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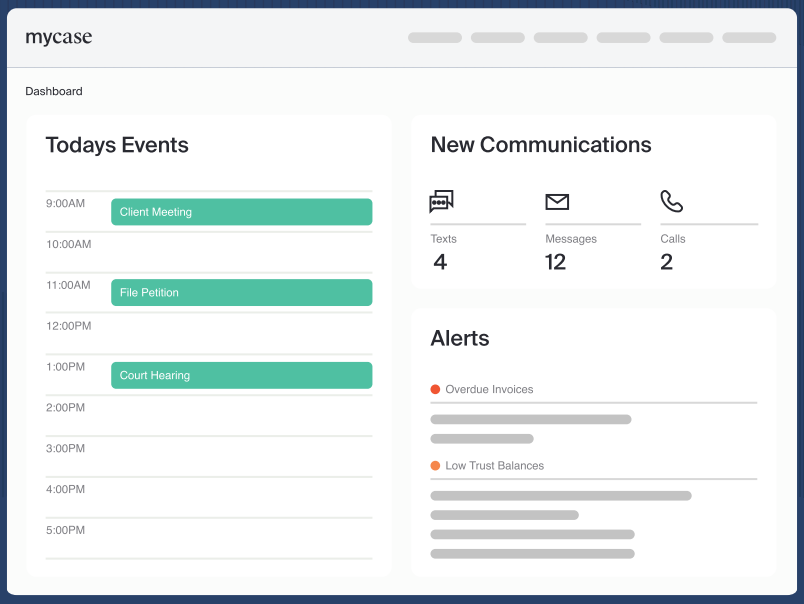

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APRIL 29, 2023
SEPTEMBER 23, 2023

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MEMBER SUSPENSIONS
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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 Feb. 15, 2022, 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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IN BRIEF

APPELLATE PRACTICE SECTION

The Appellate Practice Section Journal is published three times a year. Deadlines for submissions in 2023 are Feb. 15, June 15, and Oct. 15. Anyone interested in writing for the journal on an appellate practice topic is welcome to contact Nancy V. Dembinski, chair of the section's publications committee, at ndembinski@lmdlaw.com.

CHILDREN'S LAW SECTION

On Oct. 1, 2021, the Raise the Age law went into effect, allowing youths to be charged as juveniles until they are 18 rather than 17. There is a keen focus on Michigan's juvenile justice system and how it can be improved for youths and their families. The Michigan Task Force on Juvenile Justice Reform issued its report and recommendations for improvements to the state's juvenile justice system on July 22.

ELDER LAW AND DISABILITY RIGHTS SECTION

The section will hold its annual spring conference on Friday, March 31, 2023, at the Kellogg Center in East Lansing. Join us for an informative program on the most current issues surrounding elder and disability law-related topics. Also, please consider attending one of our monthly meetings. For more information, contact Angela Hentkowski at ahentkowski@stewardsheridan.com.

ENVIRONMENTAL LAW SECTION

Members of the section's 2022-2023 executive council are Chair Scott Sinkwitts, Chair-elect Todd Schebor, and Treasurer/Secretary Ross Hammersley. The annual joint conference was held on Nov. 9 at Lansing Community College West Campus. Detailed event information and past event materials are available at connect.michbar.org/envlaw.

GOVERNMENT LAW SECTION

The section is planning its upcoming winter seminar for Feb. 17, 2023, with the focus on election-related issues affecting local governments. The conference will be held at Summit on the Park at 46000 Summit Parkway in Canton. Registration information will be available in January. Save the date — we hope to see you there!

INTERNATIONAL LAW SECTION

The section's annual meeting took place on Sept. 28 at the LoveITDetroit installation at the Consulate of Italy in Detroit. The section elected new council members and heard a presentation from the Consulate of Italy. An in-person panel titled, "Uyghur Forced Labor Prevention Act — Understanding the Impact to U.S. Supply Chains," will kick off 2023.

LITIGATION SECTION

There are two openings for members at large on the section's governing council. The section recently partnered with the Young Lawyers Section to sponsor the National Trial Advocacy Competition awards reception at the Detroit Athletic Club, and the section is also sponsoring a March 16, 2023, masters in litigation seminar presented by Sybil Dunlop titled, "Persuading People on Page and Screen," and an iLitigate workshop by Brett Burney which will take place on Jan. 18, 2023.

PARALEGAL SECTION

The section held its annual meeting in September and welcomed new council members Elizabeth Sailor (chair-elect) and Dominic Vincenti (treasurer). Vincenti was also honored as Paralegal of the Year. The section also said goodbye to longtime members Marianne Delaney, Teresa Duddles, and Patricia Allerton, who wore many hats over the years. While we are very sad to see them go, we feel immense gratitude to have served alongside them.

REAL PROPERTY LAW SECTION

Join the Real Property Law Section for its winter conference at The Don CeSar in St. Pete Beach, Florida. The program, "Surfing the Legal Landscape" will take place from March 9-11, 2023. Register at na.eventscloud.com/ereg/index.php?eventid=720645&. Book a room at book.passkey.com/event/50399048/owner/50154506/home or call 1.800.282.1116 and refer to code RPL307 for a special rate.

SOCIAL SECURITY SECTION

The section welcomes your submissions for its next newsletter. Articles on topics of interest to the section are encouraged regardless of length. Submit articles to Elizabeth Yard at eyard@tanisschultz.com.

NEWS & MOVES

ARRIVALS AND PROMOTIONS

ELONA ASIMETAJ has joined Collins Einhorn Farrell.

JOE BROWN has joined Plunkett Cooney.

BRIAN FRASIER has joined Collins Einhorn Farrell.

TANYA E.J. LUNDBERG has joined Maddin Hauser as an associate office administrator.

MARY PAT MEYERS has joined Meyers Law.

AWARDS AND HONORS

MICHAEL S. BOGREN with Plunkett Cooney was recognized by Michigan Lawyers Weekly in its 2022 class of Leaders in the Law.

BUTZEL was recognized by the Original Equipment Suppliers Association for reaching its 20-year membership milestone during its Automotive Supplier Conference on Nov. 7. Daniel Rustmann accepted an award on behalf of the firm.

JUSTIN J. HAKALA with Plunkett Cooney was inducted as a member of the Michigan chapter of the American Board of Trial Advocates.

BRETT J. MILLER with Butzel has been recognized in Michigan Lawyers Weekly's Leaders in the Law class of 2022.

DAVID M. MOSS and **A. VINCE COLELLA** of Moss & Colella have been recognized as 2023 Top Lawyers by DBusiness magazine.

The ALFA International legal network named **PLUNKETT COONEY** its 2022 Law Firm of the Year.

NICHOLAS W. SIEWERT with Plunkett Cooney was certified as a fire and explosion investigator by the National Association of Fire Investigators.

QUENDALE G. SIMMONS with Butzel has been listed in Leadership Detroit's Class XLIII.

WARNER NORCROSS & JUDD has been recognized as one of the upmarket movers in litigation by BTI Consulting Group.

LEADERSHIP

LORI GRIGG BLUHM was named president of the International Municipal Lawyers Association.

MITCHELL "MITCH" ZAJAC with Butzel has been appointed vice chair of the Western Michigan University Cooley Law School board of directors.

OTHER

Nemeth Law has changed its name to **NEMETH BONNETTE BROUWER**.

DREW S. NORTON PC has moved its offices to 1700 West Big Beaver Road, Suite 220, in Troy.

PRESENTATIONS, PUBLICATIONS AND EVENTS

BETH S. GOTTHELF with Butzel was among the speakers at the "Putting Environment, Social, and Governance into Practice: Real World Lessons from the Boardroom" webinar Nov. 8.

LEE HORNBERGER spoke on the *Michigan AFSCME Council 25 v. County of Wayne* Michigan Court of Appeals case at the Nov. 8 meeting of the Oakland County Bar Association Alternative Dispute Resolution Committee.

The **INGHAM COUNTY BAR ASSOCIATION** hosts its Meet the Judges event on Jan. 12, 2023.

SHELDON LARKY was a featured speaker on search warrants at the 2022 Michigan District Court Magistrates Association annual conference in Traverse City on Sept. 23.

CLAUDIA RAST with Butzel participated in an Oct. 28 fireside chat webcast on cyber priorities.

IN MEMORIAM

GERARD J. ANDREE, P25497, of Southfield, died Sept. 4, 2022. He was born in 1950, graduated from University of Detroit School of Law, and was admitted to the Bar in 1975.

