

# Changes to Attorney Disciplinary Procedural Rules Effective September 1, 2011

By John F. Van Bolt and Dawn M. Evans

**O**n September 1, significant changes to Michigan's attorney discipline system will take effect. This article highlights a number of those changes. For a comprehensive look at the revisions, the Michigan Supreme Court's April 19, 2011, implementation order can be viewed at [http://www.courts.michigan.gov/supremecourt/Resources/Administrative/2006-38\\_04-19-11\\_formatted%20order\\_1.pdf](http://www.courts.michigan.gov/supremecourt/Resources/Administrative/2006-38_04-19-11_formatted%20order_1.pdf).

Several provisions aim to boost enforcement by either foreclosing efforts that might impede the reporting of professional misconduct or requiring self-reporting. Others are intended to protect the public from further misconduct by a suspended, disbarred, transferred-to-inactive, or resigned lawyer (collectively termed "suspended or former lawyer").

Beginning September 1, a lawyer can be disciplined for entering into or attempting to obtain an agreement that would (1) prohibit reporting either professional misconduct or the terms of settlement of such a claim, (2) require a complainant to withdraw a complaint or not cooperate with an investigation or prosecution of misconduct, or (3) seal the record of a civil action for professional misconduct from review by the grievance administrator.<sup>1</sup> As worded, the prohibition applies equally to any lawyer signatory of such an agreement.

Suspended or former lawyers cannot have contact with clients or potential clients as a paralegal, law clerk, legal assistant, or lawyer, whether in person, by telephone, or by electronic means.<sup>2</sup> While not banning the employment of a suspended or former lawyer by a law firm or within a law office, the prohibition may have the practical effect of making such employment unworkable from the employer's standpoint.

Michigan lawyers licensed elsewhere must report discipline in other jurisdictions, including being transferred to inactive status and resigning in lieu of discipline.<sup>3</sup> Additionally, the requirement to self-report criminal convictions has been clarified to include ordinances and tribal laws pursuant to MCR 2.615.<sup>4</sup>

Law firms that take over the caseloads of a suspended or former lawyer must maintain signed copies of the former clients' written consent to the law firm's continued representation of them.<sup>5</sup>

Several changes clarify the jurisdiction of the Attorney Discipline Board (ADB). Out-of-state lawyers who appear in a Michigan proceeding *pro hac vice* are subject to the ADB's jurisdiction.<sup>6</sup> The ADB has continuing jurisdiction over its orders of discipline and orders granting reinstatement;<sup>7</sup> the power to issue reciprocal subpoenas predicated on subpoenas received from another lawyer disciplinary or admissions jurisdiction;<sup>8</sup> the ability to impose terms of discipline that are either concurrent or consecutive;<sup>9</sup> and the authority to grant interlocutory appeals without a hearing.<sup>10</sup> An ADB hearing panel can hear a reinstatement from a disability inactive-status proceeding, something formerly heard by the ADB.<sup>11</sup>

Changes to the rule regarding contractual probation, a confidential option the Attorney Grievance Commission (AGC) may offer respondents under certain circumstances, include increasing the maximum term of pro-

bation to three years,<sup>12</sup> expanding the types of behavior for which contractual probation may be offered to include a mental or physical infirmity or disability,<sup>13</sup> and detailing the types of requirements that may be included.<sup>14</sup> Finally, panel reports in which discipline is imposed must describe the conduct that led to a contractual probation in summarizing all previous misconduct.<sup>15</sup>

The amendments include a more detailed treatment of how to seek disqualification of a hearing panelist;<sup>16</sup> refinements to the reciprocal discipline procedure;<sup>17</sup> and an articulation of how to obtain an expert's examination and report in a proceeding alleging the lawyer is incapacitated, specifying the circumstances under which reports are admissible.<sup>18</sup>

Discovery has been expanded to require the exchanging of names of persons with knowledge of relevant facts and compliance with reasonable requests for nonprivileged information and evidence relevant to the charges and other materials upon good cause shown.<sup>19</sup> Witnesses may testify by telephone, voice, or videoconferencing upon a party's showing of good cause.<sup>20</sup> Complainants can presumptively be present during a hearing unless a panel finds, based on specific facts, that their testimony is likely to be materially affected by exposure to other testimony.<sup>21</sup>

During the investigation phase when the AGC has the power to issue subpoenas for the appearance of a witness or production of a document, the recipient of the subpoena

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can file a request with the ADB, which can quash or modify the subpoena if compliance would be unreasonable or oppressive.<sup>22</sup>

Answers filed by respondent attorneys in formal proceedings must be signed by the respondent, whose signature constitutes verification that the response has been read.<sup>23</sup> A respondent refusing to answer on constitutional or professional grounds may do so under seal.<sup>24</sup> A respondent with actual notice of a hearing who fails to appear will be suspended seven days from the hearing panel's entry of an order of suspension.<sup>25</sup> When a lawyer is suspended for 179 days or fewer, a stay automatically issues when a timely motion for reconsideration is filed. Where the sanction imposed is disbarment or a suspension of greater than 179 days, the respondent may petition for a stay of the order in a timely motion for reconsideration.<sup>26</sup> Lawyers who resign or are suspended, disbarred,

Taken as a whole, the refinements and modifications promote clarity about the process, afford all participants in the disciplinary system an appropriate level of due process, and enhance public protection. ■



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or transferred to inactive status must either file a motion to withdraw or facilitate a substitution of counsel of client's choosing for all active client matters existent at the time of change of status.<sup>27</sup> An affidavit of compliance with the discipline order must include any assertion that the lawyer does not have active clients at the time of the effective date of the change in status.<sup>28</sup> Lawyers are disqualified from serving as ADB hearing panelists if they have ever been the subject of an order of discipline or if they have been admonished or placed on contractual probation within the past five years.<sup>29</sup>

In proceedings seeking to establish incapacity and transfer of a lawyer to inactive status, the hearing panel may appoint counsel for an unrepresented respondent upon the request of a party or on its own motion.<sup>30</sup>

#### FOOTNOTES

1. Proposed MCR 9.104(10).
2. Proposed MCR 9.119(E)(2).
3. Proposed MCR 9.120(A)(2).
4. Proposed MCR 9.120(B)(3).
5. Proposed MCR 9.119(G)(1).
6. Proposed MCR 9.110(A).
7. Proposed MCR 9.110(E)(6).
8. Proposed MCR 9.112(D)(4).
9. Proposed MCR 9.115(J)(3).
10. Proposed MCR 9.118(A)(1).
11. Proposed MCR 9.121(E).
12. Proposed MCR 9.114(C)(1).
13. Proposed MCR 9.114(C)(1)(a).
14. Proposed MCR 9.114(C)(2).
15. Proposed MCR 9.115(J)(1).
16. Proposed MCR 9.115(F)(2)(b).
17. Proposed MCR 9.120(C).
18. Proposed MCR 9.121(B)(1).
19. Proposed MCR 9.115(F)(4)(a)(iii).
20. Proposed MCR 9.115(I)(3).
21. Proposed MCR 9.115(G).
22. Proposed MCR 9.112(D)(1).
23. Proposed MCR 9.113(A).
24. Proposed MCR 9.113(B)(3).
25. Proposed MCR 9.115(H)(1).
26. Proposed MCR 9.118(E).
27. Proposed MCR 9.119(B).
28. Proposed MCR 9.119(C).
29. Proposed MCR 9.111(B).
30. Proposed MCR 9.120(B)(2).