FINAL REPORT
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State Bar of Michigan
Special Committee on Grievance

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COMMENTS AND PROPOSALS

PROPOSED MICHIGAN STANDARDS FOR IMPOSING LAWYER SANCTIONS (ADM File No. 2002-29)

ADM File No. 2002-29 at:
http://courts.michigan.gov/supremecourt/Resources/Administrative/2002-29.pdf

1. "Injury" or "potential injury" should be a factor in imposing a sanction.

OUR PROPOSAL: Regarding 3.0, 4.1, 4.3, Alternative A to 4.4, 4.5, and 4.63, 6.2, 6.3, and 7.0, these standards should be adopted as proposed by ADB, rejecting the deletions from the ABA Model Standards regarding "injury" or "potential injury" to the client.

Especially since Requests for Investigation may be initiated based on reports made by non-clients (third parties, opponents), "injury" is a valid consideration in determining whether ANY sanction should be imposed. It should not be relegated to mere "mitigation," in Proposed Standard 9.32(a). The Standards proposed by ADB are preferable. In this respect, the ABA Model Standards represent the better view.

Some members of the Committee believe that "potential injury" is still too remote and conjectural for the imposition of quasi-criminal sanctions; instead, discipline under these Standards for "future" injury should be not be imposed unless the injury is "reasonably likely."

2. **Scienter: Actual Knowledge (Not just Negligence) should be required, for sanctions in regard to duties owed by lawyers to the public.**

OUR PROPOSAL: Alternatives A and B to 5.13, and ADB proposed 5.13(b) (fraud- duties owed to the public) should be rejected, unless it is restricted to a lawyer who "knowingly" engages in the prohibited conduct.

The MRPC is a strict liability, quasi-criminal code, which may result in discipline even though there is no wrongful intent, no bad faith, no injury, and no violation of the "standard of care" followed in actual practice by other lawyers. *In re Woll*, 387 Mich 154, 161, 194 NW2d 835 (1972).

Strict liability codes should not be viewed as a tool for establishing favored standards of care, nor "good practices." "Negligence" is a concept incompatible with strict or absolute liability. Inadvertent mistakes, even large ones, should not result in discipline; the civil justice system provides adequate remedies, with the additional protection of jury trials. As to duties owed to the public (not clients), actual knowledge should be required before discipline is imposed. Otherwise, there is too much opportunity for the disciplinary system to be used as leverage in conjunction with civil fraud or aiding and abetting claims against lawyers.

Some members of the Committee would go further, and require that the misconduct be "intentional."

3. **"Reprimand" should not be eliminated as a possible sanction, even in cases of fraud, deceit or misrepresentation directed to a client or to a tribunal.**

OUR PROPOSAL:

Alternatives A and B to 4.63 and 6.13 should be rejected. Standards 4.63 and 6.13 should be adopted as proposed by ADB.

The purpose of Standards should not be to eliminate the discretion of the discipline system. Alternative B to Proposed Standards 4.63, 5.1, 5.11(c), 5.12(c), 6.1 and 6.13 would eliminate "Reprimand" as a possible sanction in cases of: fraud, deceit or misrepresentation directed to a client; discourteous conduct toward a tribunal; failure to disclose legal authority; mistreats a person in the legal process because of a protected personal characteristic; and in instances of false statements, fraud and misrepresentation to a tribunal. The ADB proposal would retain "Reprimand," but restrict it to conduct which is negligent (not intentional), and which causes "injury or potential injury."

The concept of mitigation (see Proposed Standard 9.32 for examples) acknowledges that case-specific facts sometimes justify sanctions less than Disbarment or Suspension. Under Proposed Standard 4.6 (which contains no requirement or measure of materiality), minor or extremely technical untruths could be subject to discipline, even though they were inadvertent and no injury results to anyone. AGC/ADB should have the discretion for all forms of sanction.

4. **"Admonishment" should be permitted as a private sanction under MCR 9.106(6). The role of hearing panels and the ADB in "admonishments" should be clarified.**

OUR PROPOSAL:

The Supreme Court should be encouraged to affirm that these Standards are not intended to eliminate "admonishment" as presently authorized by MCR 9.106(6), and to clarify the role of hearing panels and the ADB in using an "admonishment" as a sanction.

"Admonishment" is a private sanction under MCR 9.106(6), issued by the Attorney Grievance Commission with the consent of the respondent, and without the filing of a formal complaint. Such an admonition is not discipline, and is confidential (non-public) under MCR 9.106, but can be referenced in the sanction phase of a later disciplinary proceeding. Of those Requests for Investigation which are not closed without further action, about 50% are resolved with an admonishment. It is an important tool in the Michigan lawyer discipline system.