DAVID B. BRAUN, P49244, of Pleasant Ridge, died Aug. 25, 2022. He was born in 1960, graduated from Detroit College of Law, and was admitted to the Bar in 1993.

STEPHEN C. CORWIN, P27262, of Norton Shores, died Oct. 24, 2022. He was born in 1951, graduated from University of Michigan Law School, and was admitted to the Bar in 1977.

ROY J. DANIEL, P12477, of Keizer, Oregon, died Sept. 25, 2022. He was born in 1941 and was admitted to the Bar in 1969.

LYNN B. DUNBAR, P31411, of Lansing, died Oct. 7, 2022. She was born in 1942, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1980.

EUGENE S. FRIEDMAN, P13724, of West Bloomfield, died May 11, 2022. He was born in 1934, graduated from Wayne State University Law School, and was admitted to the Bar in 1958.

MARC BRYAN GOLDBERG, P59061, of Okemos, died Oct. 25, 2022. He was born in 1952, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1999.

ROBERT M. GOLEMBIEWSKI, P14143, of Chandler, Arizona, died Sept. 2, 2022. He was born in 1932, graduated from Detroit College of Law, and was admitted to the Bar in 1973.

JAMES K. GRAHAM, P14257, of Bloomfield Hills, died Aug. 6, 2022. He was born in 1934, graduated from Detroit College of Law, and was admitted to the Bar in 1960.

ROBERT C. GREENE, P14338, of Grand Rapids, died Sept. 23, 2022. He was born in 1942 and was admitted to the Bar in 1967.

ROBERT L. HALLMARK, P26447, of Bloomfield Hills, died Aug. 23, 2022. He was born in 1948, graduated from Wayne State University Law School, and was admitted to the Bar in 1976.

EDWARD G. HENNEKE, P14873, of Flushing, died Feb. 11, 2022. He was born in 1940, graduated from University of Michigan Law School, and was admitted to the Bar in 1965.

JAMES W. LAVIGNE, P16452, of Clinton Township, died May 5, 2022. He was born in 1945, graduated from University of Detroit School of Law, and was admitted to the Bar in 1970.

F. ANTHONY LUBKIN, P32740, of Owosso, died Sept. 29, 2022. He was born in 1955, graduated from University of Michigan Law School, and was admitted to the Bar in 1981.

PATRICK J. MARUTIAK, P40105, of Perry, died Oct. 31, 2022. He was born in 1959, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1987.

MARK C. MELVIN, P27707, of Grosse Pointe Park, died Sept. 16, 2022. He was born in 1952, graduated from Detroit College of Law, and was admitted to the Bar in 1977.

CHARLES B. MOSIER, P18019, of Davison, died March 10, 2022. He was born in 1930, graduated from University of Detroit School of Law, and was admitted to the Bar in 1958.

TODD H. NYE, P59301, of Roscommon, died Oct. 13, 2022. He was born in 1962, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 2000.

FREDERICK K. PLUMB, P18955, of Chatham, Massachusetts, died Oct. 30, 2022. He was born in 1929 and was admitted to the Bar in 1956.

GARY POLLACK, P23641, of Farmington Hills, died Sept. 3, 2022. He was born in 1947, graduated from University of Detroit School of Law, and was admitted to the Bar in 1974.

JAMES A. RUHALA, P19756, of Burton, died June 22, 2022. He was born in 1929, graduated from Detroit College of Law, and was admitted to the Bar in 1968.

JOSEPH R. SGROI, P68666, of Detroit, died Jan. 11, 2022. He was born in 1979, graduated from University of Michigan Law School, and was admitted to the Bar in 2005.

FREDERICK L. STACKABLE, P20869, of Leland, died July 31, 2022. He was born in 1935, graduated from Wayne State University Law School, and was admitted to the Bar in 1962.

HON. JOANN C. STEVENSON, P30923, of Grand Rapids, died Sept. 9, 2022. She was born in 1942, graduated from Detroit College of Law, and was admitted to the Bar in 1979.

PATRICIA J. SULLIVAN, P38077, of Plymouth, died Oct. 25, 2022. She was born in 1955, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1985.

ROBERT N. SWARTZ, P21196, of Kalamazoo, died June 23, 2022. He was born in 1943 and was admitted to the Bar in 1969.

JAMES L. TALASKE, P25221, of Reed City, died Sept. 3, 2022. He was born in 1947, graduated from Wayne State University Law School, and was admitted to the Bar in 1975.

PETER TAZELAAR II, P40420, of Sanford, died Sept. 10, 2022. He was born in 1950, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1987.

JOHN L. THOMPSON, P21403, of Punta Gorda, Florida, died Oct. 7, 2022. He was born in 1941, graduated from Wayne State University Law School, and was admitted to the Bar in 1968.

KENNETH E. TIEWS, P25874, of Grand Rapids, died Aug. 8, 2022. He was born in 1948, graduated from University of Michigan Law School, and was admitted to the Bar in 1976.

PAUL J. ZIMMER, P22733, of Grand Ledge, died Sept. 28, 2022. He was born in 1943, graduated from Wayne State University Law School, and was admitted to the Bar in 1969.

MILTON Y. ZUSSMAN, P22762, of Southfield, died Aug. 8, 2022. He was born in 1921 and was admitted to the Bar in 1950.

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.

ATTORNEY GRIEVANCE COMMISSION SEEKS VOLUNTEER FEE ARBITRATORS

Under MCR 9.130(A), attorneys and clients may submit their fee dispute for binding arbitration. Proceedings are generally governed by MCR 3.602. The rule provides that when an attorney and client agree to submit their fee dispute to binding arbitration under this rule, the grievance administrator may assign an attorney to arbitrate. The arbitrator enters an award in accord with arbitration laws. The prevailing party then files a motion for entry of an order or judgment in a court having jurisdiction under MCR 8.122.

Volunteer arbitrators are needed throughout the state of Michigan. Requests for appointment to the roster of volunteers should be submitted to eserve@agcmi.org.

The Attorney Grievance Commission and the grievance administrator thank those who volunteer for the invaluable service they provide.

TAXES ON REMOTE WORKERS

States likely to step up enforcement

BY CHRISTIE R. GALINSKI AND SAMUEL L. PARKS

Remote work has never been so salient for America's employers and employees. Since the dawn of the COVID-19 pandemic, many employers have become more flexible about permitting remote work. However, many of those same employers and employees are unaware of the burdens of state tax laws for remote workers, though some are beginning to examine how to comply with tax rules when they have remote employees in another state.

This article summarizes tax issues arising from remote work arrangements and explains the triggers for employer liability for state taxes for remote workers. Finally, this article considers several updates to the state tax regime intended to reduce the increasing cost of state tax compliance.

REMOTE WORK AND STATE TAX BACKGROUND

While remote work is no longer at its 2020 peak, it is much more common than it was in 2019. Even before the pandemic, the number of employees working remotely was already on the rise — a trend that does not seem likely to reverse itself.[1] Employees are now deliberately pursuing remote work opportunities, increasing the talent pool for many employers, especially those outside of coastal cities.[2] To increase competitiveness, many employers may wish to allow remote work arrangements and therefore attract workers from other states who may only infrequently come to the physical office.

The rise of remote work has had some obvious benefits, such as employers being able to recruit more global talent, employees being able to move to be near a sick parent, and employers being able to test new markets and geographies before physically expanding.[3] However, employers must investigate the tax consequences of hiring a remote employee in a state where it previously had none.[4] Hiring an employee in a new state could make an employer liable

for complying with requirements such as state payroll income tax withholding, state unemployment tax withholding, state sales taxes, and state business taxes.[5]

Most states provided initial relief from tax rules for remote employees in March 2020, but these provisions have generally sunsetted.[6] Many employers joined the remote work world while these relief provisions were in effect, so they might be surprised to find they owe state taxes for 2022, including amounts that needed to be withheld from their employees.[7]

To make matters more confusing, each state treats each type of tax differently and many states have additional taxes or variations on these taxes (for example, Florida has no personal income tax), so employers will need to invest considerable resources to determine which taxes are owed for each state, how to comply with these taxes, and how to comply with them annually.[8]

PAYROLL TAXES: ONE WORKER FOR ONE DAY

Most states require compliance with payroll taxes when a company has even a single employee performing services in the state,[9] so remote workers almost certainly cause compliance burdens with payroll taxes.[10] Payroll taxes include income tax withholding and unemployment tax withholding. States can require payroll obligations to be withheld if even a single day of work is done in the state, but some states allow for an employee to work remotely for a limited number of days without requiring withholding. Illinois, for example, allows for 30 days of remote work until withholding is required.[11] A silver lining is that many payroll companies are experienced at handling this issue, which reduces the burden for some employers,[12] but small to mid-sized companies may not have the same luxury.

