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OF INTEREST

CELEBRATING 100 YEARS

ON THE COVER:
Martin Luther King, Jr. memorial statue in West Patomac Park next to the National Mall in Washington, D.C.

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JUNE 10, 2022
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APRIL 9, 2022
SEPTEMBER 17, 2022

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MEMBER SUSPENSIONS
FOR NONPAYMENT OF DUES

The list of active attorneys who are suspended for nonpayment of their State Bar of Michigan 2021-2022 dues is published on the State Bar's website at michbar.org/generalinfo/pdfs/suspension.pdf.

In accordance with Rule 4 of the Supreme Court's Rules Concerning the State Bar of Michigan, these attorneys are suspended from active membership effective February 12, 2021, and are ineligible to practice law in the state.

For the most current status of each attorney, see our member directory at directory.michbar.org.

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2021 AWARD WINNERS

THE ALTERNATIVE DISPUTE RESOLUTION SECTION OF THE STATE BAR OF MICHIGAN IS PROUD TO ANNOUNCE THAT THE FOLLOWING INDIVIDUALS ARE THE RECIPIENTS OF THE ADR SECTION'S MAJOR AWARDS IN 2021.

THE DIVERSITY AND INCLUSION AWARD is given in recognition of significant contributions concerning diversity and inclusion in the field of alternative dispute resolution. **John Obee** is the 2021 award recipient.

THE DISTINGUISHED SERVICE AWARD is presented to an individual, program, or entity in recognition of significant contributions to the field of dispute resolution. **Sheldon Larkey** is the 2021 award recipient.

THE GEORGE M. BASHARA AWARD (THE CHAIR'S AWARD) is presented to an individual, program, in recognition of exemplary service to the Section and its members. **Scott S. Brinkmeyer** is the 2021 award recipient.

THE NANCI S. KLEIN AWARD is presented to an individual, program, or entity in recognition of exemplary programs, initiatives, and leaders in community dispute resolution. **Dispute Resolution Center of West Michigan** is the 2021 award recipient.

A ONE-OFF "LIFETIME ACHIEVEMENT AWARD" FOR DOUG VAN EPPS. Perhaps no person has been more instrumental than **Doug Van Epps** in bringing the use of ADR into the Michigan State Court system. As the decades-long head of SCAO's Office of Dispute Resolution, Doug has been a firm yet gentle voice in the creation of rules and programs promoting the use of dispute resolution in the State of Michigan and in courts throughout the United States.

THE HERO OF ADR AWARD is presented to a person or entity for supporting the ADR Section's mission or the field of conflict resolution generally, by providing exemplary assistance. **Michael S. Leib** is the 2021 award recipient.

FOR MORE INFORMATION ABOUT THE ALTERNATIVE DISPUTE RESOLUTION SECTION OF THE STATE BAR OF MICHIGAN VISIT: **CONNECT.MICHBAR.ORG/ADR/HOME.**

FROM THE PRESIDENT

DANA WARNEZ

Finding courage

CUTTING US SOME SLACK(S) AND MOVING THE LEGAL PROFESSION FORWARD

Today, as we start this new year, I am thinking about all the changes the passage of time brings.

I have been a lawyer for 25 years, and I feel like I am old enough to have significant perspective about where we have been. I remember going out shopping with my family to Jacobson's in Grosse Pointe to find a suit to wear to my swearing in. With the guidance of my mom and sisters, I picked a red wool Pendleton suit with a pencil skirt, plaid vest, and double-breasted jacket. I was well poised to make a splash. I had found my go-to fancy suit to pull out on a big day at court.

Of course, the accouterments followed — nice shoes and, begrudgingly, nylons. It was the uniform of the time.

It wasn't long until I really just hated the nylons-and-skirt routine. It felt like a costume designed to make everyone else around me comfortable, but not me. There were some women, but by no means a majority, wearing pantsuits and I wanted to step out and wear them more regularly. Of course, there was concern at that time about the potential collateral consequences. A side look or comment from the bench was rare but happened occasionally. Would clients think less of me? Would it make the wrong impression? I recall a couple times coming out of the elevator at court hearing a comment about looking like Rosie O'Donnell.

I found some comfort and courage, assuming that some women in the profession purposefully wore pantsuits to make a point but had no idea (until recently) about Helen Hulick who, in 1938, appeared in a Los Angeles courtroom to testify in a burglary trial wearing pants, much to the chagrin of the presiding Judge Arthur S. Guerin. Judge Guerin rescheduled proceedings not once, but twice, each time instructing Hulick that she should appear in court wearing "an acceptable outfit."[1]

Hulick, a 28-year-old kindergarten teacher at the time, owned only one dress, which was a formal evening gown, and preferred the comfort of pants anyway. So, she continued to wear pants when appearing at the adjourned hearings.[2]

Judge Guerin held her in contempt for disregarding his instructions, and she spent time in jail. Hulick's attorney, William Katz, obtained a writ of habeas corpus and carried the matter to the appellate court.[3]

Thankfully, on appeal, Judge Guerin's contempt order was overturned, allowing her to wear whatever she liked to the next hearing. She appeared in her one and only formal evening gown.[4]

In Michigan, the standard wasn't changed until 1970 when attorney Sue Weisenfeld championed the cause and convenience of allowing women attorneys to wear pants with an article in the Detroit Free Press titled, "Leave Maxis to Judges, She'll Wear Trousers." Michigan Supreme Court Chief Justice Thomas E. Brennan quickly responded, officially declaring that female attorneys can wear pants in court.

Thank goodness for the champions of justice in this world like Helen Hulick, William Katz, Sue Weisenfeld, and Justice Brennan.

While it seems to have taken quite a while for this to happen, I'm so glad that over time, the pants dilemma became a non-issue. In this day and age, given our use of remote hearings, the primary concern just might be whether participants are wearing pants altogether.

It's always a balancing act to leverage positive change without losing our poise. Such are the growing pains of a changing society.

I continue to be reminded that change is good. We have to push ourselves to be flexible and strive to keep learning. I am very glad that our courts are opening with remote participation and in other ways. I am excited to see how the Justice for All Commission will implement recommendations to provide 100% access to our civil justice system. I am glad to see more women and persons of color as well as those with varying backgrounds and experiences seeking judicial office.

And yet, there's always room for improvement. When I was sworn in, only three women served as 16th Circuit Court judges, and now there are six women who serve at the circuit court level in Macomb County. Still, if you look at the numbers in their totality, out of the 91 circuit court judges we've had in Macomb County since the court's inception in 1818, there have been a total of only nine women to serve at the circuit court level.[5]

So, here's to all of us keeping up the efforts to pull others up, support friends, and encourage colleagues in our mutual journey toward an improved legal system. If we do that together, then I will confidently say — here's to the great new days on the way in 2022.

ENDNOTES

1 Harrison, From the Archives: Wear Slacks to Court and Go to Jail, Los Angeles Times (November 15, 2019) <https://www.latimes.com/california/story/2019-11-15/from-the-archives-wear-slacks-to-court-and-go-to-jail>[https://perma.cc/5W9D-W6LU]. All websites cited in this article were accessed December 16, 2021.

2 Margaritoff, All That's Interesting, Meet Helen Hulick, The Woman Who Was Jailed for Wearing Pants to Court, <https://allthatsinteresting.com/helen-hulick> [https://perma.cc/5P84-D8NR] (posted May 21, 2021).

3 From the Archives: Wear Slacks to Court and Go to Jail.

4 *Id.*

5 Macomb County Circuit Court, Judges of the 16th Circuit Court 1818 to Present, <https://circuitcourt.macombgov.org/sites/default/files/content/government/circuit-court/pdfs/16th%20Circuit%20Court%20Judges%201-27-20.pdf>[https://perma.cc/WB9M-X5XS].

Why the State Bar of Michigan needs to be fully funded

A special message from State Bar President Dana Warnez

No one likes a fee increase — no one, including me. As we all know, however, wants often conflict with needs. The Representative Assembly in April overwhelmingly approved recommendation of an $80 fee increase to fund State Bar of Michigan operations. This would be the first fee increase for the State Bar of Michigan in 18 years, and the recommended increase is LESS THAN the rate of inflation.

This increase was recommended because the Representative Assembly recognizes that the State Bar needs to be fully funded. While none of us like to pay more, I ask all my fellow attorneys to recognize and support the need for an increase that allows for the continuation of State Bar functions.

Let me be clear: That is exactly what the proposed increase would do. It simply fully funds the State Bar.

In response to the Representative Assembly's proposal, the Michigan Supreme Court has issued an order accepting comment on a reduced fee increase of $50. This option would require the State Bar of Michigan to make significant cuts that would jeopardize core programs and services. Public comment on the order is open through April 1, 2022.

I am glad that the Court recognized that an increase certainly is worth talking about, but I sincerely hope that more consideration will be given to the Representative Assembly's recommendation to fully fund the State Bar. Some of you might initially be a bit put off by the size of the recommended increase. So was I, until I was reminded how long we have operated on the fee established in 2004, and be-

Continued on next page

FROM THE PRESIDENT (CONTINUED)

ing convinced that the recommended increase is what is needed to meet the needs of our members and the public. No one likes paying more — but we are paying far less than most other attorneys nationwide. With the price increase, Michigan's rate would be simply average, and we would still pay less than attorneys in Wisconsin, Illinois, Missouri, and many other states. Given the bar's track record for operational prudence, we can reasonably expect the proposed increase to last for at least another seven years and quite likely for ten or more years.

For nearly two decades, our license fees have not increased. Organizations that operate for almost 20 years on the same basic revenue stream, successfully putting off a license fee increase for as long as possible, shouldn't be punished by being denied a responsible, less-than-inflationary adjustment now.

As evidenced by the huge timespan since the last funding increase, the State Bar of Michigan constantly evolves, improves services, and does more with less. We're modernizing the license fee process to make it easier and more convenient for attorneys and to significantly cut costs. We've developed cutting edge programs to serve the legal community, including mental health services through the Lawyers and Judges Assistance Program as well as critical physical needs through SOLACE. We're innovating to provide programming to ensure all of us are always practice ready, as recently seen through the development of a Technology Competency corner within the Practice Management Resource Center.

I dare say the vast majority of us recognize the inevitability of needing to pay some sort of fee in order to be licensed to practice. Unlike other states, our license fees do far more than simply give us our bar cards. The State Bar of Michigan serves us. It serves us as attorneys, and it serves all people of Michigan. The State Bar of Michigan helps to lead efforts to create a more accessible justice system, advance the legal profession, and improve public understanding of our work and the legal system.
Without an adequate funding increase, we know critically important programs could be in jeopardy. Here's just a sample:

- The ethics helpline, which helps 10 to 20 attorneys a day navigate intensely challenging issues, supports our strategic plan strategy to educate members on ethical rules and regulations.
- LJAP, which provides mental health services and coordinates the SOLACE program mentioned previously, is part of our work to help new lawyers be practice-ready and to support all members' professional competence.
- The e-Journal provides summaries of the latest opinions from the Michigan Supreme Court, Michigan Court of Appeals, and the U.S. Sixth Circuit five days a week. More than 2,200 summaries were provided last year, a key tool to provide education and resources to attorneys.
- Public policy initiatives that improve the functioning of the courts and increase the availability of legal services are core to the work of the State Bar of Michigan. Working from a broad base of diverse viewpoints, the State Bar of Michigan identifies, develops, and champions changes that advance Michigan's justice system. For example, the State Bar of Michigan led the effort to modernize civil discovery rules — bringing together stakeholders, drafting revised rules, and successfully advocating for the rules' adoption. The State Bar has also been integral in leading efforts to improve Michigan's criminal indigent defense system.
- Critical and direct support for greater access to justice includes advocacy for the legal aid community and its funding, and maintenance of Michigan's pro bono service infrastructure.

Attorneys have the unique privilege of being self-governed through the State Bar of Michigan — instead of the state of Michigan as is typical of other professional licenses. We all have a hand in our governance through elections to our Board of Commissioners and Representative Assembly; every attorney in good standing in Michigan is entitled to vote and to serve. The work being done by the elected leaders of the State Bar of Michigan is hyper-focused on our Strategic Plan — which keeps the bar focused on its essential responsibilities and specifically mandates efficiency and cost savings — and it is being done because we as attorneys collectively determined we needed this work to be done.

Our work is important, and our operations are lean. The State Bar of Michigan needs to be fully funded and should be fully funded. I hope you agree.

IN MEMORIAM

ANTHONY A. ASHER, P10273, of Southfield, died August 24, 2021. He was born in 1936, graduated from University of Detroit School of Law, and was admitted to the Bar in 1966.

JAMES C. BARNES, P38522, of Scottsdale, Ariz., died December 26, 2020. He was born in 1944 and was admitted to the Bar in 1986.

DANIEL M. BLANDFORD, P29106, of Grand Haven, died November 2, 2021. He was born in 1953, graduated from Wayne State University Law School, and was admitted to the Bar in 1978.

THOMAS K. BRICHFORD, P11189, of Farmington Hills, died August 26, 2021. He was born in 1934, graduated from Wayne State University Law School, and was admitted to the Bar in 1962.

JAMES F. FLANNERY, P42260, of Bay City, died November 19, 2021. He was born in 1944, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1989.

ROBERT A. GERMANI JR., P13933, of Lakewood Ranch, Fla., died June 21, 2021. He was born in 1947 and was admitted to the Bar in 1973.

MICHAEL M. GRAND, P14266, of Southfield, died August 21, 2021. He was born in 1938, graduated from Detroit College of Law, and was admitted to the Bar in 1963.

RICHARD J. GRAVING, P42288, of Shelby Township, died November 23, 2021. He was born in 1959, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1989.

KIM L. HAGERTY, P52029, of Traverse City, died August 25, 2021. She was born in 1956 and was admitted to the Bar in 1994.

JAMES J. HAYES IV, P32676, of Bay City, died November 7, 2021. He was born in 1955, graduated from University of Detroit School of Law, and was admitted to the Bar in 1981.

HON. W. WALLACE KENT JR., P15902, of San Antonio, Texas, died September 23, 2021. He was born in 1941, graduated from University of Michigan Law School, and was admitted to the Bar in 1968.

HON. RAYMOND L. KING, P15978, of West Branch, died October 18, 2021. He was born in 1929 and was admitted to the Bar in 1958.

MICHAEL D. LEWIS, P16635, of Traverse City, died November 3, 2021. He was born in 1944, graduated from Wayne State University Law School, and was admitted to the Bar in 1969.

MARY M. MOORE, P27384, of Albion, died October 26, 2021. She was born in 1951 and was admitted to the Bar in 1976.

ALLEN E. PITTOORS, P66045, of Detroit, died April 27, 2021. He was born in 1975, graduated from Wayne State University Law School, and was admitted to the Bar in 2003.

JOHN P. RYAN, P32422, of Evanston, Ill., died October 19, 2021. He was born in 1953, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1981.

ROBERT A. SAJDAK, P27882, of Palm Beach Gardens, Fla., died December 7, 2021. He was born in 1949, graduated from University of Detroit School of Law, and was admitted to the Bar in 1977.

ARTHUR W. SHANNON, P20270, of Bloomfield Hills, died September 28, 2021. He was born in 1937, graduated from University of Detroit School of Law, and was admitted to the Bar in 1963.

WILLIAM C. SHEDD, P20319, of Flint, died July 26, 2021. He was born in 1939, graduated from University of Michigan Law School, and was admitted to the Bar in 1968.

ATHINA T. SIRINGAS, P35761, of Detroit, died December 10, 2021. She was born in 1958, graduated from Wayne State University Law School, and was admitted to the Bar in 1983.

ROBERT M. THRUN, P21440, of Lansing, died December 2, 2021. He was born in 1931, graduated from Wayne State University Law School, and was admitted to the Bar in 1959.

ROBERT H. WITKOP, P22483, of Traverse City, died October 1, 2021. He was born in 1939 and was admitted to the Bar in 1972.

STEVE N. YARDLEY, P22612, of Grosse Pointe Park, died November 8, 2021. He was born in 1936, graduated from Wayne State University Law School, and was admitted to the Bar in 1964.

In Memoriam information is published as soon as possible after it is received. To notify us of the passing of a loved one or colleague, please email barjournal@michbar.org.

1930s

As part of our celebration of the Michigan Bar Journal's 100th year, each month we highlight important events and legal news in a decade-by-decade special report. Last month, it was noted in this space that the 1920s was a decade neatly framed by the end of World War I and the start of the Great Depression. This month, the focus is on the 1930s, a 10-year span bookended at the front by the start of the Great Depression and at the end by the gathering dark clouds on the horizon portending the looming World War II.

The Depression dominated the decade, of course, and the worst economic downturn in the history of the industrialized world led to massive changes in this country's laws. Shortly after taking office in 1933, President Franklin D. Roosevelt shut down banks so Congress could pass reforms to save the floundering banking sector.

Seismic change was evident in Michigan law as well. During the '30s, the state's first sales tax was enacted; the first version of the Michigan Penal Code passed the legislature; and a successful sit-down strike at a General Motors plant in Flint led to the rise of the United Auto Workers union. And in 1935, lawmakers approved Public Act 58, establishing the State Bar of Michigan as an integrated bar association.

AUGUST 9, 1930
Cartoon character Betty Boop makes her debut in Paramount Pictures' "Dizzy Dishes" animated series.

MARCH 3, 1931
The "Star-Spangled Banner" is officially named the United States' national anthem.

JUNE 1, 1931
The U.S. Supreme Court in *Near v. Minnesota* decided that laws acting as a prior restraint on free speech — such as the "Minnesota Gag Rule" used against the editor of a Minneapolis newspaper — were unconstitutional outside of exceptional circumstances.

OCTOBER 18, 1931
Chicago crime boss Al Capone is convicted for tax evasion.

NOVEMBER 8, 1932
Franklin D. Roosevelt is elected president of the United States. He would be elected four times and serve until his death in 1945.

JANUARY 30, 1933
Adolf Hitler becomes chancellor of Germany.

Looking back: 1930s

BY GEORGE M. STRANDER

MAY 1933

U.S. unemployment reaches its highest level of the Depression at 25.6%; Michigan was hit even harder, with statewide unemployment topping out around 34%.

DECEMBER 5, 1933

The 21st Amendment, repealing the 18th Amendment and Prohibition, is enacted. That same day, Michigan repealed its state laws prohibiting the sale and consumption of alcohol, becoming the first state to do so.

MAY 23, 1934

Criminal couple Bonnie Parker and Clyde Barrow are killed in Louisiana following a shootout with the FBI.

The 1930s in America and Michigan were dominated by the Great Depression, its economic and social effects, and the myriad responses to these. It was a decade of much suffering across the globe, with some nations turning to authoritarian regimes, eventually creating an international cataclysm that would force our nation out of its post-World War I isolationism and into World War II. The state, and its government and law, were propelled along the national arc formed by President Franklin D. Roosevelt's New Deal and, along the way, Michigan's attorneys were reformulated into a mandatory bar association.

The Depression prompted several major changes in state law during the decade. In response to rampant property tax delinquencies (reportedly the highest in the nation at the time), Michigan voters in 1932 approved an amendment to the state constitution to limit property taxes; one year later, the state legislature enacted the Property Tax Limitation Act. Perhaps to compensate for the resulting loss in state revenue, the legislature in 1933 also instituted a state sales tax. And further, in keeping with New Deal policies, the legislature approved the Michigan Employment Security Act in 1936.

National prohibition under the 18th Amendment, which was largely unpopular, survived a few years into the decade but was finally repealed late in 1933 through the enactment of the 21st Amendment. Michigan, which was disproportionately affected by Prohibition given its active border with Canada and the resulting organized crime that controlled much of the smuggling between the two counties, repealed its own statewide prohibition on the same day the new constitutional amendment went into effect.

The '30s were also an occasion for an increase in the power of organized labor, both nationally and, most specifically, in Michigan. Historically, labor unions prior to this time either focused on organizing skilled workers or were unsuccessfully attempting to organize unskilled labor. The environment changed in the 1930s as automation in the auto industry increased the proportion of its unskilled workforce, workers faced the uncertainty of the Depression, and a decidedly pro-labor president entered the White House. The most notable result of this change was the Flint Sit-Down Strike.

Called the most significant American labor conflict of the 20th century, the Flint Sit-Down Strike started in late 1936 as the then newly formed United Auto Workers union targeted General Motors to gain recognition as the workers' representative. For more than a month, UAW workers in Flint and elsewhere went on strike, occupying factories rather than picketing, eventually idling 60 plants in 14 states. In the end, by February 1937, after new Gov. Frank Murphy fostered negotiations between the

company and the union, GM recognized UAW's right to bargain collectively for its membership. Most other auto companies quickly followed suit; Ford resisted union recognition until 1941.

Gov. Murphy went on in 1939 to be appointed by President Roosevelt to the office of U.S. attorney general; he remains the only Michigander ever to hold that position. Murphy, who was also a former assistant U.S. attorney for the Eastern District of Michigan, recorder's court judge, mayor of Detroit, and governor general of the Philippines, was appointed to the U.S. Supreme Court a year later, only the second person from Michigan (Henry Billings Brown in 1890 was the first) to serve on our nation's highest tribunal.

One interesting U.S. Supreme Court case of the decade involving Michigan settled a long-standing border disagreement with Wisconsin. In the 1936 case, *Wisconsin v. Michigan,* a line of cases stretching back to the 1920s finally resolved the states' border through Lake Michigan. Due to certain ambiguities in the description of Michigan's territory in the enabling act for its 1837 statehood, it had been unclear to which state several islands projecting off the tip of Wisconsin's Door Peninsula (the largest being Washington Island, with a current population of about 700) belonged. The Court essentially concluded the states' ongoing litigation by confirming its decision in favor of Wisconsin's claim.

Two major pieces of legislation during the '30s concerned crimes and those matters now dealt with by probate courts and family divisions of circuit courts. In 1931, the legislature enacted the Michigan Penal Code, a massive inventory of crimes still in use and constantly updated today. And at the end of the decade in 1939, the Michigan Probate Code passed, collecting in one act laws regarding decedent estates, guardianships and conservatorships, adoptions, juvenile delinquency, and child neglect and abuse.

Perhaps the most important legislative event of the decade for Michigan attorneys was the passage of Public Act 58 of 1935, establishing the State Bar of Michigan as an integrated bar association, making membership a requirement for legally practicing law. The act empowered the Michigan Supreme Court to provide for the State Bar's organization and governance, which the former did through rules effective later in 1935. At the time, Michigan's move to an integrated bar was part of a larger nationwide movement; 15 states created mandatory bars in the 1930s. Today, 31 states have mandatory bar associations.

By the end of the decade, bar association membership had essentially quadrupled from where it stood in 1930. As one writer in a 1939 edition of the Michigan Bar Journal concluded, integration was accepted with approval by the public, the press, and the profession; did not lead to the elimination of local bar associations as some had prophesied; and resulted in an annual meeting attendance in 1937 that was largest in the nation save for California. The author went on to stress that it was through State Bar committees that assistance was provided "in all phases of the administration of justice" and towards "the solution of problems of deep concern to the public, the courts, and the legal profession."

Bar Journal articles of the 1930s reflected a broad scope of interests. The integration of the bar was the topic of many of the decade's pieces, first in contemplation of a mandatory bar, then in 1935 noting the action taken to create a mandatory bar, and finally later in reflection on what a mandatory bar should do. Business issues were discussed, including anti-trust, the workmen's compensation law, contracts in restraint of trade, certificates of convenience and necessity (for public service industries), the dissolution of corporations, and the regulation of radio.

The effects of the Depression were also Journal article topics. One piece focused on the impact of the National Housing Act of 1934 (which created the Federal Housing Administration) in Michigan. The problem of defaulted mortgages was also discussed, as was how the Depression affected corporate finance.

Other pieces of interest in the decade concentrated on more specific endeavors. For instance, one article championed the formation of a non-partisan Legislative Drafting Bureau; eventually, this very thing, under the name of the Legislative Service Bureau, was created in 1941. The 1934 dedication of the University of Michigan Law School Quadrangle was celebrated. And there was a report of a failed constitutional amendment which would have moved Michigan away from an elected judiciary.

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AUGUST 15, 1935

August 15 – The U.S. Social Security Act, creating the Social Security program and unemployment insurance, is signed into law. It is a central part of President Roosevelt's New Deal.

DECEMBER 2, 1935

The Michigan Supreme Court rules creating the State Bar of Michigan — a mandatory bar association — go into effect. The Court's rules follow enabling legislation passed earlier in the year.

APRIL 11, 1936

The Detroit Red Wings defeat the Toronto Maple Leafs to win the Stanley Cup. Detroit is dubbed the "City of Champions," simultaneously holding the championships in professional hockey, professional baseball, and professional football.

NOVEMBER 2, 1936

The BBC starts television broadcasts in London.

DECEMBER 11, 1936

King Edward VIII of England gives up his throne to marry Wallace W. Simpson, an American.

FEBRUARY 11, 1937

The six-week Flint Sit-Down Strike ends, culminating in General Motors recognizing the fledgling United Auto Workers labor union as the exclusive bargaining representative of its workers.

JULY 2, 1937

Amelia Earhart, famed aviatrix who five years earlier became the first woman to fly solo across the Atlantic, disappears over the Pacific Ocean during an attempt to fly around the world.

APRIL 25, 1938

The U.S. Supreme Court in *Erie Railroad v. Tompkins* holds that a federal court, when hearing matters based on diversity jurisdiction and where there is no "federal question," cannot create its own federal common law but must apply the substantive law of the state where it sits.

JUNE 22, 1938

Detroit boxer Joe Louis knocks out Germany's Max Schmeling in the first round of a fight at Yankee Stadium to retain his heavyweight title. The fight was seen as a proxy of American democracy versus Nazi fascism and made Louis a national hero.

