Rules Concerning the State Bar of Michigan
[NEW] Rule 20 (Confidentiality of State Bar Programs)

STATE BAR OF MICHIGAN POSITION

By vote of the Representative Assembly on April 16, 2005

Should a new rule be added to the Rules Concerning the State Bar of Michigan providing that information submitted to and received from the following State Bar of Michigan programs is confidential in nature and cannot be made public except by court order after notice and hearing, or upon written waiver from the individuals involved (including the State Bar member, claimant and complainant, if applicable), or if made public by the State Bar of Michigan in a complaint seeking permanent injunction:

- Ethics Hotline programs
- Ethics Committee work product
- Law office management program
- Unauthorized practice of law program
- Client Protection Fund program
- Lawyers and Judges Assistance Program

(a). Yes
(b). No

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BACKGROUND

It is proposed that a new rule (Rule 20) be added to the Rules Concerning the State Bar of Michigan to clarify that aspects of certain State Bar of Michigan programs and work product are confidential in nature and that the identity of bar members or the public utilizing these programs and the nature of the services rendered to them, cannot be made public except by court order after notice and hearing. The new rule would clearly indicate that, except as provided in Michigan Rules of Professional Conduct ("Rules") 8.3(c), the confidentiality provision would not abrogate an attorney's independent obligation under the Rules to report "a significant violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer".

Historically, certain State Bar of Michigan programs have operated on a confidential basis, and asserted this confidentiality policy when faced with demands from third parties for certain information. However, no specific authority exists stating that the programs are confidential in nature. State Bar programs claiming confidential operations are the Ethics Hotline, the Ethics Committee, the Unauthorized Practice of Law Program ("UPL") the Client Protection Fund and the Lawyers and Judges Assistance Program.

In the process of developing the new law office management program for Michigan, the State Bar has learned that the at least twenty other states have this type of program and those recognized as benchmark programs include law office confidentiality provisions. As with other bar programs, a grant of limited confidentiality encourages members to contact the bar, seeking guidance and advice regarding remedying situations and modifying behavior to avoid future issues. Providing members with resources where they can turn to when struggling with various issues strengthens the integrity and quality of the profession and the better programs have confidentiality provisions.

Confidentiality provisions also assist the public in the Unauthorized Practice of Law ("UPL") and Client Protection Fund programs by encouraging the public to come forward when victimized by individuals practicing law, either authorized or unauthorized. If complaints from the public were subject to discovery by subpoena, the public would be chilled from coming forward to report misconduct out of fear of retribution. This is an acute concern in the unauthorized practice of law area. For example, a alleged victim of UPL, who lives in small town and will necessarily interact with the alleged perpetrator, does not want the perpetrator to be aware a complaint filed with the SBM. There have been occasions when an alleged perpetrator, who is not bound by attorney-client privilege, threatens to disclose (to the detriment of the victim) what was intended by, and represented to, the victim as confidential information. The SBM often receives requests from the alleged perpetrator for the identity of the complainant and historically the SBM has refused to disclose this information. However, having a confidentiality provision would secure this position.

This proposed revision to the Rules Concerning the State Bar of Michigan is brought to the Assembly for consideration due to the impact these programs have on State Bar members and the important policy position regarding confidentiality within State Bar programs.

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RULES CONCERNING THE STATE BAR OF MICHIGAN

[NEW]Rule 20 –Confidentiality of State Bar Programs

Information submitted to and received from the following State Bar of Michigan programs is confidential in nature and cannot be made public except by court order after notice and hearing, or upon written waiver from the individuals involved (including the State Bar member, claimant and complainant, if applicable), or if made public by the State Bar of Michigan in a complaint seeking a permanent injunction. Except as provided in Michigan Rule of Professional Conduct 8.3(c), this rule does not abrogate an attorney's independent obligation under the Rules to report "a significant violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer":

a. Ethics Hotline programs
b. Ethics Committee work product
c. Law office management program
d. Unauthorized practice of law program
e. Client Protection Fund program
f. Lawyers and Judges Assistance Program