Reciprocity agreements are a special exception to the harsh payroll tax rules and are meant to prevent double taxation. Since most states tax their residents' income wherever it's earned as well as all income earned by individuals in their state, a Michigan resident who works in Indiana could hypothetically find themselves owing taxes to both states. In many cases, state governments will provide tax credits for income taxes paid to other states, but these tax credits *do not* reduce compliance burdens; employers still must withhold for both states and employees still must file with both

states. Under reciprocity agreements, when the resident of one state earns income in another state, only the state of residence taxes that worker's income.

REMOTE WORKERS CAN CAUSE CORPORATE NEXUS

States tax businesses in a variety of ways. Most have sales taxes and corporate income taxes, which are the most common, but there are many other types of taxes such as partnership or LLC taxes, profit taxes, or industry-specific taxes.

States would like to tax any company that sticks a toe into their state, but the United States Constitution requires a certain level of connection — or nexus — with the state before assessing business and sales taxes.[13]

The commerce clause of the U.S. Constitution provides that Congress has the power to regulate commerce among the states,[14] and one consequence is that states are unable to tax in a manner that interferes or discriminates against interstate commerce. Using its authority under the commerce clause, Congress has limited state taxation several times for issues such as:

1. Prohibition on imposing an income tax on sales solicitation;[15]
2. Prohibition on states taxing retirement income by state of residence;[16]
3. Prohibition on taxes placed on activity in navigable waters.[17]

The U.S. Constitution's due process clause prohibits state governments from depriving any person of property without due process of law, making states unable to levy taxes that impose undue burdens on interstate commerce.[18] In the U.S. Supreme Court decision in *South Dakota v. Wayfair* in 2018, Justice Anthony Kennedy clarified that the commerce clause and due process standards for state taxes, while not identical, have significant parallels so the prohibition on imposing undue burdens on interstate commerce is similarly provided by the commerce clause. [19]

These principles were made into a framework for assessing the validity of state taxes in 1977 when the Supreme Court created a four-part test:

1. The activity has a substantial nexus with the taxing state;
2. The tax is fairly apportioned;
3. There is no discrimination against interstate commerce;
4. The tax is fairly related to services the state provides.[20]

The most important factor is nexus and in *Wayfair*, the Supreme Court overturned prior precedent requiring a physical presence for a state to have a nexus. Instead, it uses an economic presence standard requiring only gross sales or sales volume in the state.

States have different levels of nexus that trigger tax, which also varies by tax type.[21] Since the Supreme Court decision in *Wayfair*, most states have established a gross revenue threshold for sales taxes, such as $100,000 for Michigan[22] and $500,000 for California.[23] Many also include gross sale volume thresholds as well.

For entity-level business taxes, states typically follow a formula based on some form of sales revenue, number of employees, and value of real estate. Determining liability for a single state is time consuming and expensive due to the detail described above.[24]

Moreover, some states go even further by taxing companies that do not have employees within their boundaries. For example, some states attempt to use a "for the benefit of the employer" rule[25] to require payment of state tax even when an employee's work is performed outside of the state unless such work is "for the convenience" of the employer — think consulting at a client's plant for a few months or managing a branch that is out of state.[26]

The most notable state using this type of rule is New York, which could experience substantially more revenue loss than other states due to remote work.[27] Employers and employees will still need to file taxes in the state in which the remote work is performed, but they will likely receive credits for taxes paid to New York.[28] But for those who do not receive credit in their home state for taxes paid in New York, the "convenience of the employer" rule is a major drawback. Compliance with nuances such as these is yet another hurdle in handling remote workers.

COMPLIANCE CONCERNS WEIGH HEAVILY

The burdens of these various state taxes may be, at present, too much to bear for small and medium-sized employers who would like to open themselves to remote work to access a larger talent pool to remain competitive.[29] The cost of hiring a remote employee or allowing an employee to remain with the company remotely (a massive boon in reducing turnover) currently includes the administratively arduous and costly process of contacting attorneys and accountants to discern whether there are any filing and reporting requirements for remote employees in their state; deciding whether hiring the employee creates nexus; and creating withholding, unemployment, and business tax accounts in each state by adhering to myriad processes and filing many forms, all unique to each state.[30] Then, once the employee is actually hired, the company will need to annually calculate how much of each tax is owed based on formulas that vary by state; file information and tax returns for each state for each type of tax; and recalculate apportionment factors to include the new states with a single employee.[31]

The weight of this costly compliance does not fall solely on employers, as states have to police an increasingly complex system and project revenue based on income that is becoming more difficult to forecast.[32] Given these difficulties, California actually increased its sales tax nexus threshold to $500,000 from its initial threshold of

$100,000,[33] which mirrored the $100,000 threshold in *Wayfair*; enforcement at the lower threshold amount was reducing revenue due to administrative policing costs.[34]

Larger companies are less affected by these rules because they can leverage their economies of scale to have teams dedicated to handling compliance issues such as state taxes.[35] Small and medium-sized employers are at a comparative disadvantage.[36] And while larger companies might be less affected, they too are ultimately worse off just like states, employees, and small and medium-sized employers.[37] Moreover, larger companies are more likely to engage in corporate transactions which have substantial documentation and compliance costs with all state offices where remote workers reside. All parties to this system are spending resources to police and comply with requirements.[38]

SOLUTIONS AND CHALLENGES

While all parties involved in remote-worker state issues are harmed by having to comply, resolving these issues is a significant challenge. In any proposed resolution, some states will benefit more than others, making reforms politically challenging to enact.[39]

One solution is reciprocity agreements. For employees and employers, the simplicity of this solution is ideal — only one state's tax rules would require compliance. While reciprocity agreements normally deal with employees who cross state lines for work, a new section could be added to reciprocity agreements to clarify that the first 10 remote employees are treated as working in the other state when the employer's headquarters is in that state.

There are preconditions that must be met for reciprocity, including state-specific procedures that must be followed,[40] and some states have reciprocal thresholds after which withholding obligations begin.[41] Still, increased reciprocity among states on remote workers would bring some consistency to state income tax withholding requirements.

Another solution is having every state change their nexus and income withholding rules to provide an exception for a limited number of remote workers. This cap is like a state sales tax threshold requiring a minimum amount of sales. A minimum remote-worker threshold — such as 10 employees — would provide flexibility to smaller employers while preventing states from foregoing significant potential revenue. A universal threshold also would let employers know when they are required to begin complying with state laws.

A more unlikely method of simplifying taxation of remote workers is a federal law providing for the threshold under commerce clause powers, but the viability and constitutionality of this option is not clear and certainly has not been an area of legislative priority.

The challenge with the minimum employee threshold will be convincing states to enact it, as some states will forego revenue. However, the benefit of these rules is that some higher-paid employees will stay in states that would not otherwise offer those opportunities and the states losing those employees can still retain the tax revenue. The personal benefits of moving workers from expensive coastal cities to more affordable locations close to family are clear. States will also have substantially less compliance costs.

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Samuel L. Parks is an associate in Miller Canfield's corporate group in Troy with a focus on transactional and tax work. He has experience advising public and private sector clients on employee benefit issues including facilitating corrections of plan documentation and operational compliance failures as well as drafting plan documentation and participant communications. A University of Michigan Law School graduate, Parks has previously worked at the Michigan Supreme Court and the Washtenaw Public Defender's Office.

