Executive Summary of Regulatory Committee Recommendations

(October 2015) Law School Education-Early Character & Fitness Advisory Review

- Make early advisory and periodic review available to law students [WG 3, PDF p 31-33.]
- Effectuate greater uniformity in character and fitness panel evaluations [WG 3, PDF p 31-33]

Law School Education-Practical Legal Training

- Advance Law school curriculum reform to expand training in providing legal services, including experiential learning. [WG 3, PDF p 34-35; 44-45.]
- Amend MCR 8.120 to allow law students to appear in court to provide legal services to indigent persons and persons of limited means under supervision of active SBM member. [WG 3, PDF p 34-33-35; 44-45.]
- Actively support a change in the ABA's accreditation standards to permit law schools to grant academic credit for participation in a field placement program for which a student receives compensation. [WG 3, PDF p 35-36; 44-45.]

Bar Admission Process

- Adopt a phased-in or sequential bar admission process: [WG 3, PDF p 31-33; 35-38; 44-45.]
  - ✓ MPRE at end of 1st year
  - ✓ More streamlined doctrinal multi-state (UBE) testing as early as possible after relevant courses are completed
  - ✓ Practice-readiness and Michigan-specific law testing after J.D. as final component of testing for admission
- Require as condition for admission a prescribed number hours of supervised experience in activities that involve the practice of law, provided through law schools or through a separate program approved by the BLE. [WG 3, PDF p 39-40.]

Early Post-Bar Admission Strategies

- Establish formal mentoring program for newly-admitted lawyers focused on the practice of providing legal services, and/or 2) an early program to inculcate professionalism. [WG 3, PDF p 40.]

Continuing Competence

- Establish continuing professional development ("CPD") reporting requirements with periodic re-qualification or certification procedures as alternative to mandatory continuing legal education. [WG 3, PDF p 40-43.]

Law Practice Business Models

- Plan and prepare a multidisciplinary (MDP) business model for family, probate, and real property law practitioners. [WG 2, PDF p 1-2.]
- Develop a pilot program for Alternate Business Structure (ABS) certification for elder law and probate lawyers and financial planners. [WG 2, PDF p 2.]
- Actively explore other MDP and ABS possibilities. [WG 2, PDF p 1-2.]

Law Practice Regulation/Management

- Amend BLE Rule 5 to authorize foreign lawyers to practice in Michigan without examination when participating in ADR matters, representing organizational clients, and handling federal law matters. [WG 4, PDF p 46-50.]
- Amend the commentary to MRPC 1.1 to encourage competence in the use of technology in the practice of the law. [WG 4, PDF p 51-52.]
- Develop a SBM Technology Advisor/SBM department to advise and make recommendations regarding specific technology, products, and services to assist members in their efforts to comply with MRPC 1.1. [WG 4, PDF p 53-56.]
- Conduct a comprehensive study of online marketing platforms such as for-profit lawyer referral services and online ranking systems to reflect the way these platforms are used by Michigan lawyers. [WG 4, PDF p 57-58.]
- Adopt limited scope representation (LSR) consistent with the recommendations of the Access Committee. [WG 4, pending.]
- Encourage uniformity of local court rules. [WG 3, PDF p 43.]

- In coordination with the attorney discipline system, create a viable, quick SBM system for advisory, prospective review of novel fee arrangements through the Professional Ethics Committee and actively educate SBM members regarding existing ethics opinion on this topic. [WG 2, PDF p 4-30.]
- Seek a rule or statute requiring payee notification, i.e., requiring an insurance carrier to notify a claimant whenever a payment issues to the claimant's lawyer or other representative. [WG 2, PDF p 4-30.]
- Create a mandatory fee arbitration program to resolve attorney/client fee disputes. [WG 2, PDF p 4-30.]
- Create mediation program for attorney/client fee disputes that do not involve significant violations of MRPC 8.3. [WG 2, PDF p 4-30.]
- Expand disciplinary rules to include law firm/entity regulation. [WG 2, PDF p 3.]
- Amend MRPC 1.5 to (1) include a definitional section regarding alternative fee arrangements and (2) require written engagement letters for all matters explaining the basic components of the agreed upon fee arrangement. [WG 2, PDF p 5-30.]

Alternate Legal Services Providers

- Develop a program to license and regulate all non-lawyer legal services providers (e.g. paralegals). [WG 2, PDF p 3-4, p WG 3, PDF p 43; WG 4 pending.]

Specific Public Protection Measures

- Create public resources and educational materials to help the public assess and navigate the various online lawyer ranking and lawyer referral services. [WG 4, PDF p 59-61.]
- Adopt mandatory disclosure of malpractice coverage information. [WG 2, PDF p 3.]
- Explore a mandatory malpractice insurance requirement through analysis of data from Oregon. [WG 2, PDF p 3.]

Future Study Recommendations

- Convene a working group to evaluate whether or not the Michigan Supreme Court should adopt Regulatory Objectives similar to those under consideration by the ABA Commission on the Future of Legal Services. [WG 1 and WG 2, PDF 1-30.]
- Convene a working group to explore the possibility of partnering with Ontario to study the impact of their ABS efforts. [WG 2, PDF p 1-2.]

State Bar of Michigan, Michael Franck Building, 306 Townsend Street, Lansing, MI 48933

Modernizing the Regulatory Machinery Committee – Work Group 2: Legal Practice Business Models and Legal Services Companies

Ken Mogill (Group Leader); Mark Armitage, Scott Bassett, Donald Campbell, Jeffrey Collins, Roccy DeFrancesco, Alan Gershel, Marcia Goffney, Milton Mack, Shenique Moss, Eugene Mossner, and James Redford

Charge 1: Consideration of possible changes to the MRPC and/or commentary, concerning ownership and investment in law practices, also referred to as alternate business structures (ABS)

Currently, Michigan Rule of Professional Conduct (MRPC) 5.4 expresses traditional limitations concerning ownership and investment in law practices to prohibit lawyers from allowing nonlawyers to have an ownership interest in a law practice, to serve as a corporate director or officer, or to direct or control the professional judgment of a lawyer. The limitations set forth in MRPC 5.4 are intended to protect the lawyer's professional independence of judgment by limiting the influence of nonlawyers on the lawyer-client relationship. The Task Force's Guiding Principles 1 (maintaining a client-centered focus for the delivery of legal services) and 6 (maintaining high standards for professional ethics and protection of the public in a changing environment and the emergence of nontraditional delivery methods and providers of legal services) are implicated in considering this regulatory scheme.

This work group reviewed and discussed the recommendations of the Canadian Bar Association's (CBA) Futures Report regarding this issue as well as the reforms implemented in Australia (New South Wales) and the United Kingdom (UK) through its Solicitors Regulation Authority (SRA). [See Armitage Memo, Approached to Client/Public-Focused Regulation – Substance & Procedure]. Mindful of the potential for significant impact on consumers of legal services and the ongoing primary objective of protecting the public, the Work Group believes it is prudent to gather specific information and data from jurisdictions that have implemented these regulatory changes so that we may see the impact on the public and the profession. If these different regulatory schemes show an overall positive impact on the delivery of legal services, the Work Group believes obtaining more specific details about the substantive ethics rules and regulations regarding this ABS would be beneficial.

Recommendation: There was consensus reached by this Work Group that Alternate Business Structures (ABS) require further evaluation when data becomes available from other jurisdictions and countries. It was agreed that the Work Group would recommend further study on ABS, but not the use of the ABS business model at this time.

Charge 2: Consideration of possible changes to the MRPC and/or commentary, concerning collaborative partnerships with other professionals such as physicians, accountants, financial planners, family counselors, mental health providers, etc., also referred to as multidisciplinary practices (MDP), with a focus on consumer protection.

The regulatory scheme in Michigan currently prevents a law firm from offering non-law related professional services through the law firm. The Michigan Rules of Professional Conduct do not expressly address the conduct of engaging in the practice of law and another occupation nor do the provisions prohibit a lawyer from pursuing multiple occupations. Nevertheless, practicing dual occupations raises numerous ethics issues. There are several Ethics Opinions regarding this issue. See example, Ethics Opinions RI-313 (A lawyer may office share with the lawyer's insurance business, as long as the businesses are segregated, client confidences are protected, and public communications about each business entity are clear and do not create unjustified expectations about the results that can be achieved) and RI-206 (Generally, lawyers may share office space with non-lawyers so long as "the businesses are segregated, client confidences are protected, and public communications about each business entity are clear and do not create unjustified expectations about the results which can be achieved.").

There are variety of regulatory concerns regarding MDP, including differing ethical standards applied to various professions, differing disclosure standards, conflicts of interest, fee splitting, and referral fees. The Work Group considered the DC model regarding lawyers partnering with CPAs and family law practitioners use of collaborative law.

Recommendation: There was consensus reached by this Work Group that the concept of multidisciplinary practice (MDP) requires further evaluation when specific data becomes available from other jurisdictions and countries. It was agreed that the Work Group would recommend further study on MDP, but not the use of the MDP business model at this time.

Charge 3: Consideration of possible changes to the MRPC and/or commentary, concerning consumer protection regarding companies providing legal services, entity regulation, etc.

For the protection of the public, the practice of law and conduct that constitutes the unauthorized practice of law is regulated by ethics rules and statutes. The Guiding Principles establish client-focused priorities consistent with the avowed aims of Michigan's system of lawyer regulation. When the State Bar of Michigan was assigned its role as *the* regulator of the profession, its first President declared that "No organization of lawyers can long survive which has not for its primary object the protection of the public. Subchapter 9.10 of the Michigan Rules of Court provides that discipline is "for the protection of the public, the courts, and the legal profession." Consequently, any changes or enhancements to our regulatory objectives should be consistent with these core values.

A. Malpractice Insurance

Most clients expect lawyers to have malpractice insurance. Other countries with "modernized" regulatory systems require it. Oregon remains the only US jurisdiction with mandatory malpractice coverage for all practicing lawyers in the state. According to the ABA Standing Committee on Client Protection, approximately half of the states require *disclosure* (to either the client or a regulatory agency), if the attorney does not have insurance. Seven states require direct disclosure to the client, while 17, including Michigan, require disclosure on the registration form. Michigan, however, does not provide the information to the public. There are exemptions in each state, usually for government/municipal attorneys and in-house counsel. A few examples of the disclosure schemes to clients are provided below.

> Alaska and Ohio - Attorneys must notify clients in writing if they have no malpractice insurance, or if their coverage is less than $100,000 per claim and $300,000 aggregate. Clients must also be notified if insurance coverage is terminated or if coverage drops below the $100,000/$300,000 levels.
>
> South Dakota - Attorneys must specify on their letterhead if they have no malpractice insurance or if their coverage is less than $100,000 per claim.

The Work Group noted concerns about requiring all SBM members to have a certain level of malpractice insurance coverage, including but limited to, interfering with the attorney/client relationship, giving insurance companies greater power to determine who practices law, and negatively impacting solo and small firm practitioners. The Work Group is not inclined to recommend mandatory malpractice insurance at this time in light of these concerns. However, obtaining information and data about Oregon's program might be worthwhile to determine the impact of mandatory insurance on the protection of the public.

[For more background on this topic, see attached memos by Marcia Goffney, p 9 and Armitage, p 5.]

Recommendation: There was consensus reached by the Work Group that Michigan should adopt a mandatory disclosure scheme that includes making malpractice coverage information readily available to legal consumers. A pilot program might include disclosure to the public of the names of members who currently have malpractice insurance based on the information collected by the State Bar and provided to the Court.

B. Entity (Law Firm) Regulation

In Michigan, the Michigan Rules of Professional Conduct, the professional disciplinary rules, and the judicial canons regulate the conduct of attorneys and judges to emphasize individual accountability. Entity regulation has been embraced in other jurisdictions. This topic has been preliminarily discussed by this Work Group and consideration is ongoing. [See Armitage memo, p 7-13.]

C. Alternative Providers of Legal Services

The topic of alternative providers of legal services has been preliminary considered by this Work Group to better protect the public from unauthorized legal services that result in harm to consumers. The Work Group's consideration and discussions are ongoing. Some of the considerations are summarized as follows:

1. As a first step to providing clarity on the unauthorized practice of law definition, consideration of defining acceptable titles of legal service providers: specifically, paralegal, legal technician, legal document assistant, and legal document preparer may be warranted. Each category could specify the types of services providers should and should not provide. Further, each category of service providers could have professional standards and ethics codes and be required to use specific titles whenever providing services online or elsewhere.
2. Qualifications, credentials, licensing processes, and procedures for each category of service provider could be defined. The responsibilities of the licensed attorney working with service providers could be reiterated, along with defined penalties for non-compliance.
3. Disclosure of domicile, state(s)/country(countries) of licensure, ownership interests in the entity and credentials of any lawyer or service provider who delivers legal advice or services online could be required with penalties enumerated for non-compliance.

[For more background on this topic, see attached memo by Marcia Goffney.]

D. Attorney Advertising Legal Services

The Work Group has engaged in substantial discussion regarding attorney advertising legal services. The Work Group has carefully considered the recommendations in the 2015 Report of the Regulation of Lawyer Advertising Committee by the Association of Professional Responsibility Lawyers available at https://www.aprl.net/publications/downloads/APRL_2015_Lawyer-Advertising-Report_06-22-15.pdf. The Work Group has also considered Florida's robust regulatory program regarding this issue. The Work Group's consideration of this topic is ongoing.

E. Other Regulatory Schemes Under Considerations

Random Audits of Trust Accounts - As Michigan has learned from recently joining the ranks of the 44 states with Trust Account Overdraft Notification (TAON), early notice of problems with money handling can prevent harm to clients and serve as an opportunity to educate lawyers. In addition to the TAON Rule, twelve states have random audits of trust accounts. This is a proactive, risk-based, and often consultative and educational form of regulation.

Payee Notification - Sixteen states have rules or statutes requiring an insurance carrier to notify a claimant when the carrier makes payment to the claimant's lawyer or other representative.

Fee Arbitration - Twelve states have a program patterned after the ABA model rule which has this purpose: "A fee arbitration system provides lawyers and clients with an out-of-court method of resolving fee disputes that is expeditious, confidential, inexpensive, and impartial.

Mediation of Client-Lawyer Disputes - Twenty-three states have programs providing for mediation of disputes, including some allegations of minor misconduct upon the referral of the disciplinary agency. [See Armitage memo, p5.]

Charge 4: Consideration of possible changes to the MRPC and/or commentary, concerning alternative fee arrangements (e.g., nonrefundable, value-added, fee-splitting, referral fees and lawyer referral services, prepaid legal services, fees for unbundled legal services, etc.)

Due to time constraints, the Work Group has had only preliminary discussions regarding alternative fee arrangements. The Work Group has preliminarily discussed MRPC 6.3 regarding its limitations pertaining to "for profit" lawyer referral services, value-added fee provisions (in the family law context), and nonrefundable fees. The Work Group believes that the alternative fee arrangement topic is an important consideration and will continue its work to make appropriate recommendations. [See Armitage memo, p 6-7.]

Modernizing the Regulatory Machinery

Legal Practice Business Models and Legal Services Companies (recommendations to governing laws and regulations, including changes to MRPC).

SUBMITTED BY MARCIA GOFFNEY AUGUST 11, 2015

CONSUMER PROTECTION

A. FROM WHAT IS THE PUBLIC BEING PROTECTED?

1. THE UNAUTHORIZED PRACTICE OF LAW (UPL).

Rule 5.5 of the aba model rules: a lawyer who is not admitted to the practice of law in this jurisdiction shall not…"*establish an office or other systematic and continuous presence in this jurisdiction for the practice of law."*

Appearance at an arbitration does not constitute the practice of law [1] the aba journal has reported jurisdictions in Michigan who use software to resolve traffic tickets. Some use software to resolve tax and property tax disputes.

The issue of what constitutes the unlicensed practice of law (UPL) remains unsettled. Some distinguish between unauthorized practice of law and "provision of legal services." Historically, legal services are buried within the definition of "practicing law." Clarification is needed in Michigan and nationally. Eight state bar associations have filed lawsuits against Legal Zoom,

[1] Bennett, Steven C. (May2002). Arbitration: essential concepts New York: Incisive Media.

alleging that the decision tree makes legal analyses which constitutes the unauthorized practice of law.

AVVO operates a website for legal advice, lawyer reviews and way to connect clients with lawyers. It is now valued at $650 million.

According to a 2002 FTC report commenting upon the American Bar Association's proposed model definition of the practice of law, the open-ended statutory definitions have given the courts and bar agencies "scant guidance when they attempt to apply UPL statutes to specific facts."[2]

2. **<u>Incompetency (generally malpractice</u>**)
   a. Bad advice
   b. Poorly drafted/insufficient legal documents
   c. Misinformation about procedures/timelines
   d. Client's losses (asset and property loss including fees)

3. **<u>INADEQUATE REPRESENTATION BEFORE TRIBUNALS, AGENCIES AND COURTS</u>**

B. WHY IS IT NECESSARY TO PROTECT THE PUBLIC?

1. <u>GLOBALIZATION</u>

a. International transactions and borderless world for companies and individuals online. Offshore companies who are coming onshore
b. The public does not understand the role of lawyers. Roles differ in different countries.

[2] Federal Trade Commission *Comments on the American Bar Associations' Proposed Model Definition of the Practice of Law*, December 20, 2002.

c. There is uncertainty about the interpretation of laws and codes in each state/country.

2. **<u>TECHNOLOGY (WEB BASED BUSINESSES AND THE INTERNET).</u>**
   a. There is no need to be face to face to transact business. More interactive online forms.
   b. The public has the legal right to:
      (1) Identify with whom they are dealing?
      (2). Avoid individuals who are not qualified to “practice law”/ provide legal services”/ “provide legal opinions”-unqualified individuals
      (3). Ensure documents address individual needs (lDA’s). Legal document assistants; computer assisted drafting libraries (“you draft ems”).
      (4) Be informed of consequences before making a decision or assuming risk
      (5) minimize risk of an adverse result

3. **<u>THERE ARE NO UNIFORM MULTIJURISDICTIONAL LAW SERVICE PROVIDER REQUIREMENTS.</u>**

4. **<u>A MORE MOBILE SOCIETY</u>**

CONSUMER PROTECTION ISSUES FOR DISCUSSION

I.PROTECTION FROM THE UNAUTHORIZED PRACTICE OF LAW (UPL)

A. SHOULD THE SUPREME COURT AND STATE BAR PROVIDE GUIDANCE THAT CAN BE USED TO DETERMINE WHAT CONSTITUTES THE "PRACTICE OF LAW" IN ORDER TO AMEND/UPDATE/BROADEN MRPC AND REGULATIONS TO ENCOMPASS GLOBALIZATION AND ONLINE TECHNOLOGY?

UPL Statutes have been used to challenge professionals who provide legal services.

HISTORICAL DEFINITIONS OF "PRACTICE OF LAW." Done by one admitted to practice and licensed as required by state law; usually requiring a four-year degree, a three-year law degree, fitness and character assessment, passage of a bar examination and licensure.

Lawyers:

1. Do initial intake
2. Render legal opinion and advice about risks and potential outcomes, select, draft or complete documents; negotiate legal rights or responsibilities[3]
3. Represent clients before all courts, agencies and tribunals unless court rules otherwise
4. Are totally responsible for outcomes and all individuals who are working with her/him on any matter (MRPC 5.5)
5. "Activities that lawyers have traditionally performed"[4]
6. When the client's belief is that they are receiving legal advice[5]

[3] Task Force on the Model Definition of the Practice of Law, Proposed Model Definition of the Practice of Law, section (b) (1) Sept 18, 2002

[4] State Bar of Arizona v. Arizona Land Title and Trust Co. 366 P2d at 9 ("we believe it sufficient to state that those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries must constitute "the practice of law."

[5] See *Guidelines on Mediation and the Unauthorized Practice of Law,* Department of Dispute Resolution Services of the Supreme Court of Virginia (2001)

Lay People:

1. Activities incidental to those usually performed by lawyers if incidental to the profession or business of the layperson[6]
2. Activities that don't involve difficult or complex questions of law.[7]

PROS

- Aids consistency.
- Most states have regulations governing who may practice law except Arizona.
- Provides greater flexibility in acquiring legal service at any time
- Can minimize forum shopping
- Makes enforcement easier
- Enables understanding. Clarifies role of lay people in assisting the public.
- ABA 2002 Model definition indicates the conduct "must be targeted toward the circumstances or objectives of a specific person" in order to be "the practice of law." This excludes software, general guidance on wills provided by hospitals, etc.
  1. A company that is a "certified legal document preparation entity" is not "practicing law". If the company software is too smart (legal information vs. Legal advice) it could be UPL[8]
  2. Real Estate agents can save clients legal fees by preparing buyer agreements. [9]

CONS

- "Practice of law' definitions is a means of securing a monopoly for lawyers and bar to entry
- Attempt to restrict competition

[6] Virginia v. Jones & Robbins, Inc. 41 S.E.2d 720, 727 (VA 1947). It was deemed advisable to prohibit real estate agents from preparing legal instruments which transfer legal title from seller to purchaser. Sale contracts option and leases were permitted to be prepared by real estate agents.
[7] Agran v. Shapiro, 273 P.2d 619, (cal. Ct. App. 1954). Preparation of a simple tax form was not the practice of law.
[8] www.lawtechnologytoday.org/2015/06
[9] supra

- Results in higher pricing to public
- Stifles competitive rates for certain services between the states
- There are very few cases of consumer harm from UPL[10]
- FTC position is that harm to consumers outweighs the good
- Out-Of-State service providers in non-lawyer markets

B.SHOULD THE STATE REQUIRE ANNUAL MANDATORY CONTINUING LEGAL EDUCATION IN THE STATE OF MICHIGAN AND STATEMENT OF COMPLIANCE FROM ALL LAWYERS LICENSED TO PRACTICE IN MICHIGAN?

PROS

- Ensures a minimum level of legal knowledge and capability
- Required in all but eight states
- Lawyers can keep pace with changing laws/globalization
- Reduces malpractice claims
- Aids in client selection and satisfaction
- Additional manpower required to administer is offset by consumer protection

CONS

- Requires additional manpower for administration and enforcement
- On the job experience is often as effective as courses
- Takes time away from billable hours

[10] Note 34, *Comments on the American Bar Association's Proposed Model Definition of the Practice of Law, December 20, 2002. "The agencies have not seen any factual evidence demonstrating that consumers are actually hurt by the availability of lay services…*

C.SHOULD THE COURT/BAR DEFINE ACCEPTABLE NON-LAWYER LEGAL SERVICE PROVIDERS AND MINIMAL EDUCATION/ CERTIFICATION REQUIREMENTS?

1. Legal document assistants-draft with issue oversight and review by state licensed lawyer. CLE and certification required
2. Paralegal-research, calendar, timelines, etc. (i.e. 2 years in paralegal program and 1 year internship. 1 year in state bar education program.)
3. Legal project manager- process, calendar, timelines. Business degree and two-year paralegal program; 1 year experience in a legal environment. Certification required

PROS

- Permits clients to know credentials
- Less risk of misinformation
- Creates accountability and credibility for job class
- Lower cost to client due to non-lawyer rates for all services
- Medical profession permits physician assistants
- Accounting profession permits advice without certification

CONS

- Difficult to track and enforce

D. IS IT ADVISABLE TO DEVELOP A SEPARATE NATIONAL/STATE LICENSING PROCESS AND PROCEDURE FOR LEGAL SERVICE PROVIDERS WHO OPERATE ONLINE?

1. Licensing process for providing legal services on line (required to show training of all employees and background checks for all employees).
2. All on-line legal service providers would receive (1) MRPC, individualized by professional title, and (2) a professional ethics code for on line provision of legal services.
   Regulation could be on a scale from software provider to general information to document preparation

PROS

- Saves court's time in handling lawsuits. (Eight states have filed lawsuits against legal zoom)
- Helps refute argument that lawyers have a cartel designed to exclude others and gain financial advantage.

CONS

- More oversight of more people required
- Complicated and requires interpretation

E. SHOULD THE STATE REQUIRE CERTAIN MANDATORY DISCLOSURES BY LAWYERS AND LEGAL SERVICE PROVIDERS TO CUSTOMER WHEN PROVIDING LEGAL SERVICES ONLINE?

1. State employees" credentials and qualifications.
2. Disclose whether principals/owners are licensed to practice law.
3. Disclose ownership
4. Require customer understanding and acknowledgment
5. Show ratings 1-5 star (malpractice actions against company/principals)
6. If information and tools are not the "practice of law (by lawyers) state clearly and conspicuously that "the products are not a substitute for the advice of an attorney."[11]

PROS

- Minimizes misleading information

CONS

- Set-up, administration and oversight would add cost

[11] Unauthorized Practice of Law Comm. V. Parsons Technology, Inc., 179 F.3d 956 (5th Cir. 1999). The publisher of a software program was enjoined because the court held it constituted the unauthorized practice of law. The Texas legislature amended the statutory UPL definition to state "practice of law" does not include the design, creation, publication, distribution, display or sale…..of software or similar products if the disclosure is used.

F. IS IT ADVISABLE TO REQUIRE MANDATORY MALPRACTICE INSURANCE, DISCLOSURE OF IT TO THE STATE BAR AND ON LAWYERS' BUSINESS CORRESPONDENCE; AND MANDATORY MINIMUM COVERAGE IN AN AMOUNT NOT LESS THAN $100K?

PROS

- 8 states had disclosure requirements (exception: for government and in-house counsel)
- Criminal statutes is bar associations' preferred method in Texas. It's a felony[12]
- North Carolina and Virginia post malpractice coverage on line.
- Delaware, Virginia, Nebraska and North Carolina require annual certification to the state's mandatory bar or to the state supreme court
- South Dakota attorneys must specify on letterhead if there is no malpractice insurance or if coverage is less than $100,000.
- Michigan bar app and renewals only ask whether applicant has malpractice insurance.
- Ohio and Alaska require disclosure and a minimum amount of coverage. Ohio requires notice to the client if less than 100k//claim or 300k in the aggregate.

CONS

- ABA Standing Committee on Client Protection proposed malpractice insurance disclosure in 1990 and proposal never made it to the ABA House of Delegates.

G. SHOULD CRIMINAL PENATIES AND FINES BE IMPOSED FOR ON-LINE VIOLATIONS CONNECTED WITH UPL?

PROS

- Greater incentive to comply
- Emphasizes potential for global or national damage

[12] Texas Gov't Code sec. 38.123

CONS

- Lawyers prefer self-regulation.
- Criminal enforcement dilutes the MRPC

H. IS IT NECESSARY TO CREATE MULTI-JURISDICTIONAL PRACTICE RULES FOR LEGAL SERVICES?

PROS

- Consistency in practice and enforcement

CONS

- Would require extensive rewrite of all state regulations/codes

I. SHOULD THE STATE ESTABLISH A REGULATORY COMMISSION THAT REVIEWS ONLINE LEGAL SERVICE PROVIDERS AND RATES THEM?

Online legal service providers would have to submit annual reports disclosing employees and credentials.

PROS

- Proactive regulation
- Improves quality of online service providers
- Clear, specific direction/ interpretations of what's required will save time
- Minimizes lawsuits
- Helps consumer evaluate on line service providers

CONS

- Administrative resources
- Additional operational expense
- "Another" commission

- "Fox in the hen house" if commission is comprised of all lawyers[13]

II. RISKS TO THE CONSUMER IN ALTERNATIVE ENTITY STRUCTURES

A. SHOULD COLLABORATIONS BETWEEN LAWYERS/LEGAL SERVICE PROVIDERS AND OTHER PROFESSIONALS WITHIN THE SAME ENTITY BE PERMITTED? IT CAN FACILITATE CLIENT NEEDS BUT SHOULD THEY ONLY OPERATE AS SEPARATE LEGAL ENTITIES

PROS

- MRPC permits referrals
- Separation maintains higher quality of service
- One-stop service is more convenient for client
- FTC supports lifting the restrictions on collaborations[14]

CONS

- MRPC prohibits lawyers from splitting fees with non-lawyers
- MRPC 1.7 conflicts of interest concerns. More difficulty in identifying potential conflicts of interest if collaborations occur within the same entity. I.e. other clients, investments, being unbiased

B. SHOULD NON-LAWYERS BE PRINCIPAL OWNERS OF AN ENTITY OR ITS ONLINE ADVERTISING OR TOOLS FOR THE PURPOSE OF PROVIDING LEGAL ADVICE OR LAW SERVICES IN ANY FORMAT

PROS

[13] North Carolina State Bd. Of Dental Examiners v. FTC, 717 F.3d 359 (4th Cir. 2013) where the regulatory board was comprised of self-interested competitors alleged to be anticompetitive by their collective action.
[14] American Medical Association, 94 FTC 701 (1979, aff'd, 638 F.2d 443 (2d Cir. 1980) aff'd mem by a divided Court, 455 U.S. 676 (1982). Commission found that AMA rules prohibiting physicians from working in partnerships with non-physicians unreasonably restrained competition.

- Lawyers are responsible for those who work under them and is in the best position to determine impropriety and other violations.

- The code of ethics applied to lawyers may not apply to other legal service providers

CONS

- May increase cost of legal services to consumers

AFTER THE FACT OPTIONS FOR PROTECTING CONSUMERS

A MALPRACTICE CIVIL ACTION WITH EVIDENCE OF MRPC NON-COMPLIANCE

The model code and rules of professional conduct prefatory language state that "violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached…*They* are not designed to be a basis for civil liability". In most instances, the MRPC provisions are admissible as evidence of the standard of care in malpractice actions[15]

PROS

- Self-regulation is hallmark of attorney profession

CONS

- Non-lawyers or collaborative entities could not be governed by the same rules which would make evidence of non-compliance in actions against a collaborative entity or offshore entity.

[15] Kathleen J. McKee, Annotation, *Admissibility and Effect of Evidence of Professional Ethics Rules in Legal Malpractice Action*, 50 A.L.R. 5th 301 (1997). Lazy Seven Coal Sales, Inc. v. Stone and Hinds P.C., 813 S.W. 2d 400, 403 (Tenn. 1991)

MEMORANDUM

TO: 21ST CTF Modernizing the Regulatory Machinery Committee

FROM: Mark A. Armitage

RE: Approaches to Client/Public-Focused Regulation - Substance & Procedure

DATE: September 17, 2015

I. Introduction and overview.

One can see why the impressive and thoughtful report of the Canadian Bar Association (CBA) Futures Initiative was selected as a centerpiece for our consideration and as a model for the Task Force's work. It concisely and elegantly summarizes a great body of commentary and data regarding the evolution of legal services delivery around the world and the implications of these developments and changes in consumer expectations for the practice and regulation of lawyers in North America. And yet, it is only a summary. The selected bibliography, while a pared down list, reflects a significant quantity of information worthy of the Task Force's consideration.

A few of the key trends identified in the CBA report and some of the calls to action found in the report and other sources are listed below in an attempt to refine areas of inquiry and identify questions to be considered, and to seek correction, clarification, and comments from others.

Here are some key facts or assumptions suggesting the need for action:

- The world has changed (for reasons which include technological innovation) and with it the expectations (which have become needs) of the consumers of various services.

- Access to essential or important services relating to the law (such as dispute resolution, defense of criminal charges, compliance and other counseling, documentation of agreements and other important events, etc.) is uneven at best, grossly unfair at worst, and threatens to make a mockery of fundamental American precepts such as equal justice and the rule of law.

- Other countries regulate the legal profession (and provision of legal services) in different ways. Some of these differences may be said to relate to the manner in which legal services will be delivered (e.g., as part of a business structure not currently permitted, perhaps a firms with many disciplines under one roof, perhaps one which is owned in part by nonlawyers, etc.).[1] Some differences relate to the approach to regulation. These

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[1] Of course, current prohibitions may regarded as more than mere matters of form. The restriction on nonlawyer ownership in MRPC 5.4, for example, is rooted in the need to protect a lawyer's independent

differences include not only a shift in thinking as to who or what is to be regulated (entities as opposed to or in addition to individuals), but also, broadly speaking, whether the model should be proactive or reactive. One American regulator describes our approach as "the firehouse model." An alarm goes off (a grievance is filed) and the regulators head out to investigate, douse the flames, etc. Several Commonwealth countries tout a proactive approach, variously described as "risk based," "compliance-based,"or "proactive management based regulation (PMBR)."

- To my knowledge, no regulatory models under review expressly propose modifying or diluting what we might call the "core ethical precepts" of lawyering and delivery of legal services, such as, a fiduciary relationship with the client, confidentiality, and the exercise of independent judgment (which entails conflict-free representation).

