PROFESSIONAL RESPONSIBILITY

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I. INTRODUCTION

This Article will address the noteworthy developments in Michigan law of Professional Responsibility during the 2008-2009 *Survey* period.[1] Although Michigan courts issued only two published opinions directly impacting professional responsibility during the *Survey* period, two Informal Ethics Opinions were adopted by the State Bar of Michigan. In addition, there was a significant opinion by the Michigan Attorney Discipline Board related to professional misconduct, and the Michigan Supreme Court adopted a change to the *pro hac vice* requirements under the Michigan Court Rules (MCR).

II. PUBLISHED CASES DURING THE *SURVEY* PERIOD

A. Grievance Administrator v. Cooper

In *Grievance Administrator, Attorney Grievance Commission v. Cooper*,[2] the Michigan Supreme Court issued an order interpreting Michigan Rules of Professional Conduct (MRPC) 1.5(a),[3] 1.15(b),[4] and

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1. The *Survey* period for this Article is June 1, 2008 to May 31, 2009.

2. 757 N.W.2d 867 (Mich. 2008).

3. MICH. RULES OF PROF'L CONDUCT R. 1.5(a) (1988) ("Fees").

1.16(d).[5] The Supreme Court ruled unanimously that a Warren, Michigan, attorney, Patricia M. Cooper, did not violate the Michigan Rules of Professional Conduct by charging her divorce client a nonrefundable fee and refusing to return a portion of the fee after the client reconciled with her spouse and terminated Cooper's representation.[6] In doing so, the Supreme Court overturned the September 17, 2007 opinion of the Michigan Attorney Discipline Board (ADB or the Board), which held Cooper had charged an excessive fee, failed to promptly pay funds a client was entitled to receive, and failed to refund the advance payment of the fee that she did not earned.[7] The Supreme Court, in a one paragraph ruling, reversed the opinion and order of the Attorney Discipline Board and reinstated the dismissal of the charges by the Attorney Discipline Board Hearing Panel.[8]

In July of 2002, attorney Patricia Cooper entered into a fee agreement with a client who was interested in retaining her to assist in her divorce.[9] As part of the fee agreement, Cooper asked for a "nonrefundable" $4,000 minimum fee — the client would then be entitled to Cooper's "attorney time" at a rate of $195 per hour.[10] The fee agreement read, in part, as follows:

> 1. Client agrees to pay Attorney a MINIMUM FEE OF $4,000 which shall be payable as follows:
>
> Retainer $4,000
>
> Balance $0
>
> * * *
>
> This MINIMUM FEE shall entitle Client to a combined amount of Attorney and Legal Assistant time computed in accordance with the hourly rate set forth in paragraph 3 below.

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4. MICH. RULES OF PROF'L CONDUCT R. 1.15(b) (1988) ("Safekeeping Property").

5. MICH. RULES OF PROF'L CONDUCT R. 1.16(d) (1988) ("Declining or Terminating Representation").

6. *Cooper*, 757 N.W.2d at 867-68.

7. Grievance Adm'r v. Patricia Cooper, 06-36-GA 1 (ADB, Sept. 17, 2007) *available at* www.michbar.org/opinions/ethics/cooper.pdf.

8. *Cooper*, 757 N.W.2d at 867-68.

9. *Patricia Cooper*, 06-36-GA at 2-3.

10. *Id.*

> 2. Client understands that NO portion of the MINIMUM FEE referred to above is REFUNDABLE, to the client, under any circumstances.
>
> 3. Hourly rate: Attorney $195.00 Assistant: _____
>
> 4. In the event the combined Attorney and Legal Assistant time shall exceed the MINIMUM FEE, Client agrees to pay for such time at the rates set forth in Paragraph 3 above.
>
> * * *
>
> 11. . . . The Client is entitled to terminate this agreement subject to its contractual liability to the law firm for services rendered.[11]

A few months later, the client reconciled with her husband, and asked Cooper for an accounting of the legal services and a refund on the remaining portion of her fee. Cooper billed only 6.4 hours on the client's case, totaling $1,228.50, but refused to refund the client the remaining $2,771.50 balance because it was "nonrefundable" pursuant to the fee agreement.[12] However, she decided to refund half of the unearned fees, $1,385.75 "out of the goodness of [her] heart."[13] In October 2002, Cooper called the State Bar of Michigan's Ethics Helpline, and the Bar faxed her RI-10 (April 6, 1989), RI-69 (February 14, 1991), and RI-162 (April 30, 1993), from which she concluded that it was reasonable for her to keep the remaining sum of the fee.[14]

In April of 2006, the Grievance Administrator filed a formal complaint, alleging that Cooper charged an excessive or illegal fee, failed to promptly pay funds the client was entitled to receive, and failed to refund the client's advance payment of the fee.[15] The Attorney Grievance Panel dismissed the formal complaint of the Grievance Administrator focusing on MRPC 1.5(a), finding that the retention contract was clear on its face, and that Cooper had not violated any ethical duties to her client by refusing to refund the $4,000 fee.[16]

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11. *Id.*
12. *Id* at 3.
13. *Id.*
14. *Id.* at 4.
15. *Patricia Cooper*, 06-36-GA at 4.
16. *Id.* at 5.