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SBM
STATE BAR OF MICHIGAN

FY 2023 BUDGET SUMMARY

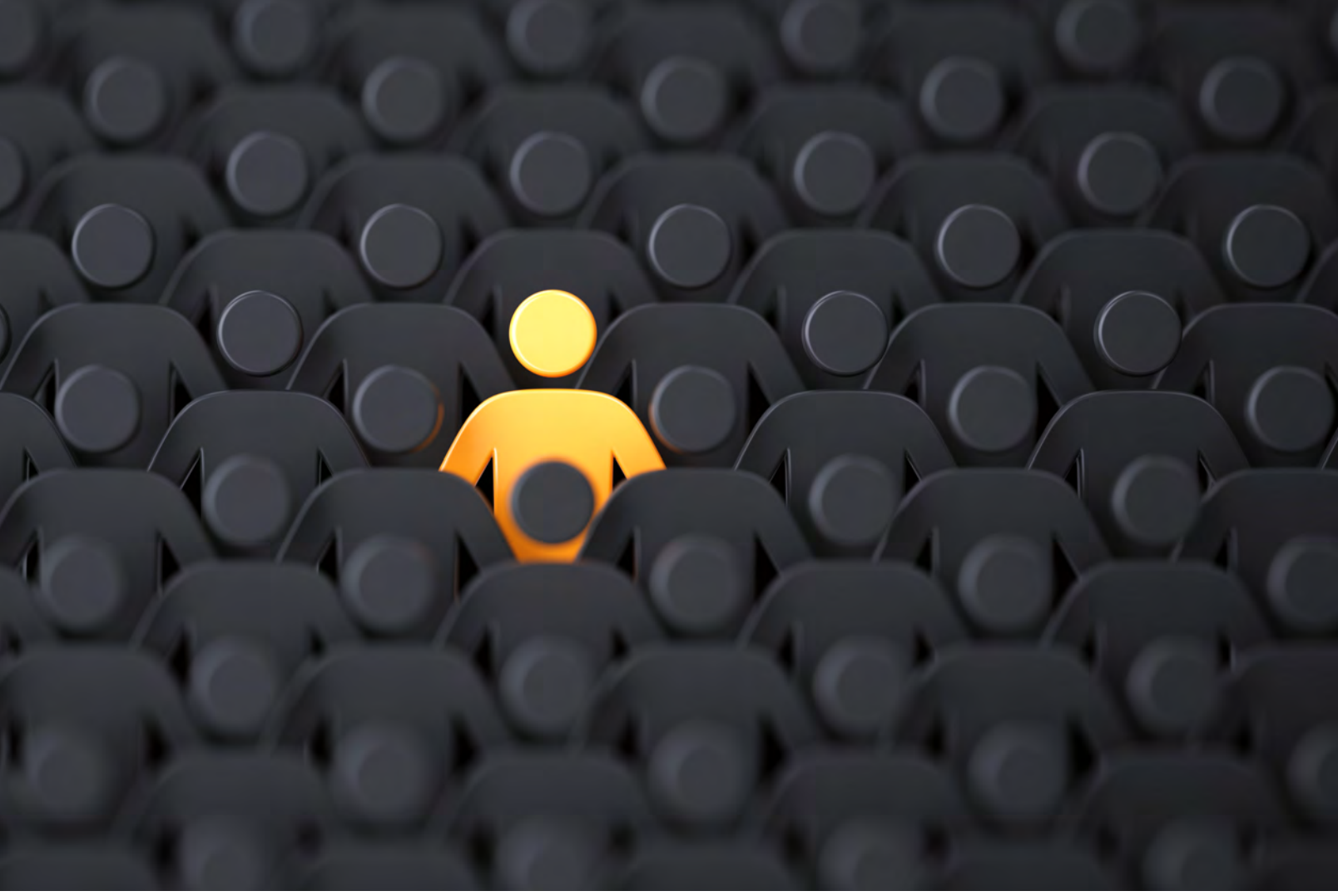
STATE BAR OF MICHIGAN

OCTOBER 1, 2022 - SEPTEMBER 30, 2023 ADMINISTRATIVE FUND

On July 22, 2022, the Board of Commissioners adopted a budget for the 2023 fiscal year that continues the funding of the State Bar of Michigan's Strategic Plan.

The budget and the Strategic Plan are available at **michbar.org/generalinfo**

OPERATING AND RELATED REVENUES:	
License Fees and Related	10,929,500
All Other Operating Revenues	1,747,435
Total Operating Revenues	12,676,935
OPERATING EXPENSES:	
Salaries	5,894,701
Benefits and Payroll Taxes	2,012,614
Total Labor-Related Expenses	7,907,315
NON-LABOR OPERATING EXPENSES:	
Legal	234,090
Public and Bar Services	1,073,875
Operations and Public Policy	2,541,980
Total Non-Labor Operating Expenses	3,849,945
Total Operating Expenses	11,757,260
Total Operating Income (Loss)	**919,675**
NON-OPERATING REVENUE (EXPENSES)	
Investment Income	194,000
BUDGETED INCREASE/(DECREASE) IN NET POSITION	**$1,113,675**



Lamenting the loss of public policy claims for independent contractors

BY CHANNING ROBINSON-HOLMES

Imagine two workers employed by the same employer. Both are directed by their employer to violate the law. Both refuse and are promptly terminated. They, in turn, seek legal counsel. The underlying facts support liability under a Michigan common law public policy claim.[1] Yet, only one of these workers will be able to avail themselves of this claim. Why? Because only one of these workers is defined as an "employee" while the other is an "independent contractor."

Over the nearly 40 years that Michigan has recognized a common law claim for retaliatory discharge in violation of public policy, Michigan courts have not issued a published decision prohibiting independent contractors from bringing such claims.[2] Only now, with the Court of Appeals' 2021 decision in *Smith v. Town & Country Properties II, Inc.*,[3] has this proposition become precedential and foreclosed thousands of Michigan workers from bringing this common law cause of action.

And what a time for this to become the law. The employment landscape has, and continues to change, drastically. As of 2018, one in five workers was a contract worker — an increase of more than 5% from 2008. Over the next decade, experts anticipate these numbers to skyrocket, which will result in independent contractors comprising approximately half of the nation's workforce.[4] Consequently, and as a result of the *Smith* decision, roughly half of Michigan's workforce will

be precluded from bringing common law public policy claims.

Of course, a number of Michigan industries rely heavily on independent contractors, and those workers will suffer disproportionately. For example, the plaintiff in *Smith* was an associate real estate broker and, as such, he was subject to statutes and regulations defining his role, responsibilities, and, as the Court of Appeals recognized, the nature of his employment relationship with his brokerage firm.[5] Because Smith, like the overwhelming majority of Michigan's real estate brokers, was paid primarily via commission, he was determined to be an independent contractor. The effect of the *Smith* decision, then, is to bar virtually all of Michigan's real estate agents from bringing public policy claims regardless of the merit of their claims, the harm they have suffered, or the potential harm to the public.

How is such a result consistent with the spirit of public policy jurisprudence? The country's first court opinion recognizing a civil cause of action under state public policy, *Petermann v. International Brotherhood of Teamsters,* issued in 1959, defined public policy to be the "established interests of society" and further defined a violation of public policy to be an action that contravened those interests.[6] Elaborating, the *Petermann* court stated: "By 'public policy' is intended that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good."[7]

Indeed, it is difficult to imagine a workplace situation more injurious to the public than a worker — be they an employee or independent contractor — being compelled to violate the law. The facts alleged in *Smith* provide a particularly compelling example. The plaintiff, as an associate real estate broker, possessed specialized knowledge regarding real estate sales, which are subject to stringent laws and regulations. Smith's clients, in turn, relied on his specialized knowledge, rendering them particularly vulnerable should Smith neglect to inform them of pertinent information or otherwise provide them with misinformation. This is precisely what Smith alleged the owner of his brokerage firm was demanding. When Smith refused to comply with the owner's demands, he was promptly separated from the company.

Common law public policy claims are intended to prevent and remediate exactly this type of situation where a worker is terminated for refusing to violate the law. As the *Petermann* court expertly articulated:

> "It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, *whether the employment be for a designated or unspecified duration*, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute … [I]n order to more fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when the reason for the dismissal is the employee's refusal to commit perjury. To hold otherwise would be without reason and contrary to the spirit of the law." (Emphasis added.)

In ruling contrary to the foundational purpose of public policy claims, the Michigan Court of Appeals in *Smith* nonetheless acknowledged that providing independent contractors with a common law public policy claim "may be sound public policy," yet declined to issue a decision consistent with this reasoning.