JANUARY 2, 1939

President Roosevelt appoints Michigan Gov. Frank Murphy as U.S. attorney general.

FEBRUARY 27, 1939

The Michigan Legislature cedes land to the federal government in preparation for creation of our state's one and only national park — Isle Royale.

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APPELLATE PRACTICE SECTION

The Appellate Practice Section has three upcoming seminars: recovery of attorney fees and sanctions (January 27); use of technology (March 24); and free legal research resources (June 16.) Please visit the Appellate Practice Section webpage and subscribe to the section's SBM Connect emails to receive updates and registration information.

FAMILY LAW SECTION

The Family Law Section is actively opposing the shared parenting legislation in HB 5459 and HB 5460. The bills would create a presumption of 50/50 custody. Section members are encouraged to meet with their state representatives to discuss why mandatory 50/50 custody is harmful to children. If the time comes for these bills to be presented on the floor, we ask section members to come to Lansing to testify in opposition of these measures.

HEALTH CARE LAW SECTION

The Health Care Law Section hosted a panel discussion for law students and new lawyers about the practice of health care law in Michigan. The topic was, "What Does it Take to be a Health Care Lawyer?" Panelists included Nicole Stratton, senior counsel at Spectrum Health System; Louis Szura, partner at Szura & Delonis; and Diab Rizk, compliance and privacy officer with McLaren Health Plan.

INSURANCE AND INDEMNITY LAW SECTION

The Insurance and Indemnity Law Section held its annual business meeting and program via Zoom on October 7. The section thanks Lisa Sewell DeMoss and Dick Hillary, who presented "Health Insurance Forecast: How Will Michigan No-Fault Changes Impact Health Insurance?" The next business meeting is January 13. For details on the meeting and the section's 2022 scholarship program, visit connect.michbar.org/insurance/home.

SOCIAL SECURITY SECTION

The Social Security Section will livestream a free seminar through its YouTube channel on February 11, starting at 9 a.m. The seminar is a roundtable discussion with a Q-and-A session with Social Security attorneys from across the state. Participants can register via the section email address at statebarmichigansocsecsection@gmail.com. The section's summer seminar is scheduled for Boyne Mountain from June 12-14. Sign up for the section listserv for updates on this event.

WORKERS' COMPENSATION LAW SECTION

The Workers' Compensation Law Section annual general meeting is set for June 30-July 2 at Crystal Mountain. See the section website and newsletter for further information, and please consider submitting a nomination for the section's hall of fame.

50 years after *Milliken v. Bradley*

BY JOHN RUNYAN, ERIN GIANOPOULOS, AND JOHN MOGK

The Detroit school desegregation case initiated in August 1970 against state officials, the Detroit Board of Education, and the superintendent of the Detroit Public Schools (DPS) was an inflection point in school desegregation jurisprudence.[1] The impact of the United States Supreme Court's sharply divided decision in *Milliken v. Bradley*[2] is undoubtedly reflected in Detroit's currently segregated metropolitan schools, but the case's far-reaching implications have influenced the racial makeup of urban schools across the country.[3] *Milliken v. Bradley* was the first to directly address busing as a remedy for de jure segregation outside of the South, and from the moment of the Supreme Court decision, "busing was a national issue, not just a Southern one."[4]

BACKGROUND

Local governments in the Jim Crow South had, since the Supreme Court's landmark decision in *Brown v. Board of Education*, attempted to resist desegregation requirements through intransigence and delay.[5] The Court would eventually rule that *Brown's* direction of "all deliberate speed"[6] did not mean schools could avoid desegregation altogether.[7] School boards operating state-compelled dual systems of public education did have an affirmative duty to take whatever steps necessary to convert to a unitary system and eliminate racial discrimination "root and branch."[8]

De jure segregation laws in the South provided the constitutional basis for court action, but in the *Swann v. Charlotte-Mecklenberg Board of Education* case, the

Parents and teachers greet children as they arrive at Detroit's William Robinson School.
Photo provided by Walter P. Reuther Library | Archives of Labor and Urban Affairs, Wayne State University

Supreme Court found that racial segregation in housing also produced racially identifiable schools.[9] The *Swann* Court found that "residential patterns in the city and county resulted in part from federal, state, and local government action."[10] This holding allowed desegregation efforts to move northward where explicit state acts of racial segregation were rare and difficult to prove, but racially identifiable neighborhoods and schools abounded.[11] In the first case to confront school segregation outside the South, the Court held that a "systematic program of segregation" triggered a presumption of a dual school system. Though it refused to go further and hold that de facto segregation resulted in the same constitutional equal protection violation caused by de jure segregation,[12] the Supreme Court's reasoning opened the door for cases like *Milliken*.[13]

Southern desegregation cases set the legal precedent for *Milliken*, but it is impossible to appreciate the context of the courts' decisions without understanding Detroit's political and racial landscape in the late 1960s. Economic displacement and deindustrialization fueled resentment in Detroit's Black community.[14] The unrest in July 1967 was a brutal outpouring of discontent and outrage at the city's persistent discrimination and the growing racial divide. President Lyndon Johnson convened the Kerner Commission to identify the genesis of the violent riots that killed 43 people in Detroit; the commission concluded that school integration should be "the priority education strategy; it is essential to the future of American society. … Equality of results with all-white schools must be the goal."[15] Because uprisings were partially the consequence of racial isolation, integrating schools was essential. Thus, when considering desegregation efforts before and after the *Bradley* decision, one must center them in this time of great division.

In the aftermath of the mid-1960s uprisings that shook Detroit and other major cities, some Blacks turned away from the goal of integration. Instead, whether from despair or frustration, a demand for Black power and community control became popular; a movement in the Michigan Legislature was led by state senator and future Detroit mayor Coleman Young. Although this difference in philosophy played out across the country, it had profound implications for Detroit.[16]

Young and Black nationalist Rev. Albert Cleage desired Black-centered, community control of Detroit's predominantly Black schools as opposed to integrating either predominantly white or predominantly Black schools to improve the education for Black children. Still, other local leaders like Abraham Zwerdling of the Detroit Board of Education — a white, liberal union lawyer — favored more proactive efforts to accelerate the integration of white schools too slowly occurring as housing patterns changed.[17]

Unfortunately, community control advocates and those favoring integration were at loggerheads. Led by Young, the state legislature passed Act 244 of the Public Acts of 1969, mandating that the Detroit Board of Education divide into smaller regional districts with the hope that Black leaders would represent many of those smaller, majority-Black areas.[18] To comply with the act, the board in 1970 passed what became known as the April 7th Plan.[19]

The April 7th Plan also provided for voluntary desegregation of Detroit's high schools phased in over a three-year period, ultimately moving 10,000 students so 11 racially identifiable high schools would become more integrated in a district in which Blacks comprised 63.8% of the student body. For example, at Denby High School in the conservative northeast part of the city, the percentage of Black students would have increased from fewer than 3% to approximately 53% by 1972, when the plan would have been fully implemented. The percentage of Black students at Kettering High School, which was paired with Denby in Region 6, would have decreased from 89.3% to 65.1%. Detroit voters would later recall the four board members (including Zwerdling) who supported the April 7th Plan.[20]

Before the April 7th Plan was even adopted, the Detroit newspapers learned of the proposal; the story appeared on the front pages of the Sunday News and Free Press.[21] The papers mischaracterized it as a sweeping integration plan, provoking an angry backlash[22] and a white student walkout.[23] In response to the early opposition, the state legislature passed Act 48 repealing the April 7th Plan and introducing "an 'open enrollment' policy by which white students left in neighborhoods that were transitioning from white to Black could transfer out of Black schools."[24] This action by the state legislature and then-Gov. William Milliken led the NAACP, at the urging of the Detroit schools superintendent, to file a suit against the state to set aside Act 48 in order to implement the April 7th Plan.

THE LAWSUIT

The initial complaint was filed on August 18, 1970, and the case was assigned on blind draw to U.S. District Judge Stephen J. Roth, a moderate Democrat and former Michigan attorney general and Genesee County circuit judge appointed to the bench by President John F. Kennedy. After twice denying plaintiffs' requests for preliminary injunctive relief, Roth conducted a 41-day bench trial in the spring of 1971 on the issue of whether the Detroit Public Schools were de jure segregated based on race.

Roth was not an activist judge. His finding of de jure segregation within Detroit's public schools was predicated on the persuasive evidence presented at trial of residential segregation within the city and the larger metropolitan area that was "substantial, pervasive and of long-standing."[25] The actions (and inactions) of state and DPS officials reinforced and nurtured that segregation, including enactment of Act 48. Other actions were the location of school construction, creation of optional attendance zones, grade structures, feeder patterns, and transportation policies, all of which had the natural, probable, and foreseeable effect of keeping white and Black students in racially segregated schools.[26]

Detroit students are greeted by a teacher as they arrive at school. Photo provided by Walter P. Reuther Library | Archives of Labor and Urban Affairs, Wayne State University

After conducting additional proceedings, Roth reached his most controversial conclusion: Detroit Public Schools could not and would not be successfully desegregated within the corporate geographic limits of the city. His finding that interdistrict relief was necessary to remedy the de jure segregation had two predicates. First, he felt duty bound by U.S. Supreme Court precedent to order a desegregation plan "that promises realistically to achieve now and hereafter the greatest possible degree of actual school desegregation."[27] Second, given both the state's authority over local school districts under the Michigan Constitution and its exercise (in Act 48 and elsewhere) to further the de jure segregation of Detroit's public schools, he concluded that it was within his authority to involve other districts in the desegregation plan.

Roth's finding of de jure segregation in the Detroit Public Schools was affirmed by the U.S. Court of Appeals for the Sixth Circuit, sitting en banc, and the U.S. Supreme Court.[28] The Court of Appeals also affirmed Roth's finding that interdistrict relief was necessary to cure the constitutional violation he had found, reasoning that it was:

> "impossible to declare 'clearly erroneous' the District Judge's conclusion that any Detroit only desegregation plan will lead directly to a single segregated Detroit school district overwhelmingly black in all of its schools, surrounded by a ring of suburbs and suburban school districts overwhelmingly white in composition in a State in which the racial composition is 87 percent white and 13 percent black."[29]

However, in a narrow 5-4 decision, the Supreme Court reversed Roth's and the Court of Appeals' conclusions that interdistrict relief was necessary and appropriate to remedy the de jure segregation.

The majority based its decision on several key conclusions. First, it concluded that the lower courts had mistakenly shifted the focus to an interdistrict remedy "only because of their conclusion that total desegregation of Detroit would not produce the racial balance which they perceived as desirable."[30] Second, emphasizing that "(n)o single tradition in public education is more deeply rooted than local control over the operation of schools" and ignoring Michigan constitutional and statutory provisions to the contrary, the majority concluded that "(b)oundary lines may be bridged where there has

been a constitutional violation calling for interdistrict relief, but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country."[31]

Third, emphasizing that the nature and extent of the constitutional violation determine the scope of the remedy, the majority concluded that:

By limiting the interdistrict desegregation, the Supreme Court made school district lines sacrosanct — politically significant boundaries that desegregation plans could not cross — even though the districts were instruments of the state created for administrative convenience.

> "(b)efore the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the State or local school districts, or of a single school district have been a substantial cause of interdistrict segregation."[32]

Fourth, the majority addressed the dissenters' argument that interdistrict relief was justified because of evidence implicating the state and its agencies in the constitutional violation. Although conceding arguendo that agencies having statewide authority participated in maintaining the dual school system found to exist in Detroit, the majority nevertheless concluded that because remedial relief restores victims of discriminatory conduct to the position they would have occupied in the absence of such conduct and because disparate treatment of white and Black students only occurred within the Detroit school system, the remedy must be limited to that system.[33]

Finally, because of its ruling concluding that interdistrict relief was not appropriate, the majority found it unnecessary to address the arguments of suburban school districts claiming that they were denied due process when the district court limited their participation after intervention was allowed. This precluded any opportunity to present evidence that the suburban districts had committed no acts having a segregative effect in Detroit.[34]

Although technically not before the Supreme Court, the interdistrict desegregation plan Roth ordered was both ambitious and meticulous.[35] "Some 780,000 students were involved, 220,000 of them in the Detroit school district. It was the widest-ranging busing order ever handed down by a federal court."[36] But the Supreme Court rejected this remedy, holding that to include suburban districts would require a finding of a constitutional violation on their part.[37] By limiting the remedy, the Court made school district lines sacrosanct — politically significant boundaries that desegregation plans could not cross — even though the districts were instruments of the state created for administrative convenience and the lines were approved by the very state officials whose actions confined Black and white students in racially segregated schools.[38]

These impenetrable boundaries would facilitate white and middle-class flight and concentrate poverty in city centers.[39] The decision effectively ensured the re-segregation of public school systems nationwide. A different outcome could have resulted in vastly different metropolitan areas where suburban residence did not guarantee attendance at segregated white schools and urban living need not condemn most children to an inferior education in largely impoverished and segregated Black schools.[40]

LATER CASES

The Supreme Court decision in *Milliken* marked the beginning of a judicial retreat from two decades' worth of efforts to desegregate public schools. Subsequent decisions continued the movement away from federally enforced school desegregation. In *Missouri v. Jenkins*,[41] as in *Milliken*, there were too few white children in an urban school district to meaningfully integrate the schools. The precedent set in *Milliken* prevented an adequate remedy. Hence, the *Jenkins* Court ordered creation of high-quality magnet schools to attract suburban white children to the predominantly Black city schools.[42] The Supreme Court, however, found that such orders to attract students from outside the offending school district exceeded the scope of the violation and lower courts could not employ this remedy.[43] Thus, not only could courts not specifically order suburban districts to participate in desegregation efforts, but now even attempting to induce white suburbs' voluntary participation was impermissible. The decision validated the view that imposing taxes to support other children is punitive — and where the determination of which children are other children and which kids are ours is defined by race.[44]

Housing segregation and its impact on diversity in public schools was central to two other prominent recent cases in desegregation jurisprudence: *Parents Involved* and *Meredith v. Jefferson County Board of Education*. [45] These cases involved challenges to school assignment plans that attempted to prevent the de facto segregation that occurs where racial demographics would produce racially identifiable schools.[46]

Chief Justice John Roberts' plurality opinion in *Parents Involved* distinguished the issue of K-12 school segregation from college-lev-

el affirmative action.[47] The Court upheld affirmative action in higher education based on a diversity rationale, but the *Parents Involved* opinion held that the importance of racial diversity in elementary and high schools could not be proven.[48]

Children do not, however, "learn about other children and races and other cultures in the abstract; they learn by living with them in specific places including schools."[49] The value of diversity lies in the benefits derived from students' interactions with people from different backgrounds and with different life experiences.[50] The school districts in Seattle, Washington, and Louisville, Kentucky, attempted to create this benefit because student assignments in single-race schools in segregated neighborhoods prevented valuable student interactions and "cross-racial understanding" that the Court valued for university students.[51] The Court's holding in *Parents Involved* sanctioned the possibility of voluntary integration while at the same time erected barriers to its practical implementation. Justice Roberts seemed inclined to hold that voluntary integration does not advance a compelling interest.[52] This would have been an alarming revision of desegregation history, using *Brown* to justify blocking efforts to integrate schools, but the opinion "only hinted in that direction."[53]

Progress toward integration eroded after the landmark decision in *Milliken*. U.S. Supreme Court decisions in the 1990s offered "instruction not about how to further desegregation but how to dismantle it"[54] by continuing to severely restrict court-ordered desegregation remedies.[55] The Court protected the rights of white parents to choose racial isolation over the rights of children to have an integrated education of high quality. Education reforms that followed focused on improving the quality of education without a specific push for racial integration. Absent this focus, reform policies allowed schools to become even more segregated and schools catering to poor and minority children remained unequal.[56]

SCHOOL DESEGREGATION TODAY

After *Milliken*, racial integration became all but impossible to achieve in predominantly minority, low-income school districts and in most cases, urban school districts were not only de facto segregated, but also inferior.[57] In 1965, the student population in Detroit's public schools was 54.8% Black.[58] By 1975, 65% of Detroit public school students were Black; by comparison, only 44% of the city's electorate was Black.[59] In contrast, the suburbs were overwhelmingly white — in most, Black residents represented fewer than 1% of their populations.[60]

White and middle-class flight after *Milliken* did not improve these numbers. In the 2020-21 school year, Detroit public schools were 82% Black.[61] According to 2020 census data, 77.2% of Detroit residents are Black.[62] Open enrollment and housing integration has resulted in some suburban districts having many more minority students now compared to the 1960s — Grosse Pointe Public Schools are 15.97% Black, for example.[63] Nevertheless, there are more children now than ever before who attend schools where the bulk of the student body is comprised of minorities.[64] Four of every 10 Black students in Michigan are in public schools in which the student bodies are more than 90% Black.[65] Perhaps most significant is the percentage of economically disadvantaged students in Detroit's public schools, which currently stands at 82%.[66] Even as school choice allows some Black Detroit students to travel to the suburbs in search of better schools, those with fewer choices are left behind, more racially and socially isolated than ever before.[67]

CONCLUSION

School desegregation efforts in Detroit and elsewhere were, at their core, about the same concerns today's parents have for their children: overcrowded classrooms, crumbling infrastructure, and inadequate funds for the supplies and personnel necessary to operate a quality education system. Integration would place some Black students in higher-quality schools, and the white students bused to predominately Black schools would use their political power to demand improvements, bringing everyone up.[68]

But much of that hope fell apart with the *Milliken* decision and the cases that followed, which "essentially stopped desegregation as we knew it."[69] Absent a focus on integration, reform policies allowed schools to become even more segregated and schools catering to poor and minority children remained unequal.[70] *Milliken's* impact extended beyond busing "because it protected the choice of privileged parents to avoid participation in state-ordered remedies to dismantle the segregated system that had granted them racial privilege."[71]

Milliken took school busing into the national spotlight but today, busing is a non-issue. Racial integration hasn't been part of the education policy debate at the local or federal levels for more than 20 years. Segregation has increased in American schools since the early 1990s and no one is doing anything about it.[72] Recently, the media criticized Vice President Kamala Harris for invoking busing because younger voters have no frame of reference to understand the concept; it is ancient history.[73] Central Michigan University political science professor Joyce Baugh, author of "The Detroit School Busing Case: *Milliken v. Bradley* and the Controversy over Desegregation" concluded that "[n]obody wants to deal with [school desegregation] because I think it requires a level of honesty and reflection that many people aren't quite ready to give."[74]

U.S. Supreme Court Justice Thurgood Marshall presciently foresaw much of the current division in schools and communities in his dissenting opinion in *Milliken*, writing that "[i]n the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities — one white, the other Black — but it is a course, I predict, our people will ultimately regret."[75]

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Federal Bar Association. Runyan served as law clerk to Hon. Stephen J. Roth during the Detroit school desegregation case.

Erin Gianopoulos is a 2021 Wayne State University Law School graduate currently finishing her master's degree in American legal history at Wayne State. Erin and her husband live in Detroit with their two boys who attend the Detroit public schools; she is an advocate for equitable and robust public education. Gianopoulos recently began her legal career as a tax attorney with the Internal Revenue Service Office of Chief Counsel.

John E. Mogk is Distinguished Service Professor at Wayne State University Law School. He has focused upon critical urban issues in his writing, teaching, and engagement for more than a half century. He was chair of the Detroit School Boundary Commission under Act 48 of 1970 and an interim member of the Detroit School Board when *Milliken v. Bradley* was commenced.

The authors thank Paul R. Dimond, author of "Beyond Busing: Reflections on Urban Segregation, the Courts, and Equal Opportunity" and a lead attorney for plaintiffs in *Bradley v Milliken*, for his contributions to this article.

ENDNOTES

1 See Mirel, *The Rise and Fall of an Urban School System: Detroit, 1907-81* (Ann Arbor: The University of Michigan Press, 1993), p 346 (noting that Milliken marked the first time the Supreme Court rejected the arguments of the NAACP regarding school segregation) and Baugh, *The Detroit School Busing Case: Milliken v Bradley and the Controversy over Desegregation* (Lawrence: University Press of Kansas, 2011), p xi (recognizing the case as the center of the tortured tale of urban school desegregation).

2 *Milliken v Bradley*, 418 US 717; 94 S Ct 3112; 41 L Ed 2d 1069 (1974).

3 See, e.g., *Missouri v Jenkins*, 515 US 70, 72; 115 S Ct 2038; 132 L Ed 2d 63 (1995) ("The record does not support the District Court's reliance on 'white flight' as a justification for a permissible expansion of its intradistrict remedial authority through its pursuit of desegregative attractiveness," citing *Milliken*) and *Parents Involved in Community Schools v Seattle School Dist No 1*, 551 US 701, 732; 127 S Ct 2738; 168 L Ed 2d 508 (2007) ("Even in the context of mandatory desegregation, we have stressed that racial proportionality is not required[,]" citing *Milliken*).

4 LeBlanc, *Busing set off Democratic debate flare-up, but does it still matter in Detroit?* The Detroit News (July 22, 2019) < https://www.detroitnews.com/story/news/local/michigan/2019/07/21/busing-set-off-debate-flare-up-but-does-still-matter-detroit/1693231001/> [https://perma.cc/7CGL-PZV5]. All websites cited in this article were accessed December 3, 2021.

5 *Brown v Bd of Education*, 347 US 483; 74 S Ct 686; 98 L Ed 2d 873 (1954).

6 *Brown v Bd of Education*, 349 US 294, 301; 75 S Ct 753; 99 L Ed 2d 1083 (1955).

7 *Griffin v School Bd of Prince Edward Cty*, 377 US 218, 221–224; 84 S Ct 1226; 12 L Ed 2d 256 (1964).

8 *Green v Cty School Bd of New Kent Cty*, 391 US 430, 437-438; 88 S Ct 1689; 20 L Ed 2d 716 (1968).

9 *Swann v Charlotte-Mecklenburg Bd of Education*, 402 US 1, 7–9; 91 S Ct 1267; 28 L Ed 2d 554 (1971).

10 *Id.*

11 Orfield, *Milliken, Meredith, and Metropolitan Segregation* 62 UCLA L Rev 364, 382 (2015). Another significant difference between school districts in the South and those in the North would prove critical. The difference in how the North and South drew district lines resulted in inconsistency in assigning government responsibility for segregated schools and in the scope of the permissible remedy for such segregation. While there is no absolute relationship between district size and segregation, "[n]o state with small districts and a substantial African American population [like Michigan and most urban centers in the North] has come anywhere near the level of desegregation achieved in the most successful states with large systems [where large districts incorporating large metropolitan areas was the norm]." Orfield et al., *Deepening Segregation in American Public Schools: A Special Report from the Harvard Project on School Desegregation*, 30 Equity & Excellence in Education 2, 14 (1997).

12 *Keyes v School Dist No 1*, 413 US 189, 193–195, 208–209; 93 S Ct 2686; 37 L Ed 2d 548 (1973). See also James, *Opt-Out Education: School Choice as Racial Subordination*, 99 Iowa L Rev 1083, 1092 n 33 (2014) (rather than affirm the district court's finding that segregated schools were inherently separate and unequal, the Court instead concluded that "intentionally segregative school board actions in a meaningful portion of a school system … creates a [rebuttable] presumption that other segregated schooling within the system is not adventitious [.]"), available at <https://ilr.law.uiowa.edu/assets/Uploads/ILR-99-3-James.pdf> [https://perma.cc/DZ7A-EB64].

13 *Davis v School Dist of City of Pontiac, Inc*, 309 F Supp 734 (ED Mich, 1970), aff'd, 443 F2d 573 (CA 6, 1971). Judge Keith held that evidence of past discriminatory practices, including locating new schools in areas that would perpetuate segregation, was sufficient to show the same violation of equal protection rights as *de jure* segregation. This decision built on the precedent of *Swann* and *Keyes*, paving the way for the claims in *Bradley*.

14 Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit* (Princeton: Princeton University Press, 2005), p 260.

15 *Report of the National Advisory Commission on Civil Disorders*, Nat'l Advisory Commission on Civil Disorders (US Government Printing Office, 1968), available at <https://belonging.berkeley.edu/sites/default/files/kerner_commission_full_report.pdf?file=1&force=1> [https://perma.cc/937V-UGUY]. This commission was created by Executive Order No 11365, issued by President Lyndon B. Johnson on July 29, 1967. *Executive Order 11365 – Establishing a National Advisory Commission on Civil Disorders*, The American Presidency Project <https://www.presidency.ucsb.edu/documents/executive-order-11365-establishing-national-advisory-commission-civil-disorders#:~:text=Executive%20Order%2011365%E2%80%94Establishing%20a%20National%20Advisory%20Commission%20on%20Civil%20Disorders,-July%2029%2C%201967&text=By%20virtue%20of%20the%20authority,it%20is%20ordered%20as%20follows%3A&text=(a)%20There%20is%20hereby%20established,as%20the%20%22Commission%22)> [https://perma.cc/E6QA-LNWK].

16 *Recalling the Milliken v Bradley Case*, presentation by Wayne State University Law School professor John E. Mogk at the SBM 36th Legal Milestone Dedication Ceremony, Hyatt Regency, Dearborn, Michigan (September 16, 2011). See also *The Detroit School Busing Case*, p 77 ("Young and other community control advocates argued against creating integrated regions, in favor of regional boundaries that would ensure Black control of Black schools . . . [W]hite Detroiters preferred to draw the boundaries along existing administrative lines which, along with neighborhood schools, would preserve the prevailing system of racial segregation.").

17 Young stated that he did not believe that Black kids had to go to school with White kids in order to be educated and would later refer to the Detroit Board's April 7 plan as "a chickenshit integration plan." Grant, *Community control vs school integration — the case of Detroit*, 24 The Public Interest 24, (1971) pp 62-79, 73, Box 5 of 5, Folder 5-4, Personal Working Papers 1975-1979, Robert E. DeMascio Papers, Archives of Labor and Urban Affairs, Walter P. Reuther Library, Wayne State University.