On review to the Michigan Attorney Discipline Board, the Grievance Administrator argued that the case involved a fee paid in advance, not a general retainer, and therefore, dismissal by the panel was improper and should have focused on violations of MRPC 1.16(d) and MRPC 1.15(b).[17] The Board agreed. In a lengthy opinion, the Board (1) addressed the applicability of MRPC 1.5(a), 1.15(b), and 1.16(d), (2) discussed the concept of a "non-refundable retainer," and (3) attempted to explain the difference between "retainers" and "advance fees."[18] The Board explained that "[t]oo often . . . a fee agreement drawn up by a lawyer will attempt to designate fees paid in advance for specific services as nonrefundable. This is inconsistent with our Rules of Professional Conduct."[19]

The Board's opinion clarified the differences between a "general retainer," "special retainer," and "advance fees with a claim of nonrefundability."[20] A "general retainer," or a "classic" or "true" retainer fee "is an amount a lawyer charges the client not for specific services but to ensure the lawyer's availability whenever the client may need legal services."[21] A "special retainer" or "advance fee," is "essentially a deposit for legal services to be performed."[22] "Advance fees with a claim of nonrefundability" are fee agreements which "designate prepaid fees for services to be rendered in the future as nonrefundable."[23] The Board concluded that "the $4,000 paid to [Cooper] was clearly for legal services to be performed. As such, it is a fee paid in advance—not a general retainer—and belongs to the client until earned in accordance with the fee agreement."[24]

Examining the fee agreement, the Board said that even though the agreement says "NO portion of the MINIMUM FEE referred to above is REFUNDABLE, to the client, under any circumstances," it did not affect the ethical obligations under the rules of Professional Conduct.[25] Cooper owed her client a refund under the fee agreement because of MRPC 1.16(d), and 1.15(b), and as a result, the failure to refund was a violation of her ethical obligations.[26] Due to the ambiguity of the use of such fee

17. *Id.* at 6.
18. *Id.* at 6-12.
19. *Id.* at 8.
20. *Id.* at 8-12.
21. *Patricia Cooper*, 06-36-GA at 8.
22. *Id.* at 9.
23. *Id.* at 10.
24. *Id.* at 29-30.
25. *Id.* at 30.
26. *Id.*

agreements, the Board only ordered Cooper to pay restitution to her client for the balance of the unearned fees.[27]

On appeal to the Michigan Supreme Court, the court reversed the opinion of the Board, simply stating:

> The Attorney Discipline Board erred in holding that the July 29, 2002 fee agreement was ambiguous as to whether the $4,000 minimum fee was nonrefundable. As written, the agreement clearly and unambiguously provided that the respondent was retained to represent the client and that the minimum fee was incurred upon execution of the agreement, regardless of whether the representation was terminated by the client before the billings at the stated hourly rate exceeded the minimum. So understood, neither the agreement nor the respondent's retention of the minimum fee after the client terminated the representation violated existing MRPC 1.5(a), MRPC 1.15(b), or MRPC 1.16(d).[28]

Therefore, the Supreme Court opinion seems to hold that nonrefundable advance fees are permissible in Michigan and that the contractual language of the agreement was controlling over the Michigan Rules of Professional Conduct 1.16(d) and 1.15(b).[29]

However, in emphasizing the contractual language, the Court created a conflict between the contract and ethical rules. The ruling of the Supreme Court left many commentators to suggest that the ruling might lead to arguments that lawyers may contract away their ethical obligations under the MRPC.[30] Cooper's attorney, Donald D. Campbell, interpreted the Court's ruling to mean that the law of contracts will "fill the gap" where ethics rules are unclear.[31] Ultimately, the Supreme Court's ruling was lacking because it failed to create a bright line rule explaining when a contract's terms take precedence over ethics rules, or

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27. *Patricia Cooper*, 06-36-GA at 30.

28. *Cooper*, 757 N.W.2d at 867.