This is not the only inconsistency effectuated by the *Smith* decision. *Smith* effectively bars independent contractors from remedial action under common law for retaliatory termination when protections exist under comparative state legislation. Michigan's Elliott-Larsen Civil Rights Act (ELCRA) prohibits discrimination and retaliatory termination by an employer against "an individual with respect to employment."[8] Michigan's Persons with Disabilities Civil Rights Act (PDCRA) has identical language prohibiting retaliatory termination or discrimination "against an

IN PERSPECTIVE

CHANNING ROBINSON-HOLMES

individual[.]"[9] The Michigan Supreme Court has held that this statutory language "does not state that an employer is only forbidden from engaging in such acts against its own employees. Indeed, the CRA appears to envision claims by non-employees" including independent contractors.[10]

As of 2018, one in five workers was a contract worker. Over the next decade, experts anticipate these numbers to approximately half of the nation's workforce.

In light of these comparative statutes, the disparity resulting from the *Smith* decision's exclusion of independent contractors is glaringly inconsistent and nonsensical. With *Smith*, independent contractors have legal recourse when they oppose *certain* violations of law. Returning to the facts of the case, if Smith had, for example, refused to be complicit in a scheme intended to discriminate against individuals based on race or age and subsequently suffered a retaliatory termination, he would have an actionable cause under the ELCRA. Similarly, if he had refused his employer's directive to engage in practices discriminatory toward individuals with disabilities and suffered retaliatory termination as a result, he would have a cause of action under the PDCRA. Yet, because Smith alleged that he refused to violate a different law, he is deemed to be without legal recourse.

What justification can there be for this discrepancy in the common law's protections for Michigan workers when the Court of Appeals has acknowledged it is not rooted in the furtherance of public policy?

There is no inherent principle of law that justifies the inconsistency. For example, Michigan public policy claims do not sound in contract, which could impact the standing of a plaintiff. Rather, the Michigan Supreme Court has clearly articulated that wrongful discharge claims, predicated on public policy, sound in tort.[11] As a claim rooted in tort, public policy claims are not constrained or voided due to a worker's classification on account of legal principle.

Several state supreme courts and Michigan Court of Appeals Judge Jane Beckering have relied upon this reasoning to extend public policy claims to workers outside of the at-will employment context. In a concurring opinion in *Steffy v. Board of Hospital Managers of Hurley Medical Center*, Beckering, after noting "that there is no published opinion in Michigan that concludes that the public policy exception for wrongful discharge claims arises only in at-will employment relationships," reasoned "that the tort of discharge in violation of public policy should be available to all employees, regardless of their contractual status, as it differs in both scope and sanction from a breach of contract action for termination in violation of a just cause employment contract (or a collective bargaining agreement)."[12] Reaching the same conclusion, in 2000 the Supreme Court of Washington reasoned in *Smith v. Bates Technical College* that:

> "[the] right to be free from wrongful termination in contravention of public policy may not be altered or waived by private agreement, and is therefore a nonnegotiable right … *the right is independent of any contractual agreement*[.]"[13] (Emphasis in original.)

Similarly, in 1992, the Utah Supreme Court in *Retherford v. AT&T Communications of Mountain States* held that "[b]oth respect for precedent and sound public policy compel the conclusion that the tort of discharge in violation of public policy should be available to all employees, regardless of their contractual status."[14]

While it is true that historically, independent contractors have been treated differently from employees under various laws and regulations, the rationale for doing so — the so-called increased control an independent contractor has over his or her work circumstances — has become antiquated and can no longer provide a rational basis for denying independent contractors legal protections afforded to employees. In reality, independent contractors typically mirror their employee counterparts and enjoy fewer benefits and protections. Since they are responsible for income tax as well as self-employment tax, independent contractors pay higher taxes than employees.[15] By contrast, employees split Social Security and Medicare taxes with their employers, receive benefits, and have legal protections under federal and state law. Because employers are incentivized in this way, it is not uncommon for them to misclassify employees as independent contractors despite extending independent contractors no more "freedom" than actual employees. Such misclassification of independent contractors is so widespread that it is a primary focus of the U.S. Department of Labor and Michigan Attorney General Dana Nessel.[16]

Given the developments in the workforce discussed above, including the lack of a functional difference between independent contractors and employees, it seems only appropriate that Michigan common law acknowledge these changes and provide independent contractors and employees with public policy protections. The Michigan Supreme Court has recognized the validity of this argument, stating:

> "*The common law does not consist of definite rules which are absolute,*

> *fixed, and immutable like the statute law*, but it is a flexible body of principles which are designed to meet, and are susceptible of adaption to, among other things, new institutions, public policies, conditions, usages and practices, and changes in mores, trade, commerce, inventions, and increasing knowledge, as the progress of society may require. *So, changing conditions may give rise to new rights under the law*[.]"[17] (Emphasis added.)

Despite the many reasons to take up this issue, the Michigan Supreme Court declined to hear the *Smith* case, making the Court of Appeals published decision binding precedent for the foreseeable future. It is difficult to understand why the Court declined to grant leave on *Smith* given the impact it will have on Michigan workers and the implications for the public welfare. Are we to assume that the courts are so wary of potentially expanding the ambit of public policy claims, despite the Supreme Court's earlier dicta, that the common law does not consist of definite rules which are "absolute, fixed, and immutable"?

In *Smith*, the Court of Appeals signaled that extending public policy claims to include independent contractors (though no prior published decision excluded independent contractors from bringing such claims) should be a legislative decision. Are the courts relinquishing their authority over court-created common law causes of action in favor of legislative control? Does anyone really think this is on the legislature's radar?

Without legislative action on this issue, it is safe to assume that *Smith* will be a thorn in the side of plaintiff lawyers for some time as more and more potential plaintiffs shift to contracting positions. And woe is the plaintiff who works in real estate.

Channing Robinson-Holmes, a civil rights and employment litigation attorney at Pitt McGehee Palmer Bonanni & Rivers in Royal Oak, was recently a finalist for the Public Justice Trial Lawyer of the Year Award. She is a graduate of the University of Michigan and Wayne State University Law School.

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9. MCL 37.1202.
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Title IX and college campus sexual assault

BY JULIE A. GAFKAY AND JAMES A. JOHNSON

Over the past several years, colleges and universities have experienced a plethora of litigation involving student-on-student sexual assaults.[1] The majority of these suits assert Title IX causes of action.[2]

Typically, at the college level, a student-complainant alleges that he or she was sexually assaulted by a fellow student-respondent. University investigators determine if the respondent violated school policy. This student conduct investigation is separate from a criminal investigation. If it is determined by a preponderance of evidence after a hearing that the student-respondent violated university policies, sanctions are issued. In most cases, the respondent can appeal the decision at the university level.

As of Aug. 14, 2020, under Title IX regulations promulgated by the U.S. Department of Education, attorneys are now allowed to question witnesses at hearings during a university's investigative process.[3] A sexual harassment complaint under Title IX may be filed with the Department of Education's Office of Civil Rights (OCR) within 180 days of the last act of discrimination.[4] Regardless of the outcome of the OCR complaint, a victim can file a federal lawsuit.[5] Indeed, victims of sexual harassment can file a Title IX lawsuit without filing with the OCR first. The statute of limitations depends on the state in which the school is located.[6]

Under Title IX, holding a college or university liable for peer-to-peer sexual harassment requires the victim to demonstrate the institution acted with deliberate indifference. The U.S. Supreme Court held in *Davis v. Monroe County Board of Education*[7] that a recipient of federal education funds, such as a college or university, may only be liable for student-on-student harassment when the university had

an official policy of deliberate indifference, creating a heightened risk of sexual harassment to the plaintiff.[8]

After the Supreme Court decision in *Davis*, the Department of Education amended regulations implementing Title IX. The amendments adopted a modified version of the deliberate indifference standard set forth in *Davis*.[9] Under the amended regulations,[10] a university must provide supportive measures to complainants, which include:

> [N]on-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.[11]

If the respondent is found to be responsible for sexual harassment, the institution must effectively implement remedies for the complainant designed to restore or preserve the complainant's equal educational access and may impose disciplinary sanctions on the respondent.[12]

SIXTH CIRCUIT: DELIBERATE INDIFFERENCE

The U.S. Court of Appeals for the Sixth Circuit recently decided *Foster v. Board of Regents of University of Michigan*, a Title IX case involving the sexual assault of a student by a fellow student. The court found that the University of Michigan was not liable under Title IX because even if the harassment occurred, the institution was not shown to have been deliberately indifferent to the plaintiff's complaints.[13]

