE
STATE BAR OF MICHIGAN*

ANNUAL REPORT FOR 2003-2004

Committee Name: Special Committee on Grievance.

Jurisdiction: Shall make recommendations concerning the operation of the Attorney Discipline Board, the Attorney Grievance Commission, and the Judicial Tenure Commission and the rules concerning them upon request of the Board of Commissioners.

Officers and Membership:

Chair: John W. Allen
Varnum Riddering Schmidt & Howlett LLP
Tx: 269.553.3501, jwallen@varnumlaw.com

Members: 15
Associate Members: Ex Officio Members: 3

2003-04 Meeting Schedule (date and location):

- August 20, 2003 (SBM Building, Lansing, Michigan)
- October 10, 2003 (SBM Building, Lansing, Michigan)
- November 3, 2003 (SBM Building, Lansing, Michigan)

Committee Activities:

- 1. Supreme Court Admin Order No. 2002-29 - Proposed Michigan Standards for Imposing Lawyer Sanctions**
 - Current Michigan Standards for Imposing Lawyer Sanctions
 - Attorney Discipline Board (ADB) Proposal:
 - Alternative Proposal From Attorney Donald D. Campbell
- 2. Proposed Amendments to Michigan Rules Of Professional Conduct (MRPC)**
 - Framed Debate for November 14, 2003 Representative Assembly Meeting
 - Representative Assembly adopted several Grievance Committee Recommendations
 - Agreeing with Grievance Committee and Representative Assembly, Supreme Court re-ordered consideration of AO 2002-29 and proposals to amend MRPC

Resources Provided by the State Bar of Michigan in Support of Committee Work:

Tom Byerley and John Berry frequently attend Committee Meetings.

Future Goals and Activities:

The Grievance Committee should continue its work regarding A.O. 2002-29 and the proposed Amendments to MRPC.

The State Bar of Michigan Special Committee on Grievance generated its own Report and, on November 14, 2003, the State Bar of Michigan Representative adopted several Resolutions regarding these proposals, which, taken together, contain many of the most profound debates which currently confront our profession. Each of the issues is one vitally affecting the grievance and discipline process, and about which reasonable persons may reasonably differ. A thorough public discussion should be guaranteed.

In the debate thus far, one fundamental difference emerges, which could affect much of our discussion. The premise is succinctly expressed as:

The Michigan Rules of Professional Conduct (MRPC) is a "strict liability, quasi-criminal disciplinary code."

The MRPC is a set of Disciplinary Rules, by which any violation can result in the loss of the professional license to practice. This is why many persons believe MRPC is not the place for "better practices," or "what would be nice," or what would be "better public relations" for the Bench and Bar.

When the sanctions are "quasi-criminal... severe and highly penal," and rooted in concepts of strict and absolute liability, it is both unwise and unjust to base violations on subjective concepts of "negligence" (which presumes the otherwise necessary elements of proximate causation and damage which are not present in MRPC), and undefined, idiosyncratic criteria like "informed consent" or fees which are "not unreasonable" (which make it impossible to know with reasonable certainty in advance how to conform one's conduct to the requirements of the law). Many thoughtful persons believe quasi-criminal laws should not do that, because it offends elementary notions of fairness and due process.

If we think our only tool is a hammer, then we sometimes wrongly see every issue as a nail. The MRPC and sanctions for their violation need not be the vehicles with which to approach every issue of the profession. Some persons believe "good practices" (like "should" admonitions), laudatory ethical considerations (e.g., Pro Bono service), and wise loss prevention (e.g., "confirmed in writing") are all worthy aspirations, recommended topics for CLE, and probably good public relations, but not the stuff of strict liability, quasi-criminal disciplinary codes. Others believe these should be in MRPC.

As J.S. Mill said,

"These are great questions. And on all great questions, much remains to be said."

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