The CBA Report aims to establish "a viable, competitive, relevant and representative legal profession" through innovation with respect to service delivery models and "through new ideas about how lawyers are educated and trained, and how they are regulated to maintain professional standards while protecting the public." (CBA Report, p 6.) Twenty-two recommendations are based on seven key findings, the first three of which directly involve regulation:

> [1] In terms of business models, lawyers need to be freed to work differently through new structures and in conjunction with other professionals (including alternative business structures [ABS]).
>
> [2] Lawyers should be allowed to practise in business structures that allow ownership, management and investment by persons other than lawyers or other regulated professionals. Multi-disciplinary practices [MDP] and fee-sharing with non-lawyers should be allowed. All of these proposed changes must be carried out under the oversight of an enhanced regulatory framework.
>
> [3] A shift toward the introduction of new business models requires regulation of entities in addition to the regulation of individual lawyers. This form of dual oversight would allow continued innovation in legal service structures and delivery to provide better quality services to clients, while maintaining the rules of professional conduct expected from lawyers.

At this point in the development of the practice and the world's economy, it is reasonable to examine whether ABS, MDP, liberalized UPL (to facilitate not only cross-border practice but other forms of service delivery), and updated advertising rules, for example, should be adopted. And, the profession must, to maintain credibility, conduct such inquiries while wearing its regulatory hat (as

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professional judgment by limiting the influence of nonlawyers on the lawyer-client relationship. There is a great deal of commentary and some experience to draw upon in evaluating whether such aims can be achieved even with the adoption of ABS.

opposed to its trade association hat).[2] The profession must always put public protection at the top of the list of regulatory objectives, and put regulatory objectives above unrestrained self-interest.[3] However, reexamination of the rules of professional conduct is itself a time-honored tradition.

These proposals for relatively major change will require significant study and deliberation to enable the Task Force to conclude, for example, that a given reform will serve a goal, such as enhancing access, or competitiveness, or compliance with regulations. Further, a great deal of the writings on the future of US law practice and regulation focus on other, related, big-picture issues such as these:

Who Regulates Lawyers: Self-Regulation versus Co-Regulation
What (or Whom) is Regulated: e.g., Entities versus individuals; Providers versus Services
When Lawyers are Regulated: Ex Ante versus Post Hac Regulation
Where Lawyers are Regulated: Geographically versus Virtually
Why Lawyers are Regulated: Using Regulatory Objectives
How Lawyers are Regulated: e.g., Outcomes-Based Regulation versus Rules[4]

It would be helpful to have summaries of the substance of rules and regulations, as well as the process, implemented in New South Wales or in the UK, by the SRA, for example. While this inquiry into the big picture is underway, and as we assemble information regarding the substance of regulations in place elsewhere, perhaps the Task Force could start to examine needs and existing substantive regulatory proposals under the current system which may be consistent with new forms of practice, service delivery, and regulatory approach. The Task Force could determine whether these reforms could advance consumer protection and regard for the profession, irrespective of which other proposals are adopted. To start, some of the model rules and other client protection programs adopted by the ABA[5] may be worthy of examination, in addition to other proposals.

All of this is a very long way of saying two things. First, as we consider alternative approaches to regulation of lawyers (or the providers of services), it would be helpful to this member

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[2] For a discussion of the two different roles, *see* Laurel S. Terry, *Globalization and the ABA Commission on Ethics 20/20: Reflections on Missed Opportunities and The Road Not Taken*, 43 Hofstra L Rev 95, 117.(2014). See also, *Preamble to the Michigan and Model Rules of Professional Conduct*: "The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar."

[3] ABA Canons of Professional Ethics (1908) ("it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade").

[4] Laurel Terry, The "Landscape" of Lawyer Regulation (Prepared for NOBC [August] 2015 Annual Meeting), p 1.

[5] See http://www.americanbar.org/groups/professional_responsibility/resources/client_protection/client.html\#MJP

to have more detail about what the substantive ethics rules and regulations actually require of the service providers in the UK and other countries in which different regulatory models have been adopted. Second, as I discuss more below, we can start to work on proposals that advance the goals of this task force, the avowed purposes of discipline, and some regulatory objectives regarded as sound and useful statements by these other systems.

II. The Goals of the Task Force & Committee

The three purposes and corresponding committees of the Task Force (access to legal services, analyzing and perhaps redesigning law practice from beginning to end, and modernizing the regulation of the profession) are each ambitious and each contain a vast number of complex and interrelated problems to solve and prescriptions to evaluate.

The Guiding Principles for the Work of the Task Force and its Committees (2nd Ed, 5/11/15 Draft) are the following:

1. The expectations and needs of clients, potential clients and others who use the legal system should be at the center of the delivery of legal services and its regulation.

2. To meet client needs and facilitate access to justice, innovation should be encouraged in how legal services are ethically delivered and by whom.

3. The legal services delivery system should help clients find the kind of legal help and information they need when they need it.

4. Optimal access to justice for all requires that those who provide legal services reflect the diversity of the population they serve.

5. Mechanisms should be developed to assure ongoing identification of and effective responses to changes.

6. The rules upon which regulation of legal services rest should continue to be based on enduring principles of professional ethics and protection of the public but should provide practical guidance responsive to the changing environment and the emergence of nontraditional delivery methods and providers.

7. Legal education for lawyers and others authorized to provide legal assistance should include future-oriented skills, knowledge and experiential learning and continue during the full career.

III. Regulatory Aims and Objectives

The Guiding Principles establish client-focused priorities consistent with the avowed aims of Michigan's system of lawyer regulation. When the State Bar of Michigan was assigned its role as *the* regulator of the profession, its first President declared: "No organization of lawyers can long survive which has not for its primary object the protection of the public."[6] Subchapter 9.100 of the Michigan Court Rules provides that discipline is "for the protection of the public, the courts, and the legal profession."[7]

Such statements of purpose are fairly common in the US. Other countries are going further and adopting "regulatory objectives." Many of these have been analyzed by Professor Laurel Terry and two regulators from New South Wales.[8] Whether or not regulatory objectives are ultimately adopted here, the following list of recommended regulatory objectives might provide a useful focus as the Task Force considers proposed rules and reforms:

1. Protection of clients;
2. Protection of the public interest;
3. Promoting public understanding of the legal system and respect for the rule of law;
4. Supporting the rule of law and ensuring lawyer independence sufficient to allow for a robust rule-of-law culture;
5. Increasing access to justice (including clients' willingness and ability to access lawyers' services);
6. Promoting lawyers' compliance with professional principles (including competent and professional delivery of services);
7. Ensuring that lawyer regulation is consistent with principles of "good regulation."

IV. Some Specific Reforms to Consider

Malpractice Insurance. Most clients expect it. All of the other countries with "modernized" regulatory systems require it, and have for years. Oregon is the only state that requires it in the US. According to the ABA Standing Committee on Client Protection, approximately half of the states require *disclosure* (to either the client or a regulatory agency) if the attorney does not have insurance.[9] Seven require direct disclosure to the client, while 17, including Michigan, require

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[6] Hudson, Message from the President, 15 Mich St B J 8 (1936).

[7] MCR 9.102 and 9.105.

[8] Laurel S. Terry, Steve Mark, & Tahlia Gordon, Adopting Regulatory Objectives for the Legal Profession, 80 Fordham L R 2685, 2734 (2012). Thanks to Professor Knake for this article on Regulatory Objectives.

[9] See, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_by_state_cp_programs.authcheckdam.pdf (chart showing 26 states have "disclosure of insurance" as of June 2015). http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_implementation_of_mcrid.authcheckdam.pdf (Chart dated October 2014 showing that seven states require disclosure directly to

disclosure on the registration form. Michigan, however, does not provide this information to the public.[10]

Random Audits of Trust Accounts. As Michigan has learned from recently joining the ranks of the 44 states with Trust Account Overdraft Notification, early notice of problems with money handling can prevent harm to clients and serve as an opportunity to educate lawyers. Twelve states have random audits of trust accounts.[11] This is a proactive, risk-based, and often consultative and educational form of regulation. Arming the lawyer with best practices and record-keeping models[12] could save an honest but disorganized lawyer from a prolonged investigation by the AGC or even a formal complaint. Arizona has an active program which might be worth studying. The SBM is already active in this realm, but on an ad hoc and voluntary basis; the PMRC performs consultations on request of the lawyer or as a service to the discipline system when the lawyer is required to obtain one.

Payee Notification. Sixteen states have rules or statutes requiring an insurance carrier to notify a claimant when the carrier makes payment to the claimant's lawyer or other representative.[13]

Fee Arbitration. Twelve states have a program patterned after the ABA model rule which has this purpose: "A fee arbitration system provides lawyers and clients with an out-of-court method of resolving fee disputes that is expeditious, confidential, inexpensive, and impartial. The court should ensure adequate funding for an effective program."[14]

Mediation of Client-Lawyer Disputes. Twenty-three states have programs providing for mediation of disputes, including some allegations of minor misconduct upon the referral of the disciplinary agency.[15]

Fair and Transparent Billing and Handling of Advance Fees. The relationship between the perceived value of services and fees charged can lead to disputes which often are brought to the

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the client while 17 states require disclosure on the attorney's annual registration statement.

[10] See, http://www.legalnews.com/ingham/1381823. See also, 2014 ABA Chart cited in n 2.

[11] See 2015 ABA Chart cited in n 2.

[12] See, e.g., Model Rules for Client Trust Account Records (ABA HOD, 2010) http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/adopted_8_10_10.authcheckdam.pdf

[13] See, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/implementation_payee_notification.authcheckdam.pdf

[14] See 2015 chart cited in n 2. For further charts, links to state rules, model rules, and other information, see also http://www.americanbar.org/groups/professional_responsibility/resources/client_protection/client.html#MJP

[15] See n 7.

Attorney Grievance Commission. As noted above, it might be useful to client and attorney to have programs for mediation and resolution of disputes considered appropriate for such disposition after initial screening by the AGC. Furthermore, certain rule amendments might prevent disputes by aligning client and lawyer expectations, while protecting the client's interests (and the lawyer's).

Written Fee Agreements? Although the ABA House of Delegates has at least twice in the last several decades rejected recommendations that the Model Rules require fee agreements to be in writing, some states require a writing in certain instances. Most lawyers recognize that it is in their best interest to memorialize the terms of engagement and payment in writing. It may, however, be worth discussing whether and to what extent written fee agreements would advance our regulatory objectives and the client-focused Guiding Principles of the Task Force.

Clarity With Respect to the Handling of Retainers & Advances. Clients do not expect that fees paid to a lawyer in advance, essentially as a security deposit to ensure eventual compensation to the lawyer for work performed on the client's behalf, will not be refunded in various circumstances, such as when the lawyer's services become unnecessary, or where the lawyer is unable or unwilling to perform the work. Advance fees and expenses must be held in trust, and do not become the lawyer's until earned. MPRC 1.15(g). Calling advance fees "nonrefundable" is misconduct in some states because it misleads the client and chills the client's right to discharge the attorney. On the other hand, some lawyers wish to charge an "engagement fee" or "true retainer" as a prerequisite to accepting a representation. So long as the nature of this fee is fully and clearly disclosed to a client, and the client understands that no services will be provided for this fee - that it is earned upon acceptance of the engagement and therefore is deemed earned at that time, the parties should have the freedom to contract that such fee will be deemed earned under certain circumstances.[16] Problems arise when lawyers purport to blend these two types of fees. The Task Force's Guiding Principles, especially principles 1, 2, and 6, would seem to require or encourage a rule that is logical, fair to clients, and gives guidance to lawyers. Michigan could provide clarity for consumers and members of the profession seeking to comply in good faith with the Rules of Professional Conduct by adopting more detailed rules that provide definitions and clear directions as to permissible conduct with respect to various fee arrangements.[17]

V. Law Firm Discipline (a/k/a Entity Regulation): Still a Solution in Search of a Problem and a Threat to Effective Regulation?

The CBA Report concludes, with too little elaboration and support for me, that ABS and MDP must be adopted, and that this means we must also have "entity regulation." Some or all of this may turn out to be true after further explanation and consideration. However, proponents of entity regulation seem to assume that the quaint old lawyer regulation system is in desperate need

[16] Using the shorthand "nonrefundable" is still problematic in light of the fact that every fee is subject to review by courts and discipline agencies for reasonableness. MRPC 1.5.

[17] See, e.g., Iowa's approach: https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/05-29-2015.45.pdf

of updating, and that it needs to look like systems for the regulation of other professions or corporate entities. In fact, lawyer regulation in the US was carefully designed to emphasize individual accountability, and that feature must be preserved undiminished.

As we know from reading about financial scandals in recent years, regulating, fining, and otherwise punishing entities can be woefully ineffective if the goal is to deter bad conduct. The logical and effective solution is to place responsibility on the individuals without which corporations and other organizations cannot function, act, or decide whether to comply with legal requirements.[18]

Unfortunately, the norm is described in the September 2015 edition of The Atlantic, which recounts the decision of law enforcement agencies and prosecutors not to file criminal charges following a lengthy investigation of various banks and bankers after the 2008 financial crisis:

> JPMorgan Chase agreed to a $13 billion settlement with various federal and state agencies, then the largest of its kind. [Attorney General Eric] Holder heralded the settlement as an important moment of accountability for Wall Street. But extracting large settlements paid with shareholders' money is not the same as bringing alleged wrongdoers to justice. Instead of presenting a detailed picture of JPMorgan Chase's misdeeds—as would have happened had [a US attorney's] complaint been filed and the matter adjudicated in court—the government and the bank negotiated an anodyne 11-page "Statement of Facts" that glossed over many of the details of the behavior Fleischmann [a whistleblower] was trying to stop, and did not name any JPMorgan Chase bankers.
>
> The Justice Department reached agreements with other Wall Street banks, among them Citigroup and Bank of America, using a similar playbook: Threaten public disclosure of behavior that looks criminal and then, in exchange for keeping it sealed, extract a huge financial settlement. No one individual, or group of individuals, is held accountable. No predawn raids of Park Avenue apartments are made. No one gets arrested. No one gets publicly shamed.[19]

Last week, the Department of Justice, reacting to such criticisms, released a policy memorandum with the subject line: "Individual Accountability for Corporate Wrongdoing." The

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[18] The provisions of Sarbanes Oxley requiring that senior executives take individual responsibility for the accuracy and completeness of corporate financial reports exemplify a regulatory effort to get serious about compliance. *See also*, Claire A. Hill and Richard W. Painter, *Better Bankers, Better Banks - Promoting Good Business through Contractual Commitment* (Univ of Chicago, forthcoming, October 2015) (The publisher's website describes the contents, which include the argument that, "Bankers must be personally liable from their own assets for some portion of the bank's losses from excessive risk-taking and illegal behavior.").

[19] http://www.theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368/

Deputy Attorney General, who authored the memo, told the New York Times: "Corporations can only commit crimes through flesh-and-blood people."[20]

Again, the legal profession's decision not to follow this playbook is not the result of neglecting to update antiquated procedures. There is a consensus among the vast majority of jurisdictions that fines are not an appropriate sanction, probably for the reason that, as we have seen in other spheres, lawyers and their firms will pass them on as a cost of doing business. Not long ago, during the "Ethics 2000" debates, the ABA rejected law firm discipline and a regulatory scheme that would include fines, due, in part, to the argument of regulators that entities can best be brought into conformity with the law by placing responsibility for their lawful operation on the owners and managers (See NOBC comments attached as an appendix to this memo). Has the climate changed? Is entity regulation now essential? And, if it is, can it be designed for legal service providers in such a way that individual accountability is not diluted?

Proponents of law firm discipline also argue that there might be an instance in which bad conduct is the fault of "firm culture" and no one individual. Though naive and nonsensical, and directly contrary to the Deputy Attorney General's recent statement owning up to the common-sense notion that entities created by law can only act through people, this argument – which is in some ways a self-fulfilling prophecy – continues to be trotted out by regulators, and by academics urging that the legal profession mimic other regulators.

The leading proponent of law firm discipline seems untroubled by the prospect of a firm buying its employees' way out of discipline, and seems to have no appreciation for the implications - more bad conduct resulting from passing on fines for noncompliance to the shareholders as a cost of doing business. In an article entitled *Professional Discipline In 2050: A Look Back*, an ideal investigation and settlement of disciplinary charges in the future is described:

> About a year ago, in April 2049, accountants from the regional office of the National Disciplinary Commission for Lawyers and Allied Professionals ("NDCLAP") conducted a random audit of redacted client billings at the Phoenix office of Skadden, Gibson -- one of the Big Eleven. The office came out smelling almost like roses used to smell; only eight instances of "churning" or presumptive overbilling were identified. After negotiations with NDCLAP prosecutors, always a preferable alternative to formal proceedings, Skadden, Gibson made restitution to the affected clients. The firm also accepted a modest fine along with a notice of discipline in the National Law Review. That notice depressed the price of the firm's stock, of course, but only briefly and not by much. While the matter was pending before NDCLAP, Skadden, Gibson conducted its own investigation to identify and internally discipline the lawyers or allied professionals who had padded their hours or charged for unnecessary work. The firm's management

[20] http://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html

> also decided, on grounds of undue ethical risk, to modify its policy of requiring lawyers to bill 2300 hours a year, even though no one knew for sure whether that policy had encouraged the padding of hours.[21]

How does an admittedly inconsequential hit to the firm's bottom line assure future compliance when none of the actual perpetrators have a record of discipline, not even a public declaration that the conduct was unethical, or, to be more precise, contrary to the standards of the profession as reflected in the Rules of Professional Conduct? The legal profession can avoid the mistake made by other regulatory agencies in buying into this fallacy that no one is responsible, the culture made the bad things happen, or the internally inconsistent, but also favored argument, that it was a rogue who perpetrated the wrong in the name, and with the resources, of the firm.

Furthermore, the article, and its hypothetical future regulatory scenario, admits of a bias in favor of delivery of legal services by large entities:

> In addition to illustrating our postmodern reliance on federal discipline, the Skadden, Gibson matter illustrates our emphasis on the practice entity rather than on the individual practitioner as a disciplinary target. Lawyers a century ago would have been shocked by the idea. As late as 1950, a majority of American lawyers practiced alone and even the lawyers who practiced in firms were by our standards only loosely organized. Today, of course, the sole practitioner is as extinct as the bald eagle. And thanks to the mergers and internal growth that accelerated so dramatically after 1980, nearly 90% of today's lawyers practice in entities employing at least 200 professionals. These entities include prosecutors' and defenders' offices, legal services programs, law departments in corporations, government agencies, LMO's, and, of course, law firms.[22]

But solo practitioners are not dead yet. In fact, nationally, solos make up 49% of the private practitioners, while attorneys in 2-5 person firms constitute 14% of all attorneys in private practice.[23] The assumption that solos will disappear must be revisited in light of the freelancing, flexible work arrangements, and changing attitudes of today's workers (not only lawyers) toward employment in large firms and other traditional organizations. There may always be some strength in numbers, but small and solo can be nimble and cost-effective, and good. Thus, rather than ruling out solos and small firms, any new regulatory rules and procedures should afford the same proactive guidance afforded to larger firms, and should mete out discipline in a manner that is fair and proportional in light of that meted out to large organizations.

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[21] Ted Schneyer, *Professional Discipline in 2050: A Look Back*, 60 Fordham L Rev 125 (1991). Available at: http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2942&context=flr

[22] *Id.* at 129.

[23] http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf

The ABA has a policy against using fines as a disciplinary sanction (but restitution to harmed parties is an available sanction). In this regard the ABA and the 48 states without law firm discipline are in a *better* position than other regulators. The DOJ guidelines announced last week seeking to answer criticisms and shift the balance toward individual accountability, but it will likely be difficult to get this toothpaste back in the tube as long as there are incentives to fine defendants and targets. If deterrence and compliance are the goals, then the answers are (1) making individuals responsible directly or vicariously (as through MRPC 5.1 and 5.3), and (2) providing adequate funding for discipline agencies from sources other than respondents under investigation or facing formal charges. And discipline of solos and small firms must proportional to that given to the megafirms envisioned by most proposals for regulatory reform.

V. Conclusion

This is truly an interesting time to be a lawyer, an official of a bar association, and a regulator of the legal profession. There is a great deal of opportunity to improve things for the benefit of the public and the members of the legal profession. This memo is intended to make good on a commitment to provide some client-focused, consumer-protection-oriented suggestions to the committee, initially through Marcia Goffney. Although I did not get my notes to her on schedule, I hope these preliminary comments can supplement her very thoughtful memo discussed at the last meeting. Also, I would like to reiterate my request that our study of alternative regulatory systems include a focus on the substance of regulations in addition to the form or process to be considered. Perhaps we could have some research assistance in this regard.

Appendix

3. Law Firm Discipline; MRPC 5.1 & 5.3.

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While [the] responsibility [of lawyers to manage a firm in compliance with the Rules of Professional Conduct] may be reasonably discharged in various ways, at no time should the duty comply with Rule 5.1(a) be reposed solely in the firm as an entity.

As presently worded, proposed Comment [2] might suggest the possibility that a firm could be in violation of the rule without an individual or group of individuals also being in violation. See also, Reporter's Explanation, TEXT, ¶3 (rule will facilitate discipline where "no particular lawyer can be identified as personally responsible"). While some members of NOBC might entertain the concept of firm discipline, probably all would dispute the notion that a firm could be responsible in the absence of individual culpability for a rule violation. Someone or some group of individuals must be personally responsible for compliance with rules or there will be no real accountability, and regulation will be virtually impossible. This is no less true with a rule designed to require firm-wide policies than for any other type of rule. Organizations can only act through individuals. Discipline against an entity alone is woefully ineffective as a regulatory tool. Although the proposed text of Rules 5.1 and 5.3 assign responsibility to certain individuals *and* the law firm, the above-referenced comment and Reporter's explanation raise a concern that individual accountability will be diluted notwithstanding the Reporter's explanation that "no change in substance in a lawyer's personal responsibility for compliance with paragraph (a) is intended." To put a finer point on it: a firm cannot violate Rule 5.1(a) or 5.3(a) unless an one individual or more helps through action or omission.

Even if the text and comments are revised in an attempt to make it clear that firm discipline is intended to capture conduct previously unregulated and not to diminish individual responsibility, that may not be enough to forestall adverse unintended consequences. The foreseeable consequences may well outweigh the intended benefits of law firm discipline.

The first rationale for law firm discipline offered by the Reporter's Explanation is that accountability will be increased because firms can be disciplined where previously individuals could not. This has been discussed above. Other rationales offered are the purported inefficiency of proceeding against all partners or the unfairness of selecting scapegoats if that alternative to mass prosecution is pursued. These rationales are again predicated on the notion that firm discipline might be in lieu of individual discipline. They also presume that prosecuting a law firm will be easier and will be viewed by discipline agencies as an acceptable alternative to

prosecuting individuals. As indicated above, individual accountability is believed to be more effective. In fact, if there is conduct that Rules 5.1(a) and 5.3(b) would reach with the added provision for law firm discipline, it should be assigned to appropriate individuals within the firm. Moreover, mass prosecution may not be so inefficient. Assuming some joint action is not possible, it is likely that a resolution of many cases could be reached after the initial cases against partners in like circumstances within the firm are tried. Finally, a firm's response to prosecution is probably not generally predictable. It may fight as hard as the entire partner class would have, in which case nothing much has been gained in terms of efficiency.

Another rationale offered is the hoped-for consequence that "the prospect of law-firm discipline will provide an additional incentive for each partner or managing attorney to comply with paragraph (a)." These individuals, who are directly assigned responsibility in Rules 5.1(a) and 5.3(b), may not want to see their firm's image tarnished, but the real motivator is preservation of their own reputation. The option of firm discipline gives lawyers an opportunity to preserve their own reputations by offering up their firm's.

Firm discipline poses practical problems, which include determining the aggravating effect and malpractice insurance implications of law firm discipline on firm lawyers with varying levels of culpability. Also, the nature and effectiveness of disciplinary sanctions against a firm must be considered. In practice, the sanction of choice will almost certainly be fines. Expanding the use of this sanction has the potential to lead to the prospect of firms or lawyers internalizing the cost of breaking the rules as a cost of doing business, or of offering firm-paid fines to avoid individual discipline. Also, ironically, law firm discipline has the potential to let culpable lawyers off the hook while at the same time stigmatizing innocent ones with a disciplinary history.

Although NOBC has not taken a formal vote on the advisability of law firm discipline, the serious concerns outlined above have been voiced without dissent. We urge careful consideration of this issue in connection with Rules 5.1 and 5.3.

* * *

Ethics 2000 Committee

Mark A. Armitage **G. Fred Ours**

William P. Smith, III **John T. Berry**

MODERNIZING THE REGULATORY MACHINERY COMMITTEE–
WORK GROUP 3 Law Practice Entry and Continuity of Competence

Make recommendations, including possible court rule or legislative changes, concerning

a. legal preparation, law school admissions, educations standards, and testing of candidates for admission to the bar
b. mandatory experiential/pro bono work for entry into the bar
c. early post-admission strategies for successful entry to the practice of law in Michigan
d. strategies and possible requirements to ensure ongoing competence and professionalism
e. specialty certification

REPORT WITH RECOMMENDATIONS

Note: In the comments and Recommendations following, we recognize that there are multiple parties and interests implicated. As they are presented, the Recommendations do not identify the parties who would need to be considered and involved in the actions recommended.

1. Pre-law school education/Admission to law school

A. Premise: Anyone who wishes to pursue a legal education and satisfies the law school's academic and ethical standards for admission should have the opportunity to do so.

- American Bar Association (the"ABA") Standards for Approval of Law Schools 501(b) says that a law school shall not admit an applicant who does not appear capable satisfactorily completing that schools program of legal education and of being admitted to the bar. (The "bar" is a general term, not state specific. Capability would include likely ability to pass a bar examination of some sort (there is no single actual standard) and presumably no clearly disabling character and fitness issues based on generally applicable factors.)

- MCL 600.943 provides that the board of law examiners has the authority to examine, or to cause to be examined, any school, college, junior college, or law school for the purpose of determining whether the standards of education and training required for admission to the bar are being maintained, and to exclude from the bar examination any person who was a student therein at the time any such educational institution is found to have been disqualified or of questionable reputation. The board of law examiners may exclude from the bar examination

any person who was a student in any such educational institution if such educational institution refuses to allow the examination.

- Law schools in Michigan admit persons who may seek bar admission in other jurisdictions, and non-Michigan law schools graduate students who seek admission and who desire to practice law in Michigan. Any pre-admission regulation would need to be uniform and adopted at national levels.

B. *Not addressed are subjects of affordability of law school education, debt counseling, law school debt forgiveness, etc. These may be indirectly addressed by sequential bar admission and early assessment of character and fitness, discussed below. These subjects are discussed in existing studies and reports such as that of The ABA Task Force on Financing Legal Education (June 17, 2015)*[1] *and references therein, which can be part of an ongoing dialogue based on consideration of relevant facts.*

C. No Recommendations for regulatory change are made on this topic area.

2. Admission to the Bar. This Section provides discussion and Recommendations relating to admission to the bar, and overall proposes a phased-in, or sequential, admission process.

A. ***Character and Fitness.*** An applicant for admission to the bar must be of "good moral character,"[2] meaning "the propensity on the part of the person to serve the public in the licensed area in a fair, honest, and open manner."[3] The determination of "character and fitness," a term used in Supreme Court Rules Concerning the State Bar of Michigan (the "SBM") Rule 15 and in Michigan Supreme Court Rules for the Board of Law Examiners (the "BLE") Rule 2, as well as in MCL 600.949, and commonly used in bar admission processes, is otherwise undefined but presumed to mean what the statute requires as "good moral character."

RECOMMENDATION I: For law students who plan to apply for bar admission in Michigan, the State Bar of Michigan through its Standing Committee on Character and Fitness should provide for supervised review of character and fitness in conjunction with law schools as soon as possible; and should provide for access to further review periodically.

- ABA Standard 504(b) requires law schools "as soon after matriculation as is practicable" to "take additional steps" to have students become aware of character and fitness and other bar admission requirements of jurisdictions in which the student intends to see admission.

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1 http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2015_june_report_of_the_aba_task_force_on_the_financing_of_legal_education.authcheckdam.pdf.

2 MCL 600.934.

3 MCL 338.41.

- "As soon as possible" in the Recommendation could mean pre-matriculation or even pre-law school admission.

- Clear problems should be spotted before the student continues law school education, and the student is at least made aware of risks in proceeding.

    - CAUTION: Because eventual character and fitness evaluations are made when a candidate is eligible for admission (completed a JD program in accredited law school), an early character and fitness evaluation could be possibly misleading. The applicant for early review must be made aware that all conduct prior to the time of the character and fitness review conducted at the time of application to be admitted to the bar must meet character and fitness criteria.

RECOMMENDATION II: Relative uniformity in evaluation of information in the character and fitness process by district committees is encouraged.

- When character and fitness determinations are made at district levels it seems desirable that the information is evaluated in as consistent a manner as possible from district to district.

B. ***Obtain a JD degree from a reputable and qualified law school***. State regulators do not determine law school curriculum, teaching methods, or law school admission processes. All ABA accredited law schools provide an educational experience governed by national norms, determined by the Council (the "ABA Section Council") of the ABA Section of Legal Education and Admission to the Bar (the "Section"), subject to specific exception granted on a school-by-school basis. All Michigan law schools are ABA accredited.

Law school education is a part of a continuum of legal education. While it is the most intense and potentially formative, law school education is not the beginning or the end of a lifelong professional commitment. A number of the Recommendations made in this Report can be traced back to *Legal Education and Professional Development – An Educational Continuum*, the Report of The Task Force on Law Schools and the Profession: Narrowing the Gap 1992 (known as the Mac Crate Report).[4]

Clearly greater emphasis is being placed on practical application of legal training – from doctrinal to experiential, with skills (competencies) development as a goal. The shape of law school education is in part determined by bar admission requirements, most specifically the bar examination, discussed below in Part C, and also by the need of law schools to serve a student body that will pursue diverse career paths that requires flexibility in available curriculum.[5] It may be unrealistic to expect law schools to provide experiential education

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4 http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report%29.authcheckdam.pdf.

5 The Statement by the AALS Deans Steering Committee, accessed at https://www.aals.org/wp-content/uploads/2015/08/AALSClinicalSectionTFARR.pdf, to the Final Report of the State Bar of California Task

equivalent to an apprenticeship or a mentoring program. A perspective on law school education is provided as an Addendum to this Report.

RECOMMENDATION III: The practicing bar, through the SBM, should collaborate actively with and support Michigan law schools in their development of curriculum designed to develop competencies essential in the representation of clients and in placement of law students in experiential educational opportunities.

- This could be achieved on a continuing basis through broadening the constituency and function of the existing SBM Law School Deans Committee, or by establishing a SBM Standing Committee on Legal Education and Admission to the Bar, but initially may merit a specific endeavor to gain a better mutual understanding and to review the experiences of other bar organizations having examined the subject recently.[6]
    - Such a relationship could support assignment of law students for mentored/supervised pro bono practice, not only in court matters but transactional work as well.
    - A dialogue involving the current and predicted practice of law will aid in forming law school education programs.
    - This committee would likely assist in developing transitional continuing education models.

RECOMMENDATION IV-a: To facilitate experiential education as well as broader mentoring, MCR 8.120 should be amended to allow law students to appear in court, under supervision of a licensed member of the state bar, for the purpose of providing pro bono legal services.

RECOMMENDATION IV-b: MCR 8.120 should be amended to change the definition of persons for whom free legal services may be provided from "indigent" to "persons of limited means" consistent with Michigan Rules of Professional Conduct.

Force on Admissions Regulation Reform, accessed at http://www.calbar.ca.gov/portals/0/documents/bog/bot_ExecDir/ADA%20Version_STATE_BAR_TASK_FORCE_REPORT_(FINAL_AS_APPROVED_6_11_13)_062413.pdf, presents this point.

[6] Without endorsing specific recommendations or conclusions reached in them, the following are suggested for such a review: Report and Recommendation of ABA Task Force on the Future of Legal Education (2014) http://www.americanbar.org/groups/professional_responsibility/taskforceonthefuturelegaleducation.html; Report of the Task Force on the Future of the Legal Profession of the New York State Bar Association (2011), Educating and Training New Lawyers, http://www.nysba.org/futurereport/ pp 36-73; Report and Recommendations of the Minnesota State Bar Association Task Force on the Future of Legal Education (2015) http://www.mnbar.org/docs/default-source/general-policy/recommendations-and-report-from-the-future-of-legal-education-task-force.pdf. ALI-ABA Critical Issues Summit: Equipping Our Lawyers, http://www.equippingourlawyers.org/documents/summit_final09.pdf .

- Michigan Court Rule 8.120 currently restricts law students' pro bono court appearances (under the supervision of a member of the SBM) to work undertaken on behalf of public or nonprofit defender offices or legal aid clinics that are organized under a city or county bar association or an accredited law school or for the primary purpose of providing free legal services to indigent persons.

- The proposed change should allow a law student assisting a member in good standing of the State Bar of Michigan (who is willing to supervise and mentor the law student in representing indigent and underserved persons) to appear in court during representation of a qualified pro bono client even when the student is not working exclusively for a public or nonprofit defender office or a legal aid clinic. This change would allow law students to increase their experiential learning while in law school; lawyers might be more inclined to take on pro bono cases if they had the assistance of a law student; and the legal needs of the underserved could be addressed, perhaps in greater quantity.