29. This is despite the fact that such fee agreements are often considered misconduct in some states. *See, e.g.*, Alabama Opinion Number: 1993-21 ("Lawyer may not characterize a fee as non-refundable or use other language in a fee agreement that suggests that any fee paid before services are rendered is not subject to refund or adjustment."); In the Matter of Larry D. Sather, 3 P.3d 403 (Col. 2000) (holding that fees may not be called "nonrefundable"); Bd. of Prof. Ethics and Conduct v. Frerichs, 671 N.W.2d 470, 475-77 (Iowa 2003).

30. *See* Todd C. Berg, *Michigan Supreme Court's Attorney-fee Decision Raises Questions About Contract, Ethics Law*, MICHIGAN LAWYERS WEEKLY, Dec. 22, 2008.

31. *Id.*

vice versa. As a result, the door has been opened for attorneys across Michigan to make the argument in ethics hearings that contracts should trump ethics rules. At the time of this article, the merits of such an argument based on *Cooper* are still unclear and should be left to future editions of the *Survey*.

B. People v. Davenport

In *People v. Davenport*,[32] the Michigan Court of Appeals addressed the issue of conflicts in "switching sides" in litigation, applying Michigan Rules of Professional Conduct 1.9[33] and 1.10.[34] The issues of professional responsibility arose in the context of the defendant's appeal based on ineffective assistance of counsel following his conviction on six counts of first-degree criminal sexual conduct in circuit court.[35] The defendant argued to the trial court that his attorney was ineffective for failing to move for disqualification of the prosecutor's office on the ground of a conflict of interest after the defendant's prior listed attorney, Richard Steiger, ended his representation of the defendant after the preliminary examination and joined the two-attorney prosecutor's office.[36] The trial court agreed that the failure to raise the issue constituted ineffective assistance of counsel; however, it ruled that defendant failed to establish that the error would have affected the outcome of the trial.[37]

The Michigan Court of Appeals agreed with the trial court, and held that the defendant's attorney committed a "serious and inexcusable error when she failed to challenge the potential conflict of interest that arose from [the old attorney's] move to the prosecutor's office," citing to MRPC 1.9 and MRPC 1.10.[38] The court explained, "[c]learly, a potential conflict of interest arose when Steiger joined the prosecutor's office after representing defendant at the preliminary examination."[39] The court ruled that the failure of the defendant's attorney to raise the conflict of interest

32. 280 Mich. App. 464, 760 N.W.2d 743 (2008).

33. MRPC 1.9 prohibits an attorney from "switching sides" by representing a new client in a matter if the attorney's former client has an interest adverse to the new client. MICH. RULES OF PROF'L CONDUCT R. 1.9.

34. MRPC 1.10 governs the limitations imposed on an attorney's new firm with respect to representing parties whose interests are adverse to the new attorney's former clients. It also requires the new firm to undertake and disclose safeguards against improper communications. MICH. RULES OF PROF'L CONDUCT R. 1.10.

35. *Davenport*, 280 Mich. App. at 466, 760 N.W.2d at 746.

36. *Id.* at 467, 760 N.W.2d at 746.

37. *Id.* at 467-68, 760 N.W.2d at 746.

38. *Id.* at 468-70, 760 N.W.2d at 747.

39. *Id.* at 470, 760 N.W.2d at 748.

issue with the trial court constituted an objectively unreasonable error.[40] However, disagreeing with the trial court, the court of appeals held that it was plain error for the trial court to fail to explore the matter and to make a ruling that the prosecutor's office employed safeguards to prevent Steiger from sharing information about the defendant's case with the other prosecutor.[41] When dealing with a "conflict of interest of this magnitude," a trial court must fully explore the matters at a *Ginther* hearing.[42] The court explained that the decision by the defendant's former counsel, Steiger, to "switch sides" by joining the prosecutor's office "raises serious concerns about the fair administration of justice."[43] Due to MRPC 1.10, the attorney switching sides, Steiger, had a "clear obligation" to take steps to allow the court to determine the extent of the conflict.[44] Further, the trial court, when confronted with evidence of a "switching sides" conflict, was required to conduct a hearing to determine whether disqualification of the entire prosecutor's office is necessary.[45]

During a trial court's inquiry into a conflict of interest, to disqualify an entire prosecutor's office, a court must consider "the extent to which knowledge has been shared by the disqualified lawyer and the disqualified lawyer's role within the prosecutor's office."[46] Further, and more importantly, the court held that in order "to ensure faith in the impartiality and integrity of the criminal justice system, and to prevent a chilling effect on a defendant's willingness to confide in defense counsel," an entire prosecutor's office will be presumed to be privy to the confidences obtained by the former defense lawyer in a "switching sides" situation.[47] Thus, if a defendant has shown that a prosecutor has counseled him or represented him in a same or related matter, "a presumption arises that members of the prosecutor's office have conferred about the matter."[48] To rebut this automatic presumption of shared confidences, a prosecutor will have the burden to show "effective screening procedures have been used to isolate the defendant's former counsel from the prosecution of substantially related criminal charges."[49] "To determine whether the prosecutor has rebutted the presumption of

