

Review of Several Proposed Changes to the Michigan Rules of Professional Conduct

by Donald D. Campbell*

THE IMPACT OF THE PROPOSED CHANGES TO THE MRPC ON PRACTITIONERS

The purpose of this article is to discuss several key changes to the MRPC proposed for adoption by the Michigan Supreme Court and to discuss the potential impact of these changes on your practice.

A Change in Focus

A subtle but significant change between the MRPC and the Proposed Rules is the expansion of the scope of the Rules. The current Rules clearly articulate that a violation of one of its rules does not give rise to a cause of action against a lawyer and does not create any presumption that a legal duty has been breached. In the Proposed Rules, the following sentence has been inserted, “Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.”

The addition of this sentence marks a significant departure away from recent decisions of the Michigan Court of Appeals concerning the relationship between the MRPC and civil causes of action against lawyers. See, *Watts v Polaczyk*, 242 Mich App 600, 607 n1 (2000) and *Lusader v Schaefer*, 2004 Mich App Lexis 3506 (December 21, 2004). While the Court’s proposed language stops short of advocating that a breach of a Rule should create a direct cause of action, the broadening of the scope by the Court would have a major impact upon the law governing legal malpractice.

A Shift to the Write

Another change that could have significant impact is the Proposed Rule’s new mandate that a client’s informed consent must be “confirmed in writing” in conflict of interest matters. The current MRPC use the phrase “informed consent” but does not define it and does not require a writing in support. In Proposed Rule’s “informed consent” is defined as

“denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of an reasonably available alternatives to the proposed course of conduct.”

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And “confirmed in writing” is defined as,

“denotes informed consent that is given in writing by the person or a writing that a lawyers promptly transmits to the person confirming an oral informed consent. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.”

The ABA adopted a similar provision noting that, “experience indicates that the requirement is not overly burdensome or impractical.”

It is important to understand that under the Proposed Rules, it is not necessary that the client's agreement be obtained in a writing signed by the client. Rather, the term "confirmed in writing" includes a writing by the person or a writing that a lawyer promptly transmits. However, the new MRPC 1.7(b)(4) and the Commentary make clear that a writing is required in all instances, allowing some flexibility only with regard to timing and then only when there is not time to memorialize the consent before proceeding with the representation.

Now is the time to review your current practice and procedures concerning, at a minimum, how a waiver of conflict of interest is memorialized. Under the Proposed Rule 1.7, even if you promptly and fully inform your client of a potential conflict of interest and the fully informed client agrees to waive the conflict, your failure document the understanding promptly would still be a breach of ethics and may be a breach of the standard of care.

If you do not currently use consent waiver forms or have in place specific protocol or procedures for ensuring that informed consent is obtained under proper conditions and further ensuring that the client's consent is properly and promptly memorialized, now is the time to create a flexible form consent waiver form that can be tailored to the specific client situation and to implement written policies concerning both the approach towards obtaining conflict waivers and the timing of when such waivers are obtained. If you have those items and practices in place, a compliance check with the provisions of the Proposed Rules 1.6, 1.8, and 1.9, is in order.

Finally Something to Talk About

Confidentiality is an area where the Proposed Rules are being relaxed in comparison to the MRPC. The Proposed Rule 1.6 contains a number of exceptions to the general rule of confidentiality. Among these new exceptions is new Rule 1.6(b)(4) which provides that a lawyer may reveal information relating to a representation of a client to the extent the lawyer reasonably believes necessary “to secure legal advice about the lawyer's compliance with these Rules.” The ABA adopted a similar provision citing the “overriding importance, both to lawyers and to society at large, that lawyers be permitted to secure advice regarding their legal obligations.” Comment 7 to the Proposed Rule 1.6(b)(5) reads,

A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(5)

permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

With an express exception, all doubt is removed from even the most careful practitioner as to the propriety (and wisdom) of seeking qualified advice in a timely manner concerning questions of ethics and professional responsibility.

“Reasonable over Actual” a Cost “Plus”

The Court's Proposed Rules provide an important clarification concerning expenses and costs. The Proposed Rule 1.5(a) provides that a lawyer may charge a reasonable amount for costs and expenses. This provision is important because the MRPC 1.5(a) addresses only reasonable fees and is silent on the issue of expenses.

Michigan's Ethic's Opinions have followed ABA Ethics Opinion 93-379. That Opinion states, At the beginning of the engagement, lawyers typically tell their clients that they will be charged for disbursements. When that term is used the clients justifiably should expect that the lawyer will be passing on to the client those *actual* payments of funds made by the lawyer on the client's behalf.” (Emphasis supplied).

The Opinion concluded that a lawyer may only charge the actual costs incurred unless the client has agreed in writing to be subject to a surcharge over the actual cost incurred.

The Proposed Rule 1.5(a) rejects the rationale of ABA Op. 93-379. In Comment 1 to Proposed Rule 1.5(a), it states that a surcharge on costs is permitted as long as the surcharge is not unreasonable. Specifically, the Comment reads:

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. **A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.** [Emphasis supplied.]

Importantly, the ABA in adopting the exact same language to its new 1.5(a) stated that its revisions were “not intended to alter the rule, but intended only to clarify.” So presumably, even if Proposed Rule 1.5(a) were not adopted, the prior ABA Opinion has been undercut by the ABA's tacit acknowledgement that it was wrongly decided.

The World's Noblest Profession

The Court has not proposed an adoption of a ban upon sexual relations between a lawyer and client, as has been adopted by the ABA. The ABA's new Model Rule 1.8(j) states, "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."

The ABA followed the lead of a number of jurisdictions that have adopted rules explicitly regulating client-lawyer sexual conduct. The ABA hoped that a specific rule would alert lawyers more effectively to the dangers of sexual relationships with clients and alert clients that the lawyer may have violated ethical obligations in engaging in such conduct. The 2003 Model Rule 1.8(j) prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client. The ABA reasoned that the client's special trust and confidence in the lawyer and the inherent dangers to client confidences when professional and personal relationships are blurred made a ban on sexual relationships appropriate.

The ABA decided to impose a total, rather than a partial, ban on client-lawyer relationships, except for those pre-dating the formation of the lawyer/client relationship. The Commentary to the ABA's Model Rule 1.8(j) indicates that when the client is an organization a lawyer for the organization is prohibited from having a sexual relationship with anyone in the organization who supervises, directs or regularly consults with the lawyer on the organization's behalf.

This is the second time the Michigan Court has rejected the ABA approach. However, a sexual relationship that materially limits the representation of client would still violate Proposed Rules 1.7(a)(2) and 8.4(a).

Conclusion

These are just some of the revisions that could affect your practice. The Court is currently seeking input and opinions regarding all of the proposed changes to the MRPC. Comments on the Proposed Rules can be submitted to the Court until June 1, 2005. Be sure to keep yourself educated on the changes to the Rules and your firm in compliance with the latest requirement.

If you have any questions concerning the Proposed Rules and their affect on your practice, please contact me at **(248) 351-5426** or at **donald.campbell@ceflawyers.com**.