- For purposes of law student participation in pro bono activities, the definition of pro bono should include persons of limited means in all applicable regulatory statements and policies governing representation.[7] The Voluntary Pro Bono Standard adopted by the Representative Assembly references "services to the poor" in terms of "low income individuals" and "persons of limited means." ABA Model Rule 6.1, as well as Michigan Rule of Professional Conduct 6.1, pertaining to pro bono publico legal services refers to appropriate recipients as "persons of limited means."

- The State Bar of Michigan could play an important role in encouraging pro bono service through mentoring by offering free training to attorneys in niche practice areas where pro bono representation is needed and then asking those attorneys to take on one pro bono case in exchange, and perhaps also work with a third-year law student on that pro bono case. For example, the SBM could train attorneys in the Service members Civil Relief Act and the Uniformed Services Employment and Reemployment Rights Act of 1994 so they can provide help to and build a practice representing armed services members. As another example, the SBM could provide free training for a Social Services Disability practice. Law schools have already offered these training sessions and have the connections with practitioner-trainers to help the SBM make it happen.

RECOMMENDATION V. Support change in the ABA Section Council's Interpretation 305-2 of the ABA Standards and Rules of Procedure for Approval of Law Schools ("Standards") to permit a law school to grant credit to a student for participation in a field placement program for which the student receives

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[7] The qualification of persons who may benefit from law student pro bono work should be clear. This may require coordination with the State Bar of Michigan's Committee on Pro Bono Involvement to the extent its view of qualified persons differs from the Michigan Rule of Professional Conduct or the Voluntary Pro Bono Standard, or provides a bright line test, such as having a household income at 200% of the poverty level or below and assets less than $5,000, that may exclude an appropriate populace.

compensation, provided that the placement otherwise meets the requirements of Standard 305.

C. *Pass a bar examination.* We begin with an assumption that a bar examination is an appropriate tool by which to measure a level of preparation to become a lawyer and to condition admission to the bar. Although diploma admission for graduates of accredited law schools in the state is available in some jurisdictions, no recommendation concerning that is included although the subject should be considered afresh as bar admission practices are considered. We recommend integrating portions of examinations required for admission to the bar with law school education to provide for sequential admission to the bar.

RECOMMENDATION VI: The MPRE (or similar nationally recognized examination) should be given in conjunction with the law school course on Professional Responsibility, preferably by the end of the first year of law school.

- This should not end Professional Responsibility emphasis in law school education, which must be integrated with course work, particularly with experiential and competencies training throughout the curriculum.

- MPRE tests only knowledge of the rules of professional conduct. Supplemental testing after an experiential portion of law school or a practice period post-admission as to the application of professional responsibility principles in practice may be desirable. This relates to demonstration of core competencies, discussed below.

RECOMMENDATION VII: To the extent the multi-state standardized bar examination ("MBE") is required as to certain core legal knowledge as a condition of admission to the bar, the examination should be administered as soon as possible after JD students have completed the study of topics tested on the examination [30-45 credits], which should be taught as early as possible in the curriculum.

- This recommendation is part of the staged or sequential admission strategy that can facilitate increased practical or experiential education as part of the law school curriculum.

RECOMMENDATION VIII: Support adoption of national standards for admission to practice law through administration of a uniform bar examination developed by the National Conference of Bar Examiners.

- This is also a recommendation of the ABA Task Force on the Future of Legal Education.[8]

- A currently developed uniform examination is the Uniform Bar Examination (the "UBE"), consisting of the MBE (a multistate multiple choice examination), the

[8] http://www.americanbar.org/groups/professional_responsibility/taskforceonthefuturelegaleducation.html.

MEE (a multistate essay examination), and the MPT (a multistate practice test) is promulgated by the NCBE. As of mid-August 2015, 17 states, including New York, have adopted the UBE.

- Consistent with Recommendation VII above, the MBE and MEE portions of the examination would be given during the law school education process.

- Although a state specific requirement of learning and applying Michigan law, administered concurrently, reasonably contemporaneously, or even within a short time post-admission would supplement the UBE or a similar national test,[9] the advantage of a uniform examination would be portability of results to other jurisdictions and recognition of a greater degree of uniformity of the profession.

- As noted above, jurisdictions adopting the UBE have created and administer a separate state examination. These models should be reviewed by the Board of Law Examiners in conjunction with changes in the bar exam itself.

- Adoption of this Recommendation would require amendment to MCL 600.934 if its use of the term "multi-state bar examination" is meant to describe only that portion of the UBE that consists of multiple-choice questions, and identified by the NCBE as the MBE.

- Adoption of this Recommendation would require amendment of Rule 3 of Supreme Court Rules for the Board of Law Examiners.

RECOMMENDATION IX: As legal education emphasizes competency in practicing law, examinations required for admission to the bar should likewise reduce the number of doctrinal subjects tested and increase testing of competencies and skills to practice law.[10]

- This recommendation has been advanced elsewhere.[11] This is a matter for action by the NCBE and the BLE. The MPT (Multistate Practice Test) of the UBE is a step in this direction, but other components of the UBE (MBE and MEE) remain on a doctrinal level.

- This Recommendation requires identification of competencies and development of performance models that can be used to evaluate the readiness of an applicant to serve clients, produce work product, and provide legal services consistent with recognized standards of professional responsibility. Collaboration of law schools and the practicing bar, through means such as that suggested in Recommendation III, and the BLE would be an essential part of this process.

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[9] *See* for example the New York course and exam developed in conjunction with adoption of the UBE, http://www.nybarexam.org/UBE/CONTENT_OUTLINE_FOR_NYLC_AND_NYLE_May2015.pdf.
[10] *See* Note 6.
[11] *Id.*

- The United Kingdom and Australia and New South Wales have produced specific guidelines of both doctrinal and practical application.[12] Competencies required for the effective practice of law have been identified in surveys of new lawyers, law firms, and clients.[13]

RECOMMENDATION X: If a uniform national examination such as the UBE is administered, Michigan specific knowledge and competence should be required and proven.

- There are models for this in other jurisdictions that are administering the UBE. As these models indicate, administration of a state specific testing may be done in conjunction with a bar examination or as a subsequent event before admission or as a condition of continued admission to the bar.

D. *Be admitted to the bar.* As recommended above, steps toward admission to the bar should be sequential. Admission to the bar signifies at least a minimum level of competence or capability to be a lawyer. Whether an applicant having good moral character, having completed a JD degree program from a reputable and qualified law school, and having passed the bar examination is able to provide legal services in a professionally responsible manner is uncertain, and may have a great deal to do with the degree to which experiential education and learning about the practical aspects of representing clients has informed the applicant.

- The Final Report of the State Bar of California Task Force on Admissions Regulation Reform observes:
  "We are the only learned profession that sends our newest members out into the world of practice without a period of intensive, supervised learning. We also stand alone among English common law countries in not universally requiring that new lawyers undergo some type of apprenticeship training period prior to licensing." [14]

- Through a combination of law school experiential education, cooperation and support of the practicing bar and the SBM, and pre-bar admission or post-bar admission supplemental educational or supervised practice, new lawyers should be provided with resources that enhance practice competence to provide legal services to the public in a professionally responsible manner.

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[12] Solicitors Regulatory Authority toolkit: http://www.sra.org.uk/solicitors/cpd/tool-kit/continuing-competence-toolkit.page; Competency Standards for Entry Level Lawyers, Australasian Professional Legal Education Council Law Admissions Consultative Committee (2000) http://www.aplec.asn.au/Pdf/Competency_Standards_for_Entry_Level_Lawyers.pdf.

[13] An excellent compilation of survey results and their interpretation can be found at Hamilton, Neil, "Empirical Research on the Core Competencies Needed to Practice Law: What Do Clients, New Lawyers, and Legal Employers Tell Us?" The Bar Examiner, Volume 83, Number 3 (2014).

[14] *Supra*, Note 4, at 26.

RECOMMENDATION XI: Applicants for admission to the bar should be required to have [a prescribed number] hours of supervised experience in activities that involve the practice of law, provided through law schools or through a separate program approved by the BLE or a combination of them.

- This recommendation flows from Recommendations in B, above, and includes pro bono components.

- Mentoring by licensed attorneys of third-year law students engaged in practice through paid or unpaid (depending on ABA standards – see Recommendation V), for-academic-credit apprenticeships may be the best way to complete legal education and prepare for practice.

- Mentoring by licensed attorneys of third-year law students engaged in serving persons of limited means may be an effective way to address access to justice needs, prepare the law student for practice, and create mentoring relationships that may endure into practice and ultimately improve the legal profession.

- Other more specific pre-admission requirements, such as mandatory pro bono work requirements and articling have not been reviewed in depth, and there is no Recommendation about them. The preference of the Work Group is that adequate experiential opportunities should be provided through the law school curriculum. The opportunity for pro bono service in experiential education has been noted in other Recommendations, and they should be implemented without need for mandating a certain number of hours as a condition of admission to the bar. Articling, or a period of required apprenticeship after law school but before licensing as is imposed in Canada,[15] is a formal structure that continues the legal education process following a degree, and would require a significant change in practice nationwide. If formal law school education were compressed into two years (noted in the Addendum) or were to lessen the clinical or experiential education opportunities during law school, an articling or supplemental experiential training pre-admission program would become essential. Certain post-bar admission strategies, as suggested in Section 3 below should be implemented.

- The steps toward licensing ("admission") in other professions should be considered in a process of the legal profession's self-analysis. Most require a greater practical training and mentorship than the law profession as a prerequisite to licensing. See, for example, the MSU College of Medicine program described at http://humanmedicine.msu.edu/Medical_Education/Medical_Education.htm. In such a program, the profession plays a direct and significant role beyond the medical faculty in the education process.

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[15] The program can be reviewed at http://www.lsuc.on.ca/articling/.

3. Early post-bar admission strategies for successful entry into practice.

RECOMMENDATION XII: A formal mentoring program for newly admitted lawyers or another early program to inculcate professionalism, to provide the benefit of experience in the practice of providing legal services, and to aid in assimilation into the practicing bar should be considered, if not as a condition of full licensure, as a post admission experience.

- A successful mandatory mentoring program example is the State Bar of Georgia's Mandatory Transition into Law Practice Program[16] for all lawyers newly admitted to the Georgia bar.

- Some states have voluntary mentoring programs.[17] A notably successful voluntary program is the Ohio State Bar's Lawyer to Lawyer Mentoring Program.[18] Local bars have also developed programs for the same purposes.[19]

- Tools available through the SBM Practice Management Resource Center should become a part of supplemental education on law practice management, which could be developed into a program for new lawyers made part of an early practice mentoring program.

- NOTE: Mandatory continuing legal education for new lawyers was once required under SBM Rule 17, but was rescinded in 1995 (444 Mich cxcviii), pursuant to motion of the SBM. Its original design and lack of success should be reviewed in conjunction with this Recommendation, but the prior experience should inform, not discourage. This Recommendation is not in a classic sense "CLE."

4. Continuing competence.

RECOMMENDATION XIII: As a means of continuing competence, continuing professional development ("CPD") is essential and should be recognized as a professional obligation. Continuing education would serve a specific purpose in the continued satisfaction of CPD commitments. Periodic re-qualification or certification procedures should be considered.

- This recommendation uses the term "continued professional development" to signify a desired outcome, rather than focusing on the traditional term "continuing

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[16] The program can be reviewed at http://www.gabar.org/membership/tilpp/. The State Bar of Georgia invites other bars to review its program through http://www.gabar.org/membership/tilpp/otherbars.cfm.
[17] A list of mentoring programs can be accessed at http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/mentoring.html.
[18] Accessed at https://www.supremecourt.ohio.gov/AttySvcs/mentoring/
[19] *See,* for example, New York City Bar Association's New Lawyer Institute, accessed at http://www.nycbar.org/career-development/new-lawyer-institute.

legal education," which can be a means to the end. [20] This Recommendation embraces the broad purpose and the educational steps for it.

- Although competence is required as a matter of professional responsibility, the law profession does not have a mandating statement of principle that continuing professional development is a professional essential.[21] The American Medical Society Code of Medical Ethics provides as Principle V:
  "A physician *shall* continue to study, apply, and advance scientific knowledge, maintain a commitment to medical education, make relevant information available to patients, colleagues, and the public, obtain consultation, and use the talents of other health professionals when indicated." (*emphasis added*)
  A highly developed profession-wide system of continuing medical education and certification is based on this principle.

  A similar statement of such a commitment as a matter of professionalism should be developed and adopted.

- Essential to this Recommendation and its underlying principle, as well as Recommendations concerning experiential education and testing of competencies in this Report, "competencies" need to be identified.[22] As noted with respect to Recommendation IX, collaboration among key stakeholders in this endeavor is required.

- Continuing professional development should be motivated, incentivized by recognition achieved through a certification program or other means, such as publishing a list of lawyers successfully meeting CPD goals involving education components.

- Many states have mandatory CLE requirements imposed in terms of required hours. There are arguments for and against mandatory CLE.[23] Merely mandating continuing education does not improve lawyer skills. A more effective model could be described as a "carrot and stick" approach, with general mandates for education and specific options for lawyers to choose skills developments in discrete areas that relate to their practice. To this end, every lawyer should be required to prepare and pursue a continuing professional development plan that commits to development of skills and competencies associated with that lawyer's

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[20] Comment [8] to the Model Rules of Professional Conduct Rule 1.1 provides: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." Comments to a Rule are intended for interpretive guidance, but the text of the Rule is authoritative.

[21] *See supra* note 19. Both the Model Rules and the Michigan Rules of Professional Conduct provide that lawyer "shall provide competent representation." A comment to Michigan Rules of Professional Conduct Rule 1.1 states: "To maintain requisite knowledge and skill, a lawyer should engage in continuing study and education."

[22] *See supra* Recommendation IX.

[23] *See* Rhode, Deborah L. and Ricca, Lucy Buford, "Revisiting MCLE: Is Compulsory Passive Learning Building Better Lawyers?" The Professional Lawyer, Volume 22, Number 2 (2014).

practice based on a menu of offerings recognized in specialty practice areas and other core competencies.

- The report of the Canadian Bar Association, Futures: Transforming the Delivery of Legal Services in Canada[24] notes that in Alberta, all active lawyers must create and declare an annual CPD plan.[25] It also notes that the U.K. Solicitors Regulatory Authority ended a mandatory CLE requirement in furthering a CPD plan, and requires in its place an annual declaration pledging that a solicitor's needs have been considered, a plan to meet those needs has been created, and that steps will be taken to satisfy those needs.[26]

- Procedures for testing or evaluation of the outcome effectiveness of CLE should be established. There should be participant accountability for the content of the educational experience.

RECOMMENDATION XIV: The State Bar of Michigan should create a lawyer's specialization certification program.

- Although continuing legal education should be part of a lawyer's professional responsibility and should be a part of a lawyer's continuing professional development plan, direction of it would be further motivated by a certification program that would recognize publicly successful completion of qualifying CLE. A series of subject matters for such CLE can be developed into "course plans" that would be variable for adaptation to a lawyer's practice but would always include professionalism and ethics components and relevant technology and practice management developments. Qualifying CLE for professional status certification must include testing or a process to evaluate learning.

- A program of specialty certification should be developed by the State Bar of Michigan. See recommendation of Practice Committee more specifically.

- Michigan does not express a position about the ethics of advertising a specialty or contemplate certification of a specialty. *Compare* Michigan RPC 7.4 with Model Rule 7.4.

    - The Michigan rule by silence allows advertisement of a specialty, subject only to truthfulness standards. *See* Association of Professional Responsibility Lawyers 2015 Report of the Regulation of Lawyer Advertising Committee for further discussion about re-shaping lawyer advertising rules.

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[24] Accessed at http://www.cbafutures.org/CBA/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf?ext=.pdf, at 63.
[25] Law Society of Alberta, "Create and Declare a CPD Plan" webpage, available at http://www.lawsociety.ab.ca/lawyers/cpd/cpd_plan.aspx.
[26] *Supra* Note 23.

https://www.aprl.net/publications/downloads/APRL_2015_Lawyer-Advertising-Report_06-22-15.pdf.

- Michigan RPC 7.4 would need to be amended to conform to Model Rule 7.4.

- The ABA has accredited National Board of Legal Specialty Certification to certify specialty. http://www.nblsc.us/board_certified_lawyers/. Use of a nationally recognized system of specialty certification could promote uniformity and require less local management.

5. Additional Recommendations. Although not within the purview of the Work Group's charge, the following Recommendations were considered relevant to its subject matter.

A. *Non-lawyer providers of legal services.*

RECOMMENDATION XV: The SBM and the Michigan Supreme Court should consider developing a program for licensing of providers of legal services alternative to lawyers admitted to the bar.

- The purpose of such providers is to expand access to legal solutions that do not demand the skills of lawyers, creating an affordable alternative particularly to reach the underserved.

- Washington and Minnesota are recognizing such providers as "limited license legal technicians."

  - These initial models are cautious and highly restrictive first steps, but provide valuable background for further development.

- Education of non-lawyer legal service providers could be provided by presently accredited legal schools or related universities. Education requirements involve both doctrinal and experiential.

- A national program should be encouraged through the ABA. The NCBE should develop a uniform examination for these providers. *See*, for example, PANCE for Physician Assistants.

B. *Local court rules*.

RECOMMENDATION XVI: Encourage uniformity of local court rules.

- More efficient administration of justice, facilitated by accessibility, will be served by having a single set of court rules applicable throughout the state.

- Although variations may exist for a purpose, differentiation in court rules should serve the efficient administration of justice and to the extent possible should be harmonized.

ADDENDUM

Background on Law School Education

Law schools today are attended by traditional and non-traditional students of all ages, races, gender, ethnicity, and experience. Many law students work full or part-time and have families they are raising. Many commute long distances to attend law school. At some law schools, a law school degree can be earned entirely during weekdays, in the evenings, on weekends, and in two to seven years (the minimum and maximum time periods allowed by the ABA).

Diversity in law school student ranks is important because lawyers serve a diverse client base.

Most law schools undertake a character review as part of the application process and cover many of the same topics the state bars cover in their character and fitness reviews.

Most law schools enroll students who may practice law in any of the 50 states or in other countries. Thus, most law schools do not teach the law of a particular state to all their students, and leave that to the state or the bar review course for whatever state their graduates choose. Law students may focus their studies through elective courses on specific state or international law.

Many law students seeking a JD will not practice law, but will use their degrees to further their current careers or enter a career in which a JD will provide essential knowledge and skills. Thus, most law schools allow students to concentrate their studies in areas from litigation, to business transactions, to administrative law, international law, solo practice, alternative dispute resolution, and so on.

Many law schools teach knowledge, skills, and ethics through a variety of teaching methods (not just case study) and involve students in in-class exercises to practice skills related to the substantive law they are studying. Students may be regularly assessed throughout the semester rather than have only one final exam, and those assessments test skills and ethics, along with knowledge.

Law school tuition is generally discounted through scholarships, so actual tuition rates may be much less than the maximum amount that law school are required to disclose. The default rate of Michigan law graduates remains low (2 - 4%).

The ABA accredits and regulates law schools, and law schools are limited in what they can and cannot do by those accreditation standards.

Most law schools require 3-6 credits (of 90) in experiential learning (clinics and externships) and many allow 16 credits or more. The ABA does not currently allow law students to earn money and academic credit for the same work.

Legal education cannot be "faster" than what is allowed by the ABA: a minimum of 83 credits of study and no more than 20% of the curriculum in any one semester. However, law schools can offer their entire JD program in two years— which some Michigan law schools are currently doing—thus reducing the costs associated with rent and living expenses to two years instead of three. Further, law school education could begin earlier in undergraduate studies, shortening undergraduate studies to 3 years while law study remains 3 years (called 3+3 programs, currently operating or under consideration between some law schools and undergraduate schools).

[Prepared for the Committee by Dean Phyllis L. Crocker, Dean Joan Howarth, Professor Martha Moore, and Associate Dean Amy Timmer.]

21st Century Task Force

Modernizing the Regulatory Machine Committee

Work Group 4 – Legal Services Providers and Companies

Rule for Licensing of Non-Michigan Attorneys Practicing in Michigan on a Limited Basis

We have pulled from ABA Model Rule 5.5 (c)(3) and Michigan Rule for Board of Law Examiners Rule 5 to form this proposal.

As the current rule allowing out-of-state and non-US attorneys to practice in Michigan is quite restrictive, we wish to reform the rules, so we can add legal service value to organizations operating in Michigan and make it more attractive for companies to locate or expand here while supporting their legal needs. We especially would like to encourage national and international manufacturers and businesses to utilize the Michigan system to resolve their disputes. As ADR and ODR are increasingly utilized, this workgroup would like to focus our efforts on modernizing the handling of disputes which are to be resolved by methods other than court litigation.

As many multinational organizations based outside the U.S. with operations in Michigan have contracts that are governed by Michigan law (or other state laws) and U.S. law, it makes sense to allow those organizations who wish to employ or transfer foreign counsel, licensed in their home nation, the legal ability to practice to support those organizations in Michigan.. These people are already providing counsel to their clients in Michigan on a variety of matters. Why not enable their counsel, with valuable experience and knowledge, to legitimately practice in Michigan, so long as they are bound by Michigan's high ethical standards? Likewise, attorneys from other states are routinely advising business clients on transactions and matters in Michigan, in many cases as employees of businesses that are headquartered in another state but which have Michigan operations. They have been chosen by their clients to do so, so we should recognize that freedom for those clients without obligating the use of a Michigan lawyer if the use of the Michigan lawyer only adds redundancy and cost to the client. I f adding a Michigan lawyer adds value to the client as we would expect to be the case in many instances, they will choose to do so.

While we wish to broaden the ability for these U.S. and foreign attorneys to practice in the state of Michigan, especially in contract formation and interpretation, transactional activity, and Alternative Dispute Resolution, we stop short of allowing attorneys to represent clients in Michigan courts without full licensure pro hac vice when appropriate.

We suggest amending Michigan Rules for the Board of Law Examiners by creating Rule 5(F) - Limited

Admission by adopting language from ABA Model Rule 5.5 (c)(3), (d), and (e).

RULE 5 Admission Without Examination

(F) Limited Admission

(a) An attorney admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or equivalent, may provide legal services in this jurisdiction that :

(1) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, and are not services for which the forum requires pro hac vice admission, or;

(2) are provided to the attorney's organizational clients and are not services for which the forum requires pro hac vice admission, or;

(3) are services that an attorney is authorized by federal or other law or rule to provide in this jurisdiction.

(b) For purposes of paragraph (a), the attorney admitted in another United States jurisdiction or foreign attorney must be a member in good standing of a recognized legal profession in another United States or foreign jurisdiction, the members of which are admitted to practice attorneys or counselors at law or the equivalent.

(c) An out-of-state or foreign attorney practicing law under this rule is deemed to have consented to the Michigan Rules of Professional Conduct and the Michigan Court Rules Governing Professional Disciplinary Proceedings.

(d) Organizational clients are defined as: corporations, partnerships, registered sole proprietorships or limited liability corporations.*

*One member, Carl Ver Beek, dissents from this definition, believing that the rule should allow

representation of any client, including individuals.

Questions from Michigan Bar's “Innovation Worksheet”

Reasons for Recommendations:

A. Opportunities:

The globalization of manufacturing since the development of the current ethics and admission rules is obvious. Michigan is known around the world as a manufacturing technology hub. Manufacturing companies based or located in Michigan have global legal issues that cross jurisdictional lines. This creates an opportunity for Michigan to further its economic development objectives by further enabling the practice of law in Michigan to benefit such organizations. As businesses, particularly manufacturers, select places to do business, the effectiveness of the rule of law and regulatory environment are critical ingredients. Having understandable rules and the probability that contractual obligations will be enforced in an efficient and timely manner by attorneys of the business’ choosing can give Michigan a competitive advantage. Site selection and the selection of applicable law , particularly if optimal Alternative Dispute Resolution is available, can give Michigan a significant competitive opportunity.

Assume that the rules regulating Alternative Dispute Resolution are modified to be as attractive as possible for efficient and effective dispute resolution, thereby making Michigan the "Delaware of Dispute Resolution ." Once that has occurred;

Then the liberalization of the law practice rules:

- encouraging Michigan as a welcoming state for a business domicile,
- making Michigan an attractive place to physically locate a business,
- making Michigan the preferred location for choice of law, and
- making Michigan the preferred location for hearings on business disputes.

would add significant value to U.S. and foreign organizations which are considering Michigan as a location in which to do business.

Michigan has already encouraged doing business in Michigan with the advent of Business Courts for those matters which find themselves in a court setting. This new rule would be an extension of that policy.

Liberalization of the rules of law practice for matters outside the court setting can capitalize on Michigan's international reputation as a manufacturing technology hub, thereby creating

expanded opportunities for a thriving law practice and business development.

No State has undertaken the modification of the rules relating to ADR to make them as efficient and effective as possible on a state-wide basis. Most comparable efforts in the U.S. and abroad have been undertaken at a city level. Examples include: New York City, Miami, Chicago, Singapore and Perth, Australia.

B. Risks (what is worst case scenario if adopted):

Pushback from Michigan attorneys who are still thinking of protecting the 20th Century practice; loss of business opportunities for Michigan attorneys.

Possibly overwhelming the Attorney Grievance Commission and Attorney Discipline Board due to out of state and foreign attorneys overstepping the limited safe harbor contained in this proposed rule.

C. Unknowns/Unanswered Questions:

Whether the proposal will produce concrete economic development results in terms of additional investment or job creation in Michigan.
Ability to enforce rule against attorneys who practice in Michigan without choosing to comply with the rule.

D. What Is Innovative About this Option?

Optimizing ADR and making Michigan an "attorney friendly" place for U.S. and foreign attorneys will set Michigan apart from the "turf protection" rules found in most states. Most state bars are still functioning in the 20th Century model. It is obsolete and likely is being honored in the breach in many jurisdictions.

The SBM can create a committee or Section dedicated to making Michigan the optimal place to do business without destroying the practice rules which have been developed to protect the public in the non-business/organizational world.

E. Implementation Strategies

The precise wording of the revised Rule will need careful consideration to promote clarity and consistency with other applicable rules and statutes. Once the concept is adopted, that process

can be undertaken in a worthwhile manner.

a. Potential supporters:

Business Leaders for Michigan, Michigan Chamber of Commerce, Michigan Manufacturers Association, Small Business Association of Michigan, American Arbitration Association

b. Potential opponents/obstacles:

State Board of Law Examiners and The Supreme Court
Some elements of existing Michigan bar

c. Interested SBM entities:

The ADR, International, Litigation, and Business Law Sections

d. Other interested stakeholders:

The Attorney Grievance Commission and the Attorney Discipline Board

e. What are the possibilities to increase effectiveness through technology?

Appearances may be virtual; technology can assist here

f. How might this intersect with or impact other justice system areas/needs?

Some of organizations benefitted may be national not-for-profit entities operating in Michigan, including those which support pro bono legal services.

g. Staging:

i. Does this option need experimentation or piloting?

Yes, to assuage potential fears of existing bar and assess effectiveness.

ii. What is the recommended timetable, if any?

Three- to five-year pilot program.

iii. What is the recommended order of steps, if any?

None.

Technology Advisor/Department

At this time Work Group Four is recommending a change to the MRPC that notes in the comments to Section 1.1 that a lawyer should "…keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology…" Arguably, the newly added comment is simply an explicit recognition of a component of the requirement of competence that already exists in MRPC 1.1. Regardless, the concept that technological competence is a requirement to competently represent a client may not be widely appreciated by Michigan lawyers. As such this may be perceived as the imposition of a burden on Michigan lawyers that many may feel ill prepared to meet. As such, the members of Work Group Four believes that the State Bar of Michigan should assume the task of recommending best technology practices to lawyers to assist them in their efforts to comply with MRPC 1.1. However, since Work Group Four has not had sufficient time to explore the consequences of this proposal and, in particular, what existing rules or procedures may be impacted, we recommend that this proposal be given additional consideration before it be adopted.

What follows is our recommendation:

The members of Work Group Four recommends to the Modernizing the Regulatory Machinery Committee to in turn recommend to the State Bar of Michigan the establishment of a "Legal Technology Advisor" or the formal creation of a role within an existing department whose primary role would be to recommend best practices related to the use of technology in the practice of law, including the recommendation of specific products and services. The purpose of this recommendation is to provide *specific* advice to assist compliance with MRPC Rule 1.1, which requires that a lawyer provide competent representation to a client. Examples of such guidance are contained in footnote 1.[1]. The advice given could be made situation specific. For example, what might be recommended to a lawyer

[1] For example, one recommendation could be that it is a best practice for a lawyer's iPhone or iPad to be protected with a strong pass code that has a certain number of letters, numbers and characters. (A very useful article regarding real world security issues' relating to I-Pads was published in the March 2015 Michigan Law Journal at page 46, titled "Five Ways to Strengthen Your IPad's Security." Catherine Sanders Reach and Bill Latham wrote it. Much of the article, by the way, is also applicable to I-Phones and non-Apple devices. Among other very practical pieces of information they state that in their opinion a lawyer is courting malpractice if confidential information is on her I-Pad and she has not enabled the pass code feature ***and*** that the 4 digit pass code that is the default setting is not enough. They then show you how to set a stronger passcode. Here is a link to it: http://www.michbar.org/file/barjournal/article/documents/pdf4article2585.pdf). Similarly, product recommendations could be made for software security.

practicing elder law may not be the best practice for a lawyer representing a money center commercial bank. The advice would be advisory only, not binding. Nevertheless, if the best practice recommended is followed in the situation for which it is given, we believe it should be relevant for a court or regulatory body to take into consideration if the need arises. While not recommending that the advice be a safe harbor as such, it would be appropriate to consider as a strong indicia of competence.

As technology advances or changes this advisor would be responsible for providing quick updates and revisions to existing recommendations. Because of the pace at which technological changes occur the advisor's recommendations would not require pre-approval or any formal vetting process by other parts of the State Bar of Michigan – although a procedure for overruling the advice could be established if the State Bar of Michigan believes the advisor has exceeded her prerogatives.

Additionally, Work Group Four recommends that the SBM create a structure or process to ensure that the Technology Advisor or designated department is free from undue influence by vendors seeking a competitive advantage for their services or products.

Since this recommendation may impact a number of existing rules or procedures, the recommendation comes with the caveat that further study is needed to explore these ancillary issues.

21st Century Task Force

Modernizing the Regulatory Machine Committee

Work Group 4 – Legal Services Providers and Companies

SUBMISSION FORM FOR PROPOSAL TO CREATE A TECHNOLOGY ADVISOR/DEPARTMENT

The attached document is a proposal to recommend that the State Bar of Michigan create a Technology Advisor/Department. Work Group Four is recommending a change to the MRPC that notes in the comments to Section 1.1 that a lawyer should "…keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology…" The concept that technological competence is a requirement to competently represent a client may not be widely appreciated by Michigan lawyers some of whom may be ill prepared to meet this duty.

The members of Work Group Four believes that the State Bar of Michigan should assume the task of recommending best technology practices to lawyers to assist them in their efforts to comply with MRPC 1.1. However, since Work Group Four has not had sufficient time to explore the consequences of this proposal and, in particular, what existing rules or procedures may be impacted, we recommend that this proposal be given additional consideration before it be adopted.

Questions from Michigan Bar's "Innovation Worksheet"

Reasons for Recommendations:

A. Opportunities:

To protect the public and strengthen the knowledge and competency of SBM members by helping them keep abreast of the benefits and risks of tech tools and platforms.

B. Risks (what is worst case scenario if adopted):

That the Technology Officer/Department becomes the target of vendors attempting to exert undue influence in an effort to gain an advantage for their product or service.

C. Unknowns/Unanswered Questions:
Whether the best practice recommendations of the Chief Technology Officer/Department become a mitigating factor or safe harbor in Attorney Grievance or

malpractice or proceedings.

D. What Is Innovative About this Option?

Unknown

E. Implementation Strategies
Board of Commissioners Approval
Representative Assembly Approval

F. Potential supporters:
The State Bar of Michigan Representative Assembly

G. Potential opponents/obstacles:
Attorney Grievance Commission
Attorney Discipline Board

H. Interested SBM entities:
The Computer Law Section
The SBM Ethics Committee

I. Other interested stakeholders:
The Attorney Grievance Commission and the Attorney Discipline Board

J. What are the possibilities to increase effectiveness through technology?
Any educational resources can be posted and disseminated online.

K. How might this intersect with or impact other justice system areas/needs?
N/A

L. Staging:
i. Does this option need experimentation or piloting?
Piloting to determine efficacy
ii. What is the recommended timetable, if any?
As soon as possible

Iii. What is the recommended order of steps, if any?