18 Runyan, *Milliken v Bradley I: The Struggle to Apply Brown v. Board of Education in the North*, XV The Court Legacy 1, (September 2008) (newsletter published by The Historical Society for the US District Court for the Eastern District of Michigan, copy with the author).

19 Detroit Commission on Community Relations (DCCR) / Human Rights Department Records, Part 3, UR000267 Box 119, Folder 5, Archives of Labor and Urban Affairs, Walter P. Reuther Library, Wayne State University.

20 1969 PA 244 and Baugh, *School Desegregation in Metropolitan Detroit: Struggling for Justice in a Divided and Troubled Community*, in Bowman, ed, *The Pursuit of Racial and Ethnic Equality in American Public Schools: Mendez, Brown, and Beyond* (East Lansing: Michigan State University Press, 2015), p 177.

21 *The Detroit School Busing Case*, p 79.

22 Salsinger, *New formula to integrate high schools*, The Detroit News (April 5, 1970), p A1 and Grant, *City to Shuffle School Areas in Broad Integration Plan*, Detroit Free Press (April 5, 1970), p 1A.

23 *The Detroit School Busing Case*, p 79.

24 *Id.* at 82.

25 *Bradley v Milliken*, 338 F. Supp. 582 (E.D. Mich. 1971) at 587.

26 *Id.* "Governmental actions and inactions at all levels, federal, state, and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the … metropolitan area."

27 *Bradley v Milliken*, 484 F2d 215, 244 (CA 6, 1973).

28 Dimond, *Beyond Busing: Reflections on Urban Segregation, the Courts, & Equal Opportunity* (Ann Arbor: The University of Michigan Press, 2005), pp 90-93. Due to its earlier pre-*Swann* decision in *Deal v Cincinnati Bd of Education*, 369 F2d 55 (CA 6, 1966), the Court of Appeals eschewed reliance upon the record evidence of housing segregation and discrimination admitted before Roth except as school construction programs helped cause or maintain such segregation. In *Deal*, the court held that evidence of housing discrimination was irrelevant and inadmissible when determining liability for school segregation.

29 *Bradley v Milliken*, 484 F2d at 249.

30 *Milliken v Bradley*, 418 US at 739-740.

31 *Id.* at 741. As Justice White wrote in his dissenting opinion, "The Michigan Supreme Court has observed that '(t)he school district is a State agency,'" Attorney General ex rel. *Kies v. Lowrey*, 131 Mich. 639, 644, 92 N.W. 289, 290 (1902), and that "(e)ducation in Michigan belongs to the State. It is no part of the local self-government inherent in the township or municipality, except so far as the legislature may choose to make it such. The Constitution has turned the whole subject over to the legislature. . . ." Attorney General ex rel. *Lacharias v. Detroit Board of Education*, 154 Mich. 584, 590, 118 N.W. 606, 609 (1908)."

32 *Id.* at 744-745.

33 *Id.* at 746.
34 *Id.* at 752. Recognizing the role state defendants played in the segregation of Detroit Public Schools and that under Const 1963, art VIII, § 2 providing free elementary and secondary schools is a state function, some felt it was a mistake for plaintiffs not to name suburban school districts as defendants and prove their complicity in maintaining segregated schools within metropolitan Detroit. There was no clear precedent for granting metropolitan relief if the focus of the lawsuit was upon discrimination by the Detroit Public Schools and the state within the boundary of the Detroit Public School System alone.
35 *Bradley v Milliken*, 484 F2d at 252. Although the Sixth Circuit affirmed Roth's finding that interdistrict relief was necessary to cure the constitutional violation which he found, the desegregation plan ordered by Roth was not technically before the Supreme Court because the Sixth Circuit expressed no view on the desegregation area he had proposed and vacated the order providing for the development of a plan of desegregation.
36 Riddle, *Race and Reaction in Warren, Michigan, 1971 to 1974: Bradley v. Milliken and the Cross-District Busing Controversy,* 46 Mich Hist Rev 2, 2 (2000), available at <https://www.jstor.org/stable/20173858> [https://perma.cc/5KZP-MSW7].
37 See, e.g., *Washington v Davis*, 426 US 229, 249; 96 S Ct 2040; 48 L Ed 2d 597 (1976) (holding that a law or act does not merit strict scrutiny merely because it has a racially discriminatory effect; instead, plaintiffs must show a racially discriminatory purpose. This had the effect of limiting the scope of most equal protection claims.)
38 *Milliken v Bradley*, 418 US at 749 ("[T]here is no constitutional power in the courts to decree relief balancing the racial composition of that district's schools with those of the surrounding districts.")
39 MCL 380.11a, MCL 380.12, MCL 380.701 – 380.703, MCL 380.851 – 380.976 and MCL 388.1620(10) (the Michigan Revised School Code and State School Aid Act empowers local school boards to reorganize, consolidate, annex, or divide a school district's boundaries. Some actions require approval of local voters, but neither the Department of Education nor the State Board of Education may supersede a local board's autonomy.)
40 Savage, *Beyond Boundaries: Envisioning Metropolitan School Desegregation in Boston, Detroit, and Philadelphia, 1963-1974*, 46 J of Urban Hist 129, 133 (2020), available at <https://journals.sagepub.com/doi/pdf/10.1177/0096144218801595> [https://perma.cc/44R5-LGML].
41 *Missouri v Jenkins,* 515 US 70; 115 S Ct 2038; 132 L Ed 2d 63 (1995).
42 *Id.* See also Bowman, *The Legacy of Missouri v Jenkins,* in Bowman, ed, *The Pursuit of Racial and Ethnic Equality in American Public Schools: Mendez, Brown, and Beyond (*East Lansing: Michigan State University Press, 2015), p 248.
43 *Missouri v Jenkins,* 515 US at 92 ("this *inter* district goal [or attracting white students from the suburbs] is beyond the scope of the *intra* district violation identified by the District Court.").
44 Education law lecture, Wayne State University Professor Justin Long (Fall 2019).
45 *Parents Involved in Community Schools v Seattle School Dist No 1,* 551 US 701; 127 S Ct 2738; 168 L Ed 2d 508 (2007) and *Meredith v Jefferson County Bd of Educ,* 549 US 1017; 127 S Ct 575; 166 L Ed 2d 407 (2006).
46 Ware & Robinson, *Charters, Choice, and Resegregation,* 11 Del L Rev 1, 18 (2009), available at <https://media1.dsba.org/public/media/Publications/DLR/PDFs/DLR.11-1.pdf> [https://perma.cc/U62Z-QHQE].
47 *Grutter v Bollinger*, 539 US 306; 123 S Ct 2325; 156 L Ed 2d 304 (2003).
48 *Parents Involved in Community Schools v Seattle School Dist No 1,* 551 US at 725 ("The Court in *Grutter* expressly articulated key limitations on its holding — defining a specific type of broad-based diversity and noting the unique context of higher education . . . The present cases are not governed by *Grutter*.")
49 Report to Judge Robert DeMascio, Third Draft, July 20, 1975, Box 4 of 5, Folder 4-7 Miscellaneous Papers (2 of 2), Robert E. DeMascio Papers, Archives of Labor and Urban Affairs, Walter P. Reuther Library, Wayne State University.
50 A recent *New York Times* article about voluntary efforts to desegregate Minneapolis schools and a tentative settlement of pending litigation which "would loop in suburban districts, which tend to be whiter and wealthier," and require those districts "to work with districts like Minneapolis on a regional integration plan," described the benefits of integration this way:

> Research has shown that integration can deliver benefits for all children. For example, Black children exposed to desegregation after Brown v. Board of Education experienced higher educational achievement, higher annual earnings as adults, a lower likelihood of incarceration and better health outcomes, according to longitudinal work by the economist Rucker Johnson of the University of California, Berkeley. The gains came at no cost to the educational achievement of white students. Other research has documented how racially and economically diverse schools can benefit all students, including white children, by reducing biases and promoting skills like critical thinking.

Mervosh, *In Minneapolis Schools, White Families Are Asked to Help Do the Integrating,* The New York Times (Nov. 27, 2021) <https://www.nytimes.com/2021/11/27/us/minneapolis-school-integration.html> [https://perma.cc/W36P-T9GC].
51 *Charters, Choice, and Resegregation*, p 20.
52 Ryan, *The Supreme Court and Voluntary Integration,* 121 Harv L Rev 131, 131 (2007), available at <https://harvardlawreview.org/2007/11/the-supreme-court-and-voluntary-integration/> [https://perma.cc/58MG-RWM8].
53 *Id.* at 133.
54 Orfield & Eaton, *Dismantling Desegregation: The Quiet Reversal of Brown v Board of Education* (New York: The New Press, 1996), p xv.
55 Gotham, *Missed Opportunities, Enduring Legacies: School Segregation and Desegregation in Kansas City, Missouri,* in Bowman, ed, *The Pursuit of Racial and Ethnic Equality in American Public Schools: Mendez, Brown, and Beyond* (East Lansing: Michigan State University Press, 2015), pp 221, 236.
56 Wilkinson & Pratt, *School Choice, metro Detroit's new white flight,* Bridge Magazine (September 13, 2016) < https://www.bridgemi.com/urban-affairs/school-choice-metro-detroits-new-white-flight> [https://perma.cc/N4N2-8J82].
57 Feldman, et al, *Giving Separate but Equal another Chance: The Checkered Legacy of Milliken II's "Educational Compensation" Remedies*, draft report from the Harvard Project on School Desegregation Report sent by Harvard Project Research Associate Susan Eaton to Judge Robert MeMascio on January 10, 1994, Box 4 of 5, Folder 4-2, Harvard Report, Robert E. DeMascio Papers, Archives of Labor and Urban Affairs, Walter P. Reuther Library, Wayne State University.
58 *Racial Distribution of Students and Contract Personnel in the Detroit Public Schools* (December 1965), Box 2, Folder 2-2 Racial Distribution; Detroit Schools, Wayne State University College of Education Dean's Office: Detroit Public Schools Monitoring Commission on Desegregation, Archives of Labor and Urban Affairs, Walter P. Reuther Library, Wayne State University.
59 *Community Control* at 70.
60 *School Desegregation in Metropolitan Detroit: Struggling for Justice in a Divided and Troubled Community,* pp 177, 183 ("Population from 1970 in the Detroit suburbs: of 400,000 residents in Dearborn, Warren, and Livonia, the three largest suburbs at the time, only 186 were Black. In the other 24 suburbs with populations of 35,000 or more, all but two (Highland Park and Inkster) had Black populations of less than 3%; most had fewer than 1%.")
61 *Racial Census Report by School Districts 2020 – 2021,* Michigan Dept of Education, available at <https://www.michigan.gov/documents/mde/RacialCensus0506_204440_7.pdf> [https://perma.cc/7UF3-ZY2H].
62 Afana, *Detroit Mayor Mike Duggan to challenge 2020 census results showing population decline,* Detroit Free Press (August 12, 2021) < https://www.msn.com/en-us/news/us/detroit-mayor-mike-duggan-to-challenge-2020-census-results-showing-population-decline/ar-AANg7vJ> [https://perma.cc/Y4NG-8LA8].
63 Data available through *Student Enrollment Counts Report,* MI School Data <https://www.mischooldata.org/DistrictSchoolProfiles2/StudentInformation/StudentCounts/StudentCount.aspx> [https://perma.cc/CUX7-8N3M].
64 *In Minneapolis Schools, White Families Are Asked to Help Do the Integrating*. "Today, two in five Black and Latino students in the United States attend schools where more than 90 percent of students are children of color, while one in five white students goes to a school where more than 90 percent of students look like them[.]"
65 Chambers & MacDonald, *Despite gains, Mich. schools among most segregated,* The Detroit News (December 4, 2017) <https://www.detroitnews.com/story/news/education/2017/12/04/michigan-schools-education-segregated/108295160/> [https://perma.cc/9RVD-AJCM].
66 *Student Enrollment Counts Report.*
67 MCL 388.1705 and MCL 388.11705c. The State School Aid Act of 1979 was amended in 1996 to create a state school of choice program. A school district may elect not to participate in any of the schools of choice programs, and in most cases, parents must provide transportation to any school they choose outside their home district.
68 *Despite gains, Mich. schools among most segregated.*
69 *Id.*
70 *School Choice, metro Detroit's new white flight.*
71 James, *Opt-Out Education: School Choice As Racial Subordination,* 99 Iowa L Rev 1083, 1092 (2014), available at <https://ilr.law.uiowa.edu/print/volume-99-issue-3/opt-out-education-school-choice-as-racial-subordination/> [https://perma.cc/VD8N-QWY2].
72 *Despite gains, Mich. schools among most segregated.*
73 *Busing set off Democratic debate flare-up, but does it still matter in Detroit?*
74 *Id.*
75 *Milliken v Bradley,* 418 US at 739-740 (Marshall, J, dissenting).

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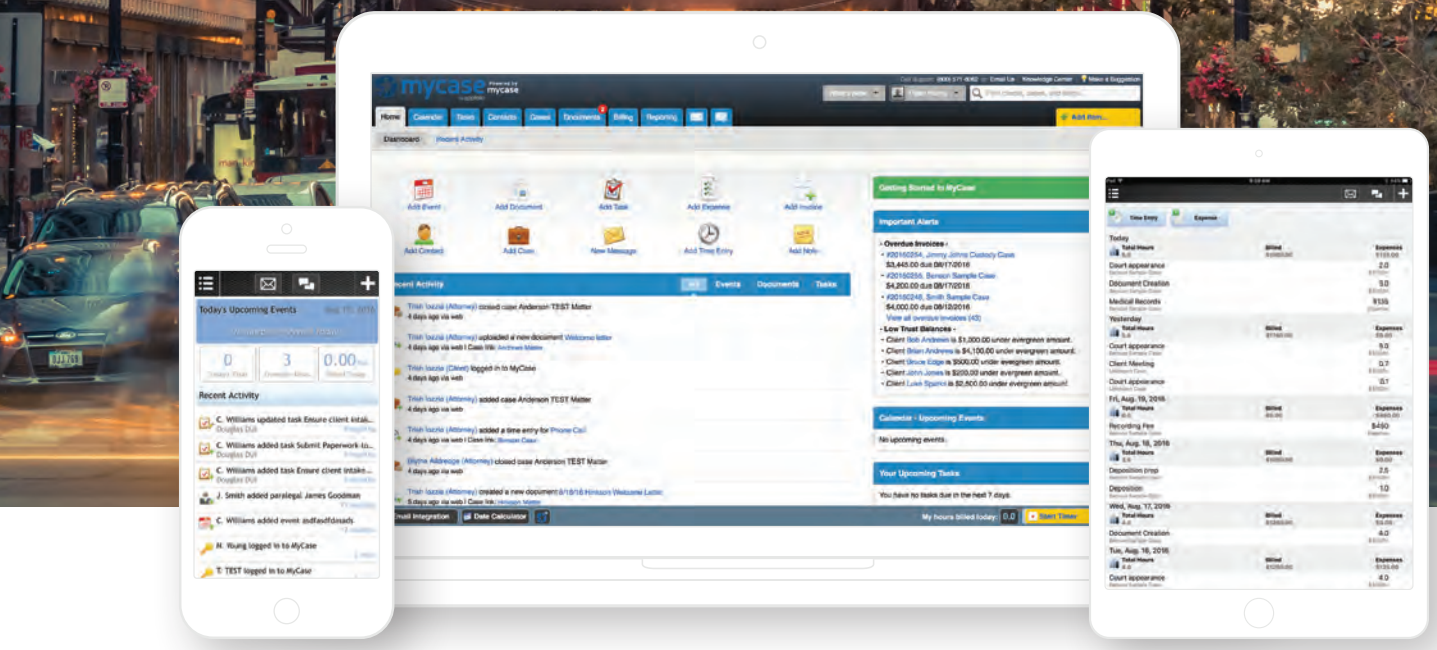

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BEYOND REDLINING

The current state of housing discrimination

BY ROBIN B. WAGNER

"We treat everyone equally because we are required to do so by the Fair Housing Act, so we did nothing wrong."

I hear this from property managers and leasing agents defending conduct that has resulted in lawsuits and administrative actions alleging housing discrimination. This simplistic formulation most likely came from fair housing training the individual received through their employment in residential real estate management, but the takeaway — treat everyone the same — is woefully incorrect and can lead to liability, fair-minded as it sounds.

The Fair Housing Act (FHA), 42 USC 3601 et seq., is arguably the most powerful and far reaching of the federal civil rights statutes passed in the 1960s,[1] yet it is the least understood and utilized of the civil rights laws — housing discrimination lawsuits account for only 2% of all civil rights lawsuits filed in federal courts.[2] Michigan's civil rights acts, the Elliott-Larsen Civil Rights Act (ELCRA)[3] and the Persons with Disabilities Civil Rights Act (PDCRA)[4], also contain housing rights provisions that largely track the federal statute.[5] This article introduces some features of the Fair Housing Act that make it such a powerful tool to address civil rights violations by requiring more than merely treating everyone equally.

The FHA prohibits discrimination based on race, color, religion, sex, national origin, familial status, or disability.[6] The law, along with its largely analogous Michigan statutes, is a remedial statute "applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority."[7]

As a remedial statute, the FHA encompasses disparate impact claims,[8] provides for more generous standing than the typical federal guidelines,[9] broadly defines who may be liable for discrimination to include third-party providers of services such as advertisements and tenant screening,[10] and allows for fee shifting and unlimited punitive damages,[11] among other features. One feature of the FHA that can lead defendants to undervalue their liability is that while the economic damages from housing discrimination may be modest, perhaps amounting to only the costs of moving or increased rent somewhere else, the discrimination by itself is the basis of the compensatory injury and is highly valued because of the remedial nature of the statute.[12] It is also often misunderstood that the FHA focuses broadly, not narrowly, on residential dwellings intended to be used as homes and land and portions of buildings intended for residential use.[13] This can and has included homeless shelters and residential homes for persons with disabilities, such as recovery and sober homes for individuals with substance use disorders, which are often subject to unlawful not-in-my-backyard responses from municipalities.[14]

One extraordinary weapon in the arsenal of federal authority created by the FHA is a national network of independent enforcement agencies that receive funding through U.S. Department of Housing and Urban Development along with state funding to provide education on fair housing, process complaints of housing discrimination, and investigate fair housing violations through various means including testers — trained individuals who make inquiries on behalf of themselves and others according to specific guidelines that identify discrimination based on protected characteristics.[15] Testing evidence is particularly potent in identifying discrimination that might otherwise go undetected. An individual whose apartment rental application is denied might not be able to prove by their own experience that they were turned down due to race, disability, or family status, whereas testing pairs where one person is single and the

AT A GLANCE

The Fair Housing Act requires more than merely "treating everyone the same"; rather, it requires affirmative efforts, particularly with requests for reasonable accommodations and modifications. Housing discrimination is defined by the consequences of an action, rather than the actor's intent. The FHA's broad grant of standing to any "aggrieved person" applies not only to an individual on a lease or mortgage application, but roommates, children, and anyone else who has been injured.

other is single with a small child, for instance, sent to inquire about available units may yield compelling evidence of discrimination based on familial status.

WHAT'S WRONG WITH TREATING EVERYONE EQUALLY?

The FHA antidiscriminatory mandates are far more nuanced than simply "treat everyone the same." As the U.S. Court of Appeals for the Sixth Circuit explained, "the phrase 'equal opportunity,' at least as used in the FHA, is concerned with achieving equal results, not just formal equality."[16]

The Fair Housing Act is arguably the most powerful and far reaching of the federal civil rights statutes passed in the 1960s, yet it is the least understood and utilized of the civil rights laws — housing discrimination lawsuits account for only 2% of all civil rights lawsuits filed in federal courts.

Because the statute reaches to the "consequences of an action, rather than the actor's intent," it provides for disparate impact liability.[17] This means, for instance, that an apartment complex's blanket rule limiting occupancy to two individuals per bedroom can be shown to cause the consequence of having fewer families with smaller children able to rent because it tends to exclude a couple with an infant from living in a one-bedroom unit or a family of five from living in a two-bedroom unit, while governing occupancy codes only limit occupancy of bedrooms by the size of the room.[18]

Second, FHA violations often take the form of failures to provide accommodations or allow for modifications to a residence for persons with disabilities. This area of the law requires far more than treating people equally; rather, it affirmatively requires the housing provider — be it the landlord, homeowner, condominium association, municipality, application screener, or other entity whose conduct is covered by the FHA — to change a policy or exempt an individual with a disability from a rule or policy if doing so may be necessary to afford that person an equal opportunity to use and enjoy a dwelling.[19] Zoning ordinances are included as rules or policies to which exceptions must be granted; this is most typically seen as relief from single-family restrictions so the home can be used as a recovery residence or group facility for individuals with disabilities.[20] Service animals and emotional support animals are also considered necessary supports for individuals with disabilities and generally, it will be necessary for a housing provider to make an exception to its rules to allow these animals to ensure the person with the disability has an equal opportunity to enjoy their home.[21]

Third, the FHA's broad grant of standing to any "aggrieved person" applies not only to an individual on a lease or mortgage application, but roommates, children, and anyone else who has been injured as a result of a discriminatory housing practice or believes a person is about to be injured by a discriminatory housing practice.[22] This means neighbors have standing to sue a realtor who engaged in racial steering that affected the stability of their neighborhood[23] and testers can sue under the FHA because the discrimination they uncovered diverted resources and obstructed the mission of organizations fighting for fair housing laws.[24]

Fourth, it is illegal to discriminate in the terms, conditions, or privileges of sale or rental, or in the provision of services and facilities 42 U.S.C. §§ 3604(b), 3604(f)(2). This section of the FHA has been broadly interpreted to apply to post-acquisition rights,[25] meaning that harassment, discriminatory conduct, or failure to provide a reasonable accommodation for an individual already living in the dwelling is also covered by the FHA.

Finally, as with many other civil rights laws, it is also a violation to threaten, harass, or otherwise interfere with an individual's rights under the act.[26] This typically takes the form of a retaliation claim but can also protect a housing providers' employee who refuses to act in an unlawful way. An example might be if the plaintiff learned their lease had not been renewed because of their race after that resident complained about inferior maintenance services.

Section § 3613(c) of the FHA provides for a broad range of remedies available in a civil lawsuit. The court can order the sale or lease of comparable housing when available or order the defendant to take steps to improve its compliance with the law such as posting fair housing signs and providing training to its staff. Actual damages in fair housing lawsuits can include any out-of-pocket costs incurred in the process such as moving and equipment rentals, mileage and transportation, and the difference in rent if a more expensive apartment was found. The law also allows for compensation for humiliation and mental anguish suffered by the victims of discrimination as well as unlimited punitive damages.[27] Finally, this is a fee-shifting statute, meaning that the prevailing party may recover attorneys' fees and other litigation costs.[28]

In conclusion, property managers, housing providers, and others working in areas related to residential property should be aware that fair housing rights extend far beyond just treating everyone equally.

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ENDNOTES

1 These laws include the Civil Rights Acts of 1960 (primarily voting rights), 1964 (public accommodations, education, and employment), 1965 (voting rights), and 1968 (housing) and their subsequent amendments. See, e.g., *Constitutional Amendments and Major Civil Rights Acts of Congress Referenced in Black Americans in Congress, History, Art & Archives, US House of Representatives* <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Constitutional-Amendments-and-Legislation/> [https://perma.cc/BB9N-BBRV]. All websites cited in this article were accessed December 2, 2021.

2 For the 12-month period ending March 31, 2020, 43,981 federal lawsuits were filed alleging civil rights violations and only 864 of them involved housing discrimination. By contrast, employment discrimination, including disability rights in the employment context, comprised 15,405 federal lawsuits, which was 35% of all civil rights cases filed in that period. T*able C-2, US District Courts, Civil Federal Judicial Caseload Statistics*, US Courts (March 31, 2020), available at <https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2020/03/31> [https://perma.cc/2BX5-4R2Q].

3 MCL 37.2101 *et seq*.

4 MCL 37.1101 *et seq*.

5 Currently pending before the Michigan Supreme Court is an application for leave to appeal that addresses the question of whether Michigan's civil rights laws protect an individual's post-acquisition housing rights. *Kooman v Boulder Bluff Condominiums Units 73*-123, 125-146, Inc, ____ Mich ____; 964 NW2d 376 (2021). The author represents the four fair housing centers in Michigan as amici curiae, supporting plaintiffs-appellants in their assertions that the housing rights sections of the ELCRA and PDCRA apply to post-acquisition violations.

6 42 USC 3604, amended in 1988 to apply to persons with a physical or mental impairment, with a history of such an impairment, or perceived to have a disability. The familial status protections have a carve out for senior living environments, provided that they comply with certain regulatory requirements. 24 CFR 100.300 et seq. It is also important to note that the ELCRA protects against housing discrimination based upon religion, race, color, national origin, age, sex, familial status, or marital status, making it more inclusive than the FHA, MCL 37.2502, and the PDCRA applies to persons with disabilities with language similar to the FHA. Compare MCL 37.1103 with 42 USC 3602(h) and MCL 37.1502 and MCL 37.1506a with 42 USC 3604(f).

7 *Jones v Alfred H Mayer Co,* 392 US 409, 417; 88 S Ct 2186; 20 L Ed 2d 1189 (1968). See also *Havens Realty Corp v Coleman*, 455 US 363, 380; 102 S Ct 1114; 71 L Ed 2d 214 (1982) and *Eide v Kelsey-Hayes Co*, 431 Mich 26, 36; 427 NW2d 488 (1988) (recognizing "the manifest breadth and comprehensive nature of" the Michigan civil rights acts).

8 *Texas Dept of Housing and Community Affairs v Inclusive Communities Project*, 576 US 519; 135 S Ct 2507; 192 L Ed 2d 514 (2015).

