Michigan Supreme Court Amends Michigan Rules of Professional Conduct

By Dawn M. Evans

The Michigan Supreme Court entered an order on October 26, 2010, amending seven rules and adding three new rules to the Michigan Rules of Professional Conduct (MRPC).[1] The implementation order, which made the changes effective January 1, 2011, is available at http://courts.michigan.gov/supremecourt/Resources/Administrative/2009-06-102610.pdf.

With the entry of this order, the Court completed work begun in 2001 with a review of the American Bar Association's Ethics 2000 revision of the Model Rules of Professional Conduct (Ethics 2000 Rules). The rules are discussed in numerical order, noting differences between pre-August 31, 2010,[2] language and post-January 1, 2011, language. This article is intended to be read in conjunction with the implementation order and does not itself contain a full text of the rules discussed.

Rule 2.4 Lawyer Serving as Third-Party Neutral

This new rule requires a lawyer serving in a third-party neutral role, such as an arbitrator or mediator, to inform unrepresented parties that he or she does not represent them and explain the difference between that role and a representative role to any party the lawyer perceives does not understand that difference. Commentary notes that conflicts-of-interest questions that arise for a lawyer performing this function are addressed by Rule 1.12 and that the lawyer's duty of candor is governed by either Rule 3.3 (when the proceeding is before a tribunal) or Rule 4.1.

Rule 3.1 Meritorious Claims and Contentions

The text of this rule is unchanged. New commentary clarifies what must be done to make good-faith arguments on behalf of clients: "inform themselves about the facts of their clients' cases and the applicable law."

Rule 3.3 Candor Toward the Tribunal

Changes in this rule are significant, representing a substantial expansion of the lawyer's duty to take remedial measures in certain circumstances.

Revisions to paragraph (a)(1) clarify a lawyer's obligation to "correct" rather than simply disclose a false statement of material fact or law previously made by the lawyer to a tribunal. New paragraph (b) extends a lawyer's obligation to take remedial measures beyond the client to an undefined "other person" when either category "intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to an adjudicative proceeding involving the client." Although commentary asserts that the rule applies when a lawyer is "representing a client in a tribunal," an adjudicative proceeding "involving the client" may not necessarily be one in which the lawyer represents the client. If the new language truly extends the lawyer's obligation to deal with knowledge of a client or other person's "criminal or fraudulent conduct" beyond a matter in which the lawyer represents the client, it remains to be seen what form "disclosure to the tribunal" will take in a proceeding in which the lawyer otherwise has no standing as an advocate.

New paragraph (e) provides a cohesive and concise roadmap of what to do when false evidence is offered by a client. Significantly, the Court has jettisoned all commentary addressing perjurious testimony by a criminal defendant client, thereby imposing the same remedial measures requirements on civil and criminal practitioners alike. For the criminal defense practitioner, this narrows the lawyer's options when a client insists on testifying, a decision with which the lawyer must abide under Rule 1.2(a).

Rule 3.4 Fairness to Opposing Party and Counsel

Although changes to this rule appear minor, their potential application is broad. Deletion of "relatives" and narrowing the category of "employees or agents" to only those persons whose statements can bind an employer or principal from an evidentiary standpoint greatly constrict the class of persons other than a client that a lawyer can advise to refrain from voluntarily giving relevant information to another party.

Rule 3.5 Impartiality and Decorum of the Tribunal

Changes to this rule are consistent with the Ethics 2000 Rule in all respects but retention of the current language prohibiting "undignified or discourteous conduct toward the tribunal."

A new paragraph (c) proscribes communication with jurors or prospective jurors after discharge under circumstances that include when the communication is prohibited by law or court order; the juror has made known a desire not to communicate; or the communication involves misrepresentation, coercion, duress, or harassment.

Rule 3.6 Trial Publicity

This rule has been significantly altered. Application of the rule has been narrowed to lawyers who are participating in or have participated in the investigation or litigation of a matter and lawyers "associated in a firm or governmental agency" with them. The

standard to be applied is when the lawyer "knows or reasonably should know" that the public communication will have a substantial likelihood of materially prejudicing an adjudicative proceeding. By moving commentary language into the rule, the Court has clarified what categories of information should not be disseminated and what types of information may be stated without elaboration. The rule applies with equal force to civil matters "triable to a jury" and criminal matters.

Nearly all the categories of information that are proscribed are straightforward and easily understood. An exception is paragraph (a)(5), which identifies as "likely to have a substantial likelihood of materially prejudicing an adjudicative proceeding":

> 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.

Its circularity aside, it requires a lawyer to safeguard against making statements about inadmissible information. A prudent practitioner would simply avoid making public statements about anticipated evidence unless a specific provision permits it.

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

This rule has undergone major revision. The portion dealing with a member's own unauthorized practice of law or assistance of another in doing so is the least altered. New paragraph (b) makes clear that a lawyer from another jurisdiction who is not licensed in Michigan shall not establish an office or otherwise maintain a systematic and continuous presence, except as authorized by law or the MRPC and cannot hold out to the public or otherwise represent himself or herself as admitted to practice in Michigan.