No recommendations as to steps

21st Century Task Force
Modernizing the Regulatory Machine Committee
Work Group 4 – Legal Services Providers and Companies

Proposal for the Creation of Consumer Resource(s) Addressing Internet-Based Attorney Review, Referral, and Ranking Platforms

The members of Work Group 4 spent significant time discussing the rising influence of internet-based attorney review, referral and ranking platforms, which take both the form of websites and applications. Particularly, the Group focused on the threats and opportunities these platforms present, as well as ways in which Bar Associations may address these platforms.

In summary, the members of the Group agreed:

1. That these platforms potentially result in violations of the Michigan Rules of Professional Conduct, particularly regarding the advertising provisions; and

2. The platforms are often structured in ways that present potentially misleading information to the public.

However, the members also agreed that these platforms bring benefits to both the general public and to attorneys. For the public, and if properly structured, they can provide:

1. Greater accessibility to attorneys and legal resources; and

2. Greater transparency around the attorney-selection process.

For attorneys and other legal professionals, these platforms can provide:

1. Greater accessibility to marketing channels and exposure.

The members of the Work Group believe these platforms pose significant and ongoing issues. Moreover, it is likely these platforms will become more prevalent and play a greater role in consumer choice in the future. The members believe the Task Force should advance research and resources to informing and, in some cases, protecting both members of the public as well as members of the Bar from the harms these platforms pose, as well as educate the public and members of the Bar on the benefits these platforms can yield.

Recommendation

The members of Work Group recommend to the Modernizing the Regulatory Machinery Committee to in turn recommend to the State Bar of Michigan to create a

resource for members of the public that would help them navigate the various online lawyer ranking and lawyer referral services.

For example, in Avvo, an attorney can increase their numerical ranking by posting content to their profile, even if the content is not particularly helpful or is of poor quality. An attorney can also pay Avvo to have their profile 'featured" at the top of a search query. Though participation in a for-profit lawyer referral service is forbidden by the Michigan Rules of Professional Conduct, a sizeable percentage of attorneys participate in them nonetheless. The members of Work Group Four believe that it is important for consumers to know when an attorney is paying a for profit company to give their name to an inquiring member of the public and other such relevant information.

To use these platforms effectively, consumers need to know which features of the platforms are legitimate and which ones can be manipulated by paying the service a fee or providing "content" to the platform to help in its Google rankings.

The members of Work Group Four encourage the State Bar of Michigan to embrace this opportunity for greater consumer education.

Since this recommendation implicates existing rules or procedures, the recommendation comes with the caveat that further study is needed to explore these larger issues.

21st Century Task Force

Modernizing the Regulatory Machine Committee

Work Group 4 – Legal Services Providers and Companies

PROPOSAL FOR CREATION OF CONSUMER RESOURCE(S) RE ONLINE RANKING/REFERRAL PLATFORMS

The attached document is a proposal to recommend to the State Bar of Michigan to create educational resources for members of the public to help them navigate the various online lawyer ranking and lawyer referral services.

Questions from Michigan Bar's "Innovation Worksheet"

Reasons for Recommendations:

A. Opportunities:

Online ranking and for profit lawyer referral services often result in attorneys arguably committing violations of the advertising provisions of the Michigan Rules of Professional Conduct. These platforms as currently structured are misleading to members of the public. These online services also bring benefits both to the general public, in terms of accessing legal services, and to attorneys seeking to market their practices.

To use these platforms effectively, consumers need to know which features of the platforms are legitimate and which ones can be manipulated by paying the service a fee or providing "content" to the platform to help in its Google rankings.

The SBM is uniquely posed to provide educational resources for the public that are credible and trusted on this topic.

B. Risks (what is worst case scenario if adopted):

Few or none.

C. Unknowns/Unanswered Questions:

D. What Is Innovative About this Option?

This is not an innovative or "risky" proposal.

E. Implementation Strategies

N/A

F. Potential supporters:

The Michigan Attorney Grievance Commission
The Michigan Attorney Discipline Board

G. Potential opponents/obstacles:

The online service platforms that are the subject of the educational pieces.

H. Interested SBM entities:

The Computer Law Section
The SBM Ethics Committee

I. Other interested stakeholders:

The Attorney Grievance Commission and the Attorney Discipline Board

J. What are the possibilities to increase effectiveness through technology?

Any educational resources can be posted and disseminated online.

K. How might this intersect with or impact other justice system areas/needs?

N/A

L. Staging:

i. Does this option need experimentation or piloting?

No.

ii. What is the recommended timetable, if any?

Immediately

iii. What is the recommended order of steps, if any?

N/A

Contents

MICHIGAN RULES OF PROFESSIONAL CONDUCT

-- Please see the attached dissent addendum attached to this packet --

This document is an updated version of pertinent MRPC sections that implement many changes suggested by the ABA Commission on Ethics 20/20 report. (Insertions underlined, deletions ~~struck through~~, comments or additions from this workgroup in red.)

Rule: 1.0 Scope and Applicability of Rules and Commentary

(a) These are the Michigan Rules of Professional Conduct. The form of citation for this rule is MRPC 1.0.

(b) Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules do not, however, give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule. In a civil or criminal action, the admissibility of the Rules of Professional Conduct is governed by the Michigan Rules of Evidence and other provisions of law.

(c) The text of each rule is authoritative. The comment that accompanies each rule does not expand or limit the scope of the obligations, prohibitions, and counsel found in the text of the rule.

Comment: The rules and comments were largely drawn from the American Bar Association's Model Rules of Professional Conduct. Prior to submission of those Model Rules to the Michigan Supreme Court, the State Bar of Michigan made minor changes in the rules and the comments to conform them to Michigan law and preferred practice. The Supreme Court then adopted the rules, with such substantive changes as appeared proper to the Court. Additional changes in the comments were then made by staff to conform the comments to the rules as adopted by the Supreme Court. The Supreme Court has authorized publication of the comments as an aid to the reader, but the rules alone comprise the Supreme Court's authoritative statement of a lawyer's ethical obligations.

Preamble: A Lawyer's Responsibilities

This preamble is part of the comment to Rule 1.0, and provides a general introduction to the Rules of Professional Conduct.

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation.

A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when

they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer acts or chooses not to act within the bounds of such discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the comments use the term "should." Comments do not add obligations to the rules, but provide guidance for practicing in compliance with the rules.

The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining

specific obligations of lawyers, and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common-law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the prosecuting attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These rules do not abrogate any such authority.

As indicated earlier in this comment, a failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

As also indicated earlier in this comment, a violation of a rule does not give rise to a cause of action, nor does it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purposes of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning

a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extradisciplinary consequences of violating such a duty.

Moreover, these rules are not intended to govern or affect judicial application of either the client-lawyer or work-product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the client-lawyer privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The client-lawyer privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the client-lawyer and work-product privileges.

The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The Preamble and this note on scope provide general orientation. The comments are intended as guides to interpretation, but the text of each rule is authoritative.

TERMINOLOGY

"Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Firm" or "law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization, and lawyers employed in a legal services organization. See comment, Rule 1.10.

"Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

"Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "reasonably believes," when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances

are such that the belief is reasonable.

"Reasonably should know," when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Substantial," when used in reference to degree or extent, denotes a material matter of clear and weighty importance.

‘‘Writing’’ or ‘‘written’’ denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopy, photography, audio or videorecording, and electronic communications. A ‘‘signed’’ writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Rule: 1.1 Competence

A lawyer shall provide competent representation to a client. A lawyer shall not:

(a) handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it;

(b) handle a legal matter without preparation adequate in the circumstances; or

(c) neglect a legal matter entrusted to the lawyer.

[The Michigan rule is superior to the ABA model rule, so no change needed, but the comment below regarding technology is relevant]

Comment:

LEGAL KNOWLEDGE AND SKILL

In determining whether a lawyer is able to provide competent representation in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency, a lawyer may give advice or assistance in a matter in which the

lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

A lawyer may offer representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

THOROUGHNESS AND PREPARATION

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

MAINTAINING COMPETENCE

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education [language from 105A mandating CLE omitted]. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

[Even with this added language to the comment, there is no concrete requirement to comply, as the comments are not rule language, and "[t]he comment that accompanies each rule does not expand or limit the scope of the obligations, prohibitions and counsel found in the text of the rule." *MPRC Rule 1.0(c)*. It may be beneficial to modify the actual rule instead. If the idea is to have technological competency suggested but not required, the modified comment will do.]

Rule: 1.4 Communication

(a) A lawyer shall A lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. A lawyer shall notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment: The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party, and take other reasonable steps that permit the client to make a decision regarding an offer from another party. A lawyer who receives an offer of settlement or a mediation evaluation in a civil controversy, or a proffered plea bargain in a

criminal case, must promptly inform the client of its substance. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation, a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and consistent with the client's overall requirements as to the character of representation.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

WITHHOLDING INFORMATION

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

...

Rule: 1.6 Confidentiality of Information

(a) "Confidence" refers to information protected by the client-lawyer privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(b) Except when permitted under paragraph (c), a lawyer shall not knowingly:

(1) reveal a confidence or secret of a client;

(2) use a confidence or secret of a client to the disadvantage of the client; or

(3) use a confidence or secret of a client for the advantage of the lawyer or of a

third person, unless the client consents after full disclosure.

(c) A lawyer may reveal:

(1) confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them;

(2) confidences or secrets when permitted or required by these rules, or when required by law or by court order;

(3) confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used;

(4) the intention of a client to commit a crime and the information necessary to prevent the crime; and

(5) confidences or secrets necessary to establish or collect a fee, or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct.

(d) A lawyer shall exercise reasonable care to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by paragraph (c) through an employee.

(e) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comment: The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client, but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Upon the basis of experience, lawyers know that almost all clients follow the advice given and that the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the client-lawyer privilege (which includes the work-product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The client-lawyer privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The

confidentiality rule applies to confidences and secrets as defined in the rule. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also *Scope, ante,* p M 1-18.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

AUTHORIZED DISCLOSURE

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or, in negotiation, by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers, or unless the disclosure would breach a screen erected within the firm in accordance with Rules 1.10(b), 1.11(a), or 1.12(c).

DISCLOSURE ADVERSE TO CLIENT

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends to commit a crime. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client's confidences even though the client's purpose is wrongful. To the extent a lawyer is required or permitted to disclose a client's purposes, the client may be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. A rule governing disclosure of threatened harm thus involves balancing the interests of one group of potential victims against those of another. On the assumption that lawyers generally fulfill their duty to advise against the commission of deliberately wrongful acts, the public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Generally speaking, information relating to the representation must be kept confidential as stated in paragraph (b). However, when the client is or will be engaged in criminal conduct or the integrity of the lawyer's own conduct is involved, the principle of confidentiality may appropriately yield, depending on the lawyer's knowledge about and relationship to the conduct in question, and the seriousness of that conduct. Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is illegal or fraudulent. See Rule 1.2(c). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(c) to avoid assisting a client in illegal or fraudulent conduct. The same is true of compliance with Rule 4.1 concerning truthfulness of a lawyer's own representations.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(c), because to "counsel or assist" criminal or fraudulent conduct requires

knowing that the conduct is of that character. Even if the involvement was innocent, however, the fact remains that the lawyer's professional services were made the instrument of the client's crime or fraud. The lawyer, therefore, has a legitimate interest in being able to rectify the consequences of such conduct, and has the professional right, although not a professional duty, to rectify the situation. Exercising that right may require revealing information relating to the representation. Paragraph (c)(3) gives the lawyer professional discretion to reveal such information to the extent necessary to accomplish rectification. However, the constitutional rights of defendants in criminal cases may limit the extent to which counsel for a defendant may correct a misrepresentation that is based on information provided by the client. See comment to Rule 3.3.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. Inaction by the lawyer is not a violation of Rule 1.2(c), except in the limited circumstances where failure to act constitutes assisting the client. See comment to Rule 1.2(c). However, the lawyer's knowledge of the client's purpose may enable the lawyer to prevent commission of the prospective crime. If the prospective crime is likely to result in substantial injury, the lawyer may feel a moral obligation to take preventive action. When the threatened injury is grave, such as homicide or serious bodily injury, a lawyer may have an obligation under tort or criminal law to take reasonable preventive measures. Whether the lawyer's concern is based on moral or legal considerations, the interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information relating to the client. As stated in paragraph (c)(4), the lawyer has professional discretion to reveal information in order to prevent a client's criminal act.

It is arguable that the lawyer should have a professional obligation to make a disclosure in order to prevent homicide or serious bodily injury which the lawyer knows is intended by the client. However, it is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind. To require disclosure when the client intends such an act, at the risk of professional discipline if the assessment of the client's purpose turns out to be wrong, would be to impose a penal risk that might interfere with the lawyer's resolution of an inherently difficult moral dilemma.

The lawyer's exercise of discretion requires consideration of such factors as magnitude, proximity, and likelihood of the contemplated wrong; the nature of the lawyer's relationship with the client and with those who might be injured by the client; the lawyer's own involvement in the transaction; and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to make a disclosure permitted by paragraph (c) does not violate this rule.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this rule, the lawyer should make an inquiry within the organization as indicated in Rule 1.13(b).

Paragraph (c)(3) does not apply where a lawyer is employed after a crime or fraud has been committed to represent the client in matters ensuing therefrom.

WITHDRAWAL

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

DISPUTE CONCERNING LAWYER'S CONDUCT

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of complicity or other misconduct has been made. Paragraph (c)(5) does not require the lawyer to await the commencement of an action or proceeding that charges complicity or other misconduct, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal, or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together.

A lawyer entitled to a fee is permitted by paragraph (c)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

DISCLOSURES OTHERWISE REQUIRED OR AUTHORIZED

The scope of the client-lawyer privilege is a question of law. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (b)(1) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of

competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession.

FORMER CLIENT

The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9.

ACTING COMPETENTLY TO PRESERVE CONFIDENTIALITY

Paragraph (e) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (e) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, advice or recommendations given to the lawyer or promulgated generally by the State Bar of Michigan, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with non-lawyers outside the lawyer's own firm, see Rule 5.3, Comments.

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the

use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

...

[Our workgroup discussed the impact of adopting rule 4.4 (b) and comment, as it is at odds with Federal Rules of Criminal Procedure 26(b)(5)(B), which expressly claims it is the sender's duty to notify the other party.
Member Jonathan Sacks voiced his dissent due to the negative impact of such a rule on criminal proceedings, specifically the role of these disclosures in indigent defense work.
Members of our group specifically mentioned, in support of adopting 4.4(b), the impact of embedded metadata in electronic files, and how this rule would make it a requirement for tech-savvy attorneys to notify senders upon receipt of otherwise-hidden information (such as previous saved versions, seemingly redacted information, original document author, time spent working on the document, to name a few) attached to word documents, pdf's, and images.]

Rule: 4.4 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Comment: Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.

Paragraph (b) recognizes that lawyers sometimes receive a documents or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, ''document or electronically stored information'' includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that

is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

21st Century Task Force

Modernizing the Regulatory Machine Committee

Work Group 4 – Legal Services Providers and Companies

Proposed revisions to Michigan Rules of Professional Conduct regarding a lawyer's duty of "tech competency."

The attached document is an updated version of pertinent MRPC sections that implement many changes suggested by the ABA Commission on Ethics 20/20 report.

In August of 2012 the ABA House of Delegates passed, with little opposition, amendments to the Model Rules of Professional Conduct that require lawyers to keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology and to take reasonable measures to prevent the inadvertent or unauthorized disclosure of or access to confidential information.

Seventeen states/territories have already adopted these proposed revisions and eighteen states are in the process of considering adoption. We suggest amending the Michigan Rules of Professional Conduct to conform to the August 2012 Ethics 20/20 changes. Many lawyers, for a variety of reasons, are using technology in their practices without an understanding and appreciation of the ethical risks involved in the various platforms and programs resulting not only in significant risk to their clients, but also to themselves and their practices.

That being said, the workgroup discussed the impact of adopting rule 4.4 (b) and its comments in several specific instances:

1) It is at odds with Federal Rules of Criminal Procedure 26(b)(5)(B), which expressly claims it is the sender's duty to notify the other party.

2) Member Jonathan Sacks voiced his dissent due to the potential negative impact of such a rule on criminal proceedings, specifically the role of these disclosures in indigent defense work.

Members of our group specifically mentioned, in support of adopting 4.4(b), the impact of embedded metadata in electronic files, and how this rule would make it a requirement for tech-

savvy attorneys to notify senders upon receipt of otherwise-hidden information (such as previous saved versions, seemingly redacted information, original document author, time spent working on the document, to name a few) attached to word documents, pdf's, and images.)

The workgroup believes that these issues may benefit from exploration and discussion in the Committee of the whole before formally recommending that the Ethics 20/20 changes to Rule 4.4 be adopted.

Questions from Michigan Bar's "Innovation Worksheet"

Reasons for Recommendations:

A. Opportunities:

By amending the comments to the Michigan Rules of Professional Conduct to state that the general requirement of competent representation includes lawyers keeping abreast of the benefits and risks associated with relevant technology we make no change to the existing substantive requirement of competence, as the comments are not rule language - "[t]he comment that accompanies each rule does not expand or limit the scope of the obligations, prohibitions and counsel found in the text of the rule." *MPRC Rule 1.0(c).* Rather we use the comments in an exhortatory manner – as a "soapbox" from which we remind lawyers that the quality and competency of the members of the State Bar of Michigan includes competency in the technology they use to deliver legal services. This exhortation is needed as the use of technology in the practice of law has become ubiquitous but understanding the associated responsibility has not. This disparity creates a hidden hazard with the use of technology that the adoption of of this part of the ABA Commission on Ethics 20/20 report will illuminate.

With respect to the addition of Rule 1.6 (e), by requiring lawyers to take reasonable measures to prevent the inadvertent or unauthorized disclosure of client information generally, we protect the clients of Michigan lawyers and preserve the sacrosanct duty of confidentiality to clients. We now make explicit what is an arguable ambiguity in the existing rules, which currently focuses on the actions that may not be taken by a lawyer (knowing disclosure) and the duty a lawyer has in protecting client information from disclosure by third parties with whom he is permitted to share the information. We make clear that a lawyer must affirmatively take reasonable steps to safeguard client information. Beyond the clarification of the rules, the amendment also serves to highlight to lawyers what should be obvious to anyone using electronic storage media, but frequently is not. The care traditionally given to the safeguarding

of a client's physical papers extends to the electronic environment. The functional equivalent of "locking the file drawers overnight" extends to the need to take analogous steps to safeguard electronic information.

B. Risks (what is worst case scenario if adopted):

That otherwise competent Michigan lawyers who refuse to take steps to become educated users to technology suddenly find themselves the subject of a discipline complaint

To avoid this, we strongly encourage the SBM to create meaningful, practical and easy "how to" resources for attorneys who have neither the time nor inclination to become "tech savvy" users.

The concern that such a rule would have an adverse impact on defendants in criminal defense proceedings.

Inconsistency with Federal Rules of Civil Procedure.

B. Unknowns/Unanswered Questions:
See Section B above.

D. What Is Innovative About this Option?

This is not an innovative or "risky" step. There was little opposition to the proposed amendments in the ABA House of Delegates and seventeen jurisdictions have already adopted the rule language.

E. Implementation Strategies

The proposed amendments will require approval by the SBM Representative Assembly

before being submitted to the Michigan Supreme Court for consideration.

a. Potential supporters:

The Michigan Attorney Grievance Commission
The Michigan Attorney Discipline Board
ICLE
Other continuing legal education providers

b. Potential opponents/obstacles:

The Michigan Supreme Court
Some members of the State Bar of Michigan

c. Interested SBM entities:

The Computer Law Section
The SBM Ethics Committee

d. Other interested stakeholders:

The Attorney Grievance Commission and the Attorney Discipline Board

e. What are the possibilities to increase effectiveness through technology?

Continuing legal education programs regarding the risks and benefits of technology can be put on line for easy access.

f. How might this intersect with or impact other justice system areas/needs?

Some of organizations benefitted may be national not-for-profit entities operating in Michigan, including those which support pro bono legal services.

g. Staging:

i. Does this option need experimentation or piloting?

No.

ii. What is the recommended timetable, if any?

Immediately

Iii. What is the recommended order of steps, if any?

1). SBM Representative Assembly
2). Michigan Supreme Court

This is my dissent as to:

1. The proposals to amend MRPC to conform with the ABA 20/20 Report;
2. As to any specific "technological" competence requirement, especially as part of MRPC;
3. As to any lawyer duty to notify a sender of receipt of confidential materials, which sending might have been "inadvertent," especially as part of MRPC.

My reasons are stated in the attached.

Inadvertent Disclosure is a topic too scrambled, holding the virtual certainty that Michigan lawyers subject to the proposed mandatory duty of disclosure would be in violation of the Rules of Professional Conduct and criminal statutes in other jurisdictions.

The field of Technological Competence is too undeveloped, and too rapidly changing, to authorize mandatory quasi-criminal sanction through MRPC. In both these areas, the better approach is to provide informational and educational materials, but not requiring same through MRPC. (e.g., see the attached article from the Federal Lawyer re E-Discovery.) It also runs a substantial risk of running afoul of Federal Anti- Trust Law, and the concerns recently raised in the SCOTUS North Carolina Board of Dentistry Case.

Re the ABA 20/20 Amendments, attached are various materials re the Michigan Supreme Court ADM 2009-6, which was a "do –over" for ADM 2003- 62, which was the combined proposal for Michigan to adopt ABA 20/20. These contain the sum of over 7 years of work by State Bar of Michigan and the Michigan Supreme Court, which considered in detail the ABA Ethics 20/20 proposals, and rejected virtually all of them (including ones similar to those now proposed). Michigan is not alone in telling the ABA, "No thank you." Nothing much has changed. In short: been there, done that. Didn't work then, won't work now.

Moreover, recent and consistent experience is that MRPC is too often a source of mischief. Most Michigan Lawyers are more likely to see MRPC raised in a Malpractice Action, or in a Motion to Disqualify Counsel, than in an RFI from AGC. MRPC is not the place for "good practices" , nor to do "what would be nice." It is a quasi-criminal, strict liability disciplinary code. Every one of its provisions holds the prospect for a lawyer to lose the license to practice law, and thus to deprive the clients of the lawyer each has chosen. Amendments to MRPC should be driven only by experience as shown by substantial evidence, and a precision in drafting that gives to each lawyer ample notice of exactly how to conform one's conduct to the law. These proposals do not do that.

For further information, please see articles linked on the following page.

Please register my dissent.

John W. Allen

Sources for further reading and information:

Michigan Supreme Court (MSC) Proposed Amendments re Ethics 2000 ADM 2009-06 with comment

https://drive.google.com/open?id=0B1JmKtbU_rzwRnZNa0ZZYVJ5YXBxSFI2a2tmRWJoQmtMbFQ4

SBM Position Letter Regarding ADM 2009-06

https://drive.google.com/open?id=0B1JmKtbU_rzwckd6VEd1S3dkaWxEdTlsdV9UNGgzbzlRVFNV

John Allen Comment to ADM 2009-06

https://drive.google.com/open?id=0B1JmKtbU_rzwZElYQjQ0MU1iSTM0MDhYLTlyenVpbV9TMU9N

Approved Changes MSC re Ethics 2000 10/26/2010

https://drive.google.com/open?id=0B1JmKtbU_rzwS2hiV0UxYWtCZmRLM1JTSDlhajItYWxMZHo0

MSC Summary of Changes to MRPC re Ethics 2000

https://drive.google.com/open?id=0B1JmKtbU_rzwV1huc2prYzhQQjI2TGticFVTb2ZJNEtYV2U4

Article "The Recipient's Dilemma - Inadvertent Disclosure of Privileged Information"

https://drive.google.com/open?id=0B1JmKtbU_rzwcXUxaExrRkhwYWNiMXRZT0ZFYnM1dW5vbDFB

Article "E-discovery Ethics: Emerging Standards of Technological Competence"

https://drive.google.com/open?id=0B1JmKtbU_rzwZHZIXzF3RlJEdFQ0WnhZRmxQY0dUblowZ1d3

Order

Michigan Supreme Court
Lansing, Michigan

November 24, 2009

Marilyn Kelly,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

ADM File No. 2009-06

Proposed Amendment of Rules 1.5, 1.7, 1.8, 3.1, 3.3, 3.4, 3.5, 3.6, 5.4, 5.5, and 8.5 of the Michigan Rules of Professional Conduct, and the addition of Rules 2.4, 5.7, and 6.6

On July 2, 2004, at the request of the State Bar of Michigan, this Court published for comment proposed changes to the Michigan Rules of Professional Conduct in ADM File No. 2003-62. In large part, the proposed modifications were similar to changes that had been made by the American Bar Association in 2002 to its Model Rules of Professional Conduct. Following the period for comment, this Court held a public hearing in September 2005 concerning the published proposals. After careful consideration, the Court closed ADM File No. 2003-62 on January 22, 2009, and opened this administrative file to further consider certain proposals that had been included in ADM File No. 2003-62.

On order of the Court, this is to advise that the Court has determined to publish for comment a number of proposed modifications to the Michigan Rules of Professional Conduct. Many of the proposals are similar to those published for comment on July 2, 2004. The manner in which the current rules would be modified is shown by overstriking (deletions) and underlining (additions). With regard to proposed new Rules 2.4, 5.7, and 6.6, which have no equivalent in the current MRPCs, there is no overstriking or underlining.

Before determining whether these proposals should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposals. In some instances, alternative language is presented.

The Court welcomes the views of all. In addition, this matter will be considered at a public hearing before the Court makes a final decision. The notices and agendas for public hearings are posted on the Court's website, www.courts.michigan.gov/supremecourt.

Publication of these proposals does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposals in their present form.

Rule 1.5 Fees (Alternative A)

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee or an unreasonable amount for expenses. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) ~~When the lawyer has not regularly represented the client,~~ The scope of the representation under Rule 1.2, and the basis or rate of the fee and expenses for which the client will be responsible, must ~~shall~~ be communicated to the client~~, preferably~~ in writing~~,~~ before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate previously agreed upon. Any changes in the basis or rate of the fee or expenses must also be communicated to the client in writing.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or ~~by~~ other law. For a ~~A~~ contingent-fee agreement to be valid, it must ~~shall~~ be in writing and signed by the client, and ~~shall~~ it must state the method by which the fee is to be determined, including the percentage that will accrue to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly identify any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent-fee matter, the lawyer shall provide the client with a written statement ~~of~~ that describes the outcome of the matter and, if there is a recovery, shows the remittance to the client and the method of its determination. See also MCR 8.121 for additional requirements applicable to some contingent-fee agreements.

(d) A lawyer shall not enter into an arrangement for, charge, or collect: ~~a contingent fee in a domestic relations matter or in a criminal matter.~~

(1) any fee in a domestic-relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony, support, or property settlement; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A lawyer and a client may agree that the client will pay the lawyer a fee at the time of engagement for the sole purpose of committing the lawyer to represent the client and not as payment for services, provided that the fee is reasonable and that the agreement is in writing, is signed by the client, and clearly states that the fee will not be returned to the client at any time or under any circumstance, and that it is not payment for services to be rendered.

(f) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client is given written notice of the fee arrangement ~~advised of~~ and consents to the arrangement in writing ~~does not object to the participation of all the lawyers involved~~; and

(2) the total fee is not increased solely by reason of the provision for division of fees and is otherwise reasonable.

Nothing in this paragraph precludes payment under a separation or retirement agreement to a lawyer who formerly was with the firm.

Comment

Reasonableness of Fee and Expenses. *Paragraph (a) requires that all fees and expenses charged by lawyers be reasonable under the circumstances. The factors specified in subparagraphs (1) through (8) are not exclusive, and all factors may not be relevant in all situations. A lawyer may seek reimbursement for services performed in-house, such as copying, or for other costs incurred in-house, such as telephone expenses, either by charging a reasonable amount to which the client has agreed or by charging an amount that reflects the cost incurred by the lawyer.*

Basis or Rate of Fee. *When the lawyer has regularly represented a client, ~~they~~ the lawyer and the client ordinarily will have ~~evolved~~ reached an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to ~~the~~ fees and expenses must ~~should~~ be ~~promptly~~ established promptly, as directed by paragraph (b). ~~It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client.~~ So as to reduce the possibility of misunderstanding, the lawyer minimally must give the client a simple memorandum or a copy of the lawyer's customary fee schedule that states the general nature of the services to be provided, the basis, rate, or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation. ~~A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.~~*

A contingent fee, like any other fee, is subject to the reasonableness standard of paragraph (a). In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable. See MCR 8.121.

Paragraph (d) prohibits a lawyer from charging a client a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony, support, or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of postjudgment balances due under support, alimony, or other financial orders because such contracts do not implicate the same policy concerns involved in securing a divorce or in the amount of alimony, support, or property settlement.

Paragraph (e) permits a lawyer and a client to agree that the client will pay the lawyer a reasonable fee at the time of engagement for the sole purpose of committing the lawyer to represent the client and not as payment for services. In order to be valid, such an agreement must be in writing and signed by the client, and clearly state that the fee will not be returned to the client at any time or under any circumstance, and that it is not payment for services to be rendered.

Terms of Payment. *A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(~~j~~i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client ~~special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property~~.*

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. ~~When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may~~

~~*impose limitations on contingent fees, such as a ceiling on the percentage. See MCR 8.121*~~.

Division of Fee. *A division of fee under paragraph (f) is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.* ~~*Paragraph (e) permits the lawyers to divide a fee on agreement between the participating lawyers if the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive.*~~

Paragraph (f) does not prohibit or regulate a division of fee to be received in the future for work done when lawyers previously were associated in a law firm.

Disputes over Fees. *If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator,* ~~*of*~~ *a class, or* ~~*of*~~ *a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.*

Staff Comment: Alternative A is similar to the proposed revision of MRPC 1.5 that was published for comment on July 2, 2004, in ADM File No. 2003-62. It differs from the current rule in several ways (indicated by overstriking and underlining). For example, paragraph (b) would require a written communication regarding fees and expenses, and paragraphs (c) and (d) contain more specific requirements regarding contingent fees, including the requirement that all contingency fee agreements be signed by the client. Under paragraph (e), a lawyer and a client could agree to payment of a nonrefundable fee that is fully earned when received and is for the sole purpose of committing the lawyer to represent the client, even though the lawyer may perform no additional work. Proposed paragraph (f) would require that the client be given written notice of any fee-sharing arrangement agreed upon by attorneys from different firms, that the client consent in writing, and that the total fee not be increased solely because of the division of fees.

Rule 1.5 Fees (Alternative B: Attorney Grievance Commission Proposal)

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee

is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) Definitions:

(1) “Advance fee” payments are payments for contemplated services that are made to a lawyer prior to the lawyer having earned the fee.

(2) “Advance expense” payments are payments for contemplated expenses in connection with the lawyer’s services.

(3) A “general retainer” is a fee a lawyer charges for agreeing to provide legal services on an as-needed basis during a specified time period. Such a fee is not payment for the actual performance of services, but only to engage the attorney’s availability. A lawyer and client may agree that a general retainer is earned by the lawyer when paid by the client. Written notice must be promptly provided to the client that the general retainer is paid solely to commit the lawyer to represent the client and not as a fee to be earned by future services.

(4) A “flat fee” is one that embraces all services that a lawyer is to perform, whether the work is to be relatively simple or complex.

(5) The definitions of "advance fee," "advance expense," "general retainer," and "flat fee" guide the application of the later provisions of this rule, even if different terminology is employed by lawyer or client.

~~(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.~~

(c) Agreements for Legal Services.

(1) The scope of the representation shall be agreed upon with the client pursuant to Rule 1.2(a).

(2) The basis or rate of the fee for which the client will be responsible must be disclosed and agreed upon with the client at the beginning of the representation and confirmed in a writing to the client within a reasonable time, except when the lawyer will charge a regularly represented client on the same basis or rate, or the fee is less than $1,000.

(3) Any changes in the basis or rate of the fee or expenses must be agreed upon and confirmed in the manner described in paragraph (2) prior to the change being effected.

(4) A fee agreement shall not give sole discretion to an attorney to enhance a fee.

(d) Deposits and Withdrawals of Fees.

(1) *Deposit and withdrawal.* A lawyer must deposit advanced costs, fees and retainers, other than a general retainer, into an IOLTA or non-IOLTA client trust account and may withdraw such payments only as the fee is earned or the expense is incurred. See Rule 1.15 for further requirements concerning trust accounts.

(2) *Notification upon withdrawal of fee or expense.* A lawyer accepting advance fee or expense payments must notify the client in writing of the time, amount, and purpose of any withdrawal of the fee or expense, together with a complete accounting. The lawyer must transmit such notice no later than the date of the withdrawal.

(3) *Withdrawal of flat fees.* A lawyer and client may agree as to the timing, manner, and proportion of fees the lawyer may withdraw from an advance fee payment of a flat fee. The agreement, however, must reasonably protect the client's right to a refund of unearned fees if the lawyer fails to complete the services or the client discharges the lawyer. In no event may the lawyer withdraw unearned fees. See Rule 1.15(d) for further requirements when there is a dispute over disbursement of fees.