In *Foster*, the plaintiff was part of an off-site MBA program based in Los Angeles that occasionally required students to stay at a hotel to participate in weekend educational sessions. The plaintiff became friends with the respondent through the program. Between September 2013 and February 2014, the respondent expressed interest in a romantic relationship with the plaintiff. On multiple occasions, he made unwanted physical contact including grabbing her buttocks, rubbing her leg, forcefully kissing her, and more than once climbing into her bed and attempting to force himself on her.[14]

On March 13, 2014, the plaintiff first reported the sexual harassment and assaults to the university's Office of Institutional Equity. After the initial report, the respondent was instructed not to have contact with the plaintiff and not to retaliate against her in any way. In addition, the plaintiff and respondent were required to stay at different hotels and the respondent could not eat in the same dining room. However, the respondent was still allowed to attend class with the plaintiff, though he was not allowed to attend social activities. The plaintiff complained the accommodations were not sufficient to address her safety concerns.[15]

On April 3, 2014, the respondent sent a crude email to various university administrators referring to the plaintiff as a "psycho" and a "lying slut whore." Still, the respondent was allowed to attend class with the plaintiff the next day; during breaks that day, the respondent stood in the plaintiff's way when she exited class and went to get a beverage and blocked her when she tried to return to her desk. The plaintiff requested that security be called and the respondent be prevented from attending class the next morning. While the respondent did not attend class the next morning as directed by the university, he sent several classmates messages calling the plaintiff "a mean awful person," a "wackadoo chick," and stating, "my, what a time we had in her bed and mine for a few months there."[16]

After the program concluded, the respondent sent more emails to university administrators generally criticizing the investigation, using

AT A GLANCE

The standard neither requires that the school purge itself of actionable peer harassment nor does it require courts to conclude that minimal ineffective or belated efforts to respond to sexual harassment are clearly unreasonable as a matter of law.

aggressive language, and making various demands. For instance, in one email, the respondent said he would graduate with his class in person; though the university barred him from attending commencement and advised him to "exercise caution," the respondent flew to Ann Arbor and appeared at a graduation function.[17]

The plaintiff brought a lawsuit under Title IX which was dismissed on summary judgment. The court held the university responded "promptly, compassionately, and effectively" to Foster's complaints. The plaintiff appealed the decision to the Sixth Circuit which initially reversed the summary judgment,[18] but after a rehearing en banc, the Sixth Circuit affirmed the district court ruling.

After the 1999 Supreme Court decision in *Davis v. Monroe County Board of Education*, the U.S. Department of Education amended regulations implementing Title IX and adopted a modified version of the deliberate indifference standard set forth in *Davis*.

The Sixth Circuit held that in order to prevail in a Title IX action, the victim must establish the school was "deliberately indifferent to sexual harassment, of which [it had] actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[19] The court relied on the 1999 U.S. Supreme Court decision in *Davis v. Monroe County Board of Education*, which held that a school's response to sexual harassment is deliberatively indifferent if it is "clearly unreasonable in light of the known circumstances."[20] The standard neither requires that the school purge itself of actionable peer harassment, nor does it require courts to conclude that "minimal, ineffective, or belated efforts to respond to sexual harassment are not clearly unreasonable as a matter of law."[21]

In *Foster*, the Sixth Circuit did not find that the school engaged in deliberate indifference. The university knew the initial no-contact order was violated when the respondent texted the plaintiff and when the university received the respondent's erratic emails. Afterward, the plaintiff detailed an escalating campaign of harassment by the respondent and what the plaintiff viewed as ineffective responses by the university.

Instead of finding a factual dispute regarding whether the university engaged in deliberate indifference, the court dismissed the plaintiff's action finding that as a matter of law, the university did not engage in deliberate indifference under applicable legal standards. By doing so, the court created a high bar for a plaintiff-victim to meet in instances of sexual harassment of a peer on campus, even when the complaint includes sexual assault. That deliberate indifference standard, as interpreted by the Sixth Circuit, has removed a fact finder's ability to review the effectiveness of the university's action.

OVERCOMING DELIBERATE INDIFFERENCE

Overcoming the deliberate indifference standard in actions against public schools where peer-on-peer harassment is at issue, the reasonableness of the school's response, the school's control over the context and the respondent, and actual notice of the alleged harassment or assault all have been found to be relevant. The U.S. Court of Appeals for the 10th Circuit in *Farmer v. Kansas State University* found that the university's deliberate indifference to student reports of rape caused victims to be more vulnerable to sexual harassment.[22] In that case, the plaintiffs alleged that the university's deliberate indifference forced them to continue attending school with the student-rapists, who were potentially emboldened, causing the plaintiffs to withdraw out of fear of encountering the student-rapists and other students who knew of the rapes.

In *C.R. v. Novi Community School District,* the U.S. District Court for the Eastern District of Michigan determined that the student-plaintiff had a claim under Title IX because the school's deliberate indifference left them more vulnerable to future abuse.[23] In that case, the respondent sexually touched the victim, who was 12 or 13 at the time of the attacks and receiving special education services, on numerous occasions. The school nonetheless wanted to place the victim back in the same classroom as the respondent, exposing the victim to the same risk of abuse.

In *Feminist Majority Foundation v. Hurley,* the Fourth Circuit U.S. Court of Appeals decided there was deliberate indifference in a Title IX claim brought by a campus feminist group which was being sexually harassed through posts on a university-maintained social media site.[24] The court found that the university's efforts were not reasonably calculated to end the harassment; the institution only

created two listening circles, sent a generic email, and on one occasion dispatched a campus police officer to accompany a threatened student.

The Ninth Circuit U.S. Court of Appeals in *Karasek v. Regents of the University of California*[25] held that deliberate indifference can be found in a pre-assault claim to survive a motion to dismiss when the following is shown:

1. the school maintained a policy of deliberate indifference to reports of sexual misconduct;
2. which created a heightened risk of sexual harassment;
3. in a context subject to the school's control; and
4. the plaintiff was harassed as a result.

The court found that actual knowledge or acting with deliberate indifference to a particular incident of harassment was not necessary for a pre-assault claim if those four elements were established and was persuaded by a state auditor's report finding mishandling of complaints was putting students at risk and the university failed to address those concerns adequately.

CONCLUSION

Under Title IX, holding a college or university liable for peer-to-peer sexual assault requires the victim to demonstrate the institution acted with deliberate indifference. The U.S. Supreme Court in *Davis* held that a college or university may only be liable for student-on-student harassment where the university had an official policy of deliberate indifference.

For liability to attach, a university must have had actual notice of the alleged harassment or assault, its response must be unreasonable and deliberately indifferent, the student must be found to be under the university's control, and it must be shown that these factors effectively precluded the complainant's access to an education.

The Sixth Circuit in *Foster* involved the sexual assault of a student by another student. That court found that the University of Michigan was not liable under Title IX because it was not deliberately indifferent.

All of the above should be considered when evaluating peer-on-peer student sexual harassment claims. Deliberate indifference is a difficult, but not impossible, standard to meet. When a university or college has acted with deliberate indifference and failed to protect its students, Title IX provides accountability.

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ENDNOTES

1. *Doe v Brown Univ,* 166 F Supp 3d 177, 180 (D RI, 2016) and *Doe v Univ of Kentucky*, 971 F3d 553 (CA 6, 2020).
2. 20 USC 1681.
3. 34 CFR 106.
4. 28 CFR 42.107(b).
5. *Cannon v Univ of Chicago,* 441 US 677, 717; 99 S Ct 1946; 60 L Ed 2d 560 (1979) (holding that an individual has a private right of action under Title IX).
6. In Michigan, the statute of limitations for a civil rights claim, like Title IX, is three years, *Lillard v Shelby County Bd of Educ*, 76 F3d 716, 729 (CA 6, 1996).
7. *Davis v Monroe County Bd of Education,* 526 US 629; 119 S Ct 1661; 143 L Ed 2d 839 (1999).
8. *Id.; Karasek v Regents of Univ of California,* 956 F3d 1093, 1112 (CA 9, 2020); and *Lozano v Baylor Univ*, 408 F Supp 3d 861, 882-883 (WD Tex, 2019) denying a motion to dismiss on heightened risk claim.
9. 34 CFR 106.
10. 34 CFR 106.44(a).
11. 34 CFR 106.30(a).
12. 34 CFR 106.45(b)(1)(i). See also Bardwell, *No One is an Inappropriate Person: The Mistaken Application of Gebser's Appropriate Person" Test to Title IX Peer Harassment Cases,* 68 Case W Res L Rev 1343, 1364-65 (2018), available at <https://scholarlycommons.law.case.edu/caselrev/vol68/iss4/12/> [https://perma.cc/YZ52-KBP8] (accessed November 4, 2022).
13. *Foster v Bd of Regents of Univ of Mich,* 982 F3d 960 (CA 6, 2020).
14. *Id.* at 972.
15. *Id.*
16. *Id.* at 976-977.
17. *Id.* at 978-979.
18. *Foster v Bd of Regents of Univ of Mich,* 952 F3d 765 (CA 6, 2020).
19. *Id.* at 981.
20. *Davis v Monroe County Bd of Education,* 526 US at 648.
21. *Foster v Bd of Regents of Univ of Mich,* 982 F3d at 981.
22. *Farmer v Kansas State Univ,* 918 F3d 1094 (CA 10, 2019).
23. *C.R. v. Novi Cmty. Sch. Dist.*, 2017 U.S. Dist. LEXIS 18394.
24. *Feminist Majority Fd v Hurley*, 911 F3d 674 (CA 4, 2018).
25. *Karasek v Regents of Univ of California,* 948 F 3d 1150, 1169 (CA 9, 2020).