9 See, e.g., *Gladstone Realtors v Village of Bellwood*, 441 US 91, 103 n 9; 99 S Ct 1601; 60 L Ed 2d 66 (1979).

10 42 USC 3604 speaks to unlawful conduct but not who the actor might be, and 42 USC 3604(c) applies to anyone who "make[s], print[s], or publish[es]" any discriminatory statement or advertisement regarding a "dwelling." *Connecticut Fair Housing Ctr v CoreLogic Rental Property Solutions*, 478 F Supp 3d 259 (D Conn, 2020), recently held that disparate impact liability could apply to a third-party provider of tenant screening services that was used to deny rental applications to individuals with criminal histories because of the disparate impact this screening had on people of color, who are incarcerated at disparately high rates.

11 42 USC 3613(c). Mortgage providers, for instance, are under increased scrutiny and facing lawsuits for refusing to lend based on a protected characteristic and providing disparate appraisals because of the race of the homeowners or potential buyers seeking the loan. For example, see *Appraisals*, Fair Housing Center of Central Indiana <https://www.fhcci.org/programs/education/appraisals/> [https://perma.cc/5RLN-AKG2].

12 See, e.g., *Preferred Properties, Inc v Indian River Estates, Inc*, 276 F3d 790, 800 (CA 6, 2002) (upholding award of $31,500 in compensatory damages and $125,000 in punitive damages and holding that conduct subject to punitive damages need not be "egregious" because "[r]elief for discriminatory housing practices requires only that a seller be engaged in unlawful discrimination.")

13 42 USC 3602(b).

14 *Lakeside Resort Enterprises, LP v B. of Supervisors of Palmyra Twp,* 455 F 3d 154, 158-59 (CA 3, 2006) (alcohol treatment center where patients stayed for 2 weeks); *Schwarz v City of Treasure Island*, 544 F 3d 1201, 1214–15 (CA 11, 2008) (halfway houses); *Turning Point, Inc v City of Caldwell*, 74 F 3d 941 (CA 9, 1996) (homeless shelter); and *Project Life, Inc v Glendening*, unpublished opinion of the United States Court of Appeals for the Fourth Circuit, decided September 4, 2002 (Case No 01-1754) (boat used as a group home).

15 Michigan has four active fair housing centers: Fair Housing Center of Metropolitan Detroit <https://www.fairhousingdetroit.org> [https://perma.cc/QTZ9-UWWG]; Fair Housing Center of Southeast and Mid-Michigan <https://www.fhcmichigan.org> [https://perma.cc/WDR5-M9MT]; Fair Housing Center of Southwest Michigan <https://www.fhcswm.org> [https://perma.cc/TCT3-X5CU]; and Fair Housing Center of West Michigan, <http://www.fhcwm.org> [https://perma.cc/46FE-H53M].

16 *Smith & Lee Associates, Inc v City of Taylor, Mich*, 102 F3d 781, 795 (CA 6, 1996).

17 *Texas Dept of Housing and Community Affairs v Inclusive Communities Project*, 576 US at 534.

18 Fair Housing Enforcement — Occupancy Standards Notice of Statement of Policy, 63 Fed Reg 70256 (December 18, 1998).

19 42 USC 3604(f)(3)(B).

20 *Smith & Lee Associates, Inc* (holding that request for a variance for a 12-person group home in a single-family home zone was reasonable accommodation).

21 See, e.g., *Anderson v City of Blue Ash*, 798 F3d 338 (CA 6, 2015). See also "Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act," US Dept of Housing and Urban Development: FHEO -2020-01 (January 28, 2020), p 10, available at <https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf> [https://perma.cc/HT6A-U792]. The reason for this application of the rule is that under the law, these animals are not pets; rather, they are more like crutches, wheelchairs, or strobe light fire alarms that are directly related to therapeutic or accessibility requirements of the individual with a disability. That said, there is a growing backlash against emotional support animals because of the unfortunate boom in online prescriptions services, and these services often fail to provide the level of documentation necessary to make substantiate a legal claim. It is important to ensure that in the case of emotional support animals, there is a clear explanation provided to the housing provider for how the animal supports a specific disabling condition of the individual.

22 42 USC 3602(i) and Trafficante v Metropolitan Life Insurance Co, 409 US 205; 93 S Ct 364; 34 L Ed 2d 415 (1972).

23 *Gladstone Realtors v Village of Bellwood.*

24 *Havens Realty Corp v Coleman*.

25 See, e.g., Georgia State Conference of the *NAACP v City of LaGrange*, Georgia, 940 F3d 627, 631-33 (CA 11, 2019) (discussing cases). At the time this was written, the Michigan Supreme Court has granted leave to appeal the question of whether the PDCRA similarly applies to post-acquisition requests for reasonable accommodations and modifications. See note 4 and discussion, supra.

26 42 USC 3617.

27 42 USC 3613(c)(1).

28 42 USC 3613(c)(2).

EXCERPTS FROM STATE BAR OF MICHIGAN AUDITED FINANCIAL STATEMENTS

AND OTHER SUPPLEMENTARY INFOMATION, YEAR ENDED SEPTEMBER 30, 2021 WITH REPORT OF INDEPENDENT AUDITORS

FULL REPORT AVAILABLE AT MICHBAR.ORG/GENERALINFO

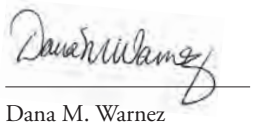
December 8, 2021

Honorable Bridget Mary McCormack
Chief Justice
Supreme Court of Michigan
Hall of Justice
925 W. Ottawa Street
Lansing, MI 48915

Pursuant to Rule 7 of the Rules Concerning the State Bar of Michigan, please accept the FY 2021 Annual Financial Report of the State Bar of Michigan. The Annual Financial Report covers the fiscal year that ended on September 30, 2021 and contains the audited financial statements and other information required by accounting standards or useful to understanding the operations and effectiveness of the State Bar of Michigan as a public body corporate operating pursuant to statute and rules set forth by the Michigan Supreme Court.

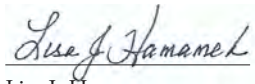
The State Bar of Michigan's management is responsible for the information provided in this FY 2021 Annual Financial Report. The basic financial statements and related notes are audited by the independent accounting firm of Andrews Hooper Pavlik PLC in accordance with auditing standards generally accepted in the United States of America, and their opinion is provided as part of this report. Questions or comments on this report should be directed to the executive director of the State Bar of Michigan.

Ordinarily this report is transmitted without further comment, but, as was the case last year, we want to note that the State Bar is especially proud of what it has been able to accomplish for the benefit of the public and the legal profession under the continuing unprecedented circumstances of the pandemic, and to express gratitude to the Michigan lawyers who have generously volunteered their time, to the Supreme Court for your leadership, and to the stakeholders with whom we partnered in our efforts.



Dana M. Warnez
President

Janet K. Welch
Executive Director



Lisa J. Hamam
Treasurer

Tatiana Goodkin
Chief Financial Officer

OVERVIEW OF THE STATE BAR OF MICHIGAN

The State Bar of Michigan was established in 1935 by public act and is regulated by the Michigan Supreme Court. The State Bar of Michigan exists to aid in promoting improvements in the administration of justice and advancements in jurisprudence, improving relations between the legal profession and the public, and promoting the interests of the legal profession in Michigan. By law, all persons licensed to practice law in Michigan constitute the State Bar of Michigan's membership. The State Bar of Michigan is a public body corporate, funded by licensing fees and revenue generated by bar activities. It receives no appropriations from the State of Michigan.

The State Bar of Michigan works to promote the professionalism of lawyers, advocates for an open, fair and accessible justice system, and provides services to members that enable them to best serve their clients.

GOVERNANCE

By integrating the bar into the regulatory structure of the legal profession, the state of Michigan adopted a modified form of the self-governance of the legal profession common to England and Commonwealth countries. Pursuant to Rule 5 of the Rules Concerning the State Bar of Michigan (State Bar Rules), the State Bar is governed by a Board of Commissioners. The president, president-elect, vice president, secretary, and treasurer are the officers of the State Bar, elected by the Board of Commissioners.

State Bar Rule 6 provides for a 150-member Representative Assembly as the final policymaking body of the State Bar. Its elected officers are the chair, vice chair, and clerk.

STRUCTURE

The State Bar of Michigan helps lawyers, as officers of the court, fulfill their ethical obligations to improve the quality of legal services and assist in the regulation of the legal profession. The State Bar of Michigan accomplishes a substantial portion of this work through its volunteers, led by the leadership of the Board of Commissioners and Representative Assembly. There are 21 standing committees and one special committee of the State Bar created to advance the work of the State Bar as defined by court rule. Almost 450 attorneys served on State Bar of Michigan committees, task forces, and workgroups. The State Bar's 44 sections, each with its own bylaws approved by the Board of Commissioners, focused largely on excellence in specific practice areas. 42 of the sections are funded by voluntary dues from their membership. The work of the Young Lawyers Section and Judicial Section is funded by State Bar dues.

The State Bar of Michigan employs a paid staff to carry out its mission under the supervision of the executive director appointed by the Board of Commissioners. The State Bar of Michigan employed 72.5 full-time equivalent employees (FTEs) at the end of fiscal year 2021, a 0.5 FTE increase from fiscal year 2020.

KEY ACTIVITIES

ACTIVITIES MANDATED BY STATUTE OR COURT RULE

ADMINISTRATIVE ACTIVITIES

- Maintenance of official attorney database
- Collection of license fees and administration of licensing requirements
- Administrative support for the attorney discipline system
- Governance (self-governing features of the integrated bar are defined by court rule)

ACTIVITIES SPECIFICALLY MANDATED BY STATUTE, COURT RULE, OR SUPREME COURT ADMINISTRATIVE ORDER

- Character and fitness operations
- Pro hac vice administration
- Annual Meeting
- Unauthorized practice of law prosecution
- Client Protection Fund administration
- Michigan Bar Journal
- Member directory
- Administration of prepaid legal services regulation
- Administration of nonprofit lawyer referral services regulation
- Regulation of advocacy concerning promotion of improvements in the administration of justice and advancements in jurisprudence
- Administration of IOLTA financial institution registrations
- Nominations for statutory positions

ACTIVITIES AUTHORIZED BY BOARD OF COMMISSIONERS TO CARRY OUT GOVERNMENTAL MANDATE

IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE AND ADVANCEMENTS IN JURISPRUDENCE

- Administration of AO 2004-1 concerning State Bar of Michigan public policy activities
- Access to justice initiatives
- Policy development and research
- Diversity and inclusion initiatives
- Advocacy (court rule and statute)

IMPROVEMENTS IN RELATIONS BETWEEN THE LEGAL PROFESSION AND THE PUBLIC

- Unauthorized practice of law educational resources
- Online legal resource center
- Civic education and public outreach
- Pro Bono program and A Lawyer Helps
- Enhanced profile directories

PROMOTION OF INTERESTS OF LEGAL PROFESSION

- Administrative support for sections
- Practice management support services
- Lawyers and judges assistance
- Ethics helpline
- Legal research tool
- Endorsed products & services
- Ethics seminars & resources
- E-Journal
- Practice management seminars
- Support for local and affinity bars

HIGHLIGHTS OF FY 2021 ANNUAL FISCAL REPORT UPDATE

ADMINISTRATIVE ACTIVITIES

Collection of license fees and administration of licensing requirements

The State Bar of Michigan has implemented further upgrades of the member portal and e-commerce site to improve attorney experience with mandatory disclosures and payments. Improvements include adding the ability to upload an order of admission for new attorneys, integrating the online renewal process for suspended attorneys, and creating payment pages for processing reinstatement and status change payments.

Governance

Court rules define the self-governing features of the State Bar of Michigan as an integrated bar. A task force reviewed and examined ways to modernize the governance structure of the State Bar for the purpose of making governance more cost-effective and timely. Its work will be presented to the Representative Assembly and Board of Commissioners.

Conversion of State Bar activities to remote work and virtual proceedings

Consistent with executive orders and public safety, the State Bar converted the bulk of its operations to remote work and assisted Michigan lawyers and the Supreme Court in adapting legal practices to adhere to COVID-19 restrictions and safe practices.

ACTIVITIES SPECIFICALLY MANDATED BY STATUTE, COURT RULE, OR SUPREME COURT ADMINISTRATIVE ORDER

Bar Admissions

The State Bar processed 957 character and fitness (C&F) applications for the February 2021 and July 2021 bar exams and conducted interviews for 35 applicants. Thirteen additional matters were referred, with interviews or recommendations pending. Thirty matters are expected to be referred to C&F district committees upon completion of the investigation. There were 42 formal hearings

completed via Zoom, due to COVID-19. Seven formal BLE hearings were via Zoom.

Annual Meeting

The State Bar satisfied court rule requirements by successfully conducting the 2021 Annual Meeting and associated business functions by Zoom.

Unauthorized Practice of Law administration

The State Bar received 62 complaints alleging the unauthorized practice of law (UPL) during FY 2021. Of these complaints, 35 were closed after investigation, either due to obtaining voluntary compliance or because there was no evidence of UPL found. Of the remaining 27 open matters, nine matters remain under investigation, seven matters are pending UPL Standing Committee review after investigation, and 11 matters were approved for litigation by the Board of Commissioners and remain open for litigation review. Four injunctive orders were obtained by the UPL Department, and three cases remain in active litigation.

Client Protection Fund administration

The Board of Commissioners approved 35 Client Protection Fund claims filed by payees whose attorneys misappropriated client funds. These claims totaled $338,293. State Bar made payments of $275,981 which included $178,925 approved by the Board of Commissioners in FY 2020. As of September 30, 2021, $241,237 of claims remained to be paid pending the receipt of signed subrogation agreements.

Development of resources to respond to COVID-19 pandemic

In response to the profound, extensive emergency changes in the operations of the court system and the practice of law precipitated by the COVID-19 public health crisis, the State Bar refocused its communications and public services to meet the emerging needs of the public and Michigan lawyers. The State Bar developed new resources, including constantly updated resource pages addressing changes in court practices and remote work tools and tips. The State Bar and its sections worked collaboratively with the State Court Administrative Office, the Board of Law Examiners, the Attorney Discipline System, the Michigan Institute for Continuing Legal Education, and the executive and legislative branches, on necessary adaptations in the provision and regulation of legal services during the pandemic.

ACTIVITIES AUTHORIZED BY BOARD OF COMMISSIONERS TO CARRY OUT GOVERNMENTAL MANDATE IMPROVEMENTS IN ADMINISTRATION OF JUSTICE AND ADVANCEMENTS IN JURISPRUDENCE

Administration of AO 2004-1 and Policy Development

The State Bar defended its governmentally-mandated duties when faced with a federal lawsuit that, as part of a string of lawsuits across the country, raised First Amendment challenges against integrated bars.

On August 22, 2019, a State Bar member filed a complaint in the Western District of Michigan alleging that mandatory membership in and payment of dues to the State Bar infringes on her first amendment right to free association and free speech. *Taylor v. State Bar of Michigan*, No. 1:19-cv-00670-RJJ-PJG (W.D. Mich). Taylor alleged that, under *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), the Michigan law requiring State Bar membership in order to practice law is unconstitutional. On September 8, 2020, the district court in the Western District of Michigan granted summary judgment in favor of the State Bar, explaining that the issues raised by Ms. Taylor have been "squarely decided" by the United States Supreme Court. On July 15, 2021, the Sixth Circuit affirmed the district court, holding that "[c]onsistent with the numerous courts faced with claims like Taylor's in the wake of Janus . . . Lathrop and Keller remain good law." Taylor filed a petition for certiorari in the United States Supreme Court.

Access to Justice Initiatives

Promotion of access to justice is a thread that winds through many State Bar activities. In addition to policy development, the State Bar supports a centralized fundraising campaign administered by the separate Michigan State Bar Foundation in partnership with the State Bar, to raise money for qualifying civil legal aid programs in Michigan. The Access to Justice Campaign revenue for FY 2021 was more than $3,095,000 (unaudited), including approximately $1,776,100 in cy pres awards. Approximately $24.50 million has been received by the Access to Justice Fund in donations and pledges. During the 2020 calendar year, 51 firms gave at the Leadership Firm level of $300+ per attorney, and 68 firms and corporate legal departments gave at tiered levels between $1,000 and $100,000.

Justice for All Commission

The State Bar plays key roles in the Justice for All Commission, which was established in January 2021 by the Michigan Supreme Court. The State Bar representatives serve on the Commission, Executive Team, and various committees and workgroups. Prior to the establishment of the Commission, the State Bar was heavily involved in the creation of the Justice for All Task Force inventory and strategic plan.

Diversity and Inclusion

In addition to its traditional work partnering with local and affinity bars on diversity and inclusion events, the State Bar developed a central repository of resources for Michigan lawyers on race and justice and convened an ongoing online Race and Justice Forum to discuss developments and foster bar collaboration. In partnership with General Motors Legal Staff, the State Bar offered virtual training sessions to all Michigan lawyers on how unconscious processes may affect individual decision-making.

Advocacy

The State Bar public policy program fully reviewed 52 public policy items, including legislation, court rules, and administrative rules, and led the advocacy on approximately 45 formal policy positions. Highlights of legislative activity include successful advocacy for funding of the Michigan Indigent Defense Commission and the Judiciary Budget, and for continued funding for the Legal Services Corporation at the federal level. Pursuant to AO 2004-1,

all advocacy is reported on the State Bar of Michigan Public Policy Resource Center.

IMPROVEMENTS IN RELATIONS BETWEEN THE LEGAL PROFESSION AND THE PUBLIC

Online Legal Resource Center and Access to Justice Initiatives

In FY 2018, the State Bar launched the country's first full-service state bar online Legal Resource and Referral Center and advanced its offerings throughout FY 2019 and FY 2020. The new service is taking full advantage of online access, automated administration, consumer-centered business practices using data-driven marketing and feedback, and new standards of accountability based on best business practices and ethics.

The portal includes lawyer referral, the online attorney directory, and educational materials to help consumers with their legal needs. In FY 2021, the Lawyer Referral Service practice areas were updated to facilitate better, more targeted referral matches and expanded its Modest Means Program.

The Legal Resource and Referral Center portal allows call center staff to process referrals and attorney panel members to manage their panel membership online. Development of the Online Legal Resource Center is coordinated with and aided by Michigan Legal Help. FY 2021 saw continued expansion of automated data reporting, and of limited scope practice areas and modest means lawyer referral offerings, and the initiation of new collaborations with legal aid, law school clinics, and local bars.

In response to COVID-19, the $25 administrative fee was waived for all matters beginning April 1, 2020. The fee was reinstated in April 2021.

In total, there were 165,095 unique visitors to the site who accessed 408,084 pages of information.

Civic Education and Public Outreach

The Public Outreach and Education Committee and the Diversity and Inclusion Advisory Committee continued to support law-related education programs across the state and assist partners and stakeholders in adapting public education offerings to a virtual environment.

Pro bono program and A Lawyer Helps

In addition to carrying out the traditional support functions for the pro bono activities of Michigan lawyers, including qualified domestic relation orders, federal and state income tax issues, patent, and new Clean Slate/expungement projects, the State Bar worked with FEMA, Lakeshore Legal Aid, Michigan Advocacy Program/Legal Services of South Central Michigan, State Bar Young Lawyers Section, Red Cross, National Disaster Legal Aid Online, Dykema, Bodman, Miller Canfield, and Honigman to assist Michiganders impacted by the flooding disaster in the metro-Detroit area. While there was a significant reduction in the volume of in-person legal clinics and pro bono events due the COVID-19 crisis, the State Bar created and maintained new resources specifically targeted at legal needs arising from the crisis, such as the Spring Pro Bono Workshop that focused on issues related to the pandemic.

PROMOTION OF INTERESTS OF LEGAL PROFESSION

Administrative support for sections

The State Bar provides basic administrative support for the sections of the State Bar, primarily by collection of voluntary dues, maintenance of the sections' membership databases, financial services, and website support. Any policy advocacy by sections is financed entirely by voluntary dues. The sections serve the profession with educational and networking events throughout the year specific to the legal interests of each section's practice area.

In FY 2021, State Bar sections remained key players in helping develop and implement strategies necessary for maintaining legal and court services in a pandemic environment.

Membership in the State Bar's sections totaled 47,961, including 34,677 total paid section memberships purchased by 24,873 unique State Bar licensees. Free section memberships were available to law students, first-year licensees, and those who qualified for the Young Lawyers or Judicial sections. There are 44 sections of the State Bar.

Practice management support services

The Practice Management Resource Center (PMRC) focused on technology competency based on the recent update to the comments on Michigan Rule of Professional Conduct 1.1, unveiling a technology competency webpage that pulls together technology and ethics resources relevant to seven core technology competencies: (1) collaboration, (2) computer skills, (3) cyber security, (4) data security, (5) e-discovery, (6) e-filing, and (7) the internet. In addition, the PMRC continued to update and provide resources, trainings, and guidance through the State Bar website, one-on-one helpline, MBJ articles, newsletters and social media. In continuation of its support for attorneys working in remote environments, the PMRC also provided training and tips concerning online meeting platforms. The State Bar's On Balance podcasts focused on the emerging needs and concerns of lawyers practicing in a pandemic environment.

Lawyers and Judges Assistance

The Lawyers and Judges Assistance Program (LJAP) helps to protect the public by its dedication to assisting legal professionals with mental health and substance use problems. The State Bar is devoted to the advancement of well-being in the legal profession, including offering services to those looking to optimize their overall wellness. Members' use of State Bar's LJAP resources were up substantially in 2021. In FY 2021 LJAP helped over 200 law students, bar applicants, lawyers and judges recover from mental illness and/or substance use disorders. LJAP provided 24 professional presentations to law schools, legal employers, local and affinity bars, regulators, and other stakeholders in the field of law, focusing on topics related to well-being in the legal profession.

Between new cases opened and referrals provided, 142 members received services, up 37% from FY 2020. LJAP clinical staff completed 29 biopsychosocial evaluations and maintained an average monthly caseload of 48 individuals. Free telephone consultations provided to law students, lawyers, judges, and their concerned parties increased by 175%. In March 2021, LJAP started a new, weekly virtual support group for Michigan lawyers.

LJAP staff continues to participate in providing On Balance podcasts on wellness topics in conjunction with the Practice Management Resource Center staff.

LJAP has been integral in the establishment of the SOLACE (Support of Lawyers/Legal Personnel – All Concern Encouraged) Program. Since the launch of SOLACE in July 2021, over 15,000 legal professionals have voluntarily joined the SOLACE Network with four requests for assistance submitted and answered by the goodwill of the members of Michigan's legal community.

Ethics helpline and seminars

The State Bar of Michigan staff counsel responded to approximately seven to eight inquiries daily from attorneys and judges seeking informal advice through the Ethics Helpline. The inquiries ranged from simple advice to complex scenarios requiring extensive thoughtful discussion. Staff counsel engaged in numerous presentations, including the Lawyer Trust Account Seminar three times and the Tips and Tools Seminar two times over the past year.

The Professional Ethics Committee published several FAQs, including FAQs focused on cybersecurity, drafted outlines concerning ethical issues in child protective proceedings and changing law firms for pending ethics guidebooks, and advised the Representative Assembly on proposal concerning remote lawyering. The Judicial Ethics Committee published FAQs concerning social media, judicial campaigns, and general judicial ethical issues and drafted a judicial ethics opinion concerning gifts (JI-146).

Interim Administrator Program

The State Bar has been working on creating a succession planning requirement to help ensure that clients are protected if their attorney dies or otherwise becomes unexpectedly unable to practice law. The need for succession planning in Michigan is great and growing based on data indicating that the number of small and solo practices is growing, and attorneys are waiting longer to retire from the practice of law. The State Bar of Michigan Representative Assembly voted in 2019 to approve an Interim Administrator Program and to recommend appropriate rule changes to implement the program. The program would provide education and resources for active Michigan attorneys in private practice regarding succession planning in the event that the attorney becomes unexpectedly unable to practice law due to death, disability, or discipline. Currently, the Attorney Grievance Commission is responsible for law practice receiverships under similar circumstances.

Under the new proposed program, all active attorneys in private practice would be required to designate a successor attorney or law firm or pay a fee to participate in the State Bar of Michigan Interim Administrator Program, which would act as, or nominate and assist, an interim administrator. The interim administrator would manage or wind up the attorney's practice depending on the circumstances. On September 22, 2021, the Court held a public administrative hearing to consider the proposed rules, and the rules are currently pending further consideration by the Michigan Supreme Court.

Support for local and affinity bars

The State Bar provides a variety of support services to Michigan's 120 State Bar-accredited voluntary bar associations, including staff advisory assistance, communications, and coordination. In a non-COVID-19 environment, these efforts are supplemented and advanced by in-person visits to voluntary bars by the State Bar president. The State Bar continues to explore the opportunities for virtual presidential involvement in voluntary bar activities.

FINANCIAL AND MEMBERSHIP SUMMARY

FINANCIAL SUMMARY

As of September 30, 2021, the State Bar's net position in the Administrative Fund totaled $11,773,220, an increase of $201,311, or 2 percent, during FY 2021. Excluding the retiree health care trust assets net of associated liabilities and other financial impacts, the Administrative Fund totaled $8,423,012, a decrease of $759,641, or 8 percent during FY 2021. The Administrative Fund decrease was anticipated as a standard feature of the SBM budgeting at the end of an extended "fee cycle." The current 18-year cycle is over twice the normal bar fee cycle, and the longest in at least half a century. The Client Protection Fund's net position totaled $1,834,119, an increase of $198,401, or 12 percent as restated during FY 2021. The sections' net position, calculated separately as it consists of voluntary section dues and other section funds, totaled $2,983,335, an increase of $363,595 or 14 percent during FY 2021. The State Bar operates with no outstanding debt.