(4) *When refundable.* Notwithstanding any contrary agreement between the lawyer and client, advanced fees, including flat fees, and expense payments are refundable to the client if the fee is not earned either in whole or in part, or the expense is not incurred.

(5) *Unearned fees.* A lawyer may not withdraw unearned fees from the IOLTA or non-IOLTA client trust account.

(6) *General retainers*. A general retainer fee is earned upon receipt. A general retainer fee shall not be deposited into an IOLTA or non-IOLTA trust account, but is considered the property of the lawyer or law firm. If a general retainer fee is found to be clearly excessive, Rule 1.15(d) is not violated unless the lawyer or law firm does not refund the excess portion of the fee by the effective date of an applicable order of restitution.

(e) *General provisions:*

(1) A fee agreement may include a charge for interest on the unpaid balance of fees where the parties stipulate in writing for the payment of interest not exceeding 7% per annum. See, also, MCL 438.31 for additional requirements applicable to charging interest.

(2) ~~(c)~~ A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph ~~(d)~~ (e)(3) or by other law. A contingent-fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses are to be deducted before the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent-fee matter, the lawyer shall provide the client with a written statement of the outcome of the matter and, if there is a recovery, show the remittance to the client and the

method of its determination. See also MCR 8.121 for additional requirements applicable to some contingent-fee agreements.

(3) ~~(d)~~ A lawyer shall not enter into an arrangement for, charge, or collect ~~a contingent fee in a domestic relations matter or in a criminal matter.~~:

(A) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce, or upon the amount of alimony, support or property settlement in lieu thereof; or,

(B) a contingent fee for representing a defendant in a criminal case.

(4) ~~(e)~~ A division of a fee between lawyers who are not in the same firm may be made only if:

(A)~~(1)~~ the ~~client is advised of and does not object to~~ lawyer who will be representing the client advises the client of the participation of all the lawyers involved and the client provides informed consent in writing; and

(B) ~~(2)~~ the total fee is reasonable.

Comment from Attorney Grievance Commission about its proposal

The proposed changes to MRPC 1.5(b) are definitional and are included to provide structure to subsequent rule provisions and apply even where other terminology is employed between a lawyer and client. Definitions are included for advanced fees and expenses, a general retainer, and flat fees. A lawyer would be able to charge an engagement fee, with a client's informed, written consent. The writing must contain a notice that the engagement fee is paid solely to have the lawyer represent the client and not to be charged as a fee for future services.

The proposed changes to MRPC 1.5(c) clarify that the scope of the lawyer and client representation is not to be set solely by the lawyer but agreed upon with the client in accordance with MRPC 1.2(a). Additionally, the timing of the lawyer's duty to communicate the lawyer's fees to a client is made clear. Where a lawyer has not previously represented a client, the lawyer has the duty to communicate the basis or rate of his fees within a reasonable time from the outset of the representation, and any subsequent changes to the fee rate, and the client must agree. Fee agreements over $1,000 must be in writing.

MRPC 1.5(c)(4) is designed to eliminate the practice of lawyers awarding themselves discretionary "bonuses." The practice of certain lawyers in awarding themselves a "bonus" creates confusion to clients as to the precise amount of fees that the client may expect to pay. The practice appears to have gained ground of late, particularly with "high end" divorce practitioners. See Olson v Olson, 256 Mich App 619 (2003). Essentially, the practice of divorce lawyers awarding themselves bonuses makes the fee charged a contingent fee that is prohibited under these rules as against public interest.

Proposed MRPC 1.5(d) provides guidance on fee handling. MRPC (d)(1) requires advanced fees and costs, other than a general retainer, to be placed into a trust account where it would be retained until earned. Fees cannot be withdrawn from the account until the lawyer has sent a fee statement to the client. See, generally, MRPC 1.15(b)(3). Under MRPC 1.5(d)(4), fees described as "flat" or "non-refundable" still must be

earned through the performance of service. This is in accord with MRPC 1.16(d), which provides that unearned fees shall be returned to a client upon the termination of a lawyer's representation.

Proposed MRPC 1.5(e) contains general fee provisions. 1.5(e) allows a lawyer to charge the statutory 7% interest rate where the parties stipulate in writing. On numerous occasions, lawyers have come to the attention of the Attorney Grievance Commission where the lawyer has charged a client a usurious rate of interest. The changes to the contingent fee rule are in line with other court rules, disciplinary rules and case law. A contingent fee must be in writing and signed by a client. Where there is a recovery, costs and expenses shall be deducted before the fee is calculated, in accord with case law and MCR 8.121(C).

The changes to MRPC 1.5(e)(3) subdivide the prohibitions against charging contingent fees in criminal and divorce matters. They further clarify that a lawyer may charge a contingent fee to collect on outstanding divorce judgments or settled alimony and support. MRPC 1.5(4) retains the ability of lawyers to collect a referral fee, but clarifies the duty to have the informed consent of the client, confirmed in writing.

Staff Comment: Alternative B is a new revision of MRPC 1.5 that has been proposed by the Attorney Grievance Commission. Changes in the existing rule are indicated by overstriking and underlining. The accompanying comment from the commission explains the proposed changes.

Rule 1.7 Conflict of Interest: General Rules Involving Current Clients

(a) Except as provided in paragraph (2), a ~~A~~ lawyer shall not represent a client if the representation involves a conflict of interest, which exists if ~~of that client will be directly adverse to another client, unless~~:

(1) the lawyer reasonably believes that the representation of one client will ~~not~~ be directly adverse~~ly affect the relationship with the~~ to the lawyer's representation of another client; ~~and~~ or

(2) there is a significant risk that ~~each client consents after consultation. (b) A lawyer shall not represent a client if~~ the representation of ~~that~~ one or more clients will ~~may~~ be materially limited by the lawyer's responsibilities to another client, a former client, or ~~to~~ a third person, or by a personal interest of the lawyer. ~~the lawyer's own interests, unless:~~

(b) Notwithstanding the existence of a conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; ~~the representation will not be adversely affected; and~~

(2) the representation is not prohibited by law; ~~the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation~~

~~shall include explanation of the implications of the common representation and the advantages and risks involved.~~

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding before a tribunal; and

(4) each affected client consents in writing after the lawyer discloses the material risks presented by the conflict of interest and explains any reasonably available alternatives, or the lawyer promptly affirms a client's oral consent in a writing sent to that client.

Comment

Loyalty to a Client. *Loyalty and independent judgment are ~~is an~~ essential element~~s~~ of a ~~in the~~ lawyer's relationship to a client. ~~An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The~~ A lawyer should adopt reasonable procedures~~, appropriate for the size and type of firm and practice,~~ to determine ~~in both litigation and nonlitigation matters~~ the parties and issues involved in a matter and ~~to determine~~ whether there are actual or potential conflicts of interest. A conflict of interest may arise from the lawyer's responsibilities to another client, a former client, or a third person, or from the lawyer's own interests.*

If a lawyer determines that there is a conflict of interest ~~such a conflict arises after representation has been undertaken~~, the lawyer must ~~should~~ decline the representation or withdraw from the representation, unless each affected client consents to the representation in writing, following full disclosure of the conflict by the lawyer in a manner that can be reasonably understood by the client, or the lawyer promptly affirms the client's oral consent in a writing sent to the client. ~~See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to Rule 1.3 and Scope, ante.~~

Developments such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client who is represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option of withdrawing from one of the representations in order to avoid the conflict. Where necessary, the lawyer must seek court approval and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9.

Identifying Directly Adverse Conflicts of Interest. ~~*As a general proposition, l*~~*Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's consent. ~~Paragraph (a) expresses that general rule.~~ Thus, a lawyer ordinarily may not act as an advocate in one matter against a ~~person~~ client the lawyer represents in some other matter, even if ~~it is~~ the matters are wholly unrelated.*

Otherwise that client is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to provide effective representation. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue the client's case less effectively out of deference to the other client. A similar conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client. On the other hand, simultaneous representation in unrelated matters of clients whose interests are ~~only generally~~ not directly adverse, such as competing economic enterprises, does not ordinarily require the consent of the respective clients. Where the lawyer and potential client have addressed these issues before establishing a client-lawyer relationship by appropriate agreement on future conflict, as discussed below, these concerns are minimized.

Directly adverse conflicts also can arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer in an unrelated matter, the lawyer could not undertake the representation without the consent of each client.

Identifying Conflicts of Interest; Material Limitation. *Even if there is no directly adverse conflict, a conflict of interest still may exist if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for a client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, if a lawyer represents several individuals seeking to form a joint venture, the lawyer's ability to recommend or advocate all possible positions for each individual client is likely to be materially limited by the obligation of loyalty to all clients. ~~Paragraph (a) applies only when the representation of one client would be directly adverse to the other.~~*

~~Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests.~~ The conflict in effect forecloses alternatives that would otherwise be available to ~~the~~ each client. ~~Paragraph (b) addresses such situations. A possible~~ The mere possibility of a conflict does not itself preclude ~~the~~ representation or require disclosure and consent. The critical questions are the likelihood that a conflict will ~~eventuate~~ arise and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. ~~Consideration should be given to whether the client wishes to accommodate the other interest involved.~~

Lawyer's Responsibilities to Former Clients and Other Third Persons*. In addition to conflicts involving current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor, or corporate director.*

~~Consultation and Consent~~*. ~~A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on~~*

~~*representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.*~~

Conflicts Arising from Lawyer's Personal Interests. ~~*The*~~ *A lawyer's own interests should not be permitted to have an adverse effect on the lawyer's representation of a client.* ~~*For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5.*~~ *If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. For example, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. Likewise, a* ~~*A*~~ *lawyer may not allow related business interests to affect the representation of a client, for example, by referring the client*~~*s*~~ *to an enterprise in which the lawyer has an undisclosed interest.*

When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyers' family relationships will interfere with their loyalty to their clients and their independent professional judgment. In such a circumstance, each client is entitled to know of the existence and implications of the relationship between the lawyers before representation is undertaken. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated.

~~***Conflicts in Litigation.*** *Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.*~~

~~*Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are*~~

~~*circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.*~~

Interest of Person Paying for a Lawyer's Service. *A lawyer may be paid from a source other than the client if the client* *consents after being* ~~*is*~~ *informed of that fact* ~~*and consents*~~ *and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f).* *If payment from another source would present a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person making the payment or by the lawyer's responsibilities to a payer who is also a client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation.* *For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence.* ~~*So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.*~~

Prohibited Representations. *Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), the existence of some conflicts precludes a lawyer from undertaking or continuing to represent a particular client. When a lawyer is representing more than one client, the question of whether consent can be given notwithstanding a conflict must be resolved as to each client. The critical question is whether the interests of the clients will be adequately protected if the clients are permitted to consent to the representation.*

Under some circumstances, it may be impossible to make the disclosure necessary to obtain a client's consent to representation notwithstanding a conflict. For example, when a lawyer represents different clients in related matters and one client refuses to allow the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In such a circumstance, each party may have to obtain separate representation.

Revoking Consent. *A client's consent to an existing or future conflict constitutes consent both to the lawyer's representation of the client and to the lawyer's representation of other existing or future clients. With regard to the former, the client is free to revoke the consent and terminate a lawyer's representation at any time. The question of whether the client may revoke the consent as to other existing or future clients*

is another matter. The answer is to be determined under contract law if the lawyer has relied upon the client's consent when undertaking or continuing representation of the client, and the consent is a material term of the representation. In other circumstances, whether the lawyer is precluded from continuing to represent other clients depends on the circumstances, including the nature of the conflict; the reason the client revoked consent, e.g., because of a material change in circumstances; the reasonable expectations of the other existing or future clients; and the likelihood that the other clients or the lawyer would suffer a material detriment.

Consent to Future Conflict. *The effectiveness of a client's consent to representation notwithstanding a conflict that might arise in the future generally depends on the extent to which the client understands the material risks and benefits. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences, the greater the likelihood that the client will have the necessary understanding. For example, if the client consents to a particular type of conflict with which the client is familiar, then the consent ordinarily will be effective with regard to that type of conflict. On the other hand, if the consent is general and open-ended and is given by an unsophisticated client without the advice of independent counsel, then it is unlikely that the client understood the material risks involved and the consent may not be effective. Consent to representation notwithstanding a conflict that might arise in the future will not be effective if the circumstances that actually materialize would preclude representation under paragraph (b).*

Conflicts in Litigation. *A lawyer may not represent opposing parties in the same litigation. Even when the simultaneous representation of parties is not precluded, conflicts may arise. For example, there may be substantial discrepancy in the parties' testimony, the parties' positions may be incompatible in relation to an opposing party, or there may be substantially different possibilities of settlement of claims and liabilities. The common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met. The potential for a conflict of interest in a criminal case is so grave, however, that a lawyer ordinarily should decline to represent more than one codefendant.*

A lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest does exist, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case, e.g., when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. The factors to be considered in determining whether clients need to be advised of the risks include (a) where the cases are pending, (b) whether the issue is substantive or procedural, (c) the temporal relationship between the matters, (d) the significance of the issue to the immediate and long-term interests of the clients, and (e) the clients' reasonable expectations in retaining the lawyer. If there is a significant risk of material limitation,

then the lawyer must decline one of the representations or withdraw from one or both matters unless the clients consent to representation notwithstanding the conflict.

When a lawyer represents or seeks to prosecute or defend a class-action lawsuit, unnamed members of the class ordinarily are not considered to be the lawyer's clients under paragraph (a)(1) of this rule. The lawyer thus does not need to obtain the consent of such a person before representing a client who is suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class-action lawsuit does not need to obtain the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

~~Other~~ Nonlitigation Conflicts ~~Situations~~. *Conflicts of interest may exist in contexts other than litigation ~~sometimes may be difficult to assess~~. Relevant factors to be considered in determining whether there is significant potential for adverse effect or material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict ~~if it does arise~~. The question is often one of proximity and degree.*

~~For example, a lawyer may not represent multiple parties in a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.~~

Conflict questions may ~~also~~ arise in estate planning and estate administration. For example, a ~~A~~ lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction ~~a question of law~~. Under one view, the client is the fiduciary; under another view, the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, ~~T~~the lawyer should make clear the lawyer's relationship to the parties involved.

Whether a client may consent to representation notwithstanding a conflict depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible if the clients are generally aligned in interest, even though there are some differences among them. Thus a lawyer may help to organize a business in which two or more clients are entrepreneurs, work out the financial reorganization of an enterprise in which two or more clients have an interest, or arrange a property distribution in connection with the settlement of an estate.

Special Considerations in Common Representation. *In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because of potentially adverse interests, the result can be additional cost, embarrassment, and recrimination. In some situations, the risk of failure is so great that multiple representation is impossible. For example, a lawyer cannot undertake common representation of clients if contentious litigation or negotiations between them are imminent or contemplated. Moreover, representation of multiple*

clients is improper when it is unlikely that the lawyer can maintain impartiality. Generally, if the relationship between the parties already is antagonistic, it is unlikely that the clients' interests can be adequately served by common representation. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

An important factor in determining whether common representation is appropriate is the effect on the attorney-client privilege and client-lawyer confidentiality. With regard to the attorney-client privilege, the prevailing rule is that the privilege does not attach as between commonly represented clients, and the clients should be so advised. With regard to client-lawyer confidentiality, continued common representation almost certainly will be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. Thus, at the outset of the common representation, the lawyer should advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the common representation if the clients agree, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and, with the consent of both clients, agree to keep that information confidential.

Organizational Clients. *A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent a constituent or affiliated organization such as a parent or a subsidiary. Thus the lawyer is not precluded from representing another client in an unrelated matter, even though that client's position is adverse to an affiliate of the organizational client, unless (a) the circumstances are such that the affiliate should be considered a client of the lawyer, (b) there is an understanding between the lawyer and the organizational client that the lawyer will avoid representing another client whose position is adverse to the client's affiliates, or (c) the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.*

A lawyer ~~for~~ who represents a corporation or other organization and who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual roles will compromise the lawyer's independent~~ce of~~ professional judgment, the lawyer should not serve as a director or should not act as the corporation's lawyer if a conflict of interest arises. The lawyer should advise the other members of the board that some matters discussed at board meetings while the lawyer is present in the capacity of

director might not be protected by the attorney-client privilege, and that the lawyer might not be able to participate as a director or might not be able to represent the corporation in certain matters because of a conflict of interest.

~~***Conflict Charged by an Opposing Party.*** *Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. See MCR 6.101(C)(4). Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope, ante.*~~

Staff Comment: The proposed changes in current MRPC 1.7 are similar in many respects to the version of MRPC 1.7 that was published for comment on July 2, 2004, in ADM File No. 2003-62. The additions to the current rule and the expanded commentary (indicated by overstriking and underlining) are intended to provide additional guidance to lawyers and to make the conflict-of-interest doctrine less difficult to understand and apply with regard to current clients. For example, proposed paragraph (b) contains more specific requirements regarding the circumstances in which a lawyer may represent a client despite the existence of a conflict of interest, including the requirement of written consent.

Rule 1.8 Conflict of Interest: Specific Rules Involving Current Clients ~~Prohibited Transactions~~

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed to the client ~~and transmitted~~ in writing ~~to the client~~ in a manner that can be reasonably understood by the client;

(2) the client is advised in writing that it is appropriate to seek the advice of independent legal counsel concerning the matter and is given a reasonable opportunity to seek ~~the~~ such advice ~~of independent counsel in the transaction~~; and

(3) the client consents in writing ~~thereto~~ to the essential terms of the transaction and the lawyer's role in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents in writing ~~after consultation~~, except as permitted or required by these ~~R~~rules ~~1.6 or Rule 3.3~~.

(c) A lawyer shall not solicit a substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer ~~as parent, child, sibling, or spouse any~~ a substantial gift, ~~from the client,~~

~~including a testamentary gift, except where the client is related to the donee~~ unless the lawyer or other intended recipient is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other person with whom the lawyer or client maintains a close familial relationship.

(d) ~~Prior to the conclusion of~~ Before concluding the representation of a client, a lawyer shall not enter into ~~make~~ or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which ~~shall ultimately be the responsibility of the client~~ may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents in writing ~~after consultation~~;

(2) there is no interference with the lawyer's independen~~tce of~~ professional judgment or with the client-lawyer relationship; and

(3) information relating to the representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or, in a criminal case, an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents in writing after ~~consultation, including~~ the lawyer disclos~~ure~~s ~~of~~ the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) ~~make~~ enter into an agreement prospectively limiting the lawyer's liability to a client for malpractice unless ~~permitted by law and~~ the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless ~~without first advising~~ that person first is advised in writing that it is appropriate to seek the advice of independent legal counsel ~~representation is appropriate in connection~~ concerning the matter and is given a reasonable opportunity to seek such advice ~~therewith~~.

(i) ~~A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.~~

~~(j)~~ A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation that the lawyer is conducting for a client, except that the lawyer may~~:~~ ~~(1)~~ acquire a lien authorized ~~granted~~ by law to secure the lawyer's fee or expenses~~,~~; and

~~(2)~~ contract with a client for a reasonable contingent fee in a civil case, as permitted by Rule 1.5 and MCR 8.121.

(j) While lawyers are associated in a firm, a prohibition in this rule that applies to any of them applies to all of them.

Comment

Business Transactions Between Client and Lawyer. *~~As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment.~~*

A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property, or financial transaction with a client. The requirements of paragraph (a) apply even when the transaction in question is not closely related to the subject matter of the representation, e.g., when a lawyer drafting a will learns that the client needs money for unrelated expenses and offers the client a loan. The rule also applies to lawyers engaged in the sale of goods or services related to the practice of law, such as title insurance and investment services, and to lawyers who wish to purchase property from estates they represent. The rule does not apply, however, to ordinary fee arrangements between a client and a lawyer, although the rule requirements do pertain if a lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. Neither does the rule ~~Paragraph (a) does not, however,~~ apply to standard commercial transactions between ~~the~~ a lawyer and ~~the~~ a client for products or services that the client generally markets to others, ~~for example,~~ such as banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction or when the lawyer's financial interest in the transaction otherwise poses a significant risk that the representation of the client will be materially limited. In such a circumstance, the lawyer must comply not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that rule, the lawyer must disclose the risks associated with the lawyer's dual role of legal adviser and participant in the transaction, for example, the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

If the client is represented by independent counsel in the transaction, the requirement of full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was represented by independent counsel is relevant in determining whether the agreement was fair and reasonable to the client.

Use of Information Related to Representation. *A lawyer violates the duty of loyalty by using information relating to the representation of a client to the disadvantage of the client. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or recommend that another client make such a purchase. A lawyer does not violate the duty of loyalty, however, if the lawyer uses the information but not to the disadvantage of the client. For example, a lawyer who learns of a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients.*

Gifts to Lawyers. *A lawyer may accept a gift from a client if the transaction meets general standards of fairness. For example, a simple gift ~~such as a present given~~ presented at a holiday or as a token of appreciation is permitted. If the gift is substantial, however, and effectuation of ~~a substantial~~ the gift requires preparing a legal instrument such as a will or conveyance, ~~however,~~ the client should have the detached advice that another lawyer can provide. The sole ~~Paragraph (c) recognizes an~~ exception to this rule is ~~where~~ if the client is a relative of the donee ~~or the gift is not substantial~~.*

Literary Rights. *An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i) ~~(j)~~ of this rule.*

Financial Assistance. *Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses. The risk is that clients would be encouraged to pursue lawsuits that they might otherwise not pursue and that such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant precluding a lawyer from lending a client court costs and litigation expenses, however, including expenses related to medical examinations and the costs of obtaining and presenting evidence. Such costs and expenses are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, lawyers should be permitted to pay the court costs and litigation expenses of indigent clients regardless of whether the money will be repaid.*

Person Paying for a Lawyer's Services. ~~*Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7*~~

~~*concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.*~~ *Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company), or a co-client (such as a corporation sued along with one or more of its employees). Third-party payers may have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing. Accordingly, a lawyer is prohibited from accepting or continuing such representation unless the client consents and the lawyer determines that the lawyer's independent professional judgment will not be compromised. See also Rule 5.4(c), which prohibits interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another, and Rule 1.6 , which concerns confidentiality.*

Aggregate Settlements. *Before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement or plea bargain, including what the other clients will receive or pay if the settlement or plea offer is accepted. Lawyers representing a class of plaintiffs or defendants must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.*

Limiting Liability and Settling Malpractice Claims. ~~*Paragraph (h) is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.*~~ *Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is represented by independent counsel because such agreements are likely to undermine competent and diligent representation. A lawyer is not prohibited from entering into an agreement with a client to arbitrate legal malpractice claims, however, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor is a lawyer prohibited from entering into an agreement to settle a claim or a potential claim for malpractice, although the lawyer must advise the client that it would be appropriate to seek the advice of independent counsel regarding such an agreement and give the client a reasonable opportunity to obtain such advice.*

~~***Family Relationships Between Lawyers.*** *Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated.*~~

~~***Acquisition of***~~ ***Acquiring Proprietary Interest in Litigation.*** *Paragraph (~~j~~i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation.* ~~*This*~~ *The general rule~~, which~~ has its basis in common-law champerty and maintenance~~,~~ and is designed to avoid giving the lawyer too great an interest in the representation. There also is concern that it is difficult for a client to discharge a lawyer who acquires an ownership interest in the subject of the representation.* ~~*is subject to s*~~*Specific exceptions to the general rule have developed in decisional law and are*

continued in these rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e).

Client-Lawyer Sexual Relationships ~~with Clients~~. *After careful study, the Supreme Court declined in 1998 to adopt a proposal to amend Rule 1.8 to limit sexual relationships between lawyers and clients. The Michigan Rules of Professional Conduct adequately prohibit representation that lacks competence or diligence, or that is shadowed by a conflict of interest. With regard to sexual behavior, the Michigan Court Rules provide that a lawyer may be disciplined for "conduct that is contrary to justice, ethics, honesty, or good morals." MCR 9.104(3). Further, the Legislature has enacted criminal penalties for certain types of sexual misconduct. In this regard, it should be emphasized that a lawyer bears a fiduciary responsibility toward the client. A lawyer who has a conflict of interest, whose actions interfere with effective representation, who takes advantage of a client's vulnerability, or whose behavior is immoral risks severe sanctions under the existing Michigan Court Rules and Michigan Rules of Professional Conduct.*

Staff Comment: Proposed MRPC 1.8 is a similar but shorter version of the proposal that was published for comment on July 2, 2004, in ADM File No. 2003-62. The proposed rule is substantially similar to current MRPC 1.8, although the title has been changed and the accompanying commentary has been expanded considerably. In addition, proposed paragraph (a)(2) would require that a client be advised in writing of the desirability of seeking the advice of independent legal counsel in a transaction, and paragraph (j) clarifies that a prohibition that applies to one lawyer in a firm applies to all lawyers in the firm.

Rule 2.4 Lawyer Serving as Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral must inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer must explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as

third-party neutrals. A third-party neutral is a person, such as a mediator, an arbitrator, a conciliator, or an evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, an evaluator, or a decision maker depends on the particular process that is selected by the parties or mandated by a court.

The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals also may be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association, or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution.

Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

Lawyers who represent clients in alternative dispute resolution are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration, the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Staff Comment: There is no equivalent to proposed MRPC 2.4 in the current Michigan Rules of Professional Conduct. The proposal is virtually identical to the version that was published for comment on July 2, 2004, in ADM File No. 2003-62. The proposed rule is designed to help parties involved in alternative dispute resolution to better understand the role of a lawyer serving as a third-party neutral.

Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous. A lawyer may offer a good-faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may so defend the proceeding as to require that every element of the case be established.

Comment

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also has a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good-faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the ~~client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person. Likewise, the action is frivolous if the~~ lawyer is unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification, or reversal of existing law.

Staff Comment: Proposed MRPC 3.1 is similar to the proposed revision that was published for comment on July 2, 2004, in ADM File No. 2003-62. The proposal makes no changes in the current rule, but modifies the accompanying commentary to clarify that a lawyer is not responsible for a client's subjective motivation.

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

~~(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;~~

(~~3~~2) fail to disclose to a tribunal controlling legal authority ~~in the jurisdiction~~ known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(~~4~~3) offer evidence that the lawyer knows to be false.

If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(b) If a lawyer knows that the lawyer's client or other person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to an adjudicative proceeding involving the client, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(~~b~~c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

~~(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.~~

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts that are known to the lawyer ~~and~~ that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

This rule governs the conduct of a lawyer who is representing a client in a tribunal. It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, subrule (a) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

As officers of the court, lawyers have special duties to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. ~~The advocate's task is to present the client's case with persuasive force.~~ Performance of that duty while maintaining confidences of the client is qualified, however, by the advocate's duty of candor to the tribunal. ~~However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.~~ Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer. *An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, because litigation documents ordinarily present assertions by the client or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the*

basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(c), see the comment to that rule. See also the comment to Rule 8.4(b).

~~Misleading~~ Legal Argument. *Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(~~3~~2), an advocate has a duty to disclose directly controlling adverse authority ~~in the jurisdiction~~ ~~which~~ that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.*

~~***False Evidence.*** *When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.~~

~~*When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.*~~

~~*Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.*~~

Offering Evidence. *Paragraph (a)(3) requires that a lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this rule if the lawyer offers the evidence for the purpose of establishing its falsity.*

If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness' testimony will be false, the lawyer may call the witness to testify but may not

elicit or otherwise permit the witness to present the testimony that the lawyer knows is false. A lawyer's knowledge that evidence is false can be inferred from the circumstances. Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

Perjury by a Criminal Defendant. *Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.*

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence, but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution, but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify, and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(c).

Remedial Measures. *If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the lawyer's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal,*

and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the lawyer ~~advocate should seek to withdraw if that will remedy the situation~~ must take further remedial action. If withdrawal ~~will not remedy the situation or is impossible,~~ from the representation is not permitted or will not remedy the effect of the false evidence, the ~~advocate should~~ lawyer must make such disclosure to the ~~court~~ tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the ~~court~~ tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing. ~~If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, the second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.~~

The disclosure of a client's false testimony can result in grave consequences to the client, including a sense of betrayal, the loss of the case, or perhaps a prosecution for perjury. However, the alternative is that the lawyer aids in the deception of the court, thereby subverting the truth-finding process that the adversarial system is designed to implement. See Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer must remediate the disclosure of false evidence, the client could simply reject the lawyer's counsel to reveal the false evidence and require that the lawyer remain silent. Thus, the client could insist that the lawyer assist in perpetrating a fraud on the court.

~~Constitutional Requirements.~~ *~~The general rule that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. The obligation of the advocate under these rules is subordinate to such a constitutional requirement.~~*

Preserving Integrity of Adjudicative Process. *Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating, or otherwise unlawfully communicating with a witness, juror, court official, or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence, or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure, if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding. See Rule 3.4.*

Duration of Obligation. *A practical time limit on the obligation to rectify the presentation of false evidence or false statements of law and fact must be established.*

The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

~~***Refusing to Offer Proof Believed to Be False***. *Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may be denied this authority by constitutional requirements governing the right to counsel.*~~

Ex Parte Proceedings. *Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts that are known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.*

Withdrawal. *Normally, a lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this rule or as otherwise permitted by Rule 1.6.*

Staff Comment: The proposed changes in MRPC 3.3 are similar to those in the proposal that was published for comment on July 2, 2004, in ADM File No. 2003-62. The manner in which the current rule would be modified (indicated by overstriking and underlining) includes specifying in paragraph (a)(1) that a lawyer shall not knowingly "fail to correct a false statement of material fact or law," and substituting proposed paragraph (b) for current paragraph (a)(2), which deals with a disclosure that is "necessary to avoid assisting a criminal or fraudulent act by the client."

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party;

(e) during trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party, unless:

(1) the person is ~~a relative or~~ an employee or other agent of a client for the purposes of MRE 801(d)(2)(D); and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improper influence of witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. Other law makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

With regard to paragraph (b), it is not improper to pay a witness' expenses or to compensate an expert witness on terms permitted by law. It is, however, improper to pay an occurrence witness any fee for testifying beyond that authorized by law, and it is improper to pay an expert witness a contingent fee.

~~*Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, because the employees may identify their interests with those of the client. See also Rules 4.2 and 4.3.*~~

Staff Comment: Proposed MRPC 3.4 and the accompanying commentary are nearly identical to the current Michigan rule and to the proposed revision that was published for comment on July 2, 2004, in ADM File No. 2003-62. One difference is the clarification in proposed paragraph (f)(1) that a lawyer may not ask someone other than a client to refrain from voluntarily giving relevant information to another party unless the person is "an employee or other agent of a client for the purposes of MRE 801(d)(2)(D)."

Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;

(b) communicate ex parte with such a person concerning a pending matter, ~~except as permitted by law; or~~ unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication constitutes misrepresentation, coercion, duress or harassment; or

~~(c)~~(d) engage in undignified or discourteous conduct toward the tribunal.

Comment

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Michigan Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters, or jurors, unless authorized to do so by law or court order.

A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so, unless the communication is prohibited by law or a court order, but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from undignified or discourteous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge, but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause,

protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Staff Comment: Proposed MRPC 3.5 is similar to the proposed revision that was published for comment on July 2, 2004, in ADM File No. 2003-62. It differs from the current rule primarily because of the addition of paragraph (c), which addresses the issue of lawyers contacting jurors and prospective jurors after the jury is discharged.

Rule 3.6 Trial Publicity (Alternative A)

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that ~~a reasonable person would expect to~~ the lawyer knows or reasonably should know will be disseminated by means of public communication ~~if the lawyer knows or reasonably should know that it~~ and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer who is participating or has participated in the investigation or litigation of a matter may state without elaboration:

(1) the nature of the claim, offense, or defense involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, also:

(i) the identity, residence, occupation, and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party ~~prior to~~ before trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of

forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

*~~No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. Moreover, the confidentiality provisions of Rule 1.6 may prevent the disclosure of information which might otherwise be included in an extrajudicial statement. In addition, s~~*S*pecial rules of confidentiality may validly govern ~~proceedings in~~ juvenile, domestic relations, and mental disability proceedings, ~~and perhaps~~ in addition to other types of litigation. Rule 3.4(c) requires compliance with such rules.*

~~For guidance in this difficult area, one may consider the following language adapted from the American Bar Association's Model Rule 3.6:~~

Rule 3.6 sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been, involved in the investigation or litigation of a case, and their associates.