40. *Id.*
41. *Davenport*, 280 Mich. App. at 471, 760 N.W.2d at 748.
42. *Id.*; *see also* People v. Ginther, 390 Mich. 436, 212 N.W.2d 922 (1973).
43. *Davenport*, 280 Mich. App. at 471, 760 N.W.2d at 748.
44. *Id.*
45. *Id.*
46. *Id.* at 472, 760 N.W.2d 743.
47. *Id.*
48. *Id* at 473, 760 N.W.2d at 749.
49. *Davenport*, 280 Mich. App. at 473, 760 N.W.2d at 749.

shared confidences, the court must consider whether the prosecutor's office utilized formal screening procedures," whether the switching attorney took part in prosecution in the case, "whether the switching attorney took part in discussions about the prosecution or otherwise revealed information . . . , and whether [the switching attorney] had access to the defendant's case file."[50] A trial court should take into account the written procedures of the prosecutor's office that take into account the structural organization of the office, "the likelihood of contact between an attorney with a conflict of interest . . . , the existence of rules that prevent the attorney with the conflict of interest from accessing the files," and "the size of the prosecutor's office."[51]

Because the trial court in *Davenport* did not require the prosecutor's office to offer any proof of a sufficient safeguard, the court "remand[ed] to the trial court for an evidentiary hearing on the question [of] whether the prosecutor's office took sufficient safeguards to avoid [the conflicted attorney] from receiving communications . . . concerning [the] defendant's case."[52]

III. MICHIGAN ETHICS OPINIONS DURING THE *SURVEY* PERIOD

A. Michigan Ethics Opinion R-20

On July 25, 2008, the State Bar of Michigan Standing Committee on Professional Ethics[53] issued Ethics Opinion R-20.[54] In Ethics Opinion R-20, "[t]he Ethics Committee reconsidered Opinion R-14, which require[d] that a lawyer make disclosure to opposing parties and counsel of the fact that the lawyer represents a judge when representing other clients before that judge in unrelated matters."[55] Ethics Opinion R-14 addressed the narrow subject of whether a lawyer's representation of judicial clients in their official capacity would "materially affect" representation of other clients in matters before them.[56] The discussion in

50. *Id.* at 474, 760 N.W.2d at 750.

51. *Id.* at 474-75, 760 N.W.2d at 750.

52. *Id.* at 475, 760 N.W.2d at 750.

53. For reference, the opinions of the State Bar of Michigan Standing Committee on Professional Ethics are advisory and non-binding in nature. Ethics opinions that begin with an "R" are formal ethics opinions interpreting the Michigan Rules of Professional Conduct. Ethics opinions beginning with a "J" are formal ethics opinions interpreting the Michigan Code of Judicial Conduct.

54. Mich. Standing Comm. On Prof'l Ethics, Formal Op. R-20 (July 25, 2008), *available at* http://www.michbar.org/opinions/ethics/numbered_opinions/r-020.htm.

55. *Id.*

56. Mich. Standing Comm. on Prof'l Ethics, Formal Op. R-14 (July 24, 1992), *available at* http://www.michbar.org/opinions/ethics/numbered_opinions/r-014.htm.

Ethics Opinion R-14 was focused on whether the simultaneous representation would be a conflict of interest under MRPC 1.7.[57] MRPC 1.7, the general Conflict of Interest Rule, states:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultations. When a 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.[58]

Ultimately, Ethics Opinion R-14 concluded, "if the lawyer agrees to represent the judicial clients, the lawyer must disclose the judicial representation to opposing parties, allowing them an opportunity to seek recusal of the judge or disqualification of the lawyer."[59] Ethics Opinion R-14 was replaced by Ethics Opinion R-20 after a vote of the State Bar of Michigan's Board of Commissioners.[60]

Ethics Opinion R-14 was issued contemporaneously with Ethics Opinion J-5, which addressed "the ethical obligations of a judge who is represented by counsel appearing before that judge in an unrelated matter."[61] "In Opinion J-5, the Committee [on Professional Ethics]

57. *Id.*

58. MICH. RULES OF PROF'L CONDUCT R. 1.7 ("Conflict of Interest: General Rule").

59. Mich. Standing Comm. on Prof'l Ethics, Formal Op. R-14.

60. *See* State Bar of Michigan: Ethics Opinions, *available at* http://www.michbar.org/opinions/ethicsopinions.cfm (last visited Feb. 19, 2010).

