

# Impaired Driving Convictions and the Disciplinary Process (Part 1 of 2)

By Cynthia C. Bullington

*This month and next, Practicing Wellness will present a two-part article that should interest all Michigan attorneys. While many attorneys may know of another attorney who has had a brush with the law concerning a drinking and driving offense that may or may not have led to a conviction, not every attorney knows what to do in this event.*

*Although they may wish to be supportive of an attorney who has been arrested or convicted, family, friends, colleagues, and clients may question the attorney's integrity and even feel angry and betrayed. In the short term, such an event can interrupt the individual's ability to work and to meet other responsibilities. The resulting legal and court-related obligations, costs, and fines can be overwhelming, and the shame and embarrassment of becoming the object of criminal proceedings can be nearly unbearable.*

*An arrest or even a conviction does not, in isolation, point to a substance use disorder. It does, however, cause great concern and a ripple effect in the life of the offending attorney and those closest to him or her. Often, attorneys who find themselves in legal trouble will call on a colleague who is a friend or family member to provide legal counsel. My experience in the Lawyers and Judges Assistance Program (LJAP) dealing with attorneys as defendants/program participants and their legal counsel only reinforces my awareness that it is critical for all attorneys to be vigilant about self-care so they do not become the subject of an arrest or conviction. It is important for all members of the Bar to know the potential consequences of an arrest and understand the legal and ethical implications and obligations they face. As always, the LJAP is here to provide confidential support and guidance with regard to these and other issues.*

*In my eight collective years of employment at the State Bar, I have come to know and respect Cynthia Bullington. As counsel for the Attorney Grievance Commission, Cynthia is one of LJAP's greatest advocates. Her gentle and humble presentation belies the breadth of her knowledge, skill, and expertise. Her firm belief in diversion under Court Rule 9.114b as a viable vehicle for the rehabilitation of attorneys who demonstrate impairment indicates both her compassion and commitment to her profession and her peers. She is truly a wealth of information and experience, and is, in my humble estimation, an unsung hero.*

—Martha D. Burkett,  
Program Administrator, LJAP

**Q**uestions often arise about how the Attorney Grievance Commission (AGC) handles impaired driving convictions. Some attorneys have more fundamental questions concerning whether the AGC should even investigate impaired driving matters. This article addresses the structure of the investigative process and the AGC's conceptual process. Next month, I'll discuss the public disciplinary process, particularly how convictions involving substance abuse are handled.

## The Confidential Investigation Stage

The AGC was established by the Michigan Supreme Court on October 1, 1978, succeeding the former State Bar Grievance Board. The attorney discipline process is governed by subchapter 9.100 of the Michigan Court Rules.

The AGC is the prosecutorial arm of the Supreme Court for the discharge of its con-

stitutional responsibility to supervise and discipline Michigan attorneys.<sup>1</sup> The AGC exercises statewide jurisdiction and is located in Detroit. The AGC is overseen by a commission consisting of nine volunteer members (six attorneys and three lay members) appointed by the Supreme Court. Robert L. Agacinski is the grievance administrator, and he is also appointed by the Supreme Court. A substantial number of requests for investigation are filed each year: 3,575 requests were filed in 2006; 3,348 requests were filed in 2007; 2,907 requests were filed in 2008; and 1,808 requests were filed as of August 15, 2009.

The disciplinary process is normally invoked by the filing of a request for investigation with the AGC or when the administrator commences an investigation in his own name. Disciplinary investigations involving impaired driving convictions are generally initiated by the administrator's issuance of a request for investigation under his own name. Any conviction is considered as establishing professional misconduct under MCR 9.104(A)(5); however, the administrator may exercise his prosecutorial discretion and not pursue certain convictions, e.g., fish and game violations.

Why does the AGC investigate an attorney's impaired driving conviction if there is no immediate indication of a problem concerning the attorney's interactions with clients? Attorneys and judges are often reluctant to report other attorneys despite the provisions of MRPC 8.3 (duty to report another attorney when that attorney's fitness is called into question by substantial misconduct). Unfortunately, at times it requires extreme conditions—such as an attorney passed out on the floor of his or her office surrounded by empty liquor bottles or stumbling and smelling of alcohol at a court

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hearing—to prompt other judges or lawyers to bring the substance abuse problem to the AGC's attention.

Where does the AGC get the information to begin a disciplinary investigation of an attorney's conviction? Sometimes the administrator learns that an attorney has been charged with a crime from news reports or from members of the public, such as unhappy former clients and spouses. Under MCR 9.120(A), however, there is a reporting requirement for convictions. When a Michigan attorney has been convicted of any crime, that attorney, defense counsel, and the prosecuting attorney are required to report the conviction within 14 days. The 14-day period runs from the date of the verdict or the date the plea was entered.<sup>2</sup> For the sake of convenience, some parties have fulfilled this requirement by submitting a joint letter signed by each.

A request for investigation involving an impaired driving conviction will generally demand that the attorney provide:

- A full and fair description of the facts and circumstances surrounding the events leading to the arrest and conviction;
- A substance assessment or a waiver allowing the AGC to obtain a copy of the assessment from the probation department;
- A description of the terms of the sentence and the attorney's compliance with the terms, and a copy of the judgment of conviction with the order of probation, if applicable; and
- A copy of the police incident report.