~~(a)~~ A statement referred to in Rule 3.6 ordinarily is likely to have ~~such a prejudicial effect~~ a substantial likelihood of materially prejudicing an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation, or criminal record of a party, of a suspect in a criminal investigation or of a witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, ~~or~~ the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) 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; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

~~*(b) Notwithstanding Rule 3.6 and paragraphs (a) (1-5) of this portion of the comment, a lawyer involved in the investigation or litigation of a matter may state without elaboration:*~~

~~*(1) the general nature of the claim or defense;*~~

~~*(2) the information contained in a public record;*~~

~~*(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;*~~

~~*(4) the scheduling or result of any step in litigation;*~~

~~*(5) a request for assistance in obtaining evidence and information necessary thereto;*~~

~~*(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and*~~

~~*(7) in a criminal case:*~~

~~*(A) the identity, residence, occupation and family status of the accused;*~~

~~*(B) if the accused has not been apprehended, information necessary to aid in apprehension of that person;*~~

~~*(C) the fact, time and place of arrest; and*~~

~~*(D) the identity of investigating and arresting officers or agencies and the length of the investigation.*~~

See Rule 3.8(e) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Staff Comment: Alternative A is a similar but abbreviated version of the proposed revision of MRPC 3.6 that was published for comment on July 2, 2004, in ADM File No. 2003-62. It expands the current rule considerably by moving substantial portions of the current commentary into the rule itself. See, for example, proposed paragraph (b). Paragraph (a) is substantially the same as the current rule, except that the "reasonable lawyer" standard is substituted for the "reasonable person" standard.

Rule 3.6 Trial Publicity (Alternative B: State Bar of Michigan Proposal)

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that ~~a reasonable person would expect to~~ the lawyer knows or reasonably should know will be disseminated by means of public communication ~~if the lawyer knows or reasonably should know that it~~ and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment proposed by State Bar of Michigan

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

~~*No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. Moreover, the confidentiality provisions of Rule 1.6 may prevent the disclosure of information which might otherwise be included in an extrajudicial statement. In addition, special rules of confidentiality may validly govern proceedings in juvenile, domestic relations, and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.*~~

~~*For guidance in this difficult area, one may consider the following language adapted from the American Bar Association's Model Rule 3.6:*~~

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations, mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been, involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly ~~*(a) A statement referred to in Rule 3.6 ordinarily is likely to have such a prejudicial effect*~~ *when* ~~*it*~~ *they refer*~~*s*~~ *to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration* ~~*and the statement relates to*~~*. These subjects relate to:*

(1) the character, credibility, reputation, or criminal record of a party, ~~*of a*~~ *suspect in a criminal investigation, or* ~~*of a*~~ *witness;* ~~*or*~~ *the identity of a witness; or the expected testimony of a party or witness;*

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense ~~*or*~~*; the existence or contents of any confession, admission, or statement given by a defendant or suspect; or that person's refusal or failure to make a statement;*

(3) the performance or results of any examination or test, ~~*or*~~ *the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;*

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) 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; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

~~*(b) Notwithstanding Rule 3.6 and paragraphs (a)(1-5) of this portion of the comment, a lawyer involved in the investigation or litigation of a matter may state without elaboration:*~~

~~*(1) the general nature of the claim or defense;*~~

~~*(2) the information contained in a public record;*~~

~~*(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;*~~

~~*(4) the scheduling or result of any step in litigation;*~~

~~*(5) a request for assistance in obtaining evidence and information necessary thereto;*~~

~~*(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and*~~

~~*(7) in a criminal case:*~~

~~*(A) the identity, residence, occupation and family status of the accused;*~~

~~*(B) if the accused has not been apprehended, information necessary to aid in apprehension of that person;*~~

~~*(C) the fact, time and place of arrest; and*~~

~~*(D) the identity of investigating and arresting officers or agencies and the length of the investigation.*~~

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(e) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Staff Comment: Alternative B is the proposed revision of MRPC 3.6 that was submitted by the State Bar of Michigan and published for comment on July 2, 2004, in ADM File No. 2003-62. The proposed changes in the current rule are indicated by overstriking and underlining. Alternative B is longer than Alternative A and includes several additional provisions, including proposed paragraph (c), which specifically would

allow a statement "that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client," and proposed paragraph (d), which specifies that a lawyer associated with a lawyer subject to paragraph (a) may not make a statement prohibited by paragraph (a). Alternative B also includes longer accompanying commentary than Alternative A.

Rule 5.4 Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate, or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price ~~pursuant to the provisions of Rule 1.17; and~~

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof, or one who occupies a position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

The provisions of this rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to

the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

This rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

~~*A lawyer does not violate this rule by affiliating with or being employed by an organization such as a union-sponsored prepaid legal services plan, provided the structure of the organization permits the lawyer independently to exercise professional judgment on behalf of a client.*~~

Staff Comment: Proposed MRPC 5.4 is similar to the proposed revision that was published for comment on July 2, 2004, in ADM File No. 2003-62. It differs from the current rule primarily because of the addition of proposed paragraph (a)(4), which specifically allows a lawyer to "share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter."

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not~~:~~ ~~(a)~~ practice law in a jurisdiction ~~where doing so violates~~ in violation of the regulation of the legal profession in that jurisdiction~~;~~, or assist another in doing so.

(b) ~~assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.~~ A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by law or these rules, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction may provide temporary legal services in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer or a person the lawyer is assisting is authorized by law to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in

which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not covered by paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized by law to provide in this jurisdiction.

Comment

A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by law, order, or court rule to practice for a limited purpose or on a restricted basis. See, for example, MCR 8.126, which permits, under certain circumstances, the temporary admission to the bar of a person who is licensed to practice law in another jurisdiction, and Rule 5(E) of the Rules for the Board of Law Examiners, which permits a lawyer who is admitted to practice in a foreign country to practice in Michigan as a special legal consultant, without examination, provided certain conditions are met.

Paragraph (a) applies to the unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, ~~L~~limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This rule ~~Paragraph (b)~~ does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for it ~~their work~~. See Rule 5.3.

~~Likewise it does not prohibit~~ A lawyer~~s from providing~~ may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law, for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

Other than as authorized by law or this rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present

here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

There are occasions in which a lawyer admitted to practice in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of clients, the public, or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not indicate whether the conduct is authorized. With the exception of paragraphs (d)(1) and (d)(2), this rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted here to practice generally.

There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction and, therefore, may be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any jurisdiction of the United States, including the District of Columbia and any state, territory, or commonwealth. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice and is in good standing to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who, while technically admitted, is not authorized to practice because, for example, the lawyer is on inactive status or is suspended for nonpayment of dues.

Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice, such as MCR 8.126, or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a law or court rule of this jurisdiction requires that a lawyer who is not admitted to practice in this jurisdiction obtain admission pro hac vice before appearing before a tribunal or administrative agency, this rule requires the lawyer to obtain that authority.

Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice under MCR 8.126. Examples of such conduct include meetings with a client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer

admitted only in another jurisdiction may engage temporarily in this jurisdiction in conduct related to pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction, provided that those services are in or are reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction and the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice under MCR 8.126 in the case of a court-annexed arbitration or mediation, or otherwise if required by court rule or law.

Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction if they arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not covered by paragraphs (c)(2) or (c)(3). These services include both legal services and services performed by nonlawyers that would be considered the practice of law if performed by lawyers.

Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors indicate such a relationship. The lawyer's client previously may have been represented by the lawyer or may reside in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work may be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship may arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of the corporation's lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise, as developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally uniform, foreign, or international law.

Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another jurisdiction of the United States and is not disbarred or suspended from practice in any jurisdiction may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as to provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a

lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. This paragraph applies to in-house corporate lawyers, government lawyers, and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by statute, court rule, executive regulation, or judicial precedent.

A lawyer who practices law in this jurisdiction is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may be required to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, such disclosure may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

Paragraphs (c) and (d) do not authorize lawyers who are admitted to practice in other jurisdictions to advertise legal services to prospective clients in this jurisdiction. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

Staff Comment: Proposed MRPC 5.5 is essentially the same proposal that was published for comment on July 2, 2004, in ADM File No. 2003-62. Both the rule and the accompanying commentary are much longer than the current rule and commentary. The rule sets specific guidelines for out-of-state lawyers who are appearing temporarily in Michigan, and is intended to work in conjunction with MRPC 8.5. See, also, MCR 8.126 and MCR 9.108(E)(8).

Rule 5.7 Responsibilities Regarding Law-Related Services

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comment

When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed, and regardless of whether the law-related services are performed through a law firm or a separate entity. This rule identifies the circumstances in which all the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, this rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made, preferably in writing, before law-related services are provided or before an agreement is reached for provision of such services.

The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances, the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the rule cannot be met. In such a case, a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls, comply in all respects with the Rules of Professional Conduct.

A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical, or environmental consulting.

When a lawyer is obliged to accord the recipients of such services the protections of those rules that apply to the client-lawyer relationship, the lawyer must take special care

to heed the proscriptions of the rules addressing conflicts of interest, and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

When the full protections of all the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest, and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

Staff Comment: There is no equivalent to proposed MRPC 5.7 in the current Michigan Rules of Professional Conduct. The proposal is substantially the same as the version that was published for comment on July 2, 2004, in ADM File No. 2003-62. The underlying presumption of the proposed rule is that the MRPCs apply whenever a lawyer performs law-related services or controls an entity that does so. The accompanying commentary explains that the presumption may be rebutted only if the lawyer carefully informs the consumer which services are which and clarifies that no client-lawyer relationship exists with respect to ancillary services.

Rule 6.6 Nonprofit and Court-Annexed Limited Legal Services Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this rule.

Comment

Legal services organizations, courts, and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services, such as advice or the completion of legal forms, that will help persons address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics, or pro se counseling programs, a client-lawyer relationship may or may not be established as a matter of law, but regardless there is no

expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

A lawyer who provides short-term limited legal services pursuant to this rule must secure the client's consent to the scope of the representation. See Rule 1.2. If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

Because a lawyer who is representing a client in the circumstances addressed by this rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

If, after commencing a short-term limited representation in accordance with this rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

Staff Comment: There is no equivalent to proposed MRPC 6.6 in the current Michigan Rules of Professional Conduct. The proposal is substantially the same as the proposal that was published for comment as MRPC 6.5 on July 2, 2004, in ADM File No. 2003-62. The proposed rule addresses concerns that a strict application of conflict-of-interest rules may deter lawyers from volunteering to provide short-term legal services through nonprofit organizations, court-related programs, and similar other endeavors such as legal-advice hotlines.

Rule 8.5 ~~Jurisdiction~~ Disciplinary Authority; Choice of Law

(a) **Disciplinary Authority.** A lawyer ~~licensed~~ admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of ~~whether~~ where the lawyer's ~~is engaged in practice elsewhere~~ conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be ~~who is licensed to practice in another jurisdiction and who is admitted to practice in this jurisdiction is~~ subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) **Choice of Law**. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct; a lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment

~~*In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5. A lawyer admitted to practice in Michigan pro hac vice is subject to the disciplinary authority of this state for actions and inactions occurring during the course of the representation of a client in Michigan.*~~

~~*If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.*~~

~~*Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.*~~

Disciplinary Authority. *It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this rule. The fact that a lawyer is subject*

to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer in civil matters.

Choice of Law. *A lawyer potentially may be subject to more than one set of rules of professional conduct that impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.*

Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interests of clients, the profession, and those who are authorized to regulate the profession. Accordingly, paragraph (b) provides that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct; makes the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions; and protects from discipline those lawyers who act reasonably in the face of uncertainty.

Paragraph (b)(1) provides, as to a lawyer's conduct relating to a proceeding pending before a tribunal, that the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred or, if the predominant effect of the conduct is in another jurisdiction, the lawyer shall be subject to the rules of that jurisdiction. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be either where the conduct occurred, where the tribunal sits, or in another jurisdiction.

When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear initially whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct actually did occur. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this rule.

If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct and should avoid proceeding against a lawyer on the basis of inconsistent rules.

The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties, or other agreements between regulatory authorities in the affected jurisdictions provide otherwise.

Staff Comment: Proposed MRPC 8.5 is similar to the proposed revision that was published for comment on July 2, 2004, in ADM File No. 2003-62. It differs considerably from the current rule, primarily by the addition of a separate section on choice of law. The proposed rule specifically gives discipline authorities jurisdiction to investigate and prosecute the ethics violations of attorneys temporarily admitted to practice in Michigan. The rule is intended to work in conjunction with MRPC 5.5. See, also, MCR 8.126 and MCR 9.108(E)(8).

The staff comments that appear throughout this proposal are intended to provide explanation, but are not authoritative constructions by the Court.

A copy of this order will be given to the Secretary of the State Bar of Michigan and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposals may be sent to the Clerk of the Michigan Supreme Court in writing or electronically by March 1, 2010, at P.O. Box 30052, Lansing, Michigan 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2009-06. Your comments and the comments of others will be posted at www.courts.michigan.gov/supremecourt/resources/administrative/index.htm

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 24, 2009

Clerk

SBM STATE BAR OF MICHIGAN

p 517-346-6300
p 800-968-1442
f 517-482-6248
www.michbar.org

306 Townsend Street
Michael Franck Building
Lansing, MI
48933-2012

February 26, 2010

Corbin Davis
Clerk of the Court
Michigan Supreme Court
P. O. Box 30052
Lansing, MI 48909

Re: Administrative Order 2009-06

Dear Clerk Davis:

Enclosed for filing among the commentary to the captioned Order are comments provided by the Standing Committee on Professional Ethics of the State Bar of Michigan.

The State Bar of Michigan supports the recommendation being made by the Standing Committee on Professional Ethics with regard to Administrative Order 2009-06. The State Bar of Michigan urges the Court to act on and within the following alternatives: 1) re-issue the content of ADM 2003-62 for a short comment period, with modifications to conform to intervening amendments to the 2002 Model Rules on which those proposed Rules were largely based, and commit to the issuance of a full set of Rules shortly thereafter; 2) adopt all the proposed Rules published with ADM 2003-62 in their present form; 3) propose adoption of the ABA 2002 Model Rules with all amendments to date; or 4) take no action on amending Michigan's Rules at this time. The State Bar of Michigan requests that the Court **not adopt** the rules as proposed in ADM 2009-06.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne M. Boomer, Administrative Counsel, Michigan Supreme Court

251 NORTH ROSE STREET • FOURTH FLOOR
KALAMAZOO, MICHIGAN 49007-3823

TELEPHONE 269 / 382-2300 • FAX 269 / 382-2382 • WWW.VARNUMLAW.COM

JOHN W. ALLEN
BOARD CERTIFIED CIVIL TRIAL ADVOCATE (NBTA)
AMERICAN BOARD OF TRIAL ADVOCATES (ABOTA)
ADMITTED IN ILLINOIS, INDIANA, MICHIGAN, MINNESOTA, WISCONSIN AND FLORIDA

DIRECT DIAL 269/553-3501
E-MAIL jwallen@varnumlaw.com

March 1, 2010

Michigan Supreme Court
Clerk's Office
PO Box 30052
Lansing, MI 48909

Email: MSC_Clerk@courts.mi.gov

Re: Comments and Proposals relating to:

PROPOSALS TO AMEND THE MRPC (ADM File No. 2009-06).

To The Michigan Supreme Court:

I am a partner with Varnum Riddering Schmidt & Howlett LLP (Varnum Attorneys).[1] In the past, I have served as Chair of the State Bar of Michigan Special Committee on Grievance, and have served as the Chair of the State Bar of Michigan Standing Committee on Professional and Judicial Ethics (the "Ethics Committee").

I also served on the ABA Ethics 2000 Advisory Committee, and chaired the Ethics and Professionalism Committee of the ABA, Trial Tort and Insurance Practice Section through the ABA Ethics 2000 process.

This letter contains the views of me only, not those of the Firm, the State Bar of Michigan, the ABA, nor their Committees. It consists of two parts:

A. APPOINT A TASK FORCE;
B. SUBSTANTIVE COMMENTS on PROPOSED CHANGES.

A. APPOINT A TASK FORCE.

As to procedure, I urge the court to appoint, or to request that the State Bar of Michigan, appoint a Task Force to study these and other proposals for amendment to the Michigan Rules of Professional Conduct, as well as the PROPOSED MICHIGAN STANDARDS FOR IMPOSING LAWYER SANCTIONS (ADM File No. 2002-29), as re-proposed by the Supreme Court on July 29, 2003.

[1] I acknowledge the thoughtful contributions of my partners, Elizabeth Jamieson and Terry Bacon.

Most other states have used a "task force" approach, bringing together the various interested parties (the State Bar of Michigan Sections, pertinent Committees, the Representative Assembly, the Board of Commissioners, speciality bar associations, other stakeholders). The issues are too important to trust them only to an abbreviated public hearing process.

The earlier consideration of ADM File No. 2003-62, based on the ABA Ethics 2000 proposals, were rushed through only one committee, with little or no debate or discussion from those many lawyers who must use them every day. When the proposals reached the Representative Assembly, many of them met heavy and wide-spread resistance, largely because many of them simply did not provide functionally practical approaches to the issues they were attempting to address. The result of that process was several material and salutary changes recommended by the Representative Assembly, sharply at variance from the Supreme Court's proposals in ADM File No. 2003-62. Some of those changes are now incorporated into ADM File No. 2009-06.

I urge the Supreme Court not to repeat that procedural error. Michigan and its lawyers have done quite well for the last ten years without the ABA Ethics 2000 changes. There is no rush. Changes, and especially material changes, to MRPC should be a deliberative process, with ample information gathered from all interested parties. Publication and public hearing at the Supreme Court is one method by which to do that. A more deliberative and through "task force" process would be even better. That is why so many other states have done it that way. Michigan should do that, too.

B. SUBSTANTIVE COMMENTS ON PROPOSED CHANGES.

The following are submitted as Comments, and as further Proposed Amendments, to the proposed changes to MRPC, to be considered with ADM File No. 2009-06.

1. Fee Agreements and Conflict Consents should NOT be required to be confirmed "in writing."

Proposal: Delete the proposed "in writing" requirement from proposed MRPC 1.5(b), and 1.7 (b).

The Court's proposal adds an "in writing" requirement for all lawyer engagements and for all waivers and consents to conflicts between any present client, and any other client or the lawyer.[2] This will add a burdensome and sometimes impractical requirement of written disclosure, which will increase expense and exposure to civil liability. The purpose of the

[2] The earlier ADM File No. 2003-62 proposed a "confirmed in writing" requirement to Rules 1.0(b), 1.7(b), 1.9(b), 1.10(d), 1.11(a), 1.12, and 1.18(d).

requirement cannot be to assist the person/ prospective client in making the engagement or waiver/consent decision, because, by the very terms of the proposal, the "writing" is not required until **after** that decision is made. It is simply a new requirement to create an exhibit.

While this may be a good practice, it is likely to be used for mischief. A lawyer's failure to provide a writing will be a *per se* violation, even if the client admits waiver and consent, and is not damaged. MRPC is a strict liability, quasi-criminal disciplinary code; mitigating factors (actual consent, no injury) affect only punishment, not culpability. See *In re Woll*, 387 Mich 154, 161, 194 NW2d 835 (1972), and ADM File No. 2002-29 Proposed Standards 4.4 (Alternative A Strike Outs) and 9.32.

Civil liability could also result. "After-the-fact" attacks on waivers could be used to avoid otherwise valid and fair fees due to the lawyer, even when the client admits waiver and consent, and is not damaged, simply to avoid payment.

Other states have already reached this conclusion.

- Pennsylvania has rejected the "confirmed in writing" requirement.
- Likewise, the Illinois Joint ISBA/CBA Committee Ethics 2000 Final Report (October 17, 2003) states:

> "Often, the conflict issues are clear, the affected clients understand the issues, and the matter is uncomplicated. The need for a consent may arise unexpectedly and without notice in the midst of a transaction or other matter. In such cases, requiring a writing merely adds unnecessary delay and expense, and elevates technicality over the substantive question whether consent was given. **Moreover, subjecting a lawyer to potential discipline, disqualification, and malpractice liability for want of a writing--when it may be entirely clear that the consent was in fact given--is not reasonable.** Accordingly, the Committee recommends that the rule and comments be revised to eliminate the requirement that conflict waivers be in writing."

Similar issues attend the requirement of a "written" engagement in every initial lawyer-client agreement. Frequently, such initial contacts are informal, by telephone or wire or other circumstances not lending themselves to the exchange of written engagement contracts, and necessitating rapid action by the lawyer to accommodate the exigencies of the new client. Like the observations by the Illinois bar as to a requirement for written conflict waivers, requiring a writing merely adds unnecessary delay and expense, and marks a material departure with what has been the practice of both lawyers and clients in Michigan for all of time. Before making that type of monumental change, the Supreme Court should assure that a Task Force or some similar body has made the empirical study which should accompany such a sea-change in the practice of both lawyers and clients.

2. <u>The “informed" "consent” requirement is not sufficiently defined.</u>

Proposal: Delete the proposed “informed" "consent” requirement from proposed MRPC 1.5(b), 1.7(b)(4), and 1.8(a)(3) and (b).

The “confirmed in writing” requirement is made even more perilous by the Court’s Proposal to add a new "informed" "consent" requirement in three of its proposals.[3] Despite that the ABA-coined term "informed" has been stricken, its legacy remains, as does its problems and issues. In the ABA Ethics 2000 Proposal, "informed consent" was not defined *["reasonably adequate under the circumstances*"], even though it must include an *explanation "about the material risks… and reasonably available alternatives.*" While superficially benign, and even politically attractive in its sound, the present proposal is not less onerous, nor any less defective. Just what are the "material risks presented" or "any reasonable alternatives" which must be explained before any conflict waiver is valid? It is also unclear whether ABA Rule 1.0 Comment 6 [which considers important factors such as whether the person is "experienced in legal matters generally," or "represented by independent counsel."] will be construed as part of the Rule. (See Part 4, below.)

The current proposal (in contrast to the Ethics 2000 proposals) does eliminate in some instances [e.g., Proposed Rules 1.9(a) and (b), 1.12(a) and 1.18(d)(a)], a new duty of disclosure to a **non**-client third party to whom the lawyer will be required to give “advice.” This would have been an unprecedented expansion of the lawyer’s duties to persons not party to any lawyer-client contract, and should not be reincarnated.

Nevertheless, even in its presently proposed form, lawyers will not know in advance how to conform their conduct to the requirement of the law. According to the ABA 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**."* There is no clear "materiality" limitation, and no definition of what is "material" in any specific context. The omission of any fact from the proposed "consent" disclosure will void the consent. To be valid, "informed consent" disclosures will look like SEC proxy statements…and still always be subject to attack, after the fact. **This is an undefined "negligence" in a strict liability code.**

This will invite challenges to the validity of any consent, after reliance upon the consent, based on some alleged "omission of fact" from the "consent" disclosure. Abuse is likely,

[3] The Supreme Court's earlier proposal Admin. File No. 2003-62 added an even less certainly defined "informed consent" requirement to twelve (12) rules [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)]. Though the word "informed" has now been dropped in ADM File No. 2009-06, the terms of the required "consent" are no more clear than before.

especially in the context of civil proceedings for fee collection, malpractice, and other civil liability claims by non-client third parties.

The current state of the law is sufficient on this point. There is no empirical evidence to the contrary. The “informed" "consent” requirement should be rejected.

3. MRPC should not be a platform for civil liability. The dangers of the "reasonable lawyer" or "should" standards in MRPC.

Proposal: Retain the current Rule 1.0(b) which says, "*The rules do not, however, give rise to a cause of action for enforcement of a rule or for damages caused by a failure to comply with an obligation or prohibition imposed by a rule."*

The court’s earlier proposal ADM File No. 2003-62 deleted this declarative admonition, substituting a precatory statement. The proposed Preamble, Scope [20] said**, "Violation of a Rule *should* not itself give rise to a cause of action against a lawyer nor *should* it create any presumption in such a case that a legal duty has been breached.***"***

Amendments must also be considered in light of the reality that the MRPC are used in Michigan, as well as almost every other state, (either directly or indirectly) as a platform for malpractice claims. *Cf.*, *Beattie v. Firnschild*, 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. In the 21st century, Michigan lawyers are far more likely to encounter the MRPC in a civil, rather than disciplinary, context.

The earlier Proposed Rule 1.0 deleteed 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." Even now and with that admonition, the MPRC are used to define the "standard of care" for lawyers in civil lawyer professional liability cases. Any change to MRPC has the potential to increase civil claims, and also to create new ones which do not now exist.

Thus, there is legitimate concern that changes to terms such as "should' or "reasonable" in the Model Rules will make it even more difficult to obtain summary disposition or summary judgment based on the lawyer's proven conformity with the Rules' requirements. If the Model Rules are changed to a "reasonable lawyer" standard, the question of what a "reasonable" lawyer would (or should) have done will become a jury question, virtually eliminating summary disposition and summary judgment, and automatically vesting any such claim with some value. This is a radical, and unwarranted, change from current law. It should not be adopted in any of the MRPC.

Such a change will complicate the lawyer's defense of "aiding and abetting" and of other claims in which the plaintiff admits (or it is uncontroverted) that the lawyer did not "know" of the client's wrongdoing, but the plaintiff (usually after the fact) alleges that a "reasonable lawyer" would (or should) have figured it out from what the lawyer did know, or "should have known."

This is not merely theoretical, nor minor. It holds the prospect of vastly increasing the already growing number of not only lawyer liability claims, but also those Attorney Grievance Commission (AGC) complaints, and Attorney Discipline Board (ADB) proceedings, which, at base, are really civil claims for negligence. It will increase the cost of those proceedings and thus the Bar dues requirements to finance them. It will also increase the cost of lawyer professional liability insurance to all lawyers, and thus increase the cost of legal services to all persons. Most importantly, it will divert scarce AGC/ADB resources from those truly serious cases more deserving of their attention.

4. <u>The role of the MRPC Comments should be clarified.</u>

Proposal: Either:

- **add a Provision which states explicitly that the Comments are <u>not</u> authoritative, and then <u>delete</u> the Comments from the proposed MRPC;**
  OR,
- **include the authoritative provisions of the Comments in the text of the MRPC.**

This will affect virtually all of the Court's proposed changes. In the Court's proposals, the Comments are extensively relied upon to give meaning to the Rule, even though that has not been their function; in Michigan, the Comments to MRPC are not, and never have been, the law.

> **"This court allows publication of the comments only as 'an aid to the reader,' but they are not 'authoritative statement[s].'** The rules are the only authority**."**
> *Grievance Administrator v Deutch*, 455 Mich 149, 164, 565 NW2d 369 (1997). (Emphasis added.)

Therefore, little solace can be taken from what is in the Comments.[4] This is especially significant, because in the ABA Ethics 200 process, the Comments were frequently used as vehicle for compromise. Important matters should be in the Rule. Otherwise, the material in the

[4] The Court's earlier ADM File No. 2003-62 proposed MRPC take the same position at Preamble, Scope, Comment [21]: "The Preamble and this note on Scope are only intended to provide general orientation and are not to be interpreted as Rules. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."

Comments in only misleading. If the Comments are authoritative, then the court should say so. If the Comments are not authoritative, they should be deleted.

5. <u>There should be a "transition provision," to provide for the addition of many new requirements.</u>

Proposal: Add a Transition Provision to proposed new Rule 1.0.2, Applicability of Rules, which states:

[New initial sentence] Rule 1.0.2, Applicability of Rules:

"These amendments shall not be effective until one year after the publication of their adoption.

All engagements existing as of the effective date of any amendments shall be controlled by the law in effect at the inception of the engagement, unless otherwise agreed by both the lawyer and the client."

There are several examples of the need for such a provision. For instance, the Court's proposed MRPC 1.5(b) would require written engagements for all clients, which might require considerable time to accomplish.

MRPC 1.7 would require, as of the effective date, each client in every multiple representation to have received a "written" form of any conflict waiver/consent. For an estate planner with hundreds of husband-wife estate plans on file in continuing client relationships, this could mean thousands of written confirmations. The same would be true of the disclosures and written consents under proposed MRPC 1.8.

These existing relationships should be allowed to continue, controlled by the law under which they were formed. A substantial time (e.g., one year) should be allowed for adequate Continuing Legal Education (in a state where it is not mandated) and for lawyers to adapt their practices to these new requirements.

6. <u>Isolated Acts of Negligence should not be the subject to discipline.</u>

PROPOSAL:

Add to Rule 1.1 a new Rule 1.1(d), as follows:

"(d) Disciplinary proceedings shall not be commenced based on other than knowing misconduct, or on negligent conduct, unless also based upon:

(1) A course of conduct; OR

(2) Negligence, combined with other factors, which taken in the aggregate, provide a basis for discipline."

MRPC is not the vehicle to cure lawyer incompetence or professional negligence. Too much of this has already crept into the former Model Code of Professional Responsibility DR 6-101(a) in some Code jurisdictions, and into the Model Rules of Professional Conduct Rules 1.1 and 1.3. See also ADM File No. 2002-29, Proposed Standards 4.4 and 4.5 (Alts. A and B), and 5.13(c) (Alt. B).

If we think our only tool is a hammer, then we sometimes wrongly see every issue as a nail. While some of the Model Rules (i.e., Rule 1.1) reference "neglect," the MRPC is not a proper mechanism with which to remedy every lawyer error. 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.

In reality, disciplinary authorities in most jurisdictions, including Michigan, have exercised common sense, and have not attempted to bring disciplinary proceedings based on isolated negligence, instead demanding: strong evidence of a course of conduct indicative of a refusal or inability to change; or, negligence combined with other factors (abandonment, non-feasance), which when taken in the aggregate, provide a basis for discipline. See *The Professional Lawyer*, Tellam, Bradley, *"Isolated Instances of Negligence as a Basis for Discipline,"* July, 2003, 149-152. When subjected to strict liability, quasi-criminal sanctions, citizens (including lawyers) should not be relegated to depending upon prosecutorial discretion, alone.

The above proposal would not likely result in any change in the current practices of AGC/ADB in most cases. But it would prevent abuses of prosecutorial discretion, as well as decrease the likelihood that the disciplinary process might be transformed into a ramp for civil liability actions.

7. <u>The Court should clarify the ownership of lawyer files, and a client's rights to access to the information in those files.</u>

PROPOSAL: ADD a new provision to MRPC 1.4 (c), or a New Rule Concerning the State Bar, as follows:

[NEW] Rule 1.4 (c). Lawyer's Files and Records; Ownership and Copying.

(1) A lawyer's file is owned by the lawyer maintaining the file, including any document, film, tape or other paper or electronic media. A client has the right of access to information contained in a file relating to that client's representation.

(2) The lawyer is entitled to the original, physical material in the file, unless the client has a special need or a pre-existing proprietary right in the original.

(3) When necessary for full use of a document, the client's "access" may include at least temporary custody or non-destructive use of the original document, film, tape or other paper or electronic media.

(4) Unless specifically agreed or required by law, the client is not entitled to the lawyer's internal records, such as accounting ledgers, checking account records, and "draft" statements or bills, as well as time records for lawyer's work.

(5) The client is responsible to pay the cost of copying and delivering copies of the file records.

(6) A lawyer shall have in place a "plan or procedure" governing safekeeping and disposition of "client property," including those parts of the representation file which belong to the client or for which the client has a need.

(7) Issues relating to file ownership and access, copy charges for information requests, and file destruction practices, may be described by the lawyer, and agreed by the client, in the terms of engagement or some

other disclosure."

This proposal will conform the legal status of, and access to, a lawyer's files to that which is already legally recognized for the files of other Michigan professionals. It will correct earlier and erroneous Informal Ethics Opinions, and bring these issues into the "cyber" age, when the entirety of some client files may be found only on the lawyer's computer hard drive. For the rationale behind this and some other alternatives, see *"Who Owns the File and Who Pays for the Copies,"* Michigan Bar Journal (MBJ), August 2000, pp 1062 – 1065 (attached).

Subpart (6) is in accordance with Formal Opinion R-5. Sample policies may be found at *"Record Retention Overview,"* 74 MBJ 1196 (November, 1995); and Kerr, *"Creating a Record Retention Policy,"* 69 MBJ 684 (July, 1990).

AGC is frequently confronted with issues regarding access to information in lawyer's files. The intent of this proposal is to clarify the respective rights of both the client and the lawyer, and to provide specified guidance as to how to resolve these commonly encountered issues.

When considered by the Representative Assembly, this proposal was thought better to be included as part of the Rules Concerning the State Bar, which is an alternative equally effective in providing AGC, ADB, and all Michigan lawyers the much needed guidance on this very important issue.

8. **The Court should clarify the factors controlling a dispute between lawyer and client regarding the amount of the fee, in terms which will encourage, but not mandate, express fee agreements at the time of engagement.**

PROPOSAL: ADD a new provision to MRPC 1.5(g) and (h):

[NEW] Rule 1.5(g) and (h):

"(g) Consideration of all Factors. In determining a reasonable fee, the time devoted to the representation and customary rate of fee need not be the sole or controlling factors. All factors set forth in this rule should be considered, and may be applied, in justification of a fee higher or lower than that which would result from application of only the time and rate factors.

(h) Enforceability of Fee Contracts. Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreements, unless found to be illegal,

obtained through methods not in compliance with these Rules, prohibited by this Rule, or clearly excessive as defined by this Rule."

