



# You Still Have Time... Get in the Driver's Seat!

**W**hat do *you* know about the proposed changes to the Michigan Rules of Professional Conduct (Rules) and Michigan Standards for Imposing Lawyer Sanctions (Standards)? Did you attend one of the PANEL DISCUSSIONS in Grand Rapids, Ann Arbor, Detroit, Rochester, Flint, or Lansing? Did you read the SUMMARY of all the Panel Discussions available online? Did you read any of the NEWSPAPER ARTICLES? How about the E-MAIL BLASTS from the State Bar? Did you go to the STATE BAR WEBSITE and look at any of the resources available on the Representative Assembly page?

Lucky for you, there's still time. The Representative Assembly has spent hundreds of hours making sure that you have access to information regarding the proposed Rules and Standards published by the Supreme Court for comment at <http://www.michbar.org/generalinfo/assembly>. Below is more information, an article by John Allen identifying ten significant issues within the proposed Rules. The Assembly has addressed these issues, but you can still submit individual comments directly to the Court before the comment period ends, on June 1. They asked for your input! Remember, lack of knowledge is not a defense to a Rule violation. How valuable is your license to practice law in Michigan... enough to learn more about the proposed changes and submit commentary to the Court? It's *your* license to practice law. Shouldn't you be in the driver's seat?

## The "Perfect Storm" of Michigan Lawyer Ethics and Discipline—Ten Things You May Not Like About the New MRPC and Standards for Sanctions

By John W. Allen<sup>1</sup>

The "Perfect Storm" of Michigan lawyer ethics and discipline is brewing, but it is

not yet on the radar screens of most Michigan lawyers.

The proposed Michigan Standards for Imposing Lawyer Sanctions (ADM File No. 2002-29) (MSILS), will establish the criteria for applying formal sanction (reprimand, suspension, disbarment) and mitigation for professional conduct violations.

The proposals to amend the Michigan Rules of Professional Conduct (MRPC) (ADM File No. 2003-62) are a comprehensive rewrite to MRPC, totaling 150+ changes, including changes to the rules governing fees, nonrefundable retainers, conflicts and waivers, organizational representation, and trust accounts, as well as the definition of "protected information," and new duties to "prospective" clients. Other proposals, if adopted, would give needed clarification on the ownership of and access to lawyer files by clients, and the role of a fee agreement in a fee dispute. It is the largest change to our conduct rules, since the MRPC were adopted in 1988.

MRPC is a strict liability, quasi-criminal disciplinary code.<sup>2</sup> Contributory or comparative negligence by the client or by others, lack of injury, and client consent are not defenses, and go only to mitigation, not culpability. Violation may result in the loss of the professional license to practice.

### Ten Things You May Not like About the New MRPC and MSILS

1. Conflict consents must be "confirmed in writing."

[Proposed MRPC 1.0(b), 1.7 (b), 1.9 (b), 1.10(d), 1.11(a), 1.12, 1.18(d)]

This will be a new requirement of written disclosure, as a condition for a valid conflict waiver and consent. Failure to have a writing will void any waiver/consent and is a per se violation, even if the client admits waiver and consent, and is not damaged. A violation could also serve as evidence of a breach of the standard of care in a civil action, and forfeit any fee charged.

2. A new "Informed Consent" concept is in twelve rules.

[Proposed MRPC 1.0(e)(definition), plus 1.2(c), 1.4(a)(1), 1.6(a), 1.7(b)(4), 1.8(a)(3), 1.9(b)(2), 1.10(d), 1.11(a)(2), 1.12(a), 1.18(d)(1) and 2.3(b).]

The new term "informed" is not defined ("*reasonably adequate under the circumstances*"), even though it includes an *explanation* "*about the material risks... and reasonably available alternatives.*"

According to the Proposed Comment, "A lawyer need not inform a client or other person of facts or implications *already known* to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person *assumes the risk* that the client is inadequately informed and *the consent is invalid.*"

The omission of any fact from the proposed "informed consent" disclosure will void the consent. In some instances (e.g., 1.9(a) and (b), 1.12(a) and 1.18(d)(a)), the proposal creates new duties of disclosure to a non-client third party to whom the lawyer will be required to give advice.

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3. Strength will be added to arguments that a civil liability cause of action against a lawyer is created for every violation.

[Former MRPC 1.0 (b), second sentence, is deleted.]