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PUBLIC POLICY REPORT

LEGISLATURE

SB 1162 (Wozniak) Courts: Court of Appeals; jurisdiction of the Court of Appeals to include admitting individuals to the State Bar; expand.

POSITION: Support.

IN THE HALL OF JUSTICE

Amendment of Rule 1.109 of the Michigan Court Rules (ADM File No. 2002-37) — Court records defined; document defined; filing standards; signatures; electronic filing and service; access (See Michigan Bar Journal November 2022, p 64).

STATUS: Comment period expires 1/1/23; public hearing to be scheduled.

POSITION: Support.

Proposed Amendments of Rules 2.002 and 7.109 of the Michigan Court Rules (ADM File No. 2016-10) — Waiver of fees for indigent persons; record on appeal (See Michigan Bar Journal November 2022, p 64).

STATUS: Comment period expires 1/1/23; public hearing to be scheduled.

POSITION: Support.

Proposed Amendment of Rule 2.002 of the Michigan Court Rules (ADM File No. 2021-49) — Waiver of fees for indigent persons (See Michigan Bar Journal November 2022, p 69).

STATUS: Comment period expires 1/1/23; public hearing to be scheduled.

POSITION: Support the proposed amendment to MCR 2.002 to the extent that it is intended to align statutory provisions and court rules, but express concern over the practicality of indigent defendants complying with these rules, most notably strict timelines.

Proposed Amendment of Rule 6.112 of the Michigan Court Rules (ADM File No. 2021-32) — The information or indictment (See Michigan Bar Journal November 2022, p 67).

STATUS: Comment period expires 1/1/23; public hearing to be scheduled.

POSITION: Support.

Proposed Amendment of Rule 5 of the Rules for the Board of Law Examiners (ADM File No. 2021-40) — Admission without examination (See Michigan Bar Journal November 2022, p 68).

STATUS: Comment period expires 1/1/23; public hearing to be scheduled.

POSITION: Support.

PLAIN LANGUAGE

A legal-writing carol

BY MARK COONEY

From time to time, we bring back this seasonal favorite, a spirit of Christmas past. It's a classic. — JK

Ebenezer Scribe stoked the dying embers, folded himself inside a wool afghan, and rejoined his wingback chair. He'd had another productive day, adding a good ten billable hours to Scribe & Morley's ledger. Now, in the faint firelight, he was enjoying his hard-earned repose. As he picked up his bowl of stew, he felt a whisper of a draft against the back of his neck and then, inexplicably, heard the gentle ring of the old servant bell, a vestige of his Victorian home's century-old design.

"Humbug," scowled Scribe, who was in no mood for mysterious disturbances. But he would not quell things so easily this night.

Clank, clank, thump.

Scribe snapped to attention. A few seconds passed. Then quiet again. "Confounded old pipes. Humbug!" He dipped his spoon into his stew. Then the servant bell rang again, this time with vigor.

Clank, clank, thump.

"Blasted, confounded old —"

But before the next word fell from Scribe's acid tongue, every bell and chime in the house clamored. Scribe's stew bowl fell to the floor, dumping its contents onto the hearth rug. And then, before Scribe could register what was happening, a glowing figure passed through the closed door as easily as sunlight through plate glass. The limp fire roared to life as if greeting an old friend, and Scribe as face to face with a terrifying specter.

"Wha … what …" stammered Scribe, lifting a hand up to shield his eyes.

"Ebenezer."

"Who … what are you? Why do you disturb my supper this way?"

"Do you not recognize me, Ebenezer? Look. Whom do you see?"

Scribe looked more carefully into the ghostly glow and made out a familiar face, the face of his long-dead law partner, Jacob Morley. The ghost's eyes were vacant, its expression blank. Yet its torment was evident. The ghost was clenched in chains — an elaborate network of links that bound it in eternal struggle. As Scribe looked closer still, he saw that the chains were made of words: *save as hereinbefore otherwise stipulated … as duly executed and attested by said party of the first part … and by these presents does unconditionally grant, bargain, and sell unto the said party of the second part, to have and to hold, the said chattels, goods, and objects hereof …*

Scribe mustered his voice again. "My dear Morley. My good partner and colleague. But it can't be. Bah, humbug! My eyes are tricking my brain, and I won't have it. You're nothing more than a figment, the untoward product of a bad morsel of beef."

"Your eyes do not lie, Ebenezer."

"But … but what do you want of me? And why are you so tortured? You were a good, able attorney, and your billables were always high and lucrative for our firm. Why do you come to me in chains?"

"I wear the chains I forged in life — chains made from the boilerplate, archaic language that built a wall of intimidation and confusion between me and my readers. The impenetrable words that forced my clients to beg for an explanation time and again. I'm chained by the countless surplus words, the inflated words, the rote

"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.

doublets and triplets. I wear the excess, born of laziness and vanity, that tried my readers' patience. The words that prevented clarity rather than ensuring it. I wear the chains of *legalese*, now, as I did in life."

"But those words served you well enough, Morley. Why should you regret them now? And why should I abandon what worked for my predecessors — what worked for you? It was good business, wasn't it?"

"Business? Good business? *Clarity* was my business, Ebenezer. Reader comprehension was my business. Those words didn't serve me well. I made money in spite of them. I chose the perceived safety of the stale status quo rather than striving for better."

"But clarity would dumb it down, Morley," replied Scribe.

"Ebenezer Scribe!" roared the ghost, shaking its chains.

Scribe cowered in his chair.

"Clarity is not dumbing it down. Clarity is smartening it up! Why is it, Ebenezer, that you now use a computer to write, use emails and text messages to correspond, and file briefs electronically — modern advances barely dreamt of while I was alive — yet you continue to write in a style that was already antiquated before World War II? Does that make sense, Ebenezer?"

Scribe gave no answer.

"Tonight, you will be visited by three more spirits, one each hour, starting at the stroke of midnight. Heed their words, Ebenezer — their plain words. See the folly of communicating in ways that inhibit communication."

And with that, Morley's ghost retreated from the room as quickly as it had appeared. Scribe sat in stunned disbelief, his plans for a relaxed dinner now a distant memory.

"Humbug," Scribe murmured, though without his usual conviction. "I must have dozed off for a moment there. Bad beef. Nothing a good night's sleep won't put behind me."

Scribe's sleep passed uneventfully until his bedroom clock started chiming. He stirred and woke. Then he began counting. On the twelfth chime, Morley's prophecy took life. Scribe's room glowed bright, and from the glow came a spirit that flitted and danced like a candle flame. It shifted its shape and face in quick bursts while Scribe looked on, aghast. Grabbing Scribe's trembling hand, it announced, "I'm the Ghost of Writing Past, Scribe. Your past. Come with me."

"But I … I don't want to —"

But the ghost whisked Scribe out of the house before he could finish his protest, and within seconds Scribe was a world away, standing beside a young law student who was enjoying a boisterous study-group session. Scribe was looking at himself nearly forty years earlier.

"Spirit, that's me, and this is my law-school apartment! Why, that's my buddy Richard Wilkins and good ol' Jack Robinson. Richard, Jack, how are you, my old friends?"

"They can't hear you, Scribe. But you can hear them. Listen."