APPROVED FY 2022 BUDGET

The State Bar Board of Commissioners has approved a FY 2022 Administrative Fund budget totaling $11,241,540, using $2,087,690 of reserves, focused on continued accomplishment of the State Bar's strategic focus. A summary of the FY 2022 approved budget was published in the November 2021 Michigan Bar Journal and can also be found on the State Bar's website at www.michbar.org/generalinfo/.

MEMBERSHIP AND AFFILIATE STATISTICS

During FY 2021, the number of State Bar of Michigan attorney members increased by 203, or 0.4 percent over FY 2020; however, the number of paying attorneys decreased by 149 or 0.4 percent. Below are the statistics for each class of member and affiliate group for the year ended September 30, 2021:

Attorney Members	
Active members	42,393
Inactive members	1,097
Emeritus members	3,033
Total Attorney Members	46,523

Affiliates	
Legal administrators	5
Legal assistants	219
Total Affiliates	224

During FY 2021, 873 new members joined the State Bar of Michigan.

NOTE: These figures reflect members and affiliates in good standing and do not include those disciplined, disbarred, resigned, deceased, or suspended for nonpayment of license fees.

FULL REPORT AVAILABLE AT MICHBAR.ORG/GENERALINFO

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN

NOTICE OF AMENDMENTS AND PROPOSED AMENDMENTS TO LOCAL RULES

The United States District Court for the Eastern District of Michigan publishes proposed amendments and approved amendments to its Local Rules on its website at **mied.uscourts.gov**. Attorneys are encouraged to visit the court's website frequently for up-to-date information. A printer-friendly version of Local Rules, which includes appendices approved by the court, can also be found on the website.

PLAIN LANGUAGE

More examples from the proposed new federal rules of bankruptcy

BY JOSEPH KIMBLE

This column picks up where the November 2020 column left off. As I said then, for the last few years, the Advisory Committee on Bankruptcy Rules (within the Standing Committee on Federal Rules) has been at work "restyling" (redrafting) those rules for clarity, consistency, and readability. I'm one of three drafting consultants on the project, along with Bryan Garner and Joseph Spaniol.

In November 2020, I provided a group of examples from the 1000 and 2000 series. In August 2021, the 3000 through 6000 series were released for public comment[1]—hence this new group of examples.

This is the fifth and last set of federal rules to be redrafted over the last 20 years, following the appellate rules, criminal rules, civil rules, and evidence rules. The goal has always been to improve the rules without changing substantive meaning. Many experts and groups are reviewing the drafts to make sure that the substance isn't changed. And you can judge the improvements for yourself.

If you compare the wording, you should generally find more logical organization, shorter sentences, better sentence structure, the omission of unnecessary words, and so on. Individual changes may seem trivial, but they add up to a considerable gain in clarity.

Even if you don't carefully compare the wording, just notice what a difference it makes to use more subparts, headings, and vertical lists.[2] They may make the rules look longer, but their text is invariably shorter. These are the kinds of changes that lawyers should be able to make in any of their documents—without great difficulty and to the readers' great benefit.

ENDNOTES

1 *Proposed Amendments Published for Comment*, United States Courts, available at https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_2021_0.pdf.

2 The formatting could not be exactly replicated in the pages that follow.

"Plain Language," edited by Joseph Kimble, has been a regular feature of the *Michigan Bar Journal* for 37 years. To contribute an article, contact Prof. Kimble at WMU–Cooley Law School, 300 S. Capitol Ave., Lansing, MI 48933, or at kimblej@cooley.edu. For an index of past columns, visit www.michbar.org/plainlanguage.

Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence	Rule 3002.1. Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case
(a)–(e) [omitted]	(a)–(e) [omitted]
(f) NOTICE OF FINAL CURE PAYMENT. Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.	**(f) Notice of the Final Cure Payment.** **(1)** ***Contents of a Notice.*** Within 30 days after the debtor completes all payments under a Chapter 13 plan, the trustee must file a notice: (A) stating that the debtor has paid in full the amount required to cure any default on the claim; and (B) informing the claim holder of its obligation to file and serve a response under (g). **(2)** ***Serving the Notice.*** The notice must be served on: • the claim holder; • the debtor; and • the debtor's attorney. **(3)** ***The Debtor's Right to File.*** The debtor may file and serve the notice if: (A) the trustee fails to do so; and (B) the debtor contends that the final cure payment has been made and all plan payments have been completed.

Rule 3005. Filing of Claim, Acceptance, or Rejection by Guarantor, Surety, Indorser, or Other Codebtor	Rule 3005. Filing a Proof of Claim or Accepting or Rejecting a Plan by a Surety, Endorser, Guarantor, or Other Codebtor
(a) [omitted]	(a) [omitted]
(b) FILING OF ACCEPTANCE OR REJECTION; SUBSTITUTION OF CREDITOR. An entity which has filed a claim pursuant to the first sentence of subdivision (a) of this rule may file an acceptance or rejection of a plan in the name of the creditor, if known, or if unknown, in the entity's own name but if the creditor files a proof of claim within the time permitted by Rule 3003(c) or files a notice prior to confirmation of a plan of the creditor's intention to act in the creditor's own behalf, the creditor shall be substituted for the obligor with respect to that claim.	**(b) Accepting or Rejecting a Plan in a Creditor's Name.** An entity that has filed a proof of claim on behalf of a creditor under (a) may accept or reject a plan in the creditor's name. If the creditor's name is unknown, the entity may do so in its own name. But the creditor must be substituted for the entity on that claim if the creditor: (1) files a proof of claim within the time permitted by Rule 3003(c); or (2) files notice, before the plan is confirmed, of an intent to act in the creditor's own behalf.

Rule 3015. Filing, Objection to Confirmation, Effect of Confirmation, and Modification of a Plan in a Chapter 12 or a Chapter 13 Case	Rule 3015. Chapter 12 or 13—Time to File a Plan; Nonstandard Provisions; Objection to Confirmation; Effect of Confirmation; Modifying a Plan
(a)–(g) [omitted]	(a)–(g) [omitted]
(h) MODIFICATION OF PLAN AFTER CONFIRMATION. A request to modify a plan under § 1229 or § 1329 of the Code shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 21 days' notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee. A copy of the proposed modification, or a summary thereof, shall be included with the notice. Any objection to the proposed modification shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee. An objection to a proposed modification is governed by Rule 9014.	**(h) Modifying a Plan After It Is Confirmed.** **(1)** ***Request to Modify a Plan After It Is Confirmed.*** A request to modify a confirmed plan under § 1229 or § 1329 must identify the proponent and include the proposed modification. Unless the court orders otherwise for creditors not affected by the modification, the clerk or the court's designee must: (A) give the debtor, trustee, and creditors at least 21 days' notice, by mail, of the time to file objections and the date of any hearing; (B) send a copy of the notice to the United States trustee; and (C) include a copy or summary of the modification. **(2)** ***Objecting to a Modification.*** Rule 9014 governs an objection to a proposed modification. An objection must be filed and served on: • the debtor; • the trustee; and • any other entity the court designates. A copy must also be sent to the United States trustee.

Rule 4004. Grant or Denial of Discharge	Rule 4004. Granting or Denying a Discharge
(a) [omitted]	(a) [omitted]
(b) EXTENSION OF TIME. (1) On motion of any party in interest, after notice and hearing, the court may for cause extend the time to object to discharge. Except as provided in subdivision (b)(2), the motion shall be filed before the time has expired. (2) A motion to extend the time to object to discharge may be filed after the time for objection has expired and before discharge is granted if (A) the objection is based on facts that, if learned after the discharge, would provide a basis for revocation under § 727(d) of the Code, and (B) the movant did not have knowledge of those facts in time to permit an objection. The motion shall be filed promptly after the movant discovers the facts on which the objection is based.	**(b) Extending the Time to File an Objection.** **(1)** ***Motion Before the Time Expires.*** On a party in interest's motion and after notice and a hearing, the court may, for cause, extend the time to object to a discharge. The motion must be filed before the time has expired. **(2)** ***Motion After the Time Has Expired.*** After the time to object has expired and before a discharge is granted, a party in interest may file a motion to extend the time to object if: (A) the objection is based on facts that, if learned after the discharge is granted, would provide a basis for revocation under § 727(d), and the movant did not know those facts in time to object; and (B) the movant files the motion promptly after learning those facts.

Rule 5003. Records Kept By the Clerk	Rule 5003. Records to Be Kept by the Clerk
(a)–(d) [omitted]	(a)–(d) [omitted]
(e) REGISTER OF MAILING ADDRESSES OF FEDERAL AND STATE GOVERNMENTAL UNITS AND CERTAIN TAXING AUTHORITIES. The United States or the state or territory in which the court is located may file a statement designating its mailing address. The United States, state, territory, or local governmental unit responsible for collecting taxes within the district in which the case is pending may also file a statement designating an address for service of requests under § 505(b) of the Code, and the designation shall describe where further information concerning additional requirements for filing such requests may be found. The clerk shall keep, in the form and manner as the Director of the Administrative Office of the United States Courts may prescribe, a register that includes the mailing addresses designated under the first sentence of this subdivision, and a separate register of the addresses designated for the service of requests under § 505(b) of the Code. The clerk is not required to include in any single register more than one mailing address for each department, agency, or instrumentality of the United States or the state or territory. If more than one address for a department, agency, or instrumentality is included in the register, the clerk shall also include information that would enable a user of the register to determine the circumstances when each address is applicable, and mailing notice to only one applicable address is sufficient to provide effective notice. The clerk shall update the register annually, effective January 2 of each year. The mailing address in the register is conclusively presumed to be a proper address for the governmental unit, but the failure to use that mailing address does not invalidate any notice that is otherwise effective under applicable law.	**(e) Register of Mailing Addresses of Federal and State Governmental Units and Certain Taxing Authorities.** **(1)** ***In General.*** The United States—or a state or a territory where the court is located—may file a statement designating its mailing address. A taxing authority (including a local taxing authority) may also file a statement designating an address for serving requests under § 505(b). The designation must describe where to find further information about additional requirements for serving a request. **(2)** ***Register of Mailing Address.*** (A) *In General.* In the form and manner prescribed by the Director of the Administrative Office of the United States Courts, the clerk must keep a register of the mailing addresses of the governmental units listed in the first sentence of (1) and a separate register containing the addresses of taxing authorities for serving requests under § 505(b). (B) *Number of Entries.* The clerk need not include in any register more than one mailing address for each department, agency, or instrumentality of the United States or the state or territory. But if more than one mailing address is included, the clerk must also include information that would enable a user to determine when each address applies. Mailing to only one applicable address provides effective notice. (C) *Keeping the Register Current.* The clerk must update the register annually, as of January 2 of each year. (D) *Mailing Address Presumed to Be Proper.* A mailing address in the register is conclusively presumed to be proper. But a failure to use that address does not invalidate notice that is otherwise effective under applicable law.

Rule 5005. Filing and Transmittal of Papers	Rule 5005. Filing Papers and Sending Copies to the United States Trustee
(a) FILING. (1) *Place of Filing.* The lists, schedules, statements, proofs of claim or interest, complaints, motions, applications, objections and other papers required to be filed by these rules, except as provided in 28 U.S.C. § 1409, shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the papers to be filed with the judge, in which event the filing date shall be noted thereon, and they shall be forthwith transmitted to the clerk. The clerk shall not refuse to accept for filing any petition or other paper presented for the purpose of filing solely because it is not presented in proper form as required by these rules or any local rules or practices. (2) *Electronic Filing and Signing.* (A) *By a Represented Entity—Generally Required; Exceptions.* An entity represented by an attorney shall file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. (B) *By an Unrepresented Individual—When Allowed or Required.* An individual not represented by an attorney: (i) may file electronically only if allowed by court order or by local rule; and (ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions. (C) *Signing.* A filing made through a person's electronic filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature. (D) *Same as a Written Paper.* A paper filed electronically is a written paper for purposes of these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.	**(a) Filing Papers.** **(1)** ***With the Clerk.*** Except as provided in 28 U.S.C. § 1409, the following papers required to be filed by these rules must be filed with the clerk in the district where the case is pending: • lists; • schedules; • statements; • proofs of claim or interest; • complaints; • motions; • applications; • objections; and • other papers. The clerk must not refuse to accept for filing any petition or other paper solely because it is not in the form required by these rules or any local rule or practice. **(2)** ***With a Judge of the Court.*** A judge may personally accept for filing a paper listed in (1). The judge must note on the paper the date of filing and promptly send it to the clerk. **(3)** ***Electronic Filing and Signing.*** (A) *By a Represented Entity—Generally Required; Exceptions.* An entity represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. (B) *By an Unrepresented Individual—When Allowed or Required.* An individual not represented by an attorney: (i) may file electronically only if allowed by court order or by local rule; and (ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions. (C) *Signing.* A filing made through a person's electronic filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature. (D) *Same as a Written Paper.* A paper filed electronically is a written paper for purposes of these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107.

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BEST PRACTICES

Protect the record

BY LAWRENCE J. ACKER

"The law is the only profession which records its mistakes carefully, exactly as they occurred, and yet does not identify them as mistakes."[1]

The concept of learning how to "protect the record" is one repeated in a variety of vernacular expressions:

- "If it is not on the record, it did not happen."
- "If the judge is going to make an adverse ruling, make her do it on the record."

Considered in a negative context, the message from these expressions is cautionary. As an active trial lawyer, I have learned how to not only protect the record to avoid unsatisfactory outcomes but, importantly, to protect the record to enhance my client's potentially favorable outcomes.

IN-CAMERA CONFERENCES

It is common for trial judges to conduct conferences in chambers or at sidebar. This type of conference is not reported on the record because it has taken place on an informal basis or because the lawyer has been attempting to confer with the judge without jury participation. Regardless of circumstances, disciplined trial judges will ask the court reporter to participate in the conferences, and those judges will give the attorney on that same day the opportunity to present a subsequent record of the discussions during the sidebar conference.

It is essential to place on the record the substantive argument made in chambers, the court's ruling, and any matters relevant to what occurred. This takes discipline. The judge is understandably anxious to resume witness testimony, respectful of jurors' time, and mindful of the court's caseload. Preserve all topics that were discussed in chambers, any written submissions, and the resolution. If witness testimony was limited or if proofs were excluded, a full record must be made. Offers of proof on a separate record are mandatory.

BASIC COURTROOM PROCEDURES

It is virtually impossible to construct a video record after the fact. Is the video equipment turned on? Are the tapes fresh? Are the court personnel actively monitoring the recording?

Get to know the court reporter. Friendly communications enhance the likelihood of transcript being available for appellate purposes. Ask about the preferred method for referring to exhibits; when and under what circumstances daily transcripts can be ordered; and whether opposing counsel has requested transcripts of any witnesses on any day or because of a particular event in the courtroom. Confirm that the court reporter will assist in ordering transcripts as quickly as possible should you need them during the trial.

If opposing counsel has ordered a transcript, make sure the typed record appears in subsequent examinations of other witnesses or becomes a visual aid during closing arguments. Provide the judge with a courtesy copy of any transcripts obtained during trial, including those ordered by your opposition.

If the reporter employed by the court is unreliable, get permission for a private service to maintain a non-secret "shadow" record. Find out the lead time for transcript preparation by an outside provider.

MOTION TRANSCRIPTS FOR TRIAL PREPARATION AND PRESENTATION

Transcripts are useful. They permit counsel to track arguments that have been made successfully or unsuccessfully and allow for amendment of future presentations.

"Best Practices" is a regular column of the Michigan Bar Journal, edited by Gerard V. Mantese and Theresamarie Mantese for the Michigan Bar Journal Committee. To contribute an article, contact Mr. Mantese at gmantese@manteselaw.com.

Order every transcript from every formal motion argued on any significant aspect of discovery and case preparation. Active judges balance a significant caseload and cannot be expected to retain the subtleties and nuances of each case. When the trial judge has invested time and preparation for significant motion practice, the court will furnish a detailed recitation of her findings, conclusions, impressions of exhibits, or evidence that has been submitted. Significant events in the life of a case may occur over time; have transcripts available for select sections to be used for re-presentation or assisting the trial judge in recalling determinative oral statements. In your briefs, isolate individual passages that make a difference in your case this — simply attaching the transcript unfairly shifts the burden of reading to the trial judge.

CONTINUOUSLY ACQUIRE TRANSCRIPTS

Frequent transcript acquisition confirms that the video court-reporting system or live courtroom reporter is reliably capturing everything that has been said, with minimal corrections. It also helps manage client expectations regarding the progress of the case or highlights problems that need to be addressed.

Transcripts are helpful for self-education, clarifying issues. They can also confirm that you are using language carefully and precisely and your citations to the record, documents, and exhibits are accurate and preserved. Motion practice transcripts are essential to trial preparation for use of language, specific citations, and analyzing opposing arguments.

CHECK TRANSCRIPTS FOR ACCURACY

Court rules provide a method for determining transcript accuracy and filing errata sheets. A transcript placed in a file drawer without being reviewed is of no use. A delayed errata sheet is subject to challenges.[2]

WHO IS IN THE COURTROOM?

Know who is in the courtroom and determine when it is appropriate to make a record. We all are subject to outside influences, and the identity of a newly substituted counsel for one of the parties, the presence of local counsel, significant community spectators, and client representatives may impact the trial judge, generate adverse and/or beneficial publicity, affect sequencing events, and sway public opinion. The presence of people who have the potential for undue influence on the court should be addressed on the record with argument clarifying why the judge may find it necessary to reaffirm neutrality and independence.[3]

JURY INSTRUCTION CONFERENCES

Jury instruction conferences may take place in chambers or on an abbreviated record. Preserve all decisions regarding jury instructions in a cogent manner that permits appellate review. Make sure that instructions to which you have lodged objections have been preserved with precise indications of alternative language submitted for consideration by the court. Even when the judge furnishes the jury with written instructions, there is potential for instructional error when the written transcript does not correlate or is incomplete.[4]

FRCP RULE 50 MOTIONS IN STATE COURT

FRCP 50(a) requires precision and completeness in presenting the specific factual and legal basis for a decision in your client's favor. A motion for judgment as a matter of law under FRCP 50(a) "must specify the judgment sought and the law and facts that entitle the movant to the judgment." The motion must be sufficiently specific to put the court and counsel on notice regarding the issues that have been raised. The question is whether the motion alerts the opposing party about the nature of the defect so it can try to remedy it, if possible, while the record is open.

The scope of the Rule 50(a) motion limits any Rule 50(b) renewal motion for a new trial after the verdict. This limitation furthers an important objective of the Rule 50 structure — ensuring that defects and the party's proof are discovered while the trial is ongoing, giving the party the opportunity to supply the missing proof if it is available. Determining that a Rule 50(a) motion was insufficiently described in scope, applicable law, and applicable facts can be fatal to a Rule 50(b) motion.[5]

Do not allow motion practice seeking directed verdict to be truncated or perfunctory. MCR 2.516 requires a detailed statement supporting a potential directed verdict. Simply saying that a directed verdict motion has been requested is not adequate.[6]

OBTAIN APPELLATE COUNSEL EARLY AND OFTEN

It is important to seek qualified appellate lawyers to assist in framing the issues in any case, dealing with events that occur during trial, preparing for jury instructions, and helping with unpredictable events. Since jury instruction can be fertile ground for reversible error, the help of a qualified appellate lawyer in managing non-conforming jury instructions, alternative jury instructions, and fill-in-the-blank sections of the standard jury instructions can eliminate post-trial headaches.[7]

PROTECT YOURSELF WHEN NECESSARY

Circumstances in some trials make it important to ensure that the record accurately reflects events that may jeopardize the relationship between attorney and client. A court reporter may be inappropriate for preserving a record involving communications between attorney and client. To preserve a record, I've found that an independent court reporter service provider is far better than an audio recording.[8]

DEPOSITION TRANSCRIPTS AS THE RECORD FOR SUMMARY DISPOSITION

Summary disposition motions have been filed by one side or the other — or both — in most of the cases I've encountered.[9] Deposition transcripts may be the court's only opportunity to evaluate witnesses cited for testimony in presentation of summary disposition motion.

Trial lawyers cannot be complacent during discovery depositions. Documents exchanged in discovery are not self-authenticating and should not be treated as such. Placing a Bates stamp number on a document does not make it authentic nor admissible. Silence may render unsubstantiated records irreversibly authentic.[10,]

REREAD MRPC 3.4 AND MRPC 4.1

According to MRPC 3.4 – Fairness to Opposing Party and Counsel,

> "A lawyer shall not:
>
> (e) … assert personal knowledge of facts in issue except when testifying as a witness."

MRPC 4.1 – Truthfulness in Statements to Others, in pertinent part, states,

> "In the course of representing a client, a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person;"

Do not permit cross examination of a witness at deposition that suggests the validity of a document or an evidentiary claim while opposing counsel interjects personal knowledge of facts and circumstances of a witness or an exhibit. Make timely objections. A response brief on summary disposition may be too little, too late or deemed to have been waived.[11,12,13]

The record from witness depositions is more important than ever. You will encounter lawyers who refuse to acknowledge an objection, do not respect objections, and do not respect civility of conduct. I recommend having handy a copy of the ICLE shorthand outline for objections. Seek protective orders. Make a contemporaneous, non-concealed tape recording.[14]

CONCLUSION

The record you make in courtroom proceedings is the record you and your client must live with for the life of the litigation. Be attentive, cautious, and avoid complacency. Attention to these details can, and does, make a significant difference in successful representation.

Lawrence J. Acker is a civil litigator specializing in professional liability matters involving legal malpractice including ethical concerns and conflict of interest. He also handles accounting malpractice and medical malpractice and selected personal injury cases. Acker is a fellow of the American College of Trial Lawyers and recently served a two-year term as chairman of the ACTL Michigan State Fellows.

ENDNOTES

1 Elliott Dunlap Smith as quoted by Brown, *Legal Autopsy*, 39 J Am Judicature Society 47, 47 (1955).

2 MCR 2.306(4), MCR 2.308(C)(1), and MCR 2.308(4). There are circuit courts in Michigan that use independent transcription services to review video and prepare transcripts. I have had the unfortunate experience of realizing after the trial transcript was prepared that more than 50% of the jury instruction presentation was missing. Written jury instructions had been delivered to the jury, but the trial court tried to avoid the verbatim reading of the instructions in favor of personalizing and colloquializing the written word. The appeal was a challenge predicated on the court's misuse of those ad-lib modifications. Reconstructing the record to create an acceptable transcript that both sides agreed upon took months.

3 MRE 615 (the court may order exclusion of witnesses on request or on its own motion except parties, representatives, and persons whose presence is essential). In a legal malpractice action, the only spectator in the courtroom for oral argument on a summary disposition proceeding was subsequently identified as a former partner of the defendant lawyer and the campaign manager for the sitting judge. The judge should have recused herself; it was my job to recognize the significance of the lone appearance the campaign manager/former partner. The Court of Appeals promptly reversed on the merits; the trial judge recused herself on remand.

MRE 105, evidence may be received for a limited purpose and the jury instructed accordingly.

MRE 201, judicial notice of an adjudicative fact, once recognized by the court, is enforceable but must be repeated in jury instructions.

4 MRE 105, MRE 201, and MRE 411 (evidence of insurance is not admissible to prove liability, but may be admissible for other purposes (i.e., agency, control, or bias) with appropriate limiting instruction).

5 Gensler, *Federal Rules of Civil Procedure Rules and Commentary* (Eagan: Thomson Reuters, 2021), pp 11-14.

6 "Preservation of an issue requires specific, contemporaneous objection. To preserve an evidentiary issue for [appellate] review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal," *People v Aldrich*, 246 Mich App 101, 113; 633 NW2d 376 (2001) and MRE 103(a)(1). See also Fershtman, *An Important Litigation Tool: A Motion for Directed Verdict,* 92 Mich B J 48 (2013).

7 I have been saved from myself on more than one occasion by appellate specialist James G. Gross and my long-term associate, Patricia Porter.

8 During trial in Wayne County Circuit Court defending a surgeon, the defendant used a racial slur to describe the qualifications of his medical residents. Every person in the multiracial jury and every lawyer in the room winced. The doctor was more arrogant than justified by his accomplishments and was more insensitive than he was arrogant. The insurance company was willing to settle within limits. The insurance policy permitted the insured to refuse settlement negotiations. He did. On the day of the incident and before the jury retired for deliberation, I made a record with a court reporter in an attorney-client conference attended by appellate counsel to preserve the recommendation that the defendant permit the insurance company to settle the case. Preserving this record quickly terminated post-verdict inquiries into legal malpractice claims against trial counsel.

9 Anecdotal experience of the author, who has managed thousands of cases and tried more than 120 cases to verdict and judgment in multiple jurisdictions. MCR 2.116(C)(10) motion for summary disposition filings were rarely filed between 1977-1980 in my personal experience; now they are commonplace and filed by both plaintiffs and defendants. A civil case that progresses to trial without a summary disposition pretrial presentation is a rarity.

10 MRE 901 (authentication as a condition precedent to admissibility requires evidence sufficient to support finding that the matter in question is what its proponent claims) and MRE 1003 (duplicates are admissible unless a genuine question of authenticity exists or its use would be unfair).

11 MCR 2.306(D)(2) (impeding or obstructing deposition may be sanctionable), MCR 2.306(D)(1) (authorizes request for contemporaneous court intervention), MCR 2.306(D)(3) (permits suspension of a deposition pending request for court protective orders or court rulings and instructions), and MCR 2.308(C)(3)(b)-(d) (review of objections made during proceedings, transcript irregularities, and similar problems to be addressed by the trial court if the transcript is to be used at trial; caution re: waived if not "seasonably" raised).

12 "A question which assumes the existence of a fact which has not been proven is objectionable," *People v Pollard*, 33 Mich App 114, 118; 189 NW2d 855 (1971).