The MRPC are used as a platform for malpractice claims.<sup>3</sup> Proposed Rule 1.0 deletes the admonition that MRPC are not intended to create a civil cause of action. Proposed MRPC, Preamble, Scope [20], confirms that "...the Rules do establish standard of conduct..." and "...violation of a Rule may be evidence of breach of the applicable standard of conduct."

4. The current Michigan concept of "protected information" is abandoned.

[Proposed MRPC 1.6.]

The proposal will delete the current Michigan concept of "protected information" (described in the current MRPC 1.6 to include both privileged information and "secrets"), in favor of "information relating to the representation," which is not precisely defined.

5. There is no transition provision, despite the addition of many new requirements.

There is no "transition" provision and no "grandfathering" of earlier engagements obtained under the current, and much different, rules.

6. The Comments are extensively relied upon to give meaning to the Rule, even though that has not been their function.

At Preamble, Scope, Comment [21], the proposed MRPC maintain the present Michigan position:

*"The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."* (Emphasis added.)

Thus, little solace may be taken from what is in the Comments. Important matters should be in the Rule.

7. Scienter: Actual Knowledge (Not just Negligence) should be required. MRPC is not the place to attempt regulation of isolated acts of negligence or general lawyer competence.

If we view our only tool as a hammer, then we tend to view every issue as a nail. All issues of professional practice need not be a subject of the MRPC.

Mere mistakes should not result in discipline. Attempting to regulate lawyer competence with the MRPC, is like trying to teach driver education by using only speeding tickets. Lawyer competence is better addressed by training, continuing education, and specialized programs such as certification.

Most jurisdictions demand strong evidence of a course of conduct, or negligence combined with other factors, which, when taken in the aggregate, provide a basis for discipline. The protections of due process should not rest on prosecutorial discretion.

8. A lump-sum or non-refundable fee that is earned at the time of engagement is still left in a doubtful status.

The proposed amendments purport to authorize non-refundable fees, earned at the time of engagement (proposed MRPC 1.5(f)), and would permit immediate deposit of such fees in the lawyer's own account (proposed MRPC 1.15(c)), but only if the lawyer "in fact... turns down other cases, and marshals law firm resources in reliance on the fee agreement." (Proposed MRPC 1.5(f)(4).) At the time of engagement, this is impossible, and also inconsistent with MRPC 1.5(a)(2) ("likelihood" that other employment will be precluded).

9. The proposed amendments do not speak sufficiently to two of the areas most frequently encountered in grievances in Michigan: Fee Disputes and File Ownership.

- Fee Disputes [Proposed MRPC 1.2(c) limits "scope of engagement" restrictions, and Proposed MRPC 1.5 makes fee agreements subject to more, not fewer, attacks];
- Disputes over File Ownership and Cost of Access [Proposed MRPC 1.4 does not treat this issue].

Additional proposals may be viewed on the SBM Representative Assembly Discussion Board website at <http://repassembly.michbar.org>.

10. ADM File No. 2002-29 (MSILS) together with ADM File No. 2003-62 (Amended MRPC) create the "Perfect Storm" of uncertainty.

The Supreme Court has said that it will hold off on final publication of the MSILS

until after finalization of its proposals to amend the MRPC. This priority sets a more logical progression, and should be retained.

These are the rules that control our professional lives, and all of us have a vital interest in them. Interested persons should consider the following actions:

- review the proposals and discuss them with your colleagues
- marshal the resources of your local Bar to do the same
- contact your Circuit's representative in the Representative Assembly
- write or e-mail the Michigan Supreme Court about the proposals
- attend the Public Hearing at the Michigan Supreme Court (date to be announced) ◆

## FOOTNOTES

1. John W. Allen is a partner with Varnum Riddering Schmidt & Howlett LLP, and acknowledges the thoughtful contributions of his partners, Elizabeth Jamieson and Terry Bacon. Mr. Allen currently serves as Chair of the State Bar of Michigan Special Committee on Grievance, and has served as the Chair of the State Bar of Michigan Standing Committee on Professional and Judicial Ethics. This article contains the views of the author, not those of the State Bar of Michigan nor its Committees.
2. *In re Woll*, 387 Mich 154, 161, 194 NW2d 835 (1972).
3. Cf., *Beattie v Firmschild*, 152 Mich App 785 (1986); *Lipton v Boesky*, 110 Mich App 589 (1981) (rebuttable presumption of negligence); Restatement of the Law Third, *The Law Governing Lawyers*, 52.