

MSILS Definitions
"Injury"
"Potential Injury"

MSILS 2.3
Suspension

MRPC 1.01, Terminology.

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 16, 2005

- (a) MSILS Definitions should specifically define "injury" and "potential injury" as:

“Injury” is harm to a client, the public, the legal system or the profession which results from a lawyer’s misconduct. The level of injury can range from “serious” injury to “little or no” injury; a reference to “injury” alone indicates any level of injury greater than “little or no” injury.

“Potential injury” is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyers’ misconduct. The likelihood and gravity of the potential injury are factors to be considered in deciding the level of discipline.

- (b) The definitions of "injury" and "potential injury" should be left to the ADB Hearing Panels to define.

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- (a) MSILS 2.3 should use the following definition of "suspension" [*Supreme Court version*]:

“suspension”: The removal of a lawyer from the practice of law for not less than 30 days. See MCR 9.106(2). An attorney suspended for 180 days or more is not eligible for reinstatement until the attorney has petitioned for reinstatement under MCR 9.124, has established by clear and convincing evidence the elements of MCR 9.123(B), and has complied with other applicable provisions of MCR 9.123.

- (b) MSILS 2.3 should use the following definition of "suspension" [*Campbell version*]:

“Suspension”: Suspension, as that term is used in these Standards, means the loss of the privilege to practice law for a term of no less than 180 days and until the lawyer is reinstated under MCR 9.124.

Synopsis

The proposed MSILS do not define “injury” or “potential injury”. However, the Supreme Court version proposes that injury and potential injury may be considered in deciding what sanction to impose via the application of aggravating or mitigating standards set forth in MSILS 9.1 through 9.4. It appears that without the added definitions of “injury” and “potential injury” in the MSILS, individual Attorney Discipline Board hearing panels will be charged with defining those terms on a case by case basis.

Supreme Court Version

MSILS 9.2 Aggravation identifies factors that may be considered to justify an increase in the degree of discipline to be imposed, including the degree of harm to a client, opposing party, the bar, bench of public. MSILS 9.3 Mitigation identifies factors that may be considered in mitigation to justify a decrease in the degree of discipline to be imposed, including the absence of any degree of harm to a client, opposing party, the bar, bench, or the public.

The Supreme Court version relies upon and refers to the definitions provided in the Commentary to Rule 1.0 of the Michigan Rules of Professional Conduct (MPRC) and in Michigan Court Rule 9.101, which are incorporated by reference. Additionally, specific definitions are provided for "intent" and "negligence":

“Intent” is the conscious objective or purpose to accomplish a particular result.

“Negligence” is the failure of a lawyer to exercise the degree of care that a reasonable lawyer would exercise in the situation.

ADB Version

The ADB version proposes that “injury” and “potential injury” be defined within the Standards.

“Injury” is harm to a client, the public, the legal system or the profession which results from a lawyer’s misconduct. The level of injury can range from “serious” injury to “little or no” injury; a reference to “injury” alone indicates any level of injury greater than “little or no” injury.

“Potential injury” is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyers’ misconduct. The likelihood and gravity of the potential injury are factors to be considered in deciding the level of discipline.

The ADB also proposes including definitions within the Standards for "intent", "knowledge" and "negligence":

“Intent” is the conscious objective or purpose to accomplish a particular result.

“Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct without the conscious objective or purpose to accomplish a particular result.

“Negligence” is the failure of a lawyer to exercise the degree of care that a reasonable lawyer would exercise in the situation.

Campbell Version

The Campbell version proposes referring to the relevant definitions contained in MRPC 1.0. However, the Campbell version does include a definition for "suspension":

“Suspension”, as that term is used in these Standards, is defined under Standard 2.3 below. [See additional commentary, below.]

Additional Commentary

Standards proposed for comment by the Supreme Court, incorporate by reference the terminology provision in MRPC 1.0 and the definitions as contained in MCR 9.101.

MRPC 1.0 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,” or “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.

MCR 9.101 Definitions.

As used in subchapter 9.100:

- (1) "board" means the Attorney Discipline Board;
- (2) "commission" means the Attorney Grievance Commission;
- (3) "administrator" means the grievance administrator;
- (4) "investigator" means a person designated by the administrator to assist him or her in the investigation of alleged misconduct or requested reinstatement;
- (5) "attorney" means a person regularly licensed or specially admitted to practice law in Michigan;
- (6) "respondent" means an attorney named in a request for investigation or complaint;
- (7) "request for investigation" means the first step in bringing alleged misconduct to the administrator's attention;
- (8) "complaint" means the formal charge prepared by the administrator and filed with the board;
- (9) "review" means examination by the board of a hearing panel's final order on petition by an aggrieved party;
- (10) "appeal" means judicial reexamination by the Supreme Court of the board's final order on petition by an aggrieved party;
- (11) "grievance" means alleged misconduct;
- (12) "investigation" means fact-finding on alleged misconduct under the administrator's direction;

(13) "disbarment" means revocation of the license to practice law.

Definition of Suspension:

It was also suggested that the proposed Michigan Standards For Imposing Lawyer Standards include the definition of "suspension." "Suspension" and "Interim Suspension" are already included and defined in Standards 2.3 and 2.4.

At the onset; it should be noted that the Supreme Court Standard and the ADB Standard defining suspension (2.3) are identical, with the Standard recommended by Donald D. Campbell differing. The Standard defining interim suspension is identical in all three proposed Standards.

Standard 2.3 in both the Supreme Court and Attorney Discipline Board versions defines suspension as:

(T)he removal of a lawyer from the practice of law for not less than 30 days. See MCR 9.106(2). An attorney suspended for 180 days or more is not eligible for reinstatement until the attorney has petitioned for reinstatement under MCR 9.124, has established by clear and convincing evidence the elements of MCR 9.123(B), and has complied with other applicable provisions of MCR 9.123.

Donald D. Campbell definition of suspension in Standard 2.3:

The definition of suspension, as submitted by Donald D. Campbell, differs from the above definitions, as such:

Suspension, as that term is used in these Standards, means the loss of the privilege to practice law for a term of no less that 180 days and until the lawyer is reinstated under MCR 9.124.

Standard 2.4 in all three versions defines interim suspension as:

(T)he temporary suspension of a lawyer from the practice of law pending imposition of final discipline. Interim suspension includes:

- (a) automatic suspension upon conviction of a felony (MCR 9.127[A]) or,
- (b) suspension of a lawyer who fails to comply with the lawful order of a hearing panel, the Board or the Supreme Court (MCR 9.127[A]).

As it appears that the terms suspension and interim suspension are defined in the proposed Supreme Court standards, it appears unnecessary to place their definition in the definition section.