13 In addition to a current copy of the Michigan Court Rules, the author carries the publication Carlson et al, *Michigan Rules of Evidence and Trial Objections at a Glance* (Ann Arbor: ICLE, 2019).

14 *City of Grand Rapids v HR Terryberry Co,* 122 Mich App 750, 758; 333 NW2d 123 (1983) (counsel reads news article during closing; waiver due to late filing of objection) and MCR 2.308(C)(3)(b), MCR 2.308(C)(4)-(5), and MCR 2.306(C)(2)(b).

DUTY TO REPORT AN ATTORNEY'S CRIMINAL CONVICTION

All Michigan attorneys are reminded of the reporting requirements of **MCR.9120(A)** when a lweyer is convicyted of a crime

WHAT TO REPORT:
A lawyer's conviction of any crime, including misdemean-ors. A conviction occurs upon the return of a verdict of guilty or upon the acceptance of a plea of guilty or no contest.

WHO MUST REPORT:
Notice must be given by all of the following:
1. The lawyer who was convicted;
2. The defense attorney who represented the lawyer; and
3. The prosecutor or other authority

WHEN TO REPORT:
Notice must be given by the lawyer, defense attorney, and prosecutor within 14 days after the conviction.

WHERE TO REPORT:
Written notice of a lawyer's conviction must be given to both:

Grievance Administrator
Attorney Grievance Commission
PNC Center
755 W. Big Beaver Road, Suite 2100
Troy, MI 48084

Attorney Discipline Board
333 W. Fort St., Suite 1700
Detroit, MI 48226

MONEY JUDGMENT INTEREST RATE

MCL 600.6013 governs how to calculate the interest on a money judgment in a Michigan state court. Interest is calculated at six-months intervals in January and July of each year from when the complaint was filed as is compounded annually.

For a complaint filed after December 31, 1986, the rate as of July 1, 2021, is 1.739%. This rate includes the statutory 1%.

A different rule applies for a complaint filed after June 30, 2002, that is based on a written instrument with its own specific interest rate. The rate is the lesser of:

13% per year, compounded annually; or
The specified rate, if it is fixed — or if it is variable, the variable rate when the complaint was filed if that rate was legal.

For past rates, see courts.michigan.gov/publications/interest-rates-for-money-judgments.

As the application of MCL 600.6013 varies depending on the circumstances, you should review the statute carefully.

LIBRARIES & LEGAL RESEARCH

Uneasy lies the head: Tracking a loophole in racial discrimination law

BY KATE E. BRITT

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, and national origin.[1] Historically, courts have ruled in favor of workplace grooming policies that prohibit most natural Black hairstyles as not unlawfully discriminatory within the scope of Title VII. This article discusses hair discrimination in workplaces and how federal, state, and local legislators are attempting to close this loophole.

Workplace grooming policies outline acceptable hygiene, hairstyle, and other appearance characteristics for employees. Employers can refuse employment, mete out discipline, and even terminate employees who do not abide by these policies. To stay within the bounds of employment discrimination law, these policies should be facially neutral; they must not refer to race, religion, or other protected classes. In practice, these policies expect all employees to assimilate to the dominant hair culture and hairstyles of white individuals.[2]

People of all races, genders, and creeds can be subject to hair discrimination, though Black people — and Black women in particular — are the most frequent victims of discriminatory policies and decisions. In 2019, the American personal care brand Dove conducted the CROWN Research Study comparing the workplace experiences of Black women and non-Black (mostly white) women.[3] The results showed that Black women are more likely than their non-Black counterparts to receive formal grooming policies, be subject to discipline, and be perceived as unprofessional. These findings are reinforced by court opinions like one from 2016 that held that in order to conform to an employer's dress code, Black women are expected to straighten their hair, wear a weave or a wig, or style their hair into an afro — which the judge arbitrarily decided was more "natural" than dreadlocks or braids.[4] As author Crystal Powell points out in "Bias, Employment, and Black Women's Hair," dreadlocks are "a type of hairstyle that naturally comes because of the nature of Black hair" while "hair must be teased in a way that gives it an afro style. Black women do not naturally grow afros."[5]

Hair discrimination often extends beyond the workplace. In 2018, a Black student athlete had 90 seconds to choose between forfeiting a wrestling match and allowing the white referee to cut off his dreadlocks, a story that sparked outrage and a civil rights investigation.[6] Just as in workplaces, schools often enforce dress codes that hold white hairstyles as the standard.[7]

Protections for hairstyles may derive from their status as a religious practice. In a 2015 case regarding a Muslim-American woman who was refused employment because she wore a head scarf, the U.S. Supreme Court ruled that "[a]n employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."[8] In 2017, Army Secretary Eric Fanning authorized brigade commanders to grant requests to wear a hijab or beard, or a turban or patka with unshorn hair if the request is "based on a sincerely held religious belief."[9]

These are important decisions that connect physical appearance and hairstyle with religion — a protected Title VII class. While there is little argument that hijabs, turbans, and the unshorn hair and

AT A GLANCE

People of all races, genders, and creeds can be subject to hair discrimination, though Black people — and Black women in particular — are the most frequent victims.

beards of Sikh persons are legitimate religious practices, courts historically have not recognized the legitimacy of many hairstyles as characteristics of race. Hair discrimination against Black people has been permitted when courts failed to connect physical appearance and hairstyles with the protected classes of race or gender.

To justify denying protection against employment discrimination for Black people, courts have added an immutability standard to Title VII categories of protection. Since individuals can change their hairstyles, hairstyles have been considered mutable and thus ineligible for Title VII protection.[10] This standard is legally inconsistent for at least two major reasons. First, a person can choose to change their religion and, to some extent, sexual orientation and gender marker under the law, but those characteristics are nonetheless protected under Title VII.[11] Second, to quote a California anti-hair discrimination bill, "the history of our nation is riddled with laws and societal norms that equated 'blackness,' and the associated physical traits, for example, dark skin, kinky and curly hair to a badge of inferiority, sometimes subject to separate and unequal treatment."[12] Failure to recognize the connection between hair type and race at this point in our nation's history is at best ignorant and at worst deceitful, bordering on gaslighting.

THE CROWN ACT

Since judicial interpretation is perceived to neglect the physical traits associated with race, activists are now working to enact legislation that harmonizes the legal and popular definitions of race. On the heels of its aforementioned study, Dove in 2019 partnered with the National Urban League, Color of Change, and the Western Center on Law and Poverty to form the CROWN Coalition, which champions the CROWN Act. The CROWN Act, which stands for "Create a Respectful and Open World for Natural Hair," prohibits race-based hair discrimination "because of hair texture or protective hairstyles including braids, locs, twists or bantu knots."[13] The CROWN Act would provide legal protections should an employer fire or refuse to hire a person based on the style or texture of their hair. The CROWN Coalition is pushing for anti-hair discrimination legislation on the federal, state, and local levels.

As of November 2021, CROWN Act bills have been introduced in both houses of Congress. Two New Jersey lawmakers — Rep. Bonnie Watson Coleman and Sen. Cory Booker — introduced House Bill 2116 and Senate Bill 888, respectively. The status of both bills can be tracked at Congress.gov.[14]

To encourage state legislatures to pass anti-hair discrimination legislation, the CROWN Coalition provides a template for legislative language on its website.[15] The first CROWN Act bill passed in California in 2019; as of November 2021, 13 states have passed legislation prohibiting discrimination based on hair texture, including five during their 2021 sessions. The NAACP Legal Defense and Educational Fund tracks the progress of anti-hair discrimination legislation at https://www.naacpldf.org/crown-act/.

MICHIGAN

In February 2021, Rep. Sarah Anthony introduced House Bill No. 4275 in the Michigan Legislature. 2021 HB 4275 aims to amend the 1976 Elliott-Larsen Civil Rights Act to include CROWN Act language in the definition of "race." As of November 2021, no official action has been taken on 2021 HB 4275 and no parallel bill has been introduced in the Senate.

While the state legislature has yet to pass anti-hair discrimination legislation, there is movement among local jurisdictions. A handful of local governments have incorporated the CROWN Act into their relevant anti-discrimination policies in employment statutes, providing a new level of protection to government employees.

In March 2021, the Ingham County Board of Commissioners became the first county in Michigan to ban hair discrimination against public employees.[16] The Flint City Council passed a similar resolution the following month modifying the city's Title VI Non-Discrimination Plan,[17] and it considered a second resolution in October 2021 opposing workplace discrimination based on beards and other facial hair, but that resolution does not appear to have passed.[18] Also in April 2021, the Genesee County Board of Commissioners updated the Genesee County EEOC Plan and Policy to include "natural hair, sexual orientation, gender identity, [and] gender expression" in the list of protected statuses.[19]

June 2021 saw the Ann Arbor City Council amend the city code to include CROWN Act language in its definition of "race."[20] Kent County was reportedly considering adopting the CROWN Act in April 2021; as of November 2021, it was not among the Michigan jurisdictions where hair discrimination in employment explicitly violates the law.[21]

FURTHER READING

Hair discrimination may be a major blind spot for those of us who have never had to experience it, and self-education will help us move beyond racist stereotypes and false assumptions. Some works by Black women on the topic of Black hair include Byrd & Tharps, "Hair Story: Untangling the Roots of Black Hair in America" (New York: St. Martin's Griffin, 2002), Dabiri, "Twisted: The Tangled History of Black Hair Culture" (New York, HarperColling, 2020), and Davis-Sivasothy, "The Science of Black Hair: A Comprehensive Guide to Textured Hair Care" (Stafford: Saja Publishing Co, 2011).

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LAW PRACTICE SOLUTIONS

Going digital: A law firm road map

BY JOANN L. HATHAWAY

In December's Law Practice Solutions column, I wrote about the benefits of going digital and the policies and procedures that should be implemented to begin the digital journey. This month, I introduce the hardware and software solutions needed for best practices.

HARDWARE OPTIONS AND NEEDS

Scanners

Good scanners are a must for a successful digital practice. Fortunately, there are several good, affordable scanners available in today's market. Equipping your practice with scanners is an area in which you do not want to skimp. Many law firms already have a scanner as part of a large, multifunction device that prints, copies, and more. While such devices have their place in many practices, they should definitely not be the only scanning device in a digital practice.

Determining how many and what type of scanners to purchase depends on factors such as law practice type and size, number of staff who need to scan, office layout, and remote work force, just to name a few.

Ideally, everyone who scans should have a desktop scanner. A popular choice is the iX1600 Fujitsu ScanSnap. Among the reasons you should consider a Fujitsu iX1600:

- An intuitive 4.3-inch touch screen.
- Wi-fi compatibility.
- Speedy high-resolution scans of A4-size color documents at up to 40 pages per minute and 80 images per minute.
- A 50-sheet automatic document feeder.
- An ultrasonic sensor and high-quality brake roller for stable feeds.
- A guide that provides stable scanning for inconsistent paper sizes.

Servers

While a dedicated server is not mandatory, you should discuss with an IT professional the benefits of having a server dedicated to storing your digital documents. Coupled with a document management system (more on that below), it allows everyone connected to the server to view, share, and annotate documents. It enables staff to quickly and easily search files and folders to locate documents containing author-created terms. Storing files in a searchable format on a server greatly enhances the efficiency and productivity of a digital practice.

Know that storing everything on a local server means that when the server goes down, so does the entire office. Therefore, invest wisely in a server with built-in redundancy and store at least one copy of all your data offsite.

There are ever-growing options for offsite storage and remote access, and you need to factor in the needs of your brick-and-mortar office and remote locations when making a decision. One size does not fit all. This is where you want to invest in a reliable IT professional who is aware of the confidentiality and security issues associated with a law firm — particularly digital law firms.

IT support

As touched upon above, if you don't already have reliable and capable IT support, now is the time to find someone to help you make the right choices in selecting hardware and software and be available for ongoing support. Regular maintenance and upgrades are a necessity in a digital practice.

Backup systems

Redundant, reliable backup systems are also a must not just for digital practices, but for all practices. With a redundant backup, if one fails, the other is there to make sure your data is secure. One

Law Practice Solutions is a regular column from the State Bar of Michigan Practice Management Resource Center (PMRC) featuring articles on practice, technology, and risk management for lawyers and staff. For more resources, visit the PMRC website at www.michbar.org/pmrc/content or call our Helpline at (800) 341-9715 to speak with a practice management advisor.

good option is backing up your computer to an external drive or server and secure web-based or cloud storage, giving you three redundancies (computer, physical drive or server, and internet.) A solid choice for local backups are ioSafe products, which also provide fireproof and waterproof protection.

Monitors

Having multiple and/or large monitors for your digital practice helps provide easy access to your data. If choosing a large monitor, go with one no smaller than 27 inches. Since you'll now be reviewing documents on a screen as opposed to on your desk, you'll want to have a dedicated monitor (or area on a large monitor) for viewing and working with digital documents and another for accessing other applications.

SOFTWARE OPTIONS AND NEEDS

PDF creation software

Having the ability to convert documents into PDFs is critical to the success of any digital practice. Created by Adobe, PDFs are the gold standard for converting documents from their original format into a digital format that can be shared, searched, and stored across computer platforms. If not for PDFs, users would have to share and store documents in their original format; as software becomes obsolete, newer computers and devices cannot open these documents. Understanding this concept helps clarify the need for and importance of using PDFs.

Another important argument for converting documents to PDF is the security it provides. PDFs can be encrypted, making it impossible to alter, print, or copy the document, giving the document's author peace of mind knowing their work is protected and can't be modified, even after the document has been disseminated.

There are many software applications for viewing, creating, and converting PDFs, and the costs range from free to very expensive. It's time well spent to understand the functionality of various applications. Two solid options are Adobe Acrobat DC and Foxit Phantom PDF.

When assessing which application might be best for you, consider some of these features:

Editing functions. PDF software should let users make minor corrections without having to convert a PDF back to its original format. This is especially important when creating a PDF of a scanned document. The software should have the ability to mark up the document, allow for document signing and securing, and let users redact sensitive information.

Multimedia inclusion. Full-featured PDF software should provide basic multimedia capabilities to add life to plain-text documents. At a minimum, the software should allow for the addition of images and hyperlinks.

Usability. Software should create PDFs easily and should be intuitive and easy to use.

Support. Getting help when necessary can save valuable time and eliminate frustration resulting from figuring it out on your own. Does the website have videos, tutorials, and/or articles? Is there live chat and 24/7 customer support?

Optical character recognition (OCR). OCR is the mechanical or electronic conversion of scanned or photographed images of typewritten or printed text into computer-readable text. Using OCR enables you to search and retrieve your documents. Its importance in a digital practice cannot be overstated. Scanners and software should have OCR functionality.

Bates tool. The ability to apply Bates numbers to files can be helpful. When documents bear unique sequential numbers or alphanumerical markings, it can eliminate questions about whether they were or were not produced. For example, when 2,000 pages of documents turn up in response to a discovery request and those documents are Bates numbered, there is no dispute about whether a particular page or set of pages was produced.

Document management software

Document management software (DMS) is an application used to track and store electronic documents. There are numerous such applications on the market today, and they incorporate naming conventions with myriad other functions. DMS can prevent users from developing naming protocols contrary to the firm's digital policy. While coupling DMS with a digital plan is not a necessity, it can ensure uniformity and prompt and accurate document retrieval.

Metadata scrubbers

Metadata is data about data. The term itself is ambiguous, as it is used for two concepts. Structural metadata refers to the design and specification of data structures and is more properly called data about the containers of data. Descriptive metadata deals with individual application data and the data content. Regardless of how you break it down, metadata can be benign or, at the opposite end of the spectrum, harmful.

The first step in protecting yourself from the dangers of metadata is being aware that it exists. Spend extra time checking for metadata when working with confidential files being sent to external parties. Invest in software to remove metadata from your files. This software is typically less than $100, so it's affordable. Adobe Acrobat is commonly used by law firms for metadata removal.

CONCLUSION

The benefits of going divgital are many. With proper planning, hardware, and software, you can transform your life and your practice by becoming less reliant on paper.

JoAnn L. Hathaway is a practice management advisor for the State Bar of Michigan.

PRACTICING WELLNESS

The dangers of perfectionism

BY MOLLY RANNS

perfectionism */noun/* A disposition to regard anything short of perfection as unacceptable.[1]

Perfectionism has been identified by psychologists as a personality style characterized by an individual's concern with striving for flawlessness.[2] It is also a term routinely heard coming from the mouths of lawyers. Many of you reading this article and, in full disclosure, the one writing it are self-identified perfectionists and have been labeled so by ourselves or our colleagues, family members, and friends. In fact, some of us may even have an investment in the identity of being a perfectionist and its traits that may be considered virtuous — impeccably high standards, extreme attention to detail, and a steadfast commitment to excellence.[3] In a society that seems to applaud constant proclamations of being busy and dismisses the notion that, at times, rest can be productive, it's not surprising that a recent study shows a 33% increase in socially prescribed perfectionism in the last 30 years.[4] Despite this strong need for increasingly unrealistic expectations related to education and professional accomplishments, perfectionism is not analogous to success, and research shows that the quest for it may do more harm than good.[5]

While perfectionists have been shown to have higher levels of motivation and conscientiousness than non-perfectionists, they have also been known to be overly self-critical and embrace all-or-nothing thinking — believing their performance is either perfect or a complete failure.[6] Perfectionists have been found to have higher levels of stress, burnout, and anxiety compared to their non-perfectionistic counterparts.[7] Interestingly, these same traits are found at statistically and significantly higher levels among lawyers than in the general population.[8]

Research shows that perfectionists struggle with procrastination.[9] The fear of failure can lead to an inability to complete a task or even begin it. Many refer to this as decision paralysis[10] — taking no action at all for fear that the approach isn't the absolute best. Miniscule tasks that should take no time at all are pushed lower and lower on the to-do list. Some may mistake this for difficulties with attention and concentration, or even laziness. Many perfectionists may have problems with their relationships.[11] The difficulties making and acknowledging mistakes and vulnerabilities coupled with high expectations placed on their partners can make coexisting with a perfectionist a challenge.

In addition to increased anxiety and depression and other mental and emotional struggles, perfectionists can develop more physical health issues than non-perfectionists.[12] They have been shown to experience increased headaches, fatigue, and insomnia, and chronic stress has been linked to heart disease and even a shortened life span.[13]

Those willing to turn a blind eye to emotional and physical health concerns — believing they can manage mental health issues or care for their physical well-being down the road — and confident that their perfectionistic tendencies will lead them to professional success will be surprised to hear that that belief is unfounded.[14] Research suggests that performance and perfectionism are not related.[15] In other words, perfectionists' performances are no better or no worse than that of non-perfectionists.[16]

As difficult as it is to believe, perfectionism is likely not constructive in the workplace,[17] and may actually prevent lawyers from achieving their full potential and meeting their goals. An optimal approach where one puts forth the maximum effort and accepts it as the best that he or she can do inevitably yields to increased success.[18] To those of us always searching for the perfect way to

AT A GLANCE

Perfectionism is not analogous to success, and research shows that the quest for it may do more harm than good.

approach each and every situation — as if perfection exists — this research should actually come as a relief.

With an unyielding quest for exactness and precision in our lives, how does one take this information and manage perfectionistic tendencies before they get the best of us?

Perfectionism is likely not constructive in the workplace, and may actually prevent lawyers from achieving their full potential and meeting their goals. An optimal approach where one puts forth the maximum effort and accepts it as the best that he or she can do inevitably yields to increased success.

1. Remove all-or-nothing thinking. This type of thinking is unrealistic and problematic.[19] It splits one's views into extremes or dichotomies, leaving little to no gray area in between. It can lead to an inability to see alternatives and result in negative thinking patterns. Remove unconditional words like "never," "nothing," or "always" from your vocabulary and remind yourself that things are not always absolute.

2. Embrace self-compassion and learn to respect yourself. Perfectionism has been defined in this article as being overly self-critical, and the opposite of that is self-love. Self-compassion has been linked to greater life satisfaction, improved coping skills, and a decrease in anxiety.[20] Not surprisingly, it is also inversely related to perfectionism.[21] Replace your negative self-talk with positive self-talk and hold yourself in higher regard. Forgive your failures, stop the constant self-blame, and prioritize your mental health.

3. Learn from your successes. Instead of focusing on failures, look at what's gone well. Because nothing in life happens flawlessly, chances are your greatest achievements included some bumps along the way. Focusing on successes allows us to see that it is possible to achieve goals and be fruitful in our endeavors without every little thing going exactly to plan. What may seem like a catastrophe at the time could end up being the best-case scenario for the future.

As always, if perfectionism is harder to rein in than one might think, contact the State Bar of Michigan Lawyers and Judges Assistance Program to find out about the many resources available to you.

Molly Ranns is director of the State Bar of Michigan Lawyers and Judges Assistance Program.

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ORDERS OF DISCIPLINE & DISABILITY

SUSPENSION AND RESTITUTION WITH CONDITIONS

Russell D. Brown, P60583, Plymouth, by the Attorney Discipline Board Washtenaw County Hearing Panel #5. Suspension, one year, effective November 20, 2021.

After proceedings conducted pursuant to MCR 9.115, the panel found, by default, that the respondent committed professional misconduct as charged in a four-count formal complaint. Specifically with regard to Counts 1 and 3, the panel found that the respondent neglected two client matters; failed to keep the clients informed as to the status of their matters; did not provide either client with any invoices or any explanation as to how the funds they paid respondent were earned; nor did he return any of the unearned portion of the funds each client paid. With regard to Count 2, the panel found that the respondent failed to timely respond to a request for investigation filed against him by the client referenced in count one of the formal complaint. With regard to Count 4, the panel found that the respondent failed to deposit into his IOLTA account a $10,000 advance fee paid to him by the client referenced in count three of the formal complaint.

Based on the respondent's default, the panel found that as to Counts 1 and 3, the respondent neglected legal matters entrusted to him, in violation of MRPC 1.1(c); failed to seek the lawful objectives of his clients through reasonably available means permitted by law, in violation of MRPC 1.2(a); acted without reasonable diligence and promptness, in violation of MRPC 1.3; failed to keep a client reasonably informed about the status of a matter and failed to comply promptly with reasonable requests for information, in violation of MRPC 1.4(a) [Count 1 only]; failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions, in violation of MRPC 1.4(b) [Count 1 only]; failed to take reasonable steps to protect his clients' interests upon termination of representation, including a failure to refund any advance payment of fees that had not been earned, in violation of MPRC 1.16(d); engaged in conduct that was prejudicial to the administration of justice, in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and engaged in conduct that was contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

As to Count 2, the panel found that the respondent failed to timely answer a request for investigation and other inquiries made by the Attorney Grievance Commission, in violation of MCR 9.104(7), MCR 9.113(A), and MCR 9.113(B)(2); and engaged in conduct that was prejudicial to the administration of justice, in violation of MRPC 8.4(c) and MCR 9.104(1).

As to Count 4, the panel found that the respondent commingled and misappropriated client funds, in violation of MRPC 1.15(b)(3) and MRPC 1.15(d); and failed to safeguard client funds in an IOLTA, in violation of MRPC 1.15(d).

The panel ordered that the respondent's license to practice law be suspended for a period of one year, that he pay restitution in the total amount of $15,000, and that he be subject to conditions relevant to the established misconduct. Costs were assessed in the amount of $2,146.45.

DISBARMENT AND RESTITUTION

David S. Feinberg, P42854, Lansing, by the Attorney Discipline Board Ingham County Hearing Panel #7. Disbarment, effective November 30, 2021.

After proceedings conducted pursuant to MCR 9.115, the panel found, by default, that the respondent committed professional misconduct as charged in a six-count formal complaint.

In Count 1, the panel found that the respondent negotiated a plea agreement in a criminal matter but failed to inform the client of the date and time of sentencing. When the respondent and the client failed to attend the sentencing hearing, the client's bond was revoked, a warrant was issued, and he was arrested and incarcerated for several days.

In Count 2, the panel found that the respondent approached an adverse witness after an ALJ expungement hearing in an aggressive manner and was verbally insulting and harassing to this person regarding the witness's testimony during the hearing.

In Count 3, the panel found that the respondent refused and/or failed to meet with a client and return messages from a client that he was representing in a civil matter.

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

The client's case was subsequently dismissed by summary judgment after the respondent failed to respond to the opposing counsel's motion for summary judgment and to appear for the hearing on the motion.

In Count 4, the panel found that the respondent failed to appear on behalf of a client at a criminal pretrial hearing because he had a conflict in another court and did not request an adjournment. After a show cause hearing, the respondent was held in contempt of court and fined for his failure to appear.

In Count 5, the panel found that the respondent failed to appear on behalf of a client for a criminal final pretrial conference that had already been adjourned at his request on two prior occasions. The client appeared and was appointed new counsel by the court, and the respondent was ordered to return any unused retainer fees. The court then reported the respondent's conduct to the Attorney Grievance Commission and when the respondent was subsequently contacted by the commission, he failed to produce requested documents.

In Count 6, the panel found that the respondent failed to appear on behalf of a client at a criminal arraignment hearing. The respondent also failed to timely file an appearance on behalf of the client, so he did not receive notice of the client's probable cause hearing. The respondent and the client failed to attend the probable cause hearing. As a result, the client's bond was revoked, a warrant was issued, and she spent the night in jail.