The proposed Standards provide no criteria for the imposition of admonishments. This may be a recognition that, presently, admonishments are exclusively within the authority of the Attorney Grievance Commission acting in the absence of formal compliant; presently, an admonishment may **not** be imposed by hearing panels or the Attorney Discipline Board, as all of their proceedings proceed upon and are based on a formal complaint issued by AGC. ADB does not seek or desire the authority to impose admonishments, and opposes its being given that authority as contrary to MCR 9.106(6) and as presenting implementation issues.

The role of hearing panels and the ADB in admonishments is clouded by the Proposed Standards. The Preface to the Standards states that the Standards are "intended for use by the Attorney Discipline Board and its hearing panels in imposing discipline **following** a finding or acknowledgment of professional misconduct." Proposed Standard 2.6 "Admonition," describes a form of discipline consistent with the Michigan "admonishment" authorized by MCR 9.106(6); to some, this yields the inference that hearing panels and ADB will be authorized to issue admonishments, even after the

issuance of a formal complaint, despite that this would be inconsistent with MCR 9.106(6).

The Committee believes that the Supreme Court should make clear that admonishments, as presently authorized by MCR 9.106(6) will remain as a private, non-public sanction available to the AGC.

In addition, the Committee believes that Standard 2.6 should be clarified to authorize admonitions by hearing panels and ADB even after a finding or acknowledgment of professional misconduct. This would require amendment of MCR 9.106(6).

5. Suspensions should be permitted for periods of less than 180 days.

Our Proposal:

Standard 2.3 should be adopted as proposed by the Supreme Court and the ADB.

The "alternate" (Campbell) proposal calls for all suspensions to be 180 days or more. The Supreme Court Proposed Standard and ADB Proposed Standard 2.3 are identical, and permit suspensions for periods of not less than 30 days, which is also the present definition of "suspension" under MCR 9.123(D)(1). Presently, a lawyer suspended for 180 days or more is not eligible for reinstatement until after completion of the petition and hearing procedure of MCR 9.123. The reinstatement procedure may take as little as 30 to 60 days after the original suspension has ended, but can take 90 to 180 days The petition may not be submitted until 56 days before the principal suspension is completed. Thus, the "alternate" proposal would make every suspension result in the lawyer being removed from practice for 7 to 12 months. That is too severe. Reinstatement is also expensive and time consuming, and all suspensions do not deserve those burdens.

6. Standards for sanctions for "mistreatment" of protected classes, or for "disrespectful and discourteous" conduct toward a tribunal, should be deferred until the law develops more precise definitions of the conduct prohibited by the related MRPC.

OUR PROPOSAL:

Proposed Standards 5.11(c) and (d) should be deferred, and reserved for later action.

Standard 5.11(c) relates to "mistreatment" of protected classes, and is based on MRPC 6.5; but that Rule does not use the term "mistreat," which is also not otherwise defined. Its variance from terms already in MRPC 6.5 implies that "mistreat" has a meaning different than the terms in that Rule.

Likewise, Standard 5.11(d) relates to "disrespectful and discourteous" conduct toward a tribunal, and is based on MRPC 3.5(c); but that Rule uses the terms "undignified and discourteous," not "disrespectful and discourteous," which is not otherwise defined. Again, the variance of "undignified" from "disrespectful" implies a meaning different than the term in the Rule.

Because of these uncertainties, ADB chose not to make proposals for Standards 5.11(c) and (d). It would prefer that these Standards be deferred until law is developed on the meaning of these terms. The Committee agrees with the ADB position.

7. Avoid the "Perfect Storm" Effect.

OUR PROPOSAL: Both the Amended MRPC (ADM File No. 2003-62) and the Standards for Sanctions (ADM File No. 2002-29) should be proposed and acted upon, together.

The amendments to MRPC (currently proposed by the State Bar of Michigan Ethics Committee) were drafted without reference to ADM File No. 2002-29; and ADM File No. 2002-29 was drafted without reference to the proposed amendments to MRPC. Rules should not be amended without knowing the potential sanctions. Sanctions should be established only in light of the rules violated.

8. The lawyer discipline system is not the tool to cure lawyer incompetence or professional negligence.

OUR PROPOSAL: The Representative Assembly should emphasize to the Supreme Court that the discipline system is not the proper mechanism to cure lawyer incompetence or professional negligence.

Too much of this has already crept into the Model Code of Professional Responsibility DR 6-101(a), and 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).

Attempting to improve lawyer competence through lawyer discipline is like attempting to improve motor vehicle driving by only issuing speeding tickets. Such issues

are better approached through law school training, continuing legal education, and certification programs.

In reality, disciplinary authorities in most jurisdictions, including Michigan, have exercised common sense, and do not attempt to bring disciplinary proceedings based on an isolated act of 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, trust account fraud, or criminality), 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.

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