61. Mich. Standing Comm. on Prof'l Ethics, Formal Op. R-20.

interpreted Michigan's Code of Judicial . . . Conduct Canon 3C as requiring the judge to consider recusal, but obligat[ed] the judge to disclose the lawyer/client relationship to all parties in the matter as an issue of disqualification."[62] Opinion J-5 "accepted the conclusion that representation of the judge by counsel now appearing before the judge on a matter for another client would require raising the issue of disqualification, and that it would be the obligation of the judge to raise it."[63] According to Opinion R-20, Opinion R-14, citing J-5, "stated that if the client's advocate is the judge's lawyer in a separate matter, the judge's impartiality could be reasonably questioned by the other party, . . . creating a material limitation on representation of the other client, and thus presented a conflict of interest under MRPC 1.7(b)."[64]

Ethics Opinions R-14 and J-5 remained unmodified for sixteen years until Ethics Opinion R-20 was promulgated in 2008. Ethics Opinion R-20 was written to:

> correct conclusions or inferences in Opinion R-14 regarding disclosure, and to continue analysis of the subject to its ultimate conclusion that if the represented judge does not raise the subject of disqualification when required, the lawyer will violate Rule 8.4(e) by continuing the representation in the unrelated matter.[65]

While the Committee on Professional Ethics commented that it believed "the circumstances in which a judge would refuse to offer disqualification would be extremely rare," nevertheless, it felt further guidance was necessary.[66] Opinion R-20 recognized "that representation of [a] judge presents a conflict of interest in representing a client whose matter is to be heard by the judge . . . ."[67] However, the Committee concluded that Opinions R-14 and J-5, which required the lawyer to "disclose judicial representation to opposing parties," was insufficient for several reasons.[68]

> First, the lawyer may not be permitted to disclose information pertaining to the representation of the judicial client to third persons. Second, the lawyer is not subject to disqualification by

62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at cmt.
67. Mich. Standing Comm. on Ethics, Formal Op. R-20.
68. *Id.*

> an opposing party for having a conflict of interest between the lawyer's two clients – the [area of concern is the] potential partiality by the judge. . . . Third, and of greatest importance, disclosure of the judicial client representation to a third person, even if permissible, does not resolve the obligation of the judge to disclose a potential basis for disqualification, [because] [o]nly a Judge can address that problem.[69]

As explained by the Committee, "because the judge is obligated to raise the issue of disqualification . . . , a failure to do so would violate the Judicial Code."[70] MRPC 8.4(e) provides that "[i]t is professional misconduct for a lawyer to . . . knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law."[71] A judge's failure to abide by the Judicial Code will not be cured by disclosure to the opposing party.[72] "The failure of the lawyers for either party to [raise the issue of disqualification] does not of itself violate any [Michigan] Rule of Professional Conduct, but continuing the matter before the judge will cause the lawyer to violate MRPC 8.4(e)."[73]

Therefore, to avoid violating MRPC 8.4(e), Ethics Opinion R-20 concluded that the lawyer representing the judge "may make *direct contact* with the judge to urge the judge to raise the issue of disqualification."[74] However, the Opinion recognized that Judicial Code Canon 3A(4) and MRPC 3.5(b) both forbid a lawyer and judge from "*ex parte* communications concerning a pending matter."[75] Addressing this concern, Ethics Opinion R-14 states that:

> Although these rules would on their face seem to prohibit any direct communication, it is the opinion of this Committee that communication with the judge by the judge's lawyer in this situation for the limited purpose of requesting the judge to raise the issue of disqualification is not within the meaning of

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69. *Id.*

70. *Id.*

71. MICH. RULES OF PROF'L CONDUCT R. 8.4(e) (2009).

72. Mich. Standing Comm. on Ethics, Formal Op. R-20.

73. *Id.*

74. *Id.* (emphasis added).

75. *Id.* Michigan Code of Judicial Conduct Canon 3(A)(4) states "[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . . ." MICH. CODE OF JUD. CONDUCT CANON 3A(4) (1994). Similarly, MRPC 3.5(b) states that "a lawyer shall not . . . communicate *ex parte* with [a judge] concerning a pending matter, except as permitted by law . . . ." MICH. RULES OF PROF'L CONDUCT R. 3.5(b).