The panel specifically found that the respondent neglected a legal matter entrusted to him, in violation of MRPC 1.1(c) (Counts 1 and 3-6); failed to act with reasonable diligence and promptness in representing a client, in violation of MRPC 1.3 (Counts 1 and 3-6); failed to keep a client reasonably informed about the status of his matter and comply promptly with reasonable requests for information, in violation of MRPC 1.4(a) (Counts 1 and 3-6); failed to treat all persons involved in the legal process with courtesy and respect, in violation of MRPC 6.5(a) (Count 2); knowingly failed to respond to

a lawful demand for information from a disciplinary authority, in violation of MRPC 8.1(a)(2) (Counts 5-6); violated or attempted to violate the Rules of Professional Conduct, in violation of MRPC 8.4(a) (Counts 1-6); engaged in conduct prejudicial to the administration of justice, in violation of MRPC 8.4(c) and MRPC 9.104(1) (Counts 1-6); engaged in conduct that exposes the legal profession to obloquy, contempt, censure, or reproach, in violation of MRPC 9.104(2) (Counts 1-6); engaged in conduct contrary to justice, ethics, honesty or good morals, in violation of MCR 9.104(3) (Counts 1-6); and failed to answer a request for investigation in conformity with MCR 9.113 (Count 6).

The panel ordered that the respondent be disbarred from the practice of law and that pay restitution in the total amount of $11,800. Total costs were assessed in the amount of $2,301.70.

REPRIMAND BY CONSENT AFTER REMAND

Lisa Jeanne Peterson, P71365, Norman, Oklahoma, by the Attorney Discipline Board Tri-County Hearing Panel #1. Reprimand, Effective November 30, 2021.

The grievance administrator filed Formal Complaint 20-51-GA alleging that the respondent committed professional misconduct when she improperly held earned funds in her IOLTA and failed to respond to a demand for information from a disciplinary authority. In response, the respondent filed a motion for summary disposition pursuant to MCR 2.116(C)(8) asserting that the administrator's formal complaint failed to state a claim upon which relief could be granted. On December 4, 2020, Tri-County Hearing Panel #1 granted the respondent's motion for summary disposition and dismissed the formal complaint in its entirety.

The grievance administrator petitioned for review and the Attorney Discipline Board conducted review proceedings in accordance with MCR 9.118. On June 24, 2021, the board issued an order that vacated the hearing panel's December 4, 2020, order and remanded this matter to the hearing panel for hearing on the charges in the formal complaint.

Thereafter, the respondent and the grievance administrator filed a Stipulation for Consent Order of Reprimand, pursuant to MCR 9.115(F)(5), that was approved by the Attorney Grievance Commission and accepted by the hearing panel. Based upon the respondent's admissions, the panel found that the respondent committed professional misconduct when she left funds in her IOLTA for a period longer than permitted by the rules.

Specifically, and in accordance with the parties' stipulation, the panel found that the respondent deposited funds into her IOLTA in an amount in excess of the amount reasonably necessary to pay financial institution service charges or fees or to obtain a waiver of services, charges, or fees, in violation of MRPC 1.15(f). Also in accordance with the parties' stipulation, all remaining allegations of professional misconduct set forth in the formal complaint were dismissed.

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be reprimanded. Costs were assessed in the amount of $750.

AUTOMATIC INTERIM SUSPENSION

Jay A. Schwartz, P45268, Farmington Hills, effective November 18, 2021.

On November 18, 2021, the respondent was convicted of three felonies, conspiracy to defraud the United States, in violation of 18 USC § 371, and two counts of bribery involving federal programs, in violation of 18 USC § 666(a)(2), in the matter titled United States v Jay A. Schwartz, U.S. District Court, Eastern District of Michigan, Case No. 3:19-cr- 20451-RHC-EAS-1. In accordance with MCR 9.120(B)(1), the respondent's license to practice law in Michigan was automatically suspended on the date of his felony conviction.

Upon the filing of a certified judgment of conviction, this matter will be assigned to a hearing panel for further proceedings. The interim suspension will remain in effect until the effective date of an order filed by a hearing panel.

INTERIM SUSPENSION PURSUANT TO MCR 9.115(H)(1)

Stephen LaCommare, P52718, Howell, by the Attorney Discipline Board Ingham County Hearing Panel #6. Interim suspension effective November 16, 2021.

The respondent failed to appear at the November 1, 2021, hearing and satisfactory proofs were entered into the record that the respondent possessed actual notice of the proceedings. As a result, the hearing panel issued an order of suspension, in accordance with MCR 9.115(H)(1), effective November 16, 2021, and until further order of the panel or the board.

FROM THE MICHIGAN SUPREME COURT

ADM File No. 2021-41
Proposed Amendments of Rules 6.001, 6.003, 6.006, 6.102, 6.103, 6.106, 6.445, 6.615, and 6.933 and Proposed Addition of Rules 6.105, 6.441, and 6.450 of the Michigan Court Rules

ADM File No. 2021-46 APPOINTMENT OF CHIEF JUDGES OF MICHIGAN COURTS

To read ADM File No. 2021-46, dated November 12, 2021, and ADM File No. 2021-41, dated November 17, 2021, visit http://courts.michigan.gov/courts/michigansupremecourt and click "Administrative Matters & Court Rules" and "Proposed & Recently Adopted Orders on Admin Matters."

ADM File No. 2020-06 Amendments of Rules 2.403, 2.404, and 2.405 of the Michigan Court Rules

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 2.403, 2.404, and 2.405 of the Michigan Court Rules are adopted, effective January 1, 2022.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 2.403 Case Evaluation

(A) Scope and Applicability of Rule.

(1) A court may submit to case evaluation any civil action in which the relief sought is primarily money damages or division of property unless the parties stipulate to an ADR process as outlined in subsections (A)(2)-(3) of this rule. Parties who participate in a stipulated ADR process approved by the court may not subsequently be ordered to participate in case evaluation without their written consent.

(2) ~~Case evaluation of tort cases filed in circuit court is mandatory beginning with actions filed after the effective dates of Chapters 49 and 49A of the Revised Judicature Act, as added by 1986 PA 178.~~In a case in which a discovery plan has been filed with the court under MCR 2.401(C), an included stipulation to use an ADR process other than case evaluation must:

(a) identify the ADR process to be used;

(b) describe the timing of the ADR process in relation to other discovery provisions; and

(c) state that the ADR process be completed no later than 60 days after the close of discovery.

(3) In a case in which no discovery plan has been filed with the court, a stipulated order to use an ADR process other than case evaluation must:

(a) be submitted to the court within 120 days of the first responsive pleading;

(b) identify the ADR process to be used and its timing in relationship to the deadlines for completion of disclosure and discovery; and

(c) state that the ADR process be completed no later than 60 days after the close of discovery.

(3)-(4) [Renumbered (4)-(5) but otherwise unchanged.]

(B) Selection of Cases.

(1) The judge to whom an action is assigned or the chief judge may select it for case evaluation by written order after the filing of the answer

(a)-(b) [Unchanged.]

(c) if the parties have not submitted an ADR plan under subsection (A)~~on the judge's own initiative~~.

(2) [Unchanged.]

(C)-(H) [Unchanged.]

(I) Submission of Summary and Supporting Documents.

(1) Unless otherwise provided in the notice of hearing, at least 7~~14~~ days before the hearing, each party shall

(a)-(b) [Unchanged.]

(2) Each failure to timely file and serve the materials identified in subrule (1) and each subsequent filing of supplemental materials within 7~~14~~ days of the hearing, subjects the offending attorney or party to a $150 penalty to be paid in the manner specified in the notice of the case evaluation hearing. Filing and serving the materials identified in sub-

rule (1) within 24 hours of the hearing subjects the offending attorney or party to an additional $150 penalty~~An offending attorney shall not charge the penalty to the client, unless the client agreed in writing to be responsible for the penalty~~.

(3) [Unchanged.]

(J) [Unchanged.]

(K) Decision.

(1) Within 7~~14~~ days after the hearing, the panel will make an evaluation and submit the evaluation to the ADR clerk. If an evaluation is made immediately following the hearing, the panel will provide a copy to the attorney for each party of its evaluation in writing. If an evaluation is not made immediately following the hearing, the evaluation must be served by the ADR clerk on each party within 14 days after the hearing. If an award is not unanimous, the evaluation must so indicate.

(2)-(5) [Unchanged.]

(L)-(N) [Unchanged.]

~~(O) Rejecting Party's Liability for Costs.~~

~~(1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.~~

~~(2) For the purpose of this rule "verdict" includes,~~

~~(a) a jury verdict,~~

~~(b) a judgment by the court after a nonjury trial,~~

~~(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.~~

~~(3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.~~

~~(4) In cases involving multiple parties, the following rules apply:~~

~~(a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.~~

~~(b) If the verdict against more than one defendant is based on their joint and several liability, the plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than the total case evaluation as to those defendants, and a defendant may not recover costs unless the verdict is more favorable to that defendant than the case evaluation as to that defendant.~~

~~(c) Except as provided by subrule (O)(10), in a personal injury action, for the purpose of subrule (O)(1), the verdict against a particular defendant shall not be adjusted by applying that defendant's proportion of fault as determined under MCL 600.6304(1)-(2).~~

~~(5) If the verdict awards equitable relief, costs may be awarded if the court determines that~~

~~(a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, or, in situations where both parties have rejected the evaluation, the verdict in favor of the party seeking costs is more favorable than the case evaluation, and~~

~~(b) it is fair to award costs under all of the circumstances.~~

~~(6) For the purpose of this rule, actual costs are~~

~~(a) those costs taxable in any civil action, and~~

~~(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation, which may include legal services provided by attorneys representing themselves or the entity for whom~~

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~~they work, including the time and labor of any legal assistant as defined by MCR 2.626.~~

~~For the purpose of determining taxable costs under this subrule and under MCR 2.625, the party entitled to recover actual costs under this rule shall be considered the prevailing party.~~

~~(7) Costs shall not be awarded if the case evaluation award was not unanimous. If case evaluation results in a non-unanimous award, a case may be ordered to a subsequent case evaluation hearing conducted without reference to the prior case evaluation award, or other alternative dispute resolution processes, at the expense of the parties, pursuant to MCR 2.410(C)(1).~~

~~(8) A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion~~

~~(i) for a new trial,~~

~~(ii) to set aside the judgment, or~~

~~(iii) for rehearing or reconsideration.~~

~~(9) In an action under MCL 436.1801, if the plaintiff rejects the award against the minor or alleged intoxicated person, or is deemed to have rejected such an award under subrule (L)(3)(c), the court shall not award costs against the plaintiff in favor of the minor or alleged intoxicated person unless it finds that the rejection was not motivated by the need to comply with MCL 436.1801(5).~~

~~(10)~~ For the purpose of subrule (O)(1), in an action filed on or after March 28, 1996, and based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, a verdict awarding damages shall be adjusted for relative fault as provided by MCL 600.6304.

~~(11) If the "verdict" is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs.~~

Rule 2.404 Selection of Case Evaluation Panels

(A) [Unchanged.]

(B) Lists of Case Evaluators.

(1)-(3) [Unchanged.]

(4) Specialized Lists. If the number and qualifications of available case evaluators makes it practicable to do so, the ADR clerk shall maintain

(a) [Unchanged.]

(b) where appropriate for the type of cases, separate sublists of case evaluators who primarily represent plaintiffs, primarily represent defendants, and neutral case evaluators whose practices are not identifiable as representing primarily plaintiffs or defendants. Neutral evaluators may be selected on the basis of the applicant's representing both plaintiffs and defendants, or having served as a neutral alternative dispute resolution provider, for a period of up to 15 years prior to an application to serve as a case evaluator.

(5)-(8) [Unchanged.]

(C)-(D) [Unchanged.]

Rule 2.405 Offers to Stipulate to Entry of Judgment

(A) Definitions. As used in this rule:

(1)-(3) [Unchanged.]

(4) "Verdict" includes,

(a)-(b) [Unchanged.]

(c) a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment, including a motion entering judgment on an arbitration award.

(5) [Unchanged.]

(6) "Actual costs" means the costs and fees taxable in a civil action and a reasonable attorney fee, dating to the rejection of the prevailing party's last offer or counteroffer, for services necessitated by the failure to stipulate to the entry of judgment.

(B)-(C) [Unchanged.]

(D) Imposition of Costs Following Rejection of Offer. If an offer is rejected, costs are payable as follows:

(1)-(2) [Unchanged.]

(3) The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule. Interest of justice exceptions may apply, but are not limited to:

(i) cases involving offers that are token or de minimis in the context of the case; or

(ii) cases involving an issue of first impression or an issue of public interest.

(4)-(6) [Unchanged.]

(E) This rule does not apply to class action cases filed under MCR 3.501.~~Relationship to Case Evaluation. Costs may not be awarded under this rule in a case that has been submitted to case evaluation under MCR 2.403 unless the case evaluation award was not unanimous.~~

Staff Comment: The amendments of MCR 2.403, 2.404, and 2.405 improve the case evaluation process in various ways including: allowing parties to stipulate to a different ADR process (with judicial approval), removing sanctions provisions, reducing the number of days case evaluation materials must be filed in advance, reducing the number of days for case evaluators to provide parties with an award, increasing the number of years of experience required to be considered a neutral case evaluator, updating the definitions of "verdict" and "actual costs," and defining interest of justice exceptions for attorney fees.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

CAVANAGH, J. (*concurring*). I support the Court's order. I write separately because I feel compelled to provide a complete picture of the process that led to these amendments, lest the public wrongly assume that we have made this decision without supporting data, input from stakeholders, or due deliberation.

In 2011, the State Court Administrative Office (SCAO) commissioned a study of more than 3,000 lawyers and judges, seeking their opinions about the impact of the case evaluation process on docket management.[1] This study found that case evaluation added several months to case disposition times, that a significant majority of lawyers felt the process was less valuable than mediation, and that judges rated the process more favorably than lawyers. In a 2018 follow-up study, SCAO evaluators returned to three courts that participated in the 2011 study and received survey responses from more than 1,000 lawyers and judges.[2] This study reported similar findings to the 2011 study, noting that support for the case evaluation process—among both lawyers and judges—had eroded further. To assess the implications of these studies and to gather input on the status of alternative dispute resolution practice in Michigan, SCAO convened an "ADR Summit" that was attended by 45 judges, lawyers, insurance company representatives, ADR practitioners, and court administrators. After the summit, an online survey of participants was conducted and a majority of respondents agreed or strongly agreed that case evaluation should become voluntary, while a majority of respondents disagreed or strongly disagreed with eliminating sanctions altogether.

SCAO next convened the Case Evaluation Court Rules Review Committee in early 2019 to further assess the efficacy of the current case evaluation rules and to recommend to the Court any amendments the committee deemed appropriate. This committee met throughout the course of about a year and published a report with several recommendations.[3] With respect to the issue of the sanctions provisions, the committee concluded that they should be removed for a variety of reasons. Significantly, the committee concluded that eliminating sanctions would level the playing field for plaintiffs and defendants, given the consensus that case evaluation primarily favored defendants and insurance carriers (who could absorb the cost of sanctions across hundreds of cases) over plaintiffs with a single case. In addition, the committee concluded that sanctions force settlements that are not based on the merits of claims and defenses, sanctions are not used by other states' ADR processes,[4] and sanctions are no longer needed in an era in which less than one percent of circuit court civil claims are adjudicated at trial.

After seeking and receiving comment from a variety of judicial associations and State Bar of Michigan sections,[5] the committee recommended to the Court that it amend the court rules in three key ways: (a) retain the case evaluation process of having a three-member panel provide an award, (b) remove the sanction provisions so that parties are not penalized for rejecting an award and proceeding to trial, and (c) permit the parties to waive participation in case evaluation with approval of the presiding judge upon issuance of an order adopting the parties' stipulation to use a different ADR process. The Court published the proposed amendments for comment, and a public hearing was held on September 23, 2020.

To be sure, as Justice VIVIANO pointed out, some lawyers and judges' organizations submitted comments in opposition to the proposed rule change. However, just as many commenters supported the change as an appropriate response to the problems identified through the various studies mentioned earlier. Moreover, by and large, the opposition to the amended rule was based on a misunderstanding that the proposal would completely eliminate the case evaluation process and eliminate a judge's ability to order the parties to participate. But the amended rule does neither. The rule adopted today retains case evaluation as the default ADR process in circuit court civil actions and allows parties who have completed mediation, but who have not reached an agreement, to provide the court with a stipulation to waive participation in a subsequent case evaluation. Judges retain authority to accept or reject the parties' stipulation to waive case evaluation.

It is perplexing why Justice VIVIANO is vigorously opposed to an amendment that he seems confident will have no effect. While I think it improper to pre-judge or make predictions as to the likely merit of any legal challenge on the issue, I believe it to be well established that court rules govern matters of practice and procedure in the courts of this state, Const 1963, art 6, § 5, and statutes that concern court administration yield to the court rules. *People v Williams*, 475 Mich 245, 260 (2006); *McDougall v Schanz*, 461

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Mich 15, 30-31 (1999); Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 Mich L Rev 623, 635 (1957). The statutory provisions concerning mediation differ in any number of respects from the court rule—including on the issue of available sanctions.[6] It is not at all clear that the court rule—either with or without sanctions—would yield to the statutes. In fact, in a number of places, the statutes specifically state that the court rules govern the statutory procedure.[7] Moreover, it appears to be common practice for courts to submit all cases, including tort and medical malpractice actions, to case evaluation under the court rule rather than to mediation under the statutes. Whether, and to what extent, the current practice is affected by this amendment is far from clear, but Justice VIVIANO'S prediction of devastation resulting from dismantling a practice "with a proven track record" for resolving cases is, in my opinion, not a reasonable prediction given the data establishing the declining efficacy of the process—particularly when case evaluation remains available and subject to judicial approval.

1. Campbell & Pizzuti, Courtland Consulting, **The Effectiveness of Case Evaluation and Mediation in Michigan Circuit Courts** (October 31, 2011), available at <https://www.courts.michigan.gov/4a814d/siteassets/reports/odr/effectiveness-of-case-evaluation-and-mediation-in-michigan-circuit-courts.pdf> [https://perma.cc/XF62- PENM].

2. Campbell & Pizzuti, Courtland Consulting, **Case Evaluation and Mediation in Michigan Circuit Courts: A Follow-up Study** (May 1, 2018), available at <https://www.courts.mi.gov/siteassets/reports/odr/2018-mediation-and-case-evaluation-study.pdf> [https://perma.cc/869U-9SBH].

3. State Court Administrative Office, Case Evaluation Court Rules Review Committee, **Report to the Michigan Supreme Court** (December 2019), available at <https://www.courts.michigan.gov/4af55a/siteassets/reports/ce-rule-committee-report.pdf> [https://perma.cc/XWW9-3S78].

4. The 2011 study noted that "Michigan's case evaluation process appears to have no direct counterpart elsewhere." **The Effectiveness of Case Evaluation and Mediation in Michigan Circuit Courts**, p 11. In addition, the study noted that "[n]o state appears to have as sweeping a sanction-based ADR process as Michigan's case evaluation, which includes a wide range of case types and a limitless award amount." **Id**.

5. Association commenters included the Michigan Judges Association, the Michigan District Judges Association, the Michigan Association for Justice, and the Michigan Defense Trial Counsel Association. Michigan State Bar commenters included the following sections: Business Law, Negligence Law, Insurance and Indemnity Law, ADR, Consumer Law, and Litigation.

6. For example, while MCR 2.403(O)(3) requires that the verdict be adjusted for future damages under MCL 600.6306, if applicable, neither MCL 600.4921 nor MCL 600.4969 has the same requirement. MCR 2.403(O)(3) also specifies that, if the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff is deemed more favorable to the defendant. Both MCL 600.4921 and MCL 600.4969 are silent on this issue. MCR 2.403(O)(4) specifies what constitutes a favorable verdict in cases involving multiple parties, but such provisions are absent from MCL 600.4921 and MCL 600.4969. Finally, MCR 2.403(O)(5) specifies when costs may be awarded in cases where equitable relief is at issue; the statutes have no corresponding provision.

7. For example, both MCL 600.4905 and MCL 600.4953 provide that the procedure for selecting mediation panel members and their qualifications, as well as the grounds for disqualification of a mediator, are as prescribed by the court rules. MCL 600.4907(1) and MCL 600.4955(1) provide that the court designates who serves as the mediation clerk. MCL 600.4907(3) and MCL 600.4955(3) state that adjournments may be granted in accordance with the court rules.

VIVIANO, J. (*dissenting*). I agree with all of the trial judges who submitted comments during this process that the amendments the Court adopts today are ill-advised. These amendments will cause much confusion and litigation since they purport to allow parties to stipulate to avoid the statutorily mandated case evaluation process for medical malpractice and tort cases. See MCL 600.4901 *et seq.*; MCL 600.4951 *et seq.* And, to the extent they are intended to eliminate sanctions from the case evaluation process, the amendments seem destined to fail because they do not take account of the parallel statutory requirements adopted by our Legislature more than three decades ago. See MCL 600.4921; MCL 600.4969. If the amendments actually accomplished what they set out to do—allowing parties to opt out of case evaluation and eliminating sanctions—it would sound the death knell of case evaluation as an effective dispute resolution tool.[1] In my view and the view of many thoughtful lawyers and judges who have expressed their views during this process, that would be an unfortunate result.[2] Finally, even if we could eliminate sanctions and I were inclined to do so, I would not dismantle case evaluation now, while many of our trial courts are faced with a massive backlog of cases due to the COVID-19 pandemic.[3]

As an initial matter, these changes put our rules in direct conflict with Michigan statutory law. See MCL 600.4901 *et seq.* (medical malpractice cases); MCL 600.4951 *et seq.* (tort cases). New rule 2.403(A)(1) purports to allow parties to avoid case evaluation by stipulating to a different alternative dispute resolution (ADR) process approved by the court. However, as our prior rule explicitly recognized, Chapters 49 and 49A of the Revised Judicature Act (RJA), MCL 600.101 *et seq.*, make case evaluation mandatory for all medical malpractice cases and for tort cases in which the claimed damages exceed $10,000, something our prior rule explicitly recognized.[4] Each statute requires judges to refer to mediation cases falling within its scope. See MCL 600.4903(1) ("An action alleging medical malpractice shall be mediated"); MCL 600.4951(1) (stating that tort cases in which the claimed damages exceed $10,000 "shall be mediated").[5] In addition, each statute contains a sanctions provision nearly identical to the one eliminated today from MCR 2.403(O)(1). MCL 600.4921; MCL 600.4969.[6]

These statutes, which cover a wide swath of civil litigation, remain on the books, and parties can continue to file motions seeking enforcement of them. Unfortunately, the majority today puts our trial courts in the unenviable position of having to determine whether the newly amended court rule or the conflicting laws enacted by our Legislature govern the case evaluation process. In general, "[o]ur authority to promulgate court rules that trump statutes extends only to matters of practice and procedure, not to substantive law." *Hunt v Drielick*, 507 Mich 908, 913 n 6 (2021) (VIVIANO, J., dissenting),

citing *McDougall v Schanz*, 461 Mich 15, 27 (1999). But for this to be a consideration, the rule and the statute must inherently conflict. *McDougall*, 461 Mich at 24. As noted above, the new rule does appear to conflict with the statutorily mandated case evaluation process for cases that come within the statute's scope. But, on the other hand, it is hard to see how the new rule, which is now silent on sanctions, conflicts with statutes that require sanctions. A persuasive argument therefore could be made that today's amendments do not vitiate the statutory sanction requirements.[7]

To the extent there is a conflict, before accepting a stipulation to avoid the statutorily mandated case evaluation process, trial courts will need to determine whether a statute entitling a party to a reasonable attorney fee as part of costs, depending upon the outcome of the case, is procedural.[8] Michigan follows the "American rule" for attorney fees, under which attorney fees are generally not recoverable from the losing party as part of costs unless expressly authorized by statute or court rule. *Haliw v Sterling Hts*, 471 Mich 700, 706-707 (2005). I question whether a broad exception to this general rule is procedural. See *TGI Friday's, Inc v Dvorak*, 663 So 2d 606, 611 (Fla, 1995) (holding that a similar provision in a statute was substantive and therefore did not interfere with the court's power to issue procedural rules); cf. *Ashland Chem Inc v Barco Inc*, 123 F3d 261, 264 (CA 5, 1997) (holding a similar rule to be substantive rather than procedural); *Boyd Rosene & Assoc, Inc v Kansas Muni Gas Agency*, 174 F3d 1115, 1126 (CA 10, 1999) ("Loser-pays attorney's fees are normally not within a court's inherent power. Instead, they reflect a conscious policy choice by a legislature to depart from the American rule and codify the English rule."). That the deviation from the American rule is limited to specific classes of litigation—medical malpractice and tort cases in which the alleged damages are above $10,000—further leads me to question whether the rule can be characterized as procedural. See *Persichini v William Beaumont Hosp*, 238 Mich App 626, 638 (1999) (providing "a statute that permits a prevailing party in certain classes of litigation to recover fees" as an example of a "fee-shifting rule[] that actualize[s] a substantive policy"); see also *Chambers v NASCO, Inc*, 501 US 32, 52 (1991). No doubt the majority's changes today will engender much confusion and litigation on this subject.

But even if we had the authority to allow parties to opt out of case evaluation and eliminate statutorily mandated sanctions, I would not do so. Case evaluation has been an effective tool for resolving litigation in our trial courts, and while not immune from criticism, it remains popular among trial judges. In the last survey of Michigan circuit court judges regarding ADR, conducted for the State Court Administrative Office in January 2018, 54% agreed or strongly agreed with the statement "Overall, case evaluation is an effective method for resolving civil cases."[9] Regarding the importance of the sanctions provision in particular, 73% of attorneys and 78% of judges agreed that sanctions are always, often, or at least sometimes the primary incentive for parties to accept a case evaluation award.[10] These survey results confirm my view that eliminating the sanctions provision would likely lead to fewer awards being accepted, weakening case evaluation's effectiveness as a tool to resolve cases.[11]

Perhaps most importantly, this conclusion is also confirmed by every trial judge who submitted a comment during this process and by their judicial associations. The Michigan Judges Association (MJA) is the judicial organization for the circuit and Court of Appeals judges in Michigan. The MJA vigorously opposes these changes and believes they will have a detrimental impact on the efficient administration of justice in our state. In its comment letter submitted June 15, 2021, the MJA stated as follows:

> [M]any judges find the case evaluation process to be an indispensable component of resolving cases. It often sets realistic expectations for litigants and lawyers about reasonable settlement negotiations and trial prospects. Often at pretrials, the first thing lawyers discuss is the case evaluation award and how that usually (certainly there are exceptions) sets a range by which the parties could negotiate resolution of the case. Also, the prospect of meaningful case evaluation sanctions are often vital for litigants and lawyers to soberly evaluate their expectations. This is especially true for business court and no-fault cases. *The wholesale elimination of meaningful case evaluation and sanctions will almost certainly result in protracted litigation and the waste of jury and judicial resources*. [Emphasis added.]