There are two main issues in an investigation for impaired driving: (1) Does the attorney have a problem with alcohol or a controlled substance? and (2) Are there mitigating or aggravating factors present? Among other things, aggravating factors could in-

clude the presence of prior discipline, illegal substances, lying to the police by denying consumption, multiple convictions, probation violations, and injury or death resulting from the incident. Mitigating factors could include the conduct being an isolated incident, emotional or personal problems, lack of a substance abuse problem, and a cooperative attitude in the proceedings.

After a full investigation of the allegations is concluded, the administrator submits the investigative file to the commission for its review and disposition. In deciding what action to take, the commissioners will view the staff's memorandum, which in-

cludes both a summarization and recommendation. The summary includes the nature of the conviction, the attorney's answer, the substance assessment, and other evidence in the file. Independent of the staff's recommendation, the commission may:

- Decide that the matter will be closed after the attorney is cautioned "regarding the dangers presented when an individual drives a motor vehicle after consuming alcoholic beverages. Such conduct poses a danger to not only the individual, but to the general public as well. Aside from the physical dangers and criminal aspects of such conduct, an attorney who is intoxicated while driving may jeopardize his/her license to practice law."
- Offer to place the respondent attorney on contractual probation pursuant to MCR 9.114(B).
- Admonish the respondent attorney, with his or her acceptance and consent.

- Grant authority to file a judgment of conviction proceeding against the respondent attorney based on the conviction.
- Authorize the filing of a formal complaint in matters related to an attorney's use of an illegal substance.

In reviewing a file, the commission is concerned with whether the respondent has a substance problem and ensuring that it issues consistent dispositions. The commission relies heavily on the assessment provided by a respondent in determining whether a substance abuse problem is present. If an assessment is old or poorly prepared, the respondent may be requested to submit to an evaluation by the State Bar of Michigan Lawyers and Judges Assistance Program (LJAP).

As a general rule of thumb, when a first-time impaired driving offense is present, and absent aggravating factors or evidence of a substance abuse problem, the matter will be closed with the issuance of a cautionary letter. An admonishment may be issued under similar circumstances if certain aggravating factors are present. If it appears that an attorney may be on the cusp of developing a substance abuse problem, the commission will condition the issuance of an admonishment on the attorney's completion of certain steps, such as attending an Impact Weekend or a specified number of Alcoholics Anonymous (AA) or similar type meetings, or other conditions reasonably related to the potential substance abuse problem. These conditions are imposed in an attempt to ensure that any dependency problem is addressed before clients and the courts are affected.

If the commission believes that a respondent suffers from a substance abuse problem, it may offer a diversion from a public disciplinary proceeding. This diversion is called "contractual probation" and is permitted under MCR 9.114(B). There are two types of contractual probation: (1) monitoring by LJAP and (2) an in-house program established by the AGC that requires, among other provisions, attendance at AA-type meetings, counseling, and random testing. The commission requires that the duration of a contractual probation be for two years prospective from the date of execution of the agreement. There are no early termi-

nations of the agreement. Both types of contractual probation are monitored by AGC staff to ensure compliance. Ninety-three attorneys are currently on contractual probation. The vast majority of attorneys who are diverted to contractual probation successfully complete the program.

From January 1, 2007 to August 15, 2009, the following convictions have resulted in contractual probationary diversions. The numbers to the left of the slash (/) in each column indicate the number of convictions; the numbers to the right indicate the number of resulting contractual probations.

Convictions	2007	2008	8/15/09
Disorderly conduct	5/-	7/3	2/1
Drug offense	6/4	7/5	1/-
Domestic violence	4/-	3/-	2/-
Open intoxicants	2/-	1/1	1/-
Malicious destruction/property	0/-	1/-	0/-
OUIL (operating under the influence of liquor)	12/8	5/3	3/-
OWI (operating while under the influence)	74/29	74/24	35/11
PPO violation (personal protection order violation)	1/-	0/-	0/-
Retail fraud	0/-	1/-	0/-
UBAL (unlawful blood-alcohol level)	0/-	0/-	0/1
Reckless driving	9/1	8/3	3/1
Other	16/2	18/2	8/1

Contractual probation is generally a one-time offer. If a respondent has previously been on contractual probation, relapses, and is again convicted, the commission will usually instruct staff counsel to file a judgment of conviction proceeding with the Attorney Discipline Board. Attorneys who are twice convicted of an impaired driving offense will typically either be placed on contractual probation or face public disciplinary action.

### General Suggestions

What should you do if you receive a request for investigation?

- File a timely answer. If you cannot file an answer within 21 days from the date

the request for investigation was mailed, call for an extension. The telephone number for the AGC is (313) 961-6585. If you have questions concerning a grievance that you have received or wish to file, you may contact staff counsel at this number. The AGC also maintains a website at [www.agcmi.com](http://www.agcmi.com).

- Consider whether you need to retain counsel. You know best whether you need representation. This is a balancing process. Approximately half of all grievances are dismissed in the intake process, but your ability to continue practicing law may be affected.
- Conduct research on similar cases. The Attorney Discipline Board maintains an excellent website at [www.adbmich.org](http://www.adbmich.org) that makes it easy to research Michigan attorney discipline cases. The telephone number for the board is (313) 963-5553. The State Bar of Michigan also posts ethics opinions online at [www.michbar.org](http://www.michbar.org).
- Most of all, don't panic and don't stick your head in the sand. Answer the request for investigation. Like the IRS, the AGC does not go away. If a lawyer suffers from a substance dependency or an emotional issue, he or she will be directed to sources that provide assistance.
- Do not hesitate to contact any of the attorney staff of the AGC with questions. ■

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### FOOTNOTES

1. MCR 9.126.
2. MCR 9.120(B).