The topic of multijurisdictional practice of law is entirely new in Michigan's rules. New paragraph (c) delineates four circumstances in which an out-of-state lawyer's temporary delivery of legal services in Michigan will not be deemed the unauthorized practice of law, including when the services are:

(1) Undertaken with a Michigan lawyer who actively participates in the matter;

(2) Related to a pending or potential proceeding before a tribunal in Michigan or elsewhere and the lawyer or person being assisted by the lawyer is or expects to be authorized by law to appear;

(3) Related to an alternate dispute resolution proceeding in Michigan or elsewhere that arises out of the lawyer's practice in the jurisdiction of admission and the services do not require pro hac vice admission; or

(4) Not covered by paragraphs (2) or (3) and arise out of the lawyer's practice in the jurisdiction of admission.

New paragraph (d) identifies two circumstances in which a lawyer licensed in another jurisdiction of the United States may provide legal services on an unlimited basis: (1) when the services are provided to the lawyer's employer and are not services that require pro hac vice admission and (2) when the lawyer is authorized by law to provide services in Michigan. The first example is what is generally referred to as in-house counsel representation. The second could include a lawyer licensed to practice in one or more federal courts.

Commentary makes clear that this rule is intended to work in concert with MCR 8.126, the pro hac vice rule, and Rule 5(E) of the Rules for the Board of Law Examiners, which permits lawyers licensed to practice law in foreign countries to become admitted as "special legal consultants" to be able to render legal advice pertaining to the law of the country of licensure while in Michigan.

Rule 5.7 Responsibilities Regarding Law-Related Services

This new rule is intended to address potential confusion experienced by legal consumers who receive nonlegal but law-related services from a lawyer, believing that the ethical rules apply because a lawyer provides the services. Examples of law-related services are provided in the rule. The rule's intent is for lawyers to take reasonable measures to assure that consumers know the services are not legal services and that the protections of the client-lawyer relationship do not exist, failing which the MRPC will apply to the provision of services. Commentary notes that what constitutes reasonable measures can vary with the client's sophistication level.

Rule 6.6 Nonprofit and Court-Annexed Limited Legal Services Programs

This new rule is intended to facilitate more lawyer participation in programs that deliver limited legal services to clients, such as legal advice hotlines and pro se counseling clinics. The rule narrows the application of conflicts rules to situations in which the lawyer knows of a conflict under Rule 1.7 or Rule 1.9(a) when the lawyer is providing limited legal services in a setting where there is no reasonable expectation of the creation of a client-lawyer relationship. The imputed disqualification rule, Rule 1.10, applies only when the lawyer knows that another lawyer associated with the lawyer in the firm is disqualified by Rule 1.7 or Rule 1.9(a) with respect to the client's matter. One practical basis for this limited application of conflicts rules is a recognition that lawyers working at nonprofit and court-annexed limited legal services programs are not likely able to access their law firm's databases to check for conflicts of interest.

Commentary notes that, even in the short-term relationship established during a legal clinic, the MRPC apply except as specifically set forth in this rule, including Rules 1.6 and 1.9(c).

Rule 8.5 Disciplinary Authority; Choice of Law

Revisions make clear that Michigan lawyers are subject to discipline by Michigan's disciplinary system regardless of where the conduct occurs, that out-of-state lawyers (lawyers not licensed in Michigan) are subject to discipline in Michigan if they provide or offer to provide legal services in Michigan, and that lawyers licensed in more than one jurisdiction may be subject to discipline for the same conduct in more than one jurisdiction where licensed.

The new choice-of-law provision establishes that, for conduct pertaining to proceedings before a tribunal, the rules of professional conduct where the tribunal sits apply unless the tribunal's rules provide otherwise. For any other conduct, the rules that apply are controlled by where the conduct occurred or, if the "predominant effect" of the conduct is elsewhere, in that jurisdiction. The rule provides a safe harbor for lawyers whose conduct conforms to the rules of the jurisdiction reasonably believed to apply. The theory behind the rule is to provide a way for lawyers licensed in multiple jurisdictions to sort out which set of substantive rules applies to conduct in a given situation.

For a more extensive discussion of these rules, consult the State Bar's ethics page at http://www.michbar.org/opinions/ethicsopinions.cfm#recent. Members with additional questions can contact the State Bar's ethics helpline at (877) 558-4760. Written ethics opinions can be sought from the Standing Committee on Professional Ethics. Information about how to request an opinion is available at http://www.michbar.org/generalinfo/ethics/request.cfm. ■

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FOOTNOTES

1. On June 8, 2010, the Court entered an order amending Rule 5.4, which was effective September 1, 2010. Changes clarify that lawyers who have had cases referred to them by a nonprofit, such as a legal services organization, can share legal fees with the organization without violating the general prohibition against sharing legal fees with a nonlawyer. That implementation order can be found at <http://courts.michigan.gov/supremecourt/Resources/Administrative/2009-06-06-08-10.pdf>. All websites cited in this article were accessed December 12, 2010.
2. A day before the effective date of the June order amending Rule 5.4 referenced in footnote 1.