> "communication about a pending matter" as intended by these rules. As long as the communication is limited to the subject of disqualification, the communication pertains to an independent matter – that of compliance with the Judicial Code – and not to the client matter itself.[76]

After communication with the judge, "if the attempt at remonstration . . . fails, the lawyer who represents the judge has no alternative other than to withdraw from the representation" to avoid violating MRPC 8.4(e), as required by MRPC 1.116(a).[77] Opinion R-20 suggested that "the lawyer agreeing to undertake the representation of a Judge should consider including in an engagement letter an agreement that the Judge will offer disqualification and make appropriate disclosures as required by the Judicial Code when the lawyer appears before the Judge on another matter," but recognized that such an approach may not "solve[] the problem caused by the judge's failure to make the disclosures, unless the engagement letter would authorize the lawyer to make the disclosure on the judges behalf."[78]

Overall, Ethics Opinion R-20 provides direct and more specific guidance for lawyers in the rare circumstance in which a judicial-client refuses to offer the issue of disqualification. It provides the correct conclusion in an effort to avoid any incorrect inferences that could be made from the prior ethics opinions, R-14 and J-5.[79] As a result, Michigan lawyers with judicial clients are better able to approach the perplexities of this compromising situation with precise ethical conduct.

B. Michigan Ethics Opinion RI-345

On October 24, 2008, the State Bar of Michigan Standing Committee on Professional Ethics issued RI-345,[80] which discusses a lawyer's

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76. Mich. Standing Comm. on Ethics, Formal Op. R-20.

77. *Id.* "MRPC 1.16(a) mandates withdrawal from representation that results in a violation of the Rules of Professional Conduct. Nevertheless, such a withdrawal remains subject to the order of the court to continue the representation as provided in MRPC 1.16(c)." *Id.* at n.12 Ethics Opinion R-20 recognized the potential for the lawyer to be forced to continue in the matter regardless of the violation. *Id.* A lawyer should take this into consideration because it may expose "the non-judicial client's matter to later objection and appeal based on the unresolved issue of disqualification, and thus causing disservice to the non-judicial client." *Id.*

78. Mich. Standing Comm. on Ethics, Formal Op. R-20 (citing to ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-449).

79. *See id.* at cmt.

80. For reference, ethics opinions beginning with "RI" are informal ethics opinions interpreting the Michigan Rules of Professional Conduct.

obligation when the chief executive officer of a corporate client threatens to destroy documents that are the subject of a discovery order.[81] RI-345 provides a scenario in which a closely held corporate client with a board of directors was engaged in litigation, and the CEO, who was not the sole shareholder of the corporation, informed the corporate attorney that "he intends to destroy documents relevant to the dispute that are subject to a court discovery order."[82] The CEO further directed the lawyer to refrain from producing the documents and threatened termination of the lawyer if the documents were produced.[83]

Ethics Opinion RI-345 explained that MRPC 1.4(b) and 1.13 apply in such a scenario.[84] MRPC 1.13(a) states that the lawyer's obligations are to the corporation, not the CEO.[85] The lawyer must "communicate with the client so as to permit informed decisions regarding the representation under MRPC 1.4(b), and is to take steps to prevent reasonably foreseeable harm to the client, as set forth in MRPC 1.13(b)."[86]

For purposes of the opinion, the Committee assumed the CEO's threat to destroy documents was a violation of the law that was likely to result in injury to the corporation under MRPC 1.13(b).[87] Therefore, Ethics Opinion RI-345 requires the lawyer "to proceed as reasonably necessary to protect the best interest of the corporation" under MRCP 1.13(b), which states such measures include:

> (1) asking reconsideration of the matter;
>
> (2) advising that a separate legal opinion on the matter be sought for presentation to the appropriate authority in the organization; and
>
> (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.[88]

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81. Mich. Standing Comm. on Ethics, Formal Op. RI-345, October 24, 2008, *available at* http://www.michbar.org/opinions/ethics/numbered_opinions/RI-345.htm.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Mich. Standing Comm. on Ethics, Formal Op. RI-345.

88. *Id.* (citing MICH. RULES OF PROF'L CONDUCT 1.13(b) (2009)).

The Ethics Opinion explained that the lawyer should "first attempt to dissuade the CEO from the threatened course of conduct."[89] The lawyer should discuss the applicable law, policies, and ethical obligations during this discussion.[90] When the CEO cannot be dissuaded, next, "the lawyer should consult with higher authority, here presumably the corporation's board of directors."[91] In doing so, "the lawyer should exercise care to assure that any independent [members of the board] are duly informed," and the lawyer may advise the board of ethical obligations, including likely withdrawal and disclosure to the tribunal.[92]

Importantly, Ethics Opinion RI-345 explained that "[t]he objectives of MRPC 1.13 are met if the lawyer's referral to the higher authority redresses the CEO's threatened misconduct."[93] However, if after consulting with the appropriate members of the board, the lawyer believes that the CEO has not retracted his threat, the lawyer is required to "preserve any pertinent documents . . . until the matter of discovery compliance is resolved. Otherwise, the lawyer risks violating MRPC 3.4(a)," which bars "unlawfully obstruct[ing] another party's access to evidence."[94] In such a scenario, the lawyer "should decline to return documents to the CEO or the corporation," and "*may* continue representing the corporation and is not required to withdraw . . . ."[95] Although the conclusions of the Ethics Opinion may seem to be the obvious course of action under the Michigan Rules of Conduct, Ethics Opinion RI-345 finally provides clear cut and simple steps for a corporate lawyer to follow when a CEO or other corporate officers cannot be dissuaded from destroying documents.