The sources for this proposal are: MCL 600.919; and the *Rules Regulating the Florida Bar*, Rule 4-1.5. The wording is taken from Florida Rule of Professional Conduct 4-1.5, where it has operated successfully and without adverse effect for several years. When adopted, the additional language should serve to reduce markedly the burden on disciplinary authorities and courts when fee disputes arise.

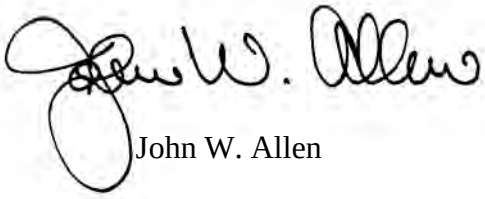
It is also already the law of Michigan, pursuant to MCL §600.919, which states that:

> The measure of compensation of members of the bar is left to the express or implied agreement of the parties, subject to the regulation of the supreme court.

The Amendment would also place a premium upon express fee agreements between lawyers and clients, without specifically requiring "written" agreements for every engagement. Thus, the amendment would encourage what is generally regarded as a good practice, but what many appropriately regard to be unsuitable and impractical as a mandatory rule for all engagements.

Very truly yours,

VARNUM ATTORNEYS



John W. Allen

Enclosure: *"Who Owns the File and Who Pays for the Copies,"* MBJ, August 2000, pp 1062 – 1065

Order

Michigan Supreme Court
Lansing, Michigan

October 26, 2010

Marilyn Kelly,
Chief Justice

ADM File No. 2009-06

Michael F. Cavanagh
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway
Alton Thomas Davis,
Justices

Amendments of Rules 3.1, 3.3, 3.4, 3.5, 3.6, 5.5, and 8.5 of the Michigan Rules of Professional Conduct and Adoption of New Rules 2.4, 5.7, and 6.6 of the Michigan Rules of Professional Conduct

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On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 3.1, 3.3, 3.4, 3.5, 3.6, 5.5, and 8.5 of the Michigan Rules of Professional Conduct and new Rules 2.4, 5.7, and 6.6 of the Michigan Rules of Professional Conduct are adopted, effective January 1, 2011.

[Additions are indicated by underlining and deletions are indicated by strikeover. New Rules 2.4, 5.7, and 6.6 contain no underlining or strikeover.]

Rule 2.4 Lawyer Serving as Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral must inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer must explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often

serve as third-party neutrals. A third-party neutral is a person, such as a mediator, an arbitrator, a conciliator, or an evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, an evaluator, or a decision maker depends on the particular process that is selected by the parties or mandated by a court.

The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals also may be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association, or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution.

Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

Lawyers who represent clients in alternative dispute resolution are governed by the Michigan Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration, the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Staff Comment: There is no equivalent to MRPC 2.4 in the current Michigan Rules of Professional Conduct. The rule is designed to help parties involved in alternative dispute resolution to better understand the role of a lawyer serving as a third-party neutral.

Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous. A lawyer may offer a good-faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may so defend the proceeding as to require that every element of the case be established.

Comment

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also has a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. *What is required of lawyers is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good-faith arguments in support of their clients' positions.* *Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the* ~~*client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person. Likewise, the action is frivolous if the*~~ *lawyer is unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification, or reversal of existing law.*

Staff Comment: The amendments of MRPC 3.1 make no changes in the current rule, but modify the accompanying commentary to clarify that a lawyer is not responsible for a client's subjective motivation.

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

~~(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;~~

(~~3~~2) fail to disclose to a tribunal controlling legal authority ~~in the jurisdiction~~ known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(~~4~~3) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(b) If a lawyer knows that the lawyer's client or other person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to an adjudicative proceeding involving the client, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(~~b~~c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

~~(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.~~

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts that are known to the lawyer ~~and~~ that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) When false evidence is offered, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures. The advocate should seek to withdraw if that will remedy the situation. If withdrawal from the representation is not permitted or will not remedy the effect of the false evidence, the lawyer must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6.

Comment

This rule governs the conduct of a lawyer who is representing a client in a tribunal. It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, subrule (a) requires a lawyer to take reasonable remedial measures if

the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

As officers of the court, lawyers have special duties to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. ~~*The advocate's task is to present the client's case with persuasive force.*~~ *Performance of that duty while maintaining confidences of the client is qualified, however, by the advocate's duty of candor to the tribunal.* ~~*However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.*~~ *Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.*

Representations by a Lawyer. An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, because litigation documents ordinarily present assertions by the client or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(c), see the comment to that rule. See also the comment to Rule 8.4(b).

~~*Misleading*~~ *Legal Argument. Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(*~~*3*~~*2), an advocate has a duty to disclose directly controlling adverse authority* ~~*in the jurisdiction which*~~ *that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.*

~~*False Evidence. When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.*~~

~~*When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.*~~

~~*Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth finding process which the adversary system is designed to implement. See Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.*~~

Offering Evidence. Paragraph (a)(3) requires that a lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this rule if the lawyer offers the evidence for the purpose of establishing its falsity.

If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness' testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false. A lawyer's knowledge that evidence is false can be inferred from the circumstances. Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

~~*Perjury by a Criminal Defendant. Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.*~~

~~*The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.*~~

~~*Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose*~~

~~*false evidence, but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution, but makes the advocate a knowing instrument of perjury.*~~

~~*The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify, and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(c).*~~

Remedial Measures. ~~*If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially.*~~ *Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. If that fails, the lawyer* ~~*advocate should seek to withdraw if that will remedy the situation*~~ *must take further remedial action.* ~~*If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court.*~~ *It is for the* ~~*court*~~ *tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing.* ~~*If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, the second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.*~~

The disclosure of a client's false testimony can result in grave consequences to the client, including a sense of betrayal, the loss of the case, or perhaps a prosecution for perjury. However, the alternative is that the lawyer aids in the deception of the court, thereby subverting the truth-finding process that the adversarial system is designed to implement. See Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer must remediate the disclosure of false evidence, the client could simply reject the lawyer's counsel to reveal the false evidence and require that the lawyer remain silent. Thus, the client could insist that the lawyer assist in perpetrating a fraud on the court.

~~*Constitutional Requirements. The general rule that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional*~~

~~*provisions for due process and the right to counsel in criminal cases. The obligation of the advocate under these rules is subordinate to such a constitutional requirement.*~~

Preserving Integrity of Adjudicative Process. Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating, or otherwise unlawfully communicating with a witness, juror, court official, or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence, or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure, if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding. See Rule 3.4.

Duration of Obligation. A practical time limit on the obligation to rectify the presentation of false evidence or false statements of law and fact must be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

~~*Refusing to Offer Proof Believed to Be False. Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may be denied this authority by constitutional requirements governing the right to counsel.*~~

Ex Parte Proceedings. Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts that are known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal. Normally, a lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this rule or as otherwise permitted by Rule 1.6.

Staff Comment: The changes in MRPC 3.3 specify in paragraph (a)(1) that a lawyer shall not knowingly "fail to correct a false statement of material fact or law," and substitute paragraph (b) for current paragraph (a)(2), which deals with a disclosure that is "necessary to avoid assisting a criminal or fraudulent act by the client." In addition, several paragraphs from the comment relating to remedial actions a lawyer must take upon learning that false testimony has been offered have been combined and inserted into the body of the rule as new subsection (e).

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party;

(e) during trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party, unless:

(1) the person is ~~a relative or~~ an employee or other agent of a client for the purposes of MRE 801(d)(2)(D); and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improper influence of witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. Other law makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

*With regard to paragraph (b), it is not improper to pay a witness'*s *expenses or to compensate an expert witness on terms permitted by law. It is, however, improper to pay an occurrence witness any fee for testifying beyond that authorized by law, and it is improper to pay an expert witness a contingent fee.*

~~*Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, because the employees may identify their interests with those of the client. See also Rules 4.2 and 4.3.*~~

Staff Comment: The amendments of MRPC 3.4 clarify in paragraph (f)(1) that a lawyer may not ask someone other than a client to refrain from voluntarily giving relevant information to another party unless the person is "an employee or other agent of a client for the purposes of MRE 801(d)(2)(D)."

Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;

(b) communicate ex parte with such a person concerning a pending matter, ~~except as permitted by law; or~~ unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication constitutes misrepresentation, coercion, duress or harassment; or

~~(c)~~(d) engage in undignified or discourteous conduct toward the tribunal.

Comment

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Michigan Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters, or jurors, unless authorized to do so by law or court order.

A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so, unless the communication is prohibited by law or a court order, but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from undignified or discourteous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge, but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Staff Comment: The amendments of MRPC 3.5 add paragraph (c), which clarifies the rule regarding lawyers' contact of jurors and prospective jurors after the jury is discharged.

Rule 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that ~~a reasonable person would expect to~~ the lawyer knows or reasonably should know will be disseminated by means of public communication ~~if the lawyer knows or reasonably should know that it~~ and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. A statement is likely to have a substantial

likelihood of materially prejudicing an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation, or criminal record of a party, of a suspect in a criminal investigation or of a witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, ~~or~~ the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) 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; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(b) Notwithstanding paragraph (a), a lawyer who is participating or has participated in the investigation or litigation of a matter may state without elaboration:

(1) the nature of the claim, offense, or defense involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, also:

(i) the identity, residence, occupation, and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party ~~prior to~~ before trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

~~No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. Moreover, the confidentiality provisions of Rule 1.6 may prevent the disclosure of information which might otherwise be included in an extrajudicial statement. In addition, s~~Special rules of confidentiality may validly govern ~~proceedings in~~ juvenile, domestic relations, and mental disability proceedings, ~~and perhaps~~ in addition to other types of litigation. Rule 3.4(c) requires compliance with such rules.

~~For guidance in this difficult area, one may consider the following language adapted from the American Bar Association's Model Rule 3.6:~~

Rule 3.6 sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of

materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been, involved in the investigation or litigation of a case, and their associates.

~~*(a) A statement referred to in Rule 3.6 ordinarily is likely to have such a prejudicial effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:*~~

~~*(1) the character, credibility, reputation or criminal record of a party, of a suspect in a criminal investigation or of a witness, or the identity of a witness, or the expected testimony of a party or witness;*~~

~~*(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;*~~

~~*(3) the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;*~~

~~*(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;*~~

~~*(5) 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; or*~~

~~*(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.*~~

~~*(b) Notwithstanding Rule 3.6 and paragraphs (a)(1-5) of this portion of the comment, a lawyer involved in the investigation or litigation of a matter may state without elaboration:*~~

~~*(1) the general nature of the claim or defense;*~~

~~*(2) the information contained in a public record;*~~

~~*(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;*~~

~~*(4) the scheduling or result of any step in litigation;*~~

~~*(5) a request for assistance in obtaining evidence and information necessary thereto;*~~

~~*(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and*~~

~~*(7) in a criminal case:*~~

~~*(A) the identity, residence, occupation and family status of the accused;*~~

~~*(B) if the accused has not been apprehended, information necessary to aid in apprehension of that person;*~~

~~*(C) the fact, time and place of arrest; and*~~

~~*(D) the identity of investigating and arresting officers or agencies and the length of the investigation.*~~

See Rule 3.8(e) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Staff Comment: The amendments in this rule expand the current rule considerably by moving substantial portions of the current commentary into the rule itself. See, for example, paragraph (b), and the latter portion of paragraph (a). The initial part of paragraph (a) is substantially the same as the current rule, except that the "reasonable lawyer" standard is substituted for the "reasonable person" standard.

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not~~: (a)~~ practice law in a jurisdiction ~~where doing so violates~~ in violation of the regulation of the legal profession in that jurisdiction~~;~~, or assist another in doing so.

(b) ~~assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.~~ A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by law or these rules, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction may provide temporary legal services in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer or a person the lawyer is assisting is authorized by law to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not covered by paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized by law to provide in this jurisdiction.

Comment

A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by law, order, or court rule to practice for a limited purpose or on a restricted basis. See, for example, MCR 8.126, which permits, under certain circumstances, the temporary admission to the bar of a person who is licensed to practice law in another jurisdiction, and Rule 5(E) of the Rules for the Board of Law Examiners, which permits a lawyer who is admitted to practice in a foreign country to practice in Michigan as a special legal consultant, without examination, provided certain conditions are met.

Paragraph (a) applies to the unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, ~~L~~limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This rule ~~Paragraph (b)~~ does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for it ~~their work~~. See Rule 5.3.

~~Likewise it does not prohibit~~ A lawyer~~s from providing~~ may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law,

for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

Other than as authorized by law or this rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

There are occasions on which a lawyer admitted to practice in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of clients, the public, or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not indicate whether the conduct is authorized. With the exception of paragraphs (d)(1) and (d)(2), this rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted here to practice generally.

There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction and, therefore, may be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any jurisdiction of the United States, including the District of Columbia and any state, territory, or commonwealth. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice and is in good standing to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who, while technically admitted, is not authorized to practice because, for example, the lawyer is on inactive status or is suspended for nonpayment of dues.

Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice, such as MCR 8.126, or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this rule when the lawyer appears

before a tribunal or agency pursuant to such authority. To the extent that a law or court rule of this jurisdiction requires that a lawyer who is not admitted to practice in this jurisdiction obtain admission pro hac vice before appearing before a tribunal or administrative agency, this rule requires the lawyer to obtain that authority.

Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice under MCR 8.126. Examples of such conduct include meetings with a client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage temporarily in this jurisdiction in conduct related to pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction, provided that those services are in or are reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction and the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice under MCR 8.126 in the case of a court-annexed arbitration or mediation, or otherwise if required by court rule or law.

Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction if they arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not covered by paragraphs (c)(2) or (c)(3). These services include both legal services and services performed by nonlawyers that would be considered the practice of law if performed by lawyers.

Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors indicate such a relationship. The lawyer's client previously may have been represented by the lawyer or may reside in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work may be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship may arise when the client's activities or the legal issues

involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of the corporation's lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise, as developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally uniform, foreign, or international law.

Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another jurisdiction of the United States and is not disbarred or suspended from practice in any jurisdiction may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as to provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. This paragraph applies to in-house corporate lawyers, government lawyers, and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by statute, court rule, executive regulation, or judicial precedent.

A lawyer who practices law in this jurisdiction is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may be required to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, such disclosure may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

Paragraphs (c) and (d) do not authorize lawyers who are admitted to practice in other jurisdictions to advertise legal services to prospective clients in this jurisdiction. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

Staff Comment: The amended rule sets specific guidelines for out-of-state lawyers who are appearing temporarily in Michigan, and is intended to work in conjunction with MRPC 8.5. See, also, MCR 8.126 and MCR 9.108(E)(8).

Rule 5.7 Responsibilities Regarding Law-Related Services

(a) A lawyer shall be subject to the Michigan Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comment

When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed, and regardless of whether the law-related services are performed through a law firm or a separate entity. This rule identifies the circumstances in which all the Michigan Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those rules that apply

generally to lawyer conduct, regardless whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer providing the law-related services must adhere to the requirements of the Michigan Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Michigan Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, this rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Michigan Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Michigan Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made, preferably in writing, before law-related services are provided or before an agreement is reached for provision of such services.

The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some

circumstances, the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the rule cannot be met. In such a case, a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls, comply in all respects with the Michigan Rules of Professional Conduct.

A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical, or environmental consulting.

When a lawyer is obliged to accord the recipients of such services the protections of those rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the rules addressing conflicts of interest, and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

When the full protections of all the Michigan Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest, and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

Staff Comment: This is a new rule. The underlying presumption of the rule is that the Michigan Rules of Professional Conduct apply whenever a lawyer performs law-related services or controls an entity that performs law-related services. The accompanying commentary explains that the presumption may be rebutted only if the lawyer carefully informs the consumer and identifies the services that are law related and clarifies that no client-lawyer relationship exists with respect to ancillary services.

Rule 6.6 Nonprofit and Court-Annexed Limited Legal Services Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this rule.

Comment

Legal services organizations, courts, and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services, such as advice or the completion of legal forms, that will help persons address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics, or pro se counseling programs, a client-lawyer relationship may or may not be established as a matter of law, but regardless there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9, and 1.10.

A lawyer who provides short-term limited legal services pursuant to this rule must secure the client's consent to the scope of the representation. See Rule 1.2. If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this rule, the Michigan Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

Because a lawyer who is representing a client in the circumstances addressed by this rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification

of a lawyer participating in the program be imputed to other lawyers participating in the program.

If, after commencing a short-term limited representation in accordance with this rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a), and 1.10 become applicable.

Staff Comment: MRPC 6.6 is a new rule. The rule addresses concerns that a strict application of conflict-of-interest rules may deter lawyers from volunteering to provide short-term legal services through nonprofit organizations, court-related programs, and similar other endeavors such as legal-advice hotlines.

Rule 8.5 ~~Jurisdiction~~ Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer ~~licensed~~ admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of ~~whether~~ where the lawyer's ~~is engaged in practice elsewhere~~ conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be ~~who is licensed to practice in another jurisdiction and who is admitted to practice in this jurisdiction is~~ subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct; a lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment

~~*In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See*~~

~~*Rule 5.5. A lawyer admitted to practice in Michigan pro hac vice is subject to the disciplinary authority of this state for actions and inactions occurring during the course of the representation of a client in Michigan.*~~

~~*If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.*~~

~~*Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.*~~

Disciplinary Authority. It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this rule. The fact that a lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer in civil matters.

Choice of Law. A lawyer potentially may be subject to more than one set of rules of professional conduct that impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interests of clients, the profession, and those who are authorized to regulate the profession. Accordingly, paragraph (b) provides that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct; makes the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions; and protects from discipline those lawyers who act reasonably in the face of uncertainty.

Paragraph (b)(1) provides, as to a lawyer's conduct relating to a proceeding pending before a tribunal, that the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice

of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred or, if the predominant effect of the conduct is in another jurisdiction, the lawyer shall be subject to the rules of that jurisdiction. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be either where the conduct occurred, where the tribunal sits, or in another jurisdiction.

When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear initially whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct actually did occur. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this rule.

If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct and should avoid proceeding against a lawyer on the basis of inconsistent rules.

The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties, or other agreements between regulatory authorities in the affected jurisdictions provide otherwise.

Staff Comment: The amendments of MRPC 8.5 add a separate section on choice of law. The rule specifically gives discipline authorities jurisdiction to investigate and prosecute the ethics violations of attorneys temporarily admitted to practice in Michigan. The rule is intended to work in conjunction with MRPC 5.5. See, also, MCR 8.126 and MCR 9.108(E)(8).

The staff comments that appear throughout these amendments are intended to provide explanation, but are not authoritative constructions by the Court.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 26, 2010

Clerk

I. 10/27/2010

II. Michigan Supreme Court Makes Significant Amendments to the Rules of Professional Conduct

The Michigan Supreme Court has amended several provisions of the Michigan Rules of Professional Conduct, effective January 1, 2011. The affected rules include:

- 3.1 Meritorious Claims and Contentions
- 3.3 Candor Toward the Tribunal
- 3.4 Fairness to Opposing Party and Counsel
- 3.5 Impartiality and Decorum of the Tribunal
- 3.6 Trial Publicity
- 5.5 Unauthorized Practice of Law; Multijurisdictional Practice
- 8.5 Disciplinary Authority; Choice of Law

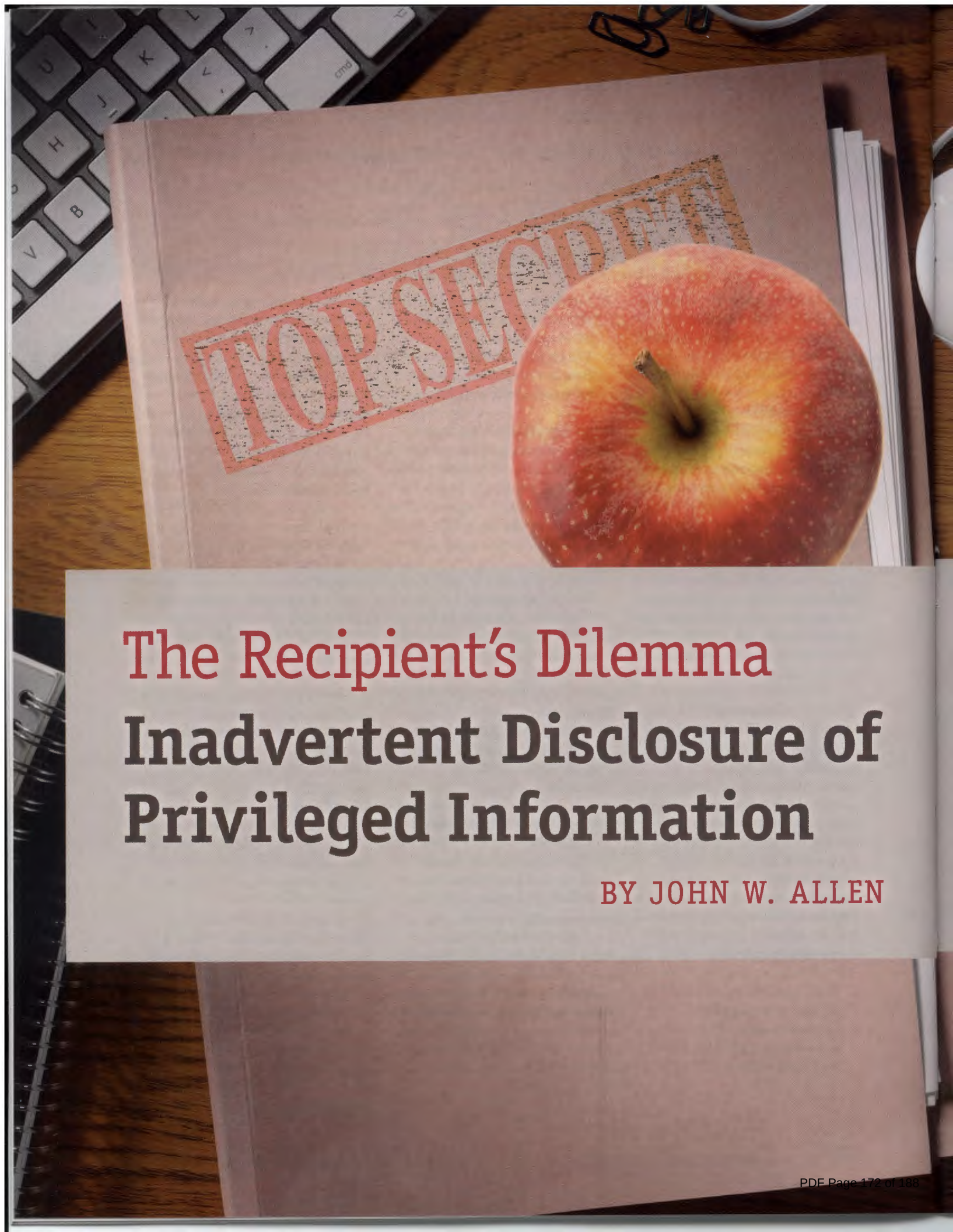
In addition, the Court added new Rules 2.4 (Lawyer Serving as Third-Party Neutral), 5.7 (Responsibilities Regarding Law-Related Services), and 6.6 (Nonprofit and Court-Annexed Limited Legal Services Programs).

Especially notable are the changes to 5.5, which are identical to the ABA's multi-jurisdictional practice rule, and make Michigan the 44th U.S. jurisdiction to adopt a rule providing for the multijurisdictional practice of law.

Here's the order (PDF).

The Court's action brought to a close Michigan’s evaluation and adoption of portions of the American Bar Association’s Ethics 2000 Model Rules, a process begun in 2001. The changes announced Tuesday are substantially the same as those published for comment by the Court November 24, 2009, with the exceptions of Rules 3.3 and 3.6. For a short description of how the new rules differ from those published, read on.

Omitted from the list of rules described in the November 24, 2009, order are Rules 1.5 (Fees), 1.7 (Conflicts of Interest: General Rule), and 1.8 (Conflicts of Interest: Prohibited Transactions). Rule 3.3 contains more stringent requirements than previously that a lawyer take remedial measures to remedy the offering of false evidence. The trial publicity rule represents a hybrid of the two alternatives the Court considered and pulls into the rule from the commentary a number of provisions that will give lawyers more precise guidance than does the current rule about what categories of information are permissibly disseminated. Rule 5.5 has entirely new provisions pertaining to multijurisdictional practice that will impact lawyers licensed in other states, while giving deference to MCR 8.126, the pro hac vice rule, and Rule 5(E) of the Rules for the Board of Law Examiners, pertaining to special legal consultants.



The Recipient's Dilemma

Inadvertent Disclosure of Privileged Information

BY JOHN W. ALLEN

Receiving inadvertently disclosed privileged information presents a decidedly two-sided coin. The false joy of discovering the often highly probative value of unintended evidence can be quickly offset by the threat of disqualification for failure to abide by the ethical and procedural rules governing such unexpected events. To complicate matters, in some jurisdictions those ethical and procedural rules are at odds and inconsistent with each other. This article describes the various rules and ethical opinions that govern inadvertent disclosures of privileged information, reiterates the importance of maintaining the attorney-client privilege, touches upon some scenarios where sanctions may well occur, and suggests procedures to both comply with the rules and to protect the privilege to which every client—yours and your opponent's—is entitled.

The Federal and State Rules

The Federal Rules of Civil Procedure (Federal Rules) and many state court rules have adopted a nearly identical procedure for handling inadvertent disclosures of privileged information. Federal Rule 26(b)(5)(B) provides:

> (B) *Information Produced*. If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, *the party making the claim* may notify any party that received the information of the claim and the basis for it. *After being notified*, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved (emphasis added).

Similarly, Michigan Court Rule 2.302(B)(7) reflects the approach found in many states:

> (7) *Information Inadvertently Produced*. If information that is subject to a claim of privilege or of protection as trial-preparation material is produced in discovery, *the party making the claim* may notify any party that received the information of the claim and the basis for it. *After being notified*, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved (emphasis added).

First, note that the "claim of privilege" is not restricted to attorney-client privilege and that many privileges are recognized in both the federal and state law. Also note that the duty of initial notice is on the *producing/sending* party, not the receiving party. Based on the Rules of Civil Procedure alone, one might conclude that the recipient has no duty whatsoever when receiving apparently privileged material under circumstances that indicate that the disclosure may have been inadvertent. Thus, a recipient might wrongly conclude that nothing need be done until the sender notices the error and notifies the recipient. This would be wrong. Sometimes, the full answer is not in the civil procedure rules alone. To get a more complete picture, one must also review the applicable rules of professional conduct and pertinent ethics opinions.

PHOTO SOURCE: ISTOCKPHOTO

TIP

The false joy of discovering the often highly probative value of unintended disclosure may be quickly offset by the threat of disqualification for failure to abide by the ethical and procedural rules governing such unexpected events.

The Model Rules and Ethics Opinions

The American Bar Association (ABA) ethics opinions and the Model Rules of Professional Conduct (Model Rules) display a somewhat tortured history of how to handle inadvertently disclosed privileged information. On November 10, 1992, the ABA Ethics Committee issued Formal Opinion 92-368, "Inadvertent Disclosure of Confidential Materials," in which it opined that a lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or that otherwise could be deemed confidential, under circumstances where it is clear that those materials were not intended for the receiving lawyer, should refrain from examining the materials, notify the lawyer who sent them of receipt of the materials, and abide by the instructions of the lawyer who sent them.

In February 2002, the ABA Model Rules were amended pursuant to the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct. The amendment to Rule 4.4, "Respect for Rights of Third Persons," not only directly addressed the precise issue discussed in Formal Opinion 92-368 but narrowed the obligations of the receiving lawyer. The amendment added Rule 4.4(b), which states that

> [a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Rule 4.4(b) thus only obligates the *receiving* lawyer to notify the *sender* of the inadvertent transmission promptly. It does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer. Comment [2] to Rule 4.4 explains that

> [w]hether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived.

Comment [3] goes on to state that

> [s]ome lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Thus, because the conclusion of Formal Opinion 92-368 was in conflict with amended Rule 4.4, the ABA Ethics Committee withdrew the earlier opinion in 2005 by issuing ABA Formal Opinion No. 05-437. Unfortunately, by that time—and even after that—many states adopted their own versions of the revised Model Rules that reflected the stance taken by the earlier ethics opinion, thus continuing to place a duty of notice on the recipient.

Thus the states have adopted varying approaches to the Model Rules. Some, like New York, have adopted the ABA version of Model Rule 4.4(b), placing a duty only on the receiving counsel. States such as Michigan and Florida have declined to do that and have no Model Rule 4.4(b) equivalent. Yet, earlier ethics opinions in Michigan—for example, Opinion CI-970 from 1983—now have no vitality, given the more recent Michigan Court Rule 2.302(B)(7) amendment, described above. Still other states, as illustrated by Colorado Rule 4.4(b) and (c), have adopted *both* approaches, incorporating both the Model Rule duty of notice on receiving counsel and the Federal Rules approach of placing a duty on the counsel who sent the materials. The Colorado rule provides:

> Rule 4.4. Respect for Rights of Third Persons
> (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
> (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.
> (c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and

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John W. Allen *is a partner in the Kalamazoo, Michigan, office of Varnum LLP. He focuses his practice on business and commercial litigation, and he also teaches trial practice to other lawyers. Allen can be reached at jwallen@varnumlaw.com.*

who, before reviewing the document, receives notice from the sender that the document was inadvertently sent, shall not examine the document and shall abide by the sender's instructions as to its disposition.

Limiting Accidental Waiver

Most courts are reluctant to endorse any theory of "accidental" waiver. The attorney-client privilege is too valuable a right to be discarded cavalierly. Its value not only benefits a specific client but society as a whole. The attorney-client privilege and work product protections confer enormous value on our society, meriting the title of the "greatest engine of law enforcement."

Dating back to the reign of Elizabeth I of England, the underlying rationale of this privilege is that legal compliance is enhanced by persons and businesses being able to seek and rely upon confidential legal advice from their lawyers. And it works. Ask any experienced lawyer, and each will tell you of his or her early career astonishment at the candor with which clients communicated facts to the lawyer, and the even greater gratification of seeing clients obey the lawyer's advice to comply with the law—even if doing so was expensive, unpleasant, and unwanted by the client. In America, this happens thousands of times each day, and it results in the highest degree of voluntary legal compliance on the planet, all without any direct government involvement and without spending a single tax dollar.

Judges understand the great value of the attorney-client privilege and protect it jealously. Any waiver of the attorney-client privilege or work product protections derogates from a culture of confidential communication, which forms the principal incentive to seek and obtain legal advice. Therefore, any waiver, even if arising out of accidental or inadvertent conduct, holds a large potential for damaging the privilege and thus decreasing legal compliance in general. Any revelation of confidential attorney-client communications—even by voluntary waiver—derogates from the candor that is essential to the effective operation of this privilege in achieving voluntary legal compliance.

To evaluate privilege waivers by inadvertent conduct, federal courts now use a balancing test contained within the recently amended Federal Rule of Evidence 502(b). That Rule now provides:

> (b) *Inadvertent disclosure.* When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:
> 1. the disclosure is inadvertent;
> 2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
> 3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

Thus the producing/sending lawyer must act promptly if a notice is received from the receiving lawyer and must take the steps specified in Federal Rule 26(b)(5)(B).

Sanctions for Violation

Some courts have concluded that, regardless of the provisions of the Federal Rules, a receiving lawyer nevertheless has a duty to notify the sender that materials may have been inadvertently disclosed. Frequently, the sanction is severe and includes disqualifying the receiving lawyer and that lawyer's entire firm from any further work in that matter. Such disqualifications are rarely well received by the disqualified lawyer's client, who usually wants reimbursed the fees already paid, and chooses not to pay any more.

The sanction for inadvertent disclosure frequently includes disqualifying the receiving lawyer—and entire firm—from further work in that matter.

Such sanctions occurred in *Maldonado v. New Jersey*.[1] In this employment discrimination case, the plaintiff found a letter in his workplace mailbox, reviewed it, and then handed it over to his attorney. Prejudice existed due to the significance of the letter's contents, which contained the defendants' case strategy. However, the court found that Maldonado was not culpable of sanctionable conduct because no evidence existed that he committed a deliberate or bad faith act.[2] The court concluded that the proper thing to do when he received a letter that was not addressed to him would have been to return it to the named recipient or author. Instead, given the alleged environment at work and Maldonado's level of legal understanding, the court found it understandable that he gave the letter to his attorney. But the court also observed that "Maldonado's

attorney is the safety-net in this situation, and is charged with certain ethical obligations as it relates to the privileged materials."[3]

The court went on to conclude that plaintiff's counsel did not properly perform their "safety net" function. The court criticized plaintiff's counsel because of the following facts:

- Maldonado's present counsel had access to privileged material for several months before giving notice to the producing party or lawyer;
- plaintiff's counsel reviewed and relied on the letter in formulating Maldonado's case;
- the letter was highly relevant and prejudicial to the defendants' case;
- plaintiff's counsel did not adequately notify opposing counsel of their possession of the material;
- the defendants took reasonable precautions to protect the letter and could not be found at fault for its disclosure; and
- Maldonado would not be severely prejudiced by the loss of his counsel of choice.[4]

The result was that plaintiff's counsel were disqualified from the case.