The chief judge, the presiding civil division judge, and, indeed, all of the judges in the civil division of the Third Circuit Court (our largest trial court) oppose these rule changes and believe they "will be detrimental to effective docket management." In particular, these judges oppose the elimination of mandatory case evaluation sanctions and instead propose that the rule be changed to give trial judges the discretion to decline to award sanctions in appropriate cases. The chief judge of the Sixth Circuit Court (our second largest trial court) agreed wholeheartedly with one of her colleagues that "case evaluation is generally a useful tool that crystalizes the attention of the parties and lawyers to become serious about resolving a case—or to get serious about trying a case" and that "the threat of sanctions also plays an important part in moving parties to become realistic about their positions."

The Mediation Tribunal Association (MTA), which was the catalyst for the original case evaluation rule, also opposes the proposed changes.[12] The MTA was formed more than 40 years ago to, among other things, "relieve the trial docket of the courts and the backlog of cases awaiting trial." In 2018, the MTA evaluated 6,540 cases in Wayne County. The MTA asserts that "[*i*]*n large*

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counties, such as Wayne County, case evaluation is not only an effective docket management tool, but also a necessity." (Emphasis added.) In addition, the MTA asserts that "[w]hether or not the case is ultimately settled at case evaluation is not as relevant as the process of negotiating sparked by the coming together of the parties." Finally, the MTA "firmly asserts that keeping the process mandatory and with sanctions, provides the most reliable, accessible, and cost-efficient form of ADR available to parties in Wayne County."

In addition, the Oakland County District Judges Association (OCDJA) and the Oakland County Bar Association oppose the rule changes adopted today as they relate to district court, pointing out that the current case evaluation process is highly effective and has resulted "in resolution of 59 percent of district court matters submitted to case evaluation over the past five years, and at a price point far below that of private mediation." The OCDJA believes the rule changes will add costs and cause significant delays. *The OCDJA also believes that by omitting sanctions, the amendments will "eliminate[] a powerful tool in resolving cases.*" (Emphasis added.)[13]

In summary, I strongly disagree with the Court's efforts to make case evaluation optional and to eliminate case evaluation sanctions altogether. These amendments will cause confusion and require much additional litigation to clarify what effect, if any, the amendments will have in light of the statutorily required case evaluation process that mandates sanctions. Regardless, like every trial judge who has commented during this process, I vigorously oppose the elimination of sanctions because of the harm I believe it will do to case evaluation as a useful tool for resolving cases in our trial courts.[14] And I would not dismantle a 40-year-old dispute resolution practice with a proven track record while our trial courts are still confronting the massive docket backlogs caused by the pandemic. I fear these changes will only exacerbate the enormous docket management problems many of our trial courts are currently facing. For these reasons, I respectfully dissent.

ZAHRA, J., joins the statement of VIVIANO, J.

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1. We have recognized that "[t]he purpose of this fee-shifting provision is to encourage the parties to seriously consider the evaluation and provide financial penalties to the party that, as it develops, 'should' have accepted but did not. This encouragement of settlements is traditional in our jurisprudence, as it deters protracted litigation with all its costs and also shifts the financial burden of trial onto the party who imprudently rejected the case evaluation." **Smith v Khouri**, 481 Mich 519, 527-528 (2008).

2. As one experienced lawyer commented at an earlier stage of this process: "[E]liminating sanctions from MCR 2.403 would seem counterintuitive, at best. Without sanctions, the efficacy of the rule is eviscerated. If the actual intent of the proposed rule change is to completely do away with MCR 2.403 Mediations[,] the committee should just say so."

3. See Michigan Supreme Court, State Court Administrative Office, **Trial Court Backlogs Backgrounder, March 2021** <https://www.courts.michigan.gov/siteassets/covid/covid-19/trial-court-case-backlog-backgrounder.pdf> (accessed November 5, 2021) [https://perma.cc/4QPF-SCG5] (noting that the number of pending felony and misdemeanor cases increased by more than 75% and that the number of pending noncriminal cases increased by approximately 14% in district courts and approximately 18% in circuit and probate courts). It appears that these case backlogs have continued to increase in 2021 and that they continue to be a problem, as chronicled in numerous news reports. See, e.g., **Anderson, Wayne County Prosecutor: Office is in "Crisis Mode" and Caseloads are "Inhumane"**, Detroit Free Press (September 20, 2021), <https://www.freep.com/story/news/local/michigan/wayne/2021/09/20/wayne-county-prosecutors-office-kym-worthy/8419000002/> (accessed November 5, 2021) [https://perma.cc/N8N3-54QG]; see also Administrative Order No. 2019-33, 507 Mich (2021) (VIVIANO, J., concurring in part and dissenting in part).

4. See prior MCR 2.403(A)(2) ("Case evaluation of tort cases filed in circuit court is mandatory beginning with actions filed after the effective dates of Chapters 49 and 49A of the [RJA], as added by 1986 PA 178.").

5. The rule was amended in 2000 "to change terminology, replacing 'mediation' . . . with the term 'case evaluation.' " MCR 2.403, 462 Mich lxxxv, cxx (staff comment) (comma omitted). Thereafter, the term "mediation" has been used "to describe the facilitative process established in MCR 2.411, in keeping with the generally accepted usage of the term." **Id**.

6. The similarity is no surprise. Our first mediation court rule was adopted in 1980. See GCR 1963, 316. As noted above, our Legislature codified the court rule in 1986 PA 178. And, although our first case evaluation rule preceded the statutes by a few years, we have frequently amended the rule to align with and implement this and other statutory directives, as noted in the text of the rule and the staff comments accompanying various amendments of MCR 2.403. See, e.g., MCR 2.403, 429 Mich cvii, cxviii-cxix (staff comment). See also MCR 2.403(K)(4) ("In a tort case to which MCL 600.4915(2) or MCL 600.4963(2) applies . . . ."); MCR 2.403(K)(5) ("In an action alleging medical malpractice to which MCL 600.4915 applies "); MCR 2.403(O)(3) (incorporating the adjustment for future damages required by MCL 600.6306); MCR 2.403(O)(9) (incorporating the requirements of MCL 436.1801); MCR 2.403(O)(10) (incorporating the comparative fault provisions of MCL 600.6304).

7. While I agree with Justice CAVANAGH that "it is improper to prejudge . . . the likely merit of any legal challenge" to the amendments, it surely must be an important step in our administrative process to at least consider whether we even have the power to make certain policy changes before we adopt amendments that purport to do so. My position, simply stated, is that in addition to being a bad idea as a matter of policy (for the reasons discussed below), I believe the Court's action today is detrimental to the administration of justice because it will take thousands of motions and many appeals to determine its legal effect. This latter point, I believe, is worth discussing because the Court's primary mission is to bring clarity to the law for our citizens, not the opaqueness the majority is delivering today.

8. It is well settled "that a court is not bound by the parties' stipulations of law" and must instead "determine the applicable law in each case." **In re Finlay Estate**, 430 Mich 590, 595 (1988).

9. Campbell & Pizzuti, Courtland Consulting, **Case Evaluation and Mediation in Michigan Circuit Courts: A Follow-up Study** (May 1, 2018), p 65, available at <https://www.courts.mi.gov/siteassets/reports/odr/2018-mediation-and-case-evaluation-study.pdf> [https://perma.cc/869U-9SBH]. Additionally, when asked whether they would still order case evaluation even if it were not mandatory for tort claims, most judges indicated that they would. **Id**. at 64.

10. **Id**. at 58, 64. The 2019 report from the Case Evaluation Court Rules Review Committee, which Justice CAVANAGH cites in support of removing sanctions from the court rule, contains a number of inaccuracies. Specifically, the report incorrectly states that "a majority of attendees [from the 2018 summit] recommended that case evaluation should become voluntary **and** that the sanctions provisions should be removed." Michigan Supreme Court, State Court Administrative Office, Case Evaluation Court Rules Review Committee,

Report to the Michigan Supreme Court (December 2019), p 2, available at <https://www.courts.michigan.gov/4af55a/siteassets/reports/ce-rule-committee-report.pdf> [https://perma.cc/XWW9-3S78] (emphasis added). In point of fact, only half of the attendees responded to the survey, and of those, a wide majority disagreed or strongly disagreed that "[s]anctions provisions should be removed altogether." Michigan Supreme Court, State Court Administrative Office, Office of Dispute Resolution, **2018 ADR Summit Meeting Summary** (August 2018), p 5. Unfortunately, that is not the only inaccuracy contained in the report. That the committee was biased against the case evaluation process is perhaps best demonstrated by the fact that it virtually ignored all dissenting voices, particularly those of trial judges who submitted comments during the process. Indeed, in light of the informal comments it received, some of which are noted below, it was patently untrue for the committee to assert that there was a "[l]ack of any evidence, empirical or otherwise, that sanctions provided meaningful value to the parties or the court." **Report to the Michigan Supreme Court**, p 12. The report was also deficient because it failed to discuss the statutorily mandated case evaluation process and sanctions, and the confusion that will arise by allowing parties to opt out and by eliminating sanctions from the court rule. In light of these deficiencies, and even though I was nominally a member of the committee (I was invited to attend one meeting, and my dissenting comments were apparently ignored since they, too, are not accounted for in the report), I would give the report very little weight.

11. The 2018 Courtland Consulting report concludes from the survey questions that "[n] either attorneys nor judges consistently said that the sanction provisions had been the primary incentive for parties to accept the case evaluation award . . . ." **Case Evaluation and Mediation in Michigan Circuit Courts**, p 40. But the report's conclusion here misses the point. Even if case evaluation sanctions are only sometimes the primary incentive for parties to accept the award, the sanction provision has a much larger impact because it continues to incentivize a party to reach a reasonable settlement after the case evaluation process has been completed.

12. The MTA's views reflect the views of the Third Circuit Court, since its board currently includes the chief judge, chief judge pro tem, and several other judges from that court.

13. The Alternative Dispute Resolution Section of the State Bar of Michigan, which supports the rule, advocated for "a possible carve out, in regard to both mandatory [case evaluation] and retention of sanctions," for no-fault cases. The special attention given to no-fault cases is undoubtedly due to the fact that such cases comprise the vast majority of civil cases in our district courts, and much of the circuit court civil docket as well.

14. A number of organizations and attorneys have taken issue with our current provision, arguing that it unfairly penalizes individual plaintiffs who have a single case and cannot absorb a sanctions award as readily as an insurance company with a large portfolio of cases. But like the judges from the Third Circuit, I believe the rule can be tweaked to address this criticism without destroying its essential features. In particular, I would encourage the Legislature to give judges more discretion to reduce or refuse to award the attorney fee portion of sanctions if imposing the full amount would create a substantial economic hardship.

ADM File No. 2021-05 Proposed Amendments of Rules 6.302 and 6.310 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering amendments of Rules 6.302 and 6.310 of the Michigan Court Rules. Before determining whether the proposal 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 proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted on the Public Administrative Hearings page.

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

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 6.302 Pleas of Guilty and Nolo Contendere

(A)-(C) [Unchanged.]

(D) An Accurate Plea.

(1) If the court engages in a preliminary evaluation of the sentence to be imposed, the court must specify the estimated sentencing guidelines range as part of the evaluation.

(1)-(2) [Renumbered (2)-(3) but otherwise unchanged.]

(E)-(F) [Unchanged.]

Rule 6.310 Withdrawal or Vacation of Plea

(A) [Unchanged.]

(B) Withdrawal After Acceptance but Before Sentence. Except as provided in subsection (3), after acceptance but before sentence,

(1) [Unchanged.]

(2) the defendant is entitled to withdraw the plea if

(a) [Unchanged.]

(b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated or determines that the actual range is different than initially estimated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose.

(3) [Unchanged.]

(C)-(E) [Unchanged.]

Staff Comment: The proposed amendments of MCR 6.302 and 6.310 would require a court to specify the estimated sentencing guideline range as part of a preliminary evaluation of the sentence and to clarify that a defendant may withdraw a plea when the actual guidelines range is different than initially estimated.

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the secretary of the State Bar and to the state court administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by March 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-05. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ZAHRA and VIVIANO, JJ., would decline to publish the proposed amendments for comment.

ADM File No. 2021-01
Assignment of Business Court Judge in the 14th Circuit Court (Muskegon County)

On order of the Court, effective January 1, 2022, the Honorable William C. Marietti is assigned to serve as a business court judge in the 14th Circuit Court for a term expiring December 31, 2022.

ADM File No. 2021-26
ADM File No. 2021-42
Proposed Adoption of Administrative Order No. 2021-X

Proposed Increase in Attorney Dues for State Bar of Michigan Operations and the Attorney Discipline System

On order of the Court, this is to advise that the Court is considering an administrative order that would increase attorney dues for the State Bar of Michigan operations and the Attorney Discipline System. Before determining whether the proposal 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 proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted on the Public Administrative Hearings page.

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

Administrative Order No. 2021-X – Increase in Attorney Dues for State Bar of Michigan Operations and the Attorney Discipline System

Under Rule 4 of the Rules Concerning the State Bar of Michigan, dues for active members of the State Bar of Michigan are "to be set by the Supreme Court to fund: (1) the Attorney Grievance Commission and the Attorney Discipline Board, (2) the client security fund administered by the State Bar, and (3) other State Bar expenses." The State Bar of Michigan Representative Assembly and the Attorney Discipline System (comprising the Attorney Grievance Commission and the Attorney Discipline Board) have submitted requests for dues increases for the fiscal year beginning October 1, 2022.

In light of the fact that the State Bar has not had a dues increase since 2003, and to continue the valuable services and resources the Bar provides for its members, the Court hereby establishes the State Bar portion of annual bar dues at $230, an increase of $50.

In addition, the Court establishes the ADS portion of annual bar dues at $140, an increase of $20. Dues for the client protection fund remain at the level of $15 per year.

Staff Comment: This administrative order would increase the State Bar's dues for most members by $70 for a total of $385 per year.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by April 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-26/2021-42. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2021-07
Proposed Amendment of Rule 1.8 of the Michigan Rules of Professional Conduct

On order of the Court, this is to advise that the Court is considering an amendment of Rule 1.8 of the Michigan Rules of Professional Conduct. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested

Rule 1.8 Conflict of Interest: Prohibited Transactions

(a)-(g) [Unchanged.]

(h) A lawyer shall not:

(1) make 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 for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith~~.~~; or

(3) make an agreement that includes a lawyer-client arbitration provision unless the client is independently represented in reviewing the provision.

(i)-(j) [Unchanged.]

[Comment Section Unchanged.]

Staff Comment: The proposed amendment of MRPC 1.8 would clarify that the inclusion of an arbitration clause in an attorney-client agreement is prohibited unless the client is independently represented in reviewing the provision.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the secretary of the State Bar and to the state court administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by April 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-07. Your comments and the comments of others will be posted under the chapter affected by this proposal.

VIVIANO, J., would decline to publish the proposed amendment for comment.

ADM File No. 2021-01
Supreme Court Appointments to the Justice For All Commission

On order of the Court, pursuant to Administrative Order No. 2021-1, the following members are reappointed to the Justice For All Commission for terms commencing on January 1, 2022 and ending on December 31, 2024:

Kevin Bowling (on behalf of court administrators/probate registers)
Michelle Williams (Michigan Department of Education, on behalf of the education community)

Samantha Ashby (on behalf of Michigan libraries)

Lynda Zeller (Michigan Health Care Endowment, on behalf of the health care community)

Deborah Hughes (on behalf of self-help centers)

Bianca McQueen (on behalf of the public)

Nicole Huddleston (on behalf of nonprofit local community organizations)

Brittany Schultz (on behalf of the business community)

In addition, Dana M. Warnez (SBM president) is appointed for a term commencing on January 1, 2022 and ending on December 31, 2022.

ADM File No. 2021-01
Supreme Court Appointments to the Foreign Language Board of Review

On the order of the Court, pursuant to MCR 8.127(A)(2) and effective January 1, 2022, the following appointments are made to the Foreign Language Board of Review:

Hon. Marcy A. Klaus (probate judge) is appointed to a first term that will expire on December 31, 2024.

Tyler R. Martinez (family law attorney) is appointed to a first term that will expire on December 31, 2024.

Rebeca Ontiveros-Chavez (advocate for limited English proficiency individuals) is reappointed to a second term that will expire on December 31, 2024.

ADM File No. 2021-01
Assignment of Judges to the Court of Claims and Appointment of Chief Judge

On order of the Court, effective January 1, 2022, the following Court of Appeals judges are assigned to sit as judges of the Court of Claims for terms expiring May 1, 2023:

Hon. Thomas C. Cameron
Hon. Elizabeth L. Gleicher
Hon. Douglas B. Shapiro
Hon. Brock A. Swartzle

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

On further order of the Court, the Honorable Elizabeth L. Gleicher is appointed as chief judge of the Court of Claims for a term ending May 1, 2023

ADM File No. 2021-01
Appointment of Chief Judge of the 43rd Circuit Court, the 4th District Court, and the Cass County Probate Court

On order of the Court, effective January 1, 2022, Hon. Carol Montavon Bealor is appointed chief judge of the 43rd Circuit Court, the 4th District Court, and the Cass County Probate Court for a term ending December 31, 2023.

ADM File No. 2021-01
Supreme Court Appointments to the Committee on Model Criminal Jury Instructions

On order of the Court, pursuant to Administrative Order No. 2013-13, Hon. Joyce A. Draganchuk, John Paul Hunt, and Tamara J. Phillips are reappointed to the Committee on Model Criminal Jury Instructions for terms beginning January 1, 2022 and ending December 31, 2024.

In addition, the Court appoints Hon. Ronald J. Schafer and Lisa Coyle for terms beginning January 1, 2022 and ending December 31, 2024.

ADM File No. 2021-01
Supreme Court Appointments to the Committee on Model Civil Jury Instructions

On order of the Court, pursuant to Administrative Order No. 2001-6, Hon. Michael F. Gadola, Robert L. Avers, Benjamin J. Aloia, C. Thomas Ludden, Judith A. Susskind, and Hilary A. Ballentine are reappointed to the Committee on Model Civil Jury Instructions for terms beginning January 1, 2022 and ending December 31, 2024.

In addition, the Court appoints Randy J. Wallace for a term beginning January 1, 2022 and ending December 31, 2024.

ADM File No. 2021-01
Appointment of Chief Judge of the Oakland County Probate Court

On order of the Court, effective immediately, the Honorable Linda S. Hallmark is appointed chief judge of the Oakland County Probate Court for the remainder of a term ending December 31, 2021.

ADM File No. 2020-26
Amendments of Rules 1.109 and 8.119 of the Michigan Court Rules

On order of the Court, the effective date of the June 9, 2021 order amending MCR 1.109 and MCR 8.119 is extended from January 1, 2022 to April 1, 2022.

Staff Comment: The extension of the effective date of this order is intended to allow for additional programming changes and other changes required by trial courts and court users to implement the rule changes.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

ADM File No. 2019-34
Amendment of the October 13, 2021 Order Amending Rule 2, Rule 3, Rule 4, Rule 5, Rule 6, and Rule 7 and Adopting Rule 3a and Rule 4a of the Rules for the Board of Law Examiners

On order of the Court, effective immediately, the following order revises the order entered on October 13, 2021 that amends Rule 2, Rule 3, Rule 4, Rule 5, Rule 6, and Rule 7 and adopts Rule 3a and Rule 4a of the Rules for the Board of Law Examiners.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

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 Rule 2, Rule 3, Rule 4, Rule 5, Rule 6, and Rule 7 and additions of Rule 3a and Rule 4a of the Rules for the Board of Law Examiners are adopted, effective August~~March~~ 1, 2022, and will be in effect for the first time for the February~~July~~ 2023~~2~~ administration of the bar examination in Michigan.

[The content of the order is unchanged.]

Staff comment: The amendments implement a Uniform Bar Examination in Michigan with implementation set for the February 2023~~July 2022~~ administration of the bar examination. ~~Delay in companion legislative action may defer implementation of these rules.~~The original implementation target date was the July 2022 bar examination. However, that target date was predicated on two things: enactment of accompanying legislation and implementation of a Michigan law component in the examination itself. Neither of those things have occurred, thus, requiring a deferment in the implementation of the UBE in Michigan.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

CAVANAGH, J. (concurring). [Justice Cavanagh's statement is unchanged from the initial order.]

BERNSTEIN, J. (dissenting). [Justice Bernstein's statement is unchanged from the initial order.]

ADM File No. 2017-28
Amendment of Rules 1.109 and 8.119 of the Michigan Court Rules

On order of the Court, the effective date of the May 22, 2019 order amending MCR 1.109 and MCR 8.119 is extended from January 1, 2022 to April 1, 2022.

Staff Comment: The extension of the effective date of this order is intended to allow for additional programming changes and other changes required by trial courts and court users to implement the rule changes.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

ADM File No. 2017-28
ADM File No. 2020-26
Amendment of Administrative Order No. 1999-4 Establishment of Michigan Trial Court Records Management Standards

On order of the Court, the effective date of the May 22, 2019 and June 9, 2021 orders amending Administrative Order No. 1999-4 (Establishment of Michigan Trial Court Records Management Standards) is extended from January 1, 2022 to April 1, 2022.

ADM File No. 2017-28
Amendment of Administrative Order No. 2019-4

On order of the Court, the following order amending Administrative Order No. 2019-4 is adopted, effective immediately.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Administrative Order No. 2019-4 – Electronic Filing in the 3rd, 6th, 13th, 16th, and 20th Circuit Courts

On order of the Court, the 3rd, 6th, 13th, 16th, and 20th Circuit Courts are authorized to continue their e-Filing programs in accordance with this order while the State Court Administrative Office develops and implements a statewide e-Filing system (known as MiFILE). This order rescinds and replaces Michigan Supreme Court Administrative Orders 2007-3 (Oakland County), 2010-4 (the 13th Judicial Circuit), 2010-6 (the 16th Judicial Circuit), 2011-1 (the 3rd Circuit Court), and 2011-4 (Ottawa County).

(1)-(3) [Unchanged.]

(4) Personal Identifying Information

(a)-(d) [Unchanged.]

(e) These rules regarding personal information will remain in effect until they are superseded by amendments of MCR 1.109, MCR 8.119, and Administrative Order 1999-4. Those amendments, adopted by the Court on May 22, 2019, are effective on April 1, 2022~~January 1, 2022~~.

ADM File No. 2017-28
Amendment of Rule 1.109 of the Michigan Court Rules

On order of the Court, the May 22, 2019 order amending Rule 1.109 of the Michigan Court Rules is amended as follows, effective April 1, 2022. Concurrently, individuals are invited to comment on the form or the merits of the amendments during the usual comment period. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted on the Public Administrative Hearings page.

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

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 1.109 Court Records Defined; Document Defined; Filing Standards; Signatures; Electronic Filing and Service; Access

(A)-(C) [Unchanged.]

(D) Filing Standards.

(1)-(8) [Unchanged.]

(9) Personal Identifying Information.

(a) [Unchanged.]

(b) Filing, Accessing, and Serving Personal Identifying Information

(i)-(iv) [Unchanged.]

(v) Consent.

(A) A party may stipulate in writing to allow access to his or her protected personal identifying information to any person, entity, or agency. Unless otherwise provided by this

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

subrule, the stipulation must be presented to the court when trying to access the protected personal identifying information.

(B) The State Court Administrative Office will maintain a list of authorized individuals who may have access to a party's date of birth contained in a court record for purposes of verifying the identity of that particular person without the need to present a stipulation to the court. To be placed on this list, these individuals must conform to the following procedures:

(1) In a written document, identify the entity for which they work and provide assurance to the State Court Administrative Office that each time they seek verification of a party's date of birth, it will be in the course of their work and with that person's consent. The consent may be retained in the possession of the authorized individual, the entity for whom the individual works, the person or organization seeking the information about the person, or someone acting on behalf of that person or organization. Such assurance may be satisfied by a letter from the entity for which the individual works or other authorization. The assurance required under this provision shall be updated at least every six months, beginning from the date of the original submission. The update may be provided by the individual who seeks access to a person's date of birth or by the entity that authorizes the individual to operate on its behalf in accessing the information.

(2) Submit proof of their employer's or hiring entity's current professional liability insurance in effect during the period when an authorized individual will be seeking date of birth information from a court. Failure to do so will result in the individual being removed from the list or in the individual not being placed on the list. The information provided in support of this provision shall be nonpublic. The proof of insurance required under this provision shall be updated annually.

(3) Courts must verify the identity of anyone who claims to be an authorized individual by ensuring the name on the individual's state-issued identification matches the name in SCAO's authorized user list. A court may issue a register of actions or other document that includes a party's date of birth to an authorized individual.

(vi)-(vii) [Unchanged.]

(c)-(e) [Unchanged.]

(10) [Unchanged.]

(E)-(H) [Unchanged.]

Staff Comment: The amendment of MCR 1.109 establishes a process for individuals to be authorized to have access to a party's date of birth for purposes of verification of identity with that party's consent.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the secretary of the State Bar and to the state court administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by April 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-28. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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