IV. ATTORNEY DISCIPLINE BOARD OPINIONS DURING THE *SURVEY* PERIOD

During the *Survey* period, there were seven Michigan Attorney Discipline Board Opinions. One that is particularly significant is *Grievance Administrator v. Reams*.[96] In *Reams*, the attorney, David Reams, was convicted for operating a motor vehicle while impaired, and the Grievance Administrator filed the judgment with the Attorney

89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. Mich. Standing Comm. on Ethics, Formal Op. RI-345.
94. *Id.*
95. *Id.* (emphasis added).
96. Grievance Adm'r v. Reams, 06-180-JC (ADB, September 5, 2008), *available at* www.adbmich.org/coveo/opinions/2008-09-05-06o-180.pdf.

Discipline Board, which issued an order to show cause for why discipline should not be imposed.[97] A hearing panel previously ordered that the attorney be placed on probation for one year in which he was required to (1) abstain from using alcohol, (2) attend meetings at a rehabilitative organization, and (3) "be subject to supervision and monitoring" of another attorney to ensure he was sober and properly handling his case load.[98] The attorney filed a petition for review by the ADB seeking (1) an entry of an "order of no discipline" and (2) elimination of the monitoring condition.[99]

In making its decision, first, with respect to the practice monitoring condition, the ADB held that there was no basis on the record for a practice monitor.[100] A panel must first make a finding, or there must at minimum be an allegation that the reprimanded attorney's ability to competently practice law was materially impaired to necessitate practice monitoring.[101] The ADB explained that the panel only found that the attorney was guilty of driving while impaired and that, pursuant to MCR 9.121, there must be a showing of some inability to carry out professional obligations, or that the conviction is connected to the inability to serve clients.[102] Thus, a simple misdemeanor conviction by itself is insufficient to require monitoring of the attorney.[103]

Second, in determining whether discipline of the attorney was appropriate, the ADB examined the proper standard of the panel's ability to pursue an order of "no discipline."[104] The ADB explained that the basis of misconduct in this hearing was the attorney's conviction of driving while impaired, not other violations of the Rules of Professional conduct.[105] This was an unusual case for disciplinary prosecution because the sole basis was a criminal act under MCR 9.104.[106] The act was not

97. *Id.* at 1.
98. *Id.* at 2.
99. *Id.*
100. *Id.*
101. *Id.* at 3.
102. *Reams*, 06-180-JC at 3.
103. *Id.*
104. *Id.* at 4.
105. *Id.*
106. *Id.* at 4. "MRC 9.104 contains no limitation on the types of criminal violations that are regarded as professional misconduct. Instead, all 'conduct that violates a criminal law of a state or of the United States' is defined as misconduct for which a lawyer may be disciplined . . . ." *Id.* at 4-5.

shown to reflect adversely on the lawyer's honesty or fitness, but was still professional misconduct under MRPC 8.4(b).[107]

The attorney in dispute was required to successfully complete an outpatient program through a one-year program with the Lawyers and Judges Assistance Program ("LJAP") as a condition of his probation.[108] However, the Attorney Grievance Commission refused to deviate from the standard two-year term for the LJAP assistance program.[109] The attorney "did fairly well" with respect to the abstinence requirement under the one year program.[110] Thus, the ADB was presented with the issue of whether professional discipline was appropriate where a single misdemeanor conviction of drunk driving with no evidence that the attorney's ability to practice law was impaired was the sole misconduct, and there was evidence that the lawyer had taken steps to manage his consumption of alcohol.[111]

The ADB explained that the "fitness to practice remained a fundamental criteria in the assessment of what level of discipline, if any, is appropriate for each particular case . . . ."[112] The ADB refused to apply the American Bar Association Standards for Imposing Lawyer Sanctions because of the gaps in Standard 5.1, which did not provide an appropriate standard of reprimand in this case.[113] Ultimately, the ADB decided that because the attorney satisfied his criminal sentence, continued to participate in a recovery program, and was managing his alcohol problem, it could not find a sound reason for imposing professional discipline.[114] Therefore, it entered an order of "no discipline," reversing the order of the panel.[115] This ADB opinion is significant because it explains the difference between MRPC 8.4(b) and MCR 9.104 and sets the precedent that the ADB was willing to find an order of "no discipline" for misdemeanor criminal convictions that do not materially affect an attorney's ability to practice law.