Maldonado may be criticized as outdated because it is based on the rationale of the now-rescinded ABA Formal Opinion 92-368. But the key is actually New Jersey Ethics Rule 4.4(b), which remains as it was in 2004 when *Maldonado* was decided, and reads:

> (b) A lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender.

This is still the law in New Jersey and in many other jurisdictions.

Responding to Inadvertent Receipt

If documents that you believe may be privileged are inadvertently sent to you, follow the steps outlined below to comply with the rules and to protect any privilege attached to the documents.

- *Stop reading the documents immediately.*
- Draft a memorandum regarding the facts of revelation of the documents and describe them briefly. In writing this memo, do not look at the detailed contents of the documents.
- Sequester and secure the documents, and memorialize them, preferably using personnel not working directly on the same client matter. One method used with paper documents is to turn the documents over, with the blank side showing, and add serial numbers to them. Their container or envelope needs a label and to be sealed, and a chain-of-custody log needs to be created. Separate these documents from the file containing all other documents relevant to the case.
- Draft a letter to the sending attorney giving notice of the revelation, in compliance with the applicable court rule, demanding an immediate response regarding any claim of privilege, with a description of the required privilege log. Do not waive the right to demand that the documents be produced, and do not concede the privilege claim, as delineated in Federal Rule 26(b)(5)(A)(i) and (ii). With the letter to the sender, provide a form of the privilege log to obtain information relevant to challenging the privilege claim. Send a copy of the form to your client, so the client knows what is happening.
- Inform the sending attorney that you are submitting the material to the court, under seal, and requesting that the court rule on it at a hearing unless the defendant waives the privilege before then. Offer the opportunity to inspect the documents under supervision.
- Draft and send a pleading notifying the court of the documents, filing them under seal. Do this promptly after receipt of the documents.
- After the court reviews the materials, even if the judge determines them to be privileged, that does not necessarily end the issue. Even if the materials were privileged, that privilege may have been waived by the producing party's conduct, as the discussion of Federal Rule of Evidence 501 above suggests.

Conclusion

Just because your opponent inadvertently sends you a privileged document, you do not necessarily have the right to read it. Prudence, and a high regard for the privilege, causes the wise lawyer to proceed carefully and to assure compliance with both court rules and ethical rules before proceeding. ■

Endnotes

1. 225 F.R.D. 120 (D.N.J. 2004).
2. *Id.* at 136.
3. *Id.* at 135.
4. *Id.* at 141.

E-Discovery Ethics: Emerging Standards of Technological Competence

HON. JOY FLOWERS CONTI AND RICHARD N. LETTIERI

In September 2013, the American Bar Association amended the comments to Rule 1.1[1] of the Model Rules of Professional Conduct to link lawyer competence to expertise in technology. The comments were modified to state: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology ..."[2] This change was the first time the comments to the ABA Model Rules addressed the importance of being competent about technology. Since then, the comments to rules of professional conduct applicable in many states have changed to follow the ABA's lead.[3]

On its face, the phrase "the benefits and risks associated with relevant technology" may appear simple and relatively innocuous, but its vagueness leads to the need to describe what technological e-discovery competence entails. At least one knowledgeable author[4] outlined several areas of practice where relevant technology becomes critical.

- Cybersecurity
- Internet marketing and investigations
- Employing cloud-based services (in the practice of law)
- Implementing automated document assembly and expert systems (in the delivery legal services)
- E-discovery

There are additional areas of technological competence, but these five areas seem to predominate.

This article focuses exclusively on technological competence with respect to e-discovery and posits an answer to the question: What does "understanding the benefits and risks associated with relevant technology" in the context of e-discovery mean? While the changes at the national and state level linking lawyer competence to an understanding about technology have been useful, the changes lack specifics and provide little practical direction for lawyers attempting to determine what minimum level of skills they need to develop or acquire to meet this emerging ethical competency requirement in the discovery context. The California State Bar's Standing Committee for Professional Responsibility and Conduct has taken an important step in providing the required detail in a Formal Opinion, No. 2015-193 (June 30, 2015), that identifies nine key e-discovery skills required to achieve e-discovery technological competence.[5] This article builds on those nine skills by providing the next level of detail to further describe those skills in order to develop a useful and practical guide to help lawyers determine what key e-discovery skills they need to develop or whether they need to associate with a lawyer who is competent in the e-discovery field.

Some may question whether it is too early to attempt to provide specific guidance about what competence means in the technological e-discovery sphere and consider definitive guidance to be far off.[6] While it may be difficult to provide comprehensive specifics, it is

both necessary and helpful at this time to provide at least a minimum of practical guidance to lawyers to help them meet their requirements under the applicable rules of professional conduct.

Ongoing Efforts To Help Determine and Develop E-Discovery Technological Skills

As a threshold matter, it is worth noting that some courts have already launched efforts to help lawyers identify and develop e-discovery skills to enhance their e-discovery technological competence. For example, a group of practicing lawyers, judges, academics, and e-discovery experts in the Seventh Circuit formed the Seventh Circuit Electronic Discovery Pilot Program Committee in 2009 to promote lawyer understanding and execution of critical e-discovery skills.[7] That program recognizes e-discovery performance standards for lawyers, including expecting lawyers to be familiar with the e-discovery provisions of the Federal Rules of Civil Procedure, understand the e-discovery principles developed by the court, and be aware of e-discovery case law and relevant publications on e-discovery by the Sedona Conference, a well-recognized think-tank on e-discovery issues for the past decade. The Pilot Program Committee has also launched a website (www.discoverypilot.com) that contains written educational material and webinars.

In the U.S. District Court for the Western District of Pennsylvania, the E-Discovery Series, which is sponsored by the local chapter of the Federal Bar Association, has provided ongoing CLE e-discovery education and training to more than 1,200 lawyers in 35 quarterly sessions that began in 2007. Since its inception, this series of programs has had the active support and participation of the federal judges in the district. The programs have addressed a variety of e-discovery topics like:

- How To Conduct a Meaningful Rule 26(f) "Meet and Confer"
- Determining Where the Data Is—Effective Questioning of IT People
- Understanding Predictive Coding (CAR and TAR); When and How To Use It Effectively
- Negotiating Effective ESI Search Protocols
- Admissibility of Social Media
- Effective Use of E-discovery Special Masters in Federal Court

These efforts have succeeded in increasing the awareness and knowledge of the local lawyers about e-discovery issues and enhanced specific e-discovery skills. However, prior to the California Bar committee's effort, no organization had attempted to describe standards for measuring e-discovery competence.

California Bar Committee Describes Skills Needed for E-Discovery Competence

The California Bar committee has provided some concrete and specific guidance regarding what is meant by e-discovery technological competence. Using federal case law as its basis, the committee identified nine basic e-discovery skills that a lawyer is required to develop or acquire in order to handle a case involving electronically stored information (ESI) in a competent, and, therefore, ethical manner.

Under the California Bar committee's opinion, if a lawyer has a case where ESI is likely to be sought in discovery, the duty of competence under Rule 3-110 requires that the lawyer take the steps necessary to develop the skills the lawyer lacks, associate or consult with a lawyer who has the requisite skills, or refuse the representation. (California State Bar Opinion No. 2010-179 allows that "when e-discovery is at issue, association or consultation may be with a non-lawyer, technical expert if appropriate in the circumstances"). Because the nine skills identified by the California Bar committee are based largely on federal case law, they may have applicability to lawyers in other states. These identified skills, however, are brief descriptions of complex activities. The descriptions of the skills lack the specifics necessary for successful execution. This article is not meant to offer a comprehensive explanation of each skill or how a skill can best be executed. It is, however, meant as a next step in the development of practical tools designed to provide useful guidance to lawyers trying to determine how best to execute these skills and whether they can develop the skills or need to associate with a lawyer who has the skills to fulfill the ethical duty of technological competence as it relates to e-discovery.

Nine Basic E-Discovery Skills

Skill 1: Initially assess e-discovery needs and issues, if any.

This skill is fundamental and perhaps the most important. Many lawyers unfamiliar with ESI are suspicious of the new jargon, additional costs, and unknown pitfalls of e-discovery. Consequently, they may be likely to try to avoid e-discovery, often at the risk of losing the possibility of acquiring relevant electronic evidence that could help their clients' cases. Counsel from larger firms with their own in-house e-discovery practices have commented that this is an advantage provided to their clients when opposing counsel elect not to pursue discovery of ESI.[8] Similar views regarding a wide disparity in e-discovery skills among lawyers practicing in federal court were expressed by federal judges participating in a recent survey.[9] Yet the widespread practice of not pursuing ESI discovery continues, as documented in a recent review of Rule 26(f) Reports in at least one federal jurisdiction.[10]

Certain fundamental considerations must be included in this initial assessment: (1) the dollar worth or value of the case, or the importance of the claims raised if the monetary value is insignifi-

Counsel from larger firms with their own in-house e-discovery practices have commented that this is an advantage provided to their clients when opposing counsel elect not to pursue discovery of ESI.

cant or not sought, *as compared with* the cost of ESI discovery based upon the volume of data to be collected, filtered, searched, reviewed, and produced; (2) the date ranges for the time period of the search, which may impact the amount of data to be collected; and (3) the media types involved (i.e., disk, tape, text, social media, audio). Weighing the estimated worth or value or the significance of the issues raised in the case against these ESI discovery cost elements may make obtaining ESI uneconomical. In this assessment, counsel need to be guided by the principle of proportionality that under the proposed amendment to Rule 26 of the Federal Rules of

Civil Procedure will define the scope of discovery.[11] The court will assess proportionality in determining the reasonableness of the scope of the ESI that counsel has requested be collected and produced.

Other important factors to consider in this initial ESI discovery assessment are the level of sophistication of opposing counsel and the court. Lack of knowledge or cooperation can unnecessarily delay the proceedings, require additional time, and increase motion practice and costs. The costs of retaining e-discovery co-counsel and e-discovery suppliers must also be considered. A knowledgeable e-discovery co-counsel can help a party assess these e-discovery costs in advance of a decision to proceed. It is worth stressing again that the largest ESI discovery costs will be determined by the scope, that is: (1) the number of custodians (i.e., key people from whom data must be collected), (2) the date ranges for the time period of the search, and (3) the types of media (i.e., accessible, active data on disk or devices, or inaccessible data that has been deleted or resides on tape and must be restored). ESI discovery costs will also be increased if text messages and social media must be collected.

At the conclusion of this initial assessment, a lawyer must be able to answer the following threshold question: Do the anticipated benefits of collecting and producing ESI justify the costs when compared against the value or interests involved in the case?

Skill 2: Implement or cause to implement appropriate ESI preservation procedures.

There are two key steps recommended for a lawyer to meet the requirements of this skill:

1. Obtain a thorough understanding of the client's information technology (IT) environment, outline in detail the client's preservation responsibilities, follow up any verbal discussions with the client with written instructions in a litigation hold letter that outlines the specific preservation responsibilities, send the letter to each custodian, and follow up to determine if the custodians complied with the instructions.[12]
2. Create and send a preservation letter to opposing counsel outlining all of his or her client's preservation obligations and placing that counsel on notice regarding the extent to which the lawyer's client intends to pursue ESI in a case; the letter, if possible, should outline in some detail (i.e., by person, system, and application) where relevant ESI may be found.

Skill 3: Analyze and understand a client's systems and storage.

A lawyer must be familiar with his or her client's IT environment. The lawyer needs to be able to speak knowledgeably with the client's IT staff. If a client is a business entity or operates a substantial business, these systems may be complex and may require the questioner to have some IT background and experience. Advance preparations may be helpful, such as requesting data maps of a system's architecture and application inventories.[13] The goal is to understand where potentially relevant information for key custodians may reside (i.e., by system, application software, or specific device) and whether it resides on accessible media that is easily recoverable (i.e., disk) or inaccessible media that is more difficult to recover and may need to be restored at an additional cost (i.e., tape or audio). A preliminary estimate of the cost to preserve and collect (as well as search and produce) this data, based upon the number of custodians and the time frame involved, should be obtained. These estimates can be provided by e-discovery suppliers, who may provide this service at no charge.

Skill 4: Advise the client about available options for collection and preservation of ESI.

The first issue to consider with respect to this skill is the breadth of the preservation. Large corporations or businesses may have significant preservation and operation costs associated with the preservation of data for a large number of custodians over a long period of time. These costs may be disproportional to the value of the case or the interests involved in the case. Proportionality is a guiding principle in determining the breadth and extent of the preservation required. As noted, the proposed amendment to Rule 26 of the Federal Rules of Civil Procedure includes using the principle of proportionality in determining the scope of discovery. Counsel should discuss the scope of preservation at the Rule 26(f) "Meet and Confer." If the costs of preservation, collection and production of ESI are disproportional, the court may need to decide what is the appropriate scope of discovery in the case.[14] With respect to collection, to avoid inadvertent metadata spoliation, custodians should generally not be collecting their own ESI. Sometimes collection can be performed by the client's IT staff, under the supervision of counsel. In situations where a client does not have its own experienced e-discovery personnel, and to ensure proper collection techniques as well as objectivity, the best practice is to have an e-discovery supplier perform the ESI collections, as long as the costs are reasonable.

Skill 5: Identify custodians of relevant ESI.

The key people who had or may have data relevant to this case need to be identified. Experience dictates that it may be helpful to create two categories: (1) primary custodians, whose involvement in the case is direct and obvious; and (2) secondary custodians, whose involvement is less direct. The number of custodians and the date ranges for the time period of the search have a direct and significant impact on the amount of data that needs to be handled during each phase of the e-discovery process (i.e., collecting, filtering, processing, searching, reviewing, and producing), which can have enormous cost implications. Negotiating scope (i.e., number of custodians and time frame) will set the parameters to help control the total costs of e-discovery. Fewer custodians and a more limited date range for the search will significantly reduce e-discovery costs. Counsel can demonstrate a proportional ESI discovery approach by seeking ESI from primary custodians first and only seeking additional data from secondary custodians if required. A phased, proportional approach can be applied to other ESI elements, such as number and type of data sources, and in selection of the kind and method of search to be used.

Skill 6: Engage in a competent and meaningful Meet and Confer with opposing counsel concerning an e-discovery plan.

This skill is addressed in some detail in the article "In re ESI: Local Rules Enhance the Value of Rule 26(f) Meet and Confer,"[15] which provides specific advice about how to conduct a successful Rule 26(f) Meet and Confer. The overriding prerequisites for a successful Meet and Confer are having: (1) someone on both sides who has adequate technical skills and experience to permit meaningful

discussions about technical ESI issues, (2) a willingness to cooperate with opposing counsel to reach an acceptable resolution of each of the key ESI issues, (3) a working knowledge of ESI e-discovery best practices,[16] and (4) the skill and willingness to negotiate complex technological issues and finalize in writing a proposed joint ESI discovery protocol order that may be submitted to the court.

Skill 7: Perform data searches.

This skill involves an assessment of the most effective and efficient search approach for a particular case. Two approaches currently predominate: keyword search and predictive coding, also referred to as TAR (technology-assisted review) or CAR (computer-assisted review). Most lawyers are familiar with keyword searching that uses Boolean logic to locate within electronic documents specific words or phrases that have been selected by lawyers familiar with the issues in the case. Predictive coding, which, in cases involving large amounts of electronic data, studies have shown[17] to be more effective in finding relevant electronic documents at far less cost, involves the application of artificial intelligence and requires that knowledgeable lawyers create a small and representative "seed set" of relevant documents that are used to train a computer to perform searches of a much larger number of electronic documents. In addition to greater accuracy, the cost savings can be as much as 50 to 70 percent less than a keyword search followed by manual document review.[18]

Courts may be reluctant to impose one of these approaches. Usually the parties agree which to use. As noted, predictive coding may offer significant advantages. Some counsel, however, have objected to its use unless there is transparency regarding the documents used to train the computer referred to as the seed set, but others have argued that the seed set is entitled to work product protection under certain circumstances.[19] Because the entire process is more intricate and less widely known, keyword searching is still the most used approach, although this has already begun to change as the technology, methodology, and practice of predictive coding continues to mature.

Skill 8: Collect responsive ESI in a manner that preserves the integrity of the ESI.

At least two important considerations are essential to this skill:

1. It is necessary to select the format in which the ESI is to be produced. Generally, the requesting party has the right to request the format in which the ESI will be produced.[20] The format selected will determine how the data will be presented and whether metadata (the data about data that is embedded within every electronic document)[21] will be preserved or altered. For example, an electronic document in NATIVE format will preserve the metadata of that document when produced, but a static TIFF or PDF image version may make the metadata inaccessible unless the document is made searchable or a separate metadata load file is requested and attached.
2. It is necessary to preserve the integrity of the relevant ESI by selecting an appropriate method by which it is collected. For example, merely copying an electronic document may alter the "create date" or "modification date" metadata fields of that document. Proper collection methods (forensic collection) must be used to prevent this kind of inadvertent document modification.

Skill 9: Produce responsive, non-privileged ESI in a recognized and appropriate manner.

This e-discovery skill relates not only to format, as described in Skill 8 above, but also to technical specifications regarding the file formats of the data being produced and the review software to be used. The media upon which the ESI is to be produced needs to be specified between the parties. The process should allow the documents to be loaded, searched, and reviewed in the most efficient manner in the review tool that has been specified by the receiving party. Having the technology people from the IT staff of the parties (or the technology staff of the e-discovery supplier) specify the correct file formats will facilitate the most efficient and least costly manner to achieve the loading, searching, and reviewing of the electronic documents. Communication, attention to detail, and cooperation will be needed. Detailed specifications of production file formats should be negotiated and specified in any joint proposed ESI protocol order developed and attached as part of the Rule 26(f) Report to the court. In the joint proposed order, the parties should specify an expectation and method of communication between the IT staffs to address how unforeseen technological issues will be addressed cooperatively during the execution phase of the process.

Conclusion

The California Bar committee took an excellent first step in helping to describe the minimum level of e-discovery competence required to satisfy the new standard embodied in the comments to ABA Model Rule 1.1—requiring lawyers to "keep abreast of ... *the benefits and risks associated with relevant technology*"—by articulating nine basic e-discovery skills. This article builds upon that effort by providing additional specifics regarding how each skill can be successfully executed and is intended to provide guidance to lawyers to help them determine if they can develop these skills or must associate with a competent lawyer who has these skills.

In 2006, the same year the Federal Rules of Civil Procedure were modified to include provisions regarding discovery of ESI, the plaintiff in *Martin v. Northwestern Mutual Life Insurance Co.* sought to excuse his noncompliance with e-discovery requests on the ground that he was "so computer illiterate that he could not comply with production."[22] While most lawyers today would not make such an admission in court, in December 2014, in *James v. National Finance LLC*, the court warned a lawyer that "[p]rofessed technological incompetence is not an excuse for discovery misconduct."[23] In those eight years, while the technology, case law, and the practice of e-discovery moved forward at breakneck speed, it has been hard to hold lawyers accountable for technology e-discovery competence that no one has been able to describe. Standards by which e-discovery technological competence or incompetence can be measured have not yet been established.

Starting with the guidance provided first by the amended comment to ABA Model Rule 1.1, resulting in similar changes to the comments to rules of professional conduct in a growing number of states, and the identification of nine basic e-discovery skills by the California Bar committee, standards of e-discovery technological competence for lawyers have begun to emerge. The additional specifics provided in this article should help further describe the appropriate skills needed by lawyers and help them determine whether they need to develop e-discovery skills or acquire those skills through associating with competent co-counsel. ⊙


Hon. Joy Flowers Conti is chief judge for the U.S. District Court for the Western District of Pennsylvania. She is a past president of the Allegheny County Bar Association, a former law professor at Duquesne University School of Law, and a frequent speaker on e-discovery. Richard N. Lettieri, is a technologist and a lawyer who limits his practice to electronic evidence and e-discovery. He serves as co-counsel in litigation, and is an E-Discovery Special Master. A frequent writer and speaker on ESI, read his complete bio at www.lettierilaw.com.

Endnotes

[1]ABA Model Rule 1.1 provides:

Rule 1.1 Competence

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Model Rules of Prof'l Conduct R. 1.1 (2013).

[2]Model Rules of Prof'l Conduct R. 1.1 cmt. [8] (2013) (emphasis added).

[3]*See, e.g.*, Ark. Rules of Prof'l Conduct R. 1.1 cmt. [8] (2014) (identical to ABA Model Rule); Del. Lawyers' Rules of Prof'l Conduct R. 1.1 cmt. [8] (2013) (same); Kan. Rules of Prof'l Conduct R. 1.1 cmt. [8] (same); Pa. Rules of Prof'l Conduct R. 1.1 cmt. (8) (2013) (same); *"E-Discovery in 2015: Will You Feel the Earth Move Under Your Feet?"*, Daniel R. Miller and Bree Kelly, *Legal Insights* posted on K&L/Gates website, January 2015. www.ediscoverylaw.com/files/2015/01/E-Discovery-in-2015.pdf

[4]"The Twenty-First Century Lawyer's Evolving Ethical Duty of Competence," Professor Andrew Perlman, Suffolk School of Law, The Professional Lawyer, Vol. 22, No. 4 (2014). www.americanbar.org/publications/professional_lawyer/2014/volume-22-number-4/the_twentyfirst_century_lawyers_evolving_ethical_duty_competence.html.

[5]The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-193 (June 30, 2015). The opinion is *available at* calbar.ca.gov.

[6]"Litigation, Technology & Ethics: Changing Expectations," Victoria A. Redgrave, Jonathan M. Redgrave, and Keltie H. Peay, Practical Law The Journal, August/September 2014.

[7]Seventh Circuit Electronic Discovery Pilot Program, www.discoverypilot.com (last visited Feb. 19, 2015).

[8]Comments recently made at an FBA-sponsored E-Discovery Series at the Federal Courthouse in Pittsburgh, Pa., Nov. 20, 2014.

[9]Federal Judges Survey, "E-Discovery Best Practices and Trends." *See* www.externo.com.

[10]"E-Discovery Special Master (EDSM) Program: Progress Update," The Federal Lawyer, April 2014, www.lettierilaw.com/documents/EDSM.pdf.

[11]The proposed amendment to Rule 26(b) provides:

> (b) Discovery Scope and Limits.
>
> (1) Scope in General. Unless otherwise limited by court order, **the scope of discovery is as follows**: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense **and proportional to the needs of the case**, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1) (Proposed Amendment 2014)(emphasis added), *available at* www.uscourts.gov/uscourts/RulesAndPolicies/rules/civil_rules_redline.pdf.

[12]As stated in California Opinion No. 2015-193 at p. 4, these skills relate to the attorney's ethical obligations relating to his own client's ESI, not to an attorney's duty of competence relating to obtaining opposing party's ESI.

[13]The steps outlined in the following article describe this process in greater detail: "In Re ESI: Local Rules Enhance the Value of Rule 26(f) 'Meet and Confer,'" The Judges' Journal, Vol. 49, No. 2, Spring 2010, www.lettierilaw.com/documents/articlespringwithimage2010conti_letteri.pdf.

[14]The Committee Notes to Rule 37(e) of the proposed amendments to the Federal Rules of Civil Procedure expected to take effect in Dec. 2015, explicitly point to proportionality as a factor in determining the reasonableness of a party's preservation efforts:

> Another factor in evaluating the reasonableness of preservation efforts is proportionality. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data—including social media—to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

Fed. R. Civ. P. 37 comm. note (Proposed Amendment 2014), *available at* www.uscourts.gov/uscourts/RulesAndPolicies/rules/civil_rules_redline.pdf.

[15]*See supra note* 13.

[16]Many of these ESI discovery best practices have been codified in a series of documents produced by The Sedona Conference at no charge; thesedonaconference.org/publications.

[17]*See* TREC—Legal Track, trec-legal.umiacs.umd.edu/, especially jolt.richmond.edu/v17i3/article11.pdf.

[18]This analysis for the sake of conciseness is somewhat simplistic. The two approaches may be combined, and various techniques and technologies may be used in a search. For a more detailed explanation of this complex issue, please *see* "Cooperation, Transparency, and the Rise of Support Vector Machines in E-Discovery: Issues

E-Discovery continued on page 44

E-DISCOVERY continued from page 33

Raised by the Need To Classify Documents as Either Responsive or Non-Responsive," Desi V Workshop in Rome, Italy, June 14, 2013. www.umiacs.umd.edu/~oard/desi5/additional/Baron-Jason-final.pdf.

[19]Hon. John M. Facciola and Philip Favro, *Safeguarding The Seed Set: Why Seed Set Documents May Be Entitled to Work Product Protection*, 8 FED. CTS. LAW. REV. (Feb. 2015), www.fclr.org/fclr/articles/pdf/safegaurding-final-publication.

[20]*See* FED. R. CIV. PROC. 34(b)(2)(E).

[21]For a brief and understandable explanation of metadata, see "What is Metadata Scrubbing, and Is It Good for Business?" EXECUTIVE COUNSEL, July/August, 2006. www.krollontrack.com/Publications/metadata_scrubbing.pdf.

[22]*Martin v. N.W. Mut. Life Ins. Co.*, Case No. 804CV2328T23MAP, 2006 WL 148991, at *2 (M.D. Fla. Jan. 5, 2006) (noting that such an excuse "is frankly ludicrous").

[23]*James v. Nat'l Fin. LLC*, C.A. No. 8931-VCL, 2014 WL 6845560, at *12 (Del. Ch. Dec. 5, 2014).

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[86]*Id.* at 493.

[87]*Id.* at 492.

[88]*Id.*

[89]*Id.*

[90]*Id.*

[91]*Id.* at 493.

[92]*Id.* at 494.

[93]507 F. Supp. 1312 (D. Del. 1981).

[94]A lawsuit filed under 42 U.S.C. § 1983 is a civil rights claim against a government agency or agent for violating the plaintiff's constitutional rights.

[95]*Chrisco*, 507 F. Supp. at 1314.

[96]*Id.* at 1318.

[97]*Id.* at 1319.

[98]*Id.* ("Recognizing the important role played by counsel in plea bargaining, I conclude that there can be factual contexts in which the sixth amendment right to counsel attaches prior to the time formal criminal charges have been filed.").

[99]*Id.* at 1319-1320 (stating the importance of counsel to be present is "to ensure that any decision or agreement by the defendant to plead guilty is knowing, voluntary and intelligent.").

[100]*United States v. Busse*, 814 F. Supp. 760, 763-64 (E.D. Wis. 1993).

[101]*Id.* at 761.

[102]*Id.* at 761-762.

[103]*Id.* at 763-64.

[104]*United States v. Wilson*, 719 F. Supp. 2d 1260, 1268 (D. Or. 2010).

[105]*Id.* at 1264.

[106]*Id.*

[107]For more information on the appointment of counsel through the Criminal Justice Act, see 18 U.S.C. § 3006A (2012).

[108]*Wilson*, 719 F. Supp. 2d at 1264.

[109]*Id.*

[110]*Id.*

[111]*Id.* at 1265.

[112]*Id.*

[113]*Id.* at 1266.

[114]*Id.* at 1267.

[115]*Id.* at 1267-68.

[116]*Id.* at 1268.

[117]At the time of publication, this author is unaware of any Supreme Court petitions for a writ of certiorari that would allow the Court to directly address this issue. While there is a circuit split as to whether the bright-line test should be strictly applied, which would be sufficient for the Court to take the case under Supreme Court Rule 10(a), it would likely take an appeal from a circuit court case that rules consistent with the opinion in this article in order for the Court to weigh in on this important issue.

[118]*See Wilson*, 719 F. Supp. 2d at 1268 (describing the plea negotiations as "adversarial" for the purposes of attaching the Sixth Amendment right to counsel).

[119]*See Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

[120]*Frye*, 132 S. Ct. at 1407.

[121]*See id.* at 1407-08. *See also* Laurie L. Levenson, *Peeking Behind the Plea Bargaining Process:* Missouri v. Frye & Lafler v. Cooper, 46 LOY. L.A. L. REV. 457, 469 (2013).

[122]*Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) ("That which is simple, orderly, and necessary to the lawyer—to the untrained layman—may appear intricate, complex, and mysterious.").

[123]*See United States v. Moody*, 206 F.3d 609, 615-16 (6th Cir. 2000) ("There is no question in our minds that at formal plea negotiations, where a specific sentence is offered to an offender for a specific offense, the adverse positions of the government and the suspect have solidified.").

[124]*Kirby v. Illinois*, 406 U.S. 682, (1972) (plurality opinion).

[125]*United States v. Wilson*, 719 F. Supp. 2d 1260, 1267 (D. Or. 2010) ("Courts look to whether the prosecution has committed itself to prosecute, and whether the adverse positions of the government and defendant have solidified, such that the accused finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.").

[126]*Moody*, 206 F.3d 616.

21 Century Practice Task Force
Modernizing The Regulatory Machinery Committee
Work Group Four

RECOMMENDATION RE NON JD LEGAL AND LAW RELATED SERVICES PROVIDERS

After thorough discussion about how members of the public actually find and access legal services, Work Group Four recommends the following:

1. That the SBM undertake, in conjunction with key stakeholders, a comprehensive study to consider implementing a program similar to the Limited License Legal Technician program in Washington state, with the goal of increasing access to affordable and regulated legal services for Michigan residents.

2. That the Michigan Rules of Professional Conduct be amended to allow attorneys to ethically participate in for profit lawyer referral services. This proposal accompanies the Work Group's earlier proposal that the SBM provide citizens with educational tools and resources regarding online lawyer referral and ranking systems, so citizens can make more informed choices when shopping for an attorney online.

Reasons for Recommendations:

A. Opportunities:

   1). to increase access to affordable and regulated legal services for Michigan residents.

   2). to align the Michigan Rules of Professional Conduct with the immutable realities of the legal services marketplace, thus removing the risk of potential professional discipline for attorneys participating in a changed marketplace.

B. Risks (what is worst case scenario if adopted):

   1. Opposition from solo and small firm SBM members who will perceive (mostly erroneously) that an LLLT type program will post threats to their business models and financial viability.

2. That for profit lawyer referral services may become a dominant and powerful actor in the landscape of accessing legal services, much like Google has with the issue of SEO rankings.

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C. Unknowns/Unanswered Questions:

1). ideally an LLLT type program would be largely self-funded. However there will likely be a significant upfront investment of time by the stakeholder agencies, which may have budgetary impact.

D. What Is Innovative About this Option?

Both recommendations are innovative. Only one state has adopted an LLLT type program and that is quite recent. Recommendation two is innovative in that it acknowledges the changed realities of the legal services marketplace and the inability/lack of applicability of the Rules of Professional Conduct to regulate some aspects of the legal services marketplace.

E. Implementation Strategies

a. Potential supporters: Supreme Court, Michigan State Bar Foundation, Trial courts

b. Potential opponents/obstacles: Solo and Small Firm practitioners, AGC and ADB.

c. Interested SBM entities: Representative Assembly, Ethics Committee

d. Other interested stakeholders: Trial courts

e. What are the possibilities to increase effectiveness through technology? N/A

f. How might this intersect with or impact other justice system areas/needs?

i. The LLLT proposal would likely ease the burden of trial courts dealing with poorly equipped in pro per litigants.

g. Staging:

i. Does this option need experimentation or piloting? Yes.

ii. What is the recommended timetable, if any? Defer to the study group's recommendations

iii. What is the recommended order of steps, if any? Both proposals can be pursued simultaneously.

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RECOMMENDATION RE UNBUNDLING/LIMITED SCOPE REPRESENTATION –

Work Group Four Recommends:

1. That the Access Committee's Report on Limited Scope Representation be adopted, subject to the following suggestions:

    a. That the issues presented by unbundling of legal services relative to MRPC 4.2 – Communication With Represented Parties – be explored. Work Group Four recommends that if unbundling is adopted, that MRPC 4.2 be amended to provide clear guidance to practitioners communicating with partially represented parties. (Florida and Colorado have amended their 4.2 rules to address this issue.)

    b. That it be made clear that unbundling is limited to the civil context. Several members of Work Group Four are very concerned that some practitioners would attempt to unbundle services in the context of a criminal representation.

Reasons for Recommendations:

A. Opportunities:

Work Group Four defers to the Access Committee's assessment on this and the following questions.

B. Risks (what is worst case scenario if adopted):

C. Unknowns/Unanswered Questions:

D. What Is Innovative About this Option?

E. Implementation Strategies

    a. Potential supporters:

    b. Potential opponents/obstacles:

c. Interested SBM entities:

d. Other interested stakeholders:
e. What are the possibilities to increase effectiveness through technology?

f. How might this intersect with or impact other justice system areas/needs?

g. Staging:
    i. Does this option need experimentation or piloting?

    ii. What is the recommended timetable, if any?

    iii. What is the recommended order of steps, if any?