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107. *Id.* at 5. "MRPC 8.4(b) provides that '[i]t is professional misconduct for a lawyer to . . . engage in . . . violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.'" *Id.*

108. *Reams*, 06-180-JC at 5.

109. *Id.*

110. *Id.* at 7.

111. *Id.*

112. *Id.* at 8.

113. *Id.*

114. *Reams*, 06-180-JC at 10.

115. *Id.*

V. RULE CHANGES DURING THE *SURVEY* PERIOD

There were no changes or proposed changes to the Michigan Rules of Professional Conduct during the *Survey* period. However, effective September 1, 2008, the Michigan Supreme Court amended MCR 8.126, the *pro hac vice* rule for out-of-state lawyers.[116] Out-of-state lawyers seeking to enter an appearance in a Michigan case or proceed must comply with the new *pro hac vice* rule, which provides for an out of state lawyer's appearance in a maximum of five Michigan cases in a 365-day period upon the motion of a Michigan attorney supported by an affidavit.[117] The Michigan attorney must file the motion and affidavit in the court or administrative tribunal or agency where admission is sought and submit a copy to the Attorney Grievance Commission ("AGC").[118] Within seven days, the AGC must notify the tribunal or agency of whether the out of state lawyer has sought temporary admission in the past 365 days and how many times, and the tribunal or agency may enter an order granting temporary admission.[119] By seeking permission to appear under the rule, an out-of-state attorney consents to the jurisdiction of Michigan's attorney disciplinary system and rules.[120]

It should be noted that the Michigan Supreme Court State Court Administrative Office proposed to amend the Michigan Court Rules for the new *pro hac vice* policy, but did not amend Michigan Rule of Professional Conduct 8.5, the professional conduct rule on *pro hac vice* admission.[121]

VI. CONCLUSION

Overall, during the *Survey* period, Michigan law on professional responsibility was clarified and made less ambiguous with one exception. The Michigan Supreme Court in *Grievance Administrator v. Cooper*, due to a lack of explanation by the court, has left the boundaries between fee agreements and ethics in a state of confusion. It is unclear where the boundaries between ethics and contracts begin and end. Some commentators have suggested the court's opinion implies that contract law should fill the gaps where the Michigan Rules of Professional

116. MICH. CT. R. 8.126 (2009).
117. MICH. CT. R. 8.126(A)(1)(a).
118. MICH. CT. R. 8.126(A)(1)b).
119. MICH. CT. R. 8.126(A)(1)(b)-(c).
120. MICH. CT. R. 8.126(A)(1)(e).
121. *See* MICH. RULES OF PROF'L CONDUCT R. 8.5 ("Disciplinary Authority; Choice of Law").

Conduct are unclear while others believe that the court's opinion suggests that contract law can trump ethics rules.[122] At the time of this Article, it is uncertain whether the Michigan Supreme Court will clarify these ethics issues.

In other areas of professional responsibility, key ethics questions have been made clear, providing practitioners with precise procedures to follow. For example, the court of appeals clarified the burden of proof for lawyers "switching sides" to become a prosecutor in *People v. Davenport* by placing the burden to rebut a conflict of interest on the prosecutor's office.[123] The Standing Committee on Professional Responsibility promulgated a formal Ethics Opinion, R-20, which replaced R-14, clarifying that when a lawyer representing a judicial client has an unrelated matter before the same judge, the burden is on the lawyer to ask the judge to raise disqualification.[124] Similarly, the Committee adopted informal Ethics Opinion, RI-345, which provides the exact steps to be taken by a lawyer with a corporate client who has an officer that seeks to disobey a discovery order.[125] In *Grievance Administrator v. Reams*, the Attorney Discipline Board explained that a lawyer convicted of a misdemeanor not affecting the ability to practice may not have to be disciplined, clarifying the difference between MCR 9.104 and MRPC 8.4(b).[126] Finally, the Michigan Supreme Court adopted a new rule on *pro hac vice* admission through MCR 8.126, which requires the involvement of the Attorney Grievance Commission, and it explicitly requires the out of state attorney to consent to the ethics rules of Michigan.[127]

122. *See* Todd C. Berg, *Michigan Supreme Court's Attorney-fee Decision Raises Questions About Contract, Ethics Law*, MICHIGAN LAWYERS WEEKLY, Dec. 22, 2008.

123. *Davenport*, 280 Mich. App. 464, 760 N.W.2d 743.

124. *See* Mich. Standing Comm. on Prof'l Ethics, Formal Op. R-20.

125. *See* Mich. Standing Comm. on Prof'l Ethics, Formal Op. RI-345.

126. *Reams*, No. 06-180-JC.

127. *See* MICH. CT. R. 8.126.