"Boy, Professor Fezziwig was really going on and on about that Roe v. Wade *case today. In a few years, nobody will even remember it," quipped Richard. "Hey, did you read that form contract in our Contracts text, Ebenezer?"*

"You don't read it, Richard. You endure it, like a bad movie. It's a monument to terrible writing. Listen to this nonsense: 'It is hereby covenanted and agreed that any claims, disputes, or controversies arising subsequent to the signing of this Agreement and which arise out of or concern the aforestated terms, provisions, or conditions of this Agreement shall be subject to all applicable laws prevailing in the State of Michigan as applied by a court of competent jurisdiction.' What was that lawyer on, anyway?"

"Must've been a Woodstock casualty!" joked Jack, and laughter filled the room.

"How about simply, 'Michigan law governs this contract'?" said the young Ebenezer.

"Well done, Ebenezer!" said Richard, bursting into mock applause.

"Let me tell you, gentlemen, when I get out into practice, I'm going to throw all those stuffy old forms into the garbage can and write new contracts that people can read without getting a headache — that people can actually understand."

"Letting clients understand their own contracts, Ebenezer? Why, then you can't bill them for the extra time it takes to explain what their contracts mean!" More laughter filled the room.
"Those were good days, Spirit. We were going to change the world," said Scribe.

The ghost took Scribe's hand again and led him through the wall. Once beyond it, Scribe found himself back in his bedroom. In a

moment, he was in bed and fast to his pillow, asleep. But in a blink, the clock's single chime woke him once more.

Scribe sat up quickly, readying himself. Yet he saw nothing at first. Then Scribe noticed light spilling in under his bedroom door, coming from the parlor. He walked to the door apprehensively and opened it. What he saw was indeed his parlor, but it was transformed — the ceiling double its regular height and the room aglow, as though light in its purest form were raining down from the heavens. Scribe squinted and looked up at an enormous figure. It wore a lush velvet robe with regal trimmings, and a grin lit its whiskered face. When its eyes met Scribe's, it let out a booming laugh that nearly shook Scribe out of his slippers.

"You must be the next spirit come to haunt me," Scribe said.

"Oooh," mocked the spirit, "you *are* a clever one, Scribe! No wonder your practice is so lucrative. I am the Ghost of Writing Present."

"If you have some wisdom to share with me, Spirit, be on with it. Yet I must say that all I learned from my first visitor was that I was once, like many, a bright young man with lots of big ideas. I still struggle to see why I should abandon the flowery prose that critics love to call *legalese,* as if naming some exotic, fatal disease. If everyone wrote with so-called plain English, we'd have no art — why, we'd have no Shakespeare."

"Are you comparing a zoning ordinance or a contract for the sale of 2,000 ball bearings to *Hamlet*? To poetry? Those who advocate plain-English legal writing aren't advocating plain Shakespeare, are they, Scribe? Shouldn't parties entering into a contract be able to understand the writing that embodies their business relationship — that spells out their rights and duties? Or should their own rights and duties be kept secret from them? And shouldn't citizens — common, everyday people — have a fighting chance of understanding the statutes and ordinances they're legally bound to follow?"

"But judges and clients expect and demand the flowery language — the legalese. I was just a naive boy to think otherwise," replied Scribe.

"Do intelligent people purposely communicate in ways that hinder communication, Scribe? Do intelligent writers ignore the wishes and needs of their most important readers?"

"Is that right, Scribe?" And with that, the ghost took Scribe's hand and ushered him out of the house and into the cold night sky. They flew over mountains and lakes until arriving at a large hotel conference facility bustling with activity.

"Where are we, Spirit? I don't know this place."

"No, I wouldn't expect you to, Scribe. This is the Legal Writing Institute's biennial conference, a gathering of legal-writing professors from across the country."

"But what have I to learn from law-school professors?" Scribe wondered aloud to the spirit. "I've been practicing for 36 years."

"Maybe if you'd stop talking you might see," replied the ghost, gesturing to a man who was speaking at a podium in front of a large audience.

My research builds on the existing data. For decades, we've known that judges prefer plain language over legalese. For example, Benson and Kessler's 1987 research showed that appellate judges are likely to consider legalese-filled briefs unpersuasive and substantively weak.[1] *Similar surveys between 1987 and 1990 — by Child, Harrington, Kimble, and Prokop — showed that over 80% of responding judges in Michigan, Florida, Louisiana, and Texas preferred plain English.*[2] *And Flammer's 2010 survey reaffirmed judges' preference for plain language, showing that the majority of responding state and federal judges preferred plain English over legalese.*[3]

But my research looked beyond judges to the general public's views on writing style. I surveyed people from all walks of life who've hired and communicated with attorneys. The results confirm what we've suspected for years: the respondents overwhelmingly preferred plain language — choosing the plain-English samples more than 80% of the time. Oh, I see a hand up. Yes?

You've talked about data confirming our suspicions, Professor Trudeau, but did any of the data surprise you?

As a matter of fact, yes, and it concerned well-educated clients. Some lawyers think that their so-called sophisticated clients want inflated language. But the data debunked that notion. In fact, as respondents' education levels increased, so did their preference for plain language. Respondents with less than a bachelor's degree selected the plain-language version 76.5% of the time; those with a bachelor's degree selected it 79.4% of the time; those with master's or doctoral degrees selected the plain-language version 82% of the time; and those with law degrees selected it 86% of the time. This means, for example, that respondents with master's or doctoral degrees were 5.5% more likely to prefer plain language than those with less than a bachelor's degree.[4]

"But I thought flowery legalese impressed clients, Spirit," said Scribe. "I thought it gave them confidence in my intellect."

"Do intelligent people purposely communicate in ways that hinder communication, Scribe? Do intelligent writers ignore the wishes and needs of their most important readers?"

"But —"

"Who do you think you're impressing, Scribe? Do you honestly believe that a judge who has read thousands of briefs will coo in admiration if you write *subsequent to the company's cancellation of said contract* instead of *after the company canceled the contract*? Why would you take on the style of some sort of fourth-rate Dickens while writing briefs about commercial disputes or while drafting contracts or corporate bylaws? Are you writing to please your reader or yourself?"

The spirit began to chuckle, and then its chuckle gained momentum into a laugh, and then its laughter became deafening. Scribe locked his eyes shut and covered his ears, but the sound only grew louder, as if coming from within his own mind. And then Scribe was again jolted by the clock's chimes — two this time, and then silence.

Scribe opened his eyes. His bedroom was dark and still. But he could just make out a tall robed figure, shrouded in gloom. It spoke not a word. Its hood obscured its face. Scribe could see nothing but the robe itself and a gavel extending from one sleeve.

"You are no doubt the final spirit that Morley told me to expect, the Ghost of Writing Yet to Come. I confess, Spirit, that I fear you most of all. Tell me, What are your plans for me?"

But the phantom said nothing, instead raising its right arm deliberately and pointing its gavel toward the window. And with that, they were thrust outside and into the city's hustle and bustle. Soon Scribe found himself inside an impressive downtown building, standing in a large room with rich mahogany paneling. He knew this place from his litigation work, although he was surprised to see that his favorite judge was memorialized in a painting rather than sitting behind the bench. Then an unfamiliar judge began to speak.

Thank you for your arguments, counsel. I'm ready to rule. To summarize, in an earlier case, the State sued Reliable Construction Company because Reliable damaged State property. When the parties settled, the State signed a "Release and Indemnity" agreement in Reliable's favor. Now Reliable claims that this agreement requires the State to indemnify Reliable for a personal-injury claim arising from the same accident. The State counters that the indemnity agreement is unclear and ambiguous, which allows me to consider parole evidence showing that the parties didn't intend for the agreement to stretch this far.

"I drafted that agreement, Spirit, using an old form. It's ironclad. The State hasn't a leg to stand on," said Scribe with confident glee.

This court agrees with the State and dismisses Reliable's indemnity claim.

Scribe clutched his heart and tottered like a glanced bowling pin. "But —"

In so ruling, I rely, in part, on the Louisiana case Sanders v. Ashland Oil, Inc,[5] *where a contractor likewise sought indemnity from a state agency under an indemnity clause that said this:*

> *"We do hereby further agree to indemnify and hold harmless said parties, together with all employees, agents, officers, or assigns thereof of and from any and all further claims and/or punitive damage claims that may be made or asserted by the aforesaid or by anyone because of the aforesaid injuries, damages, loss or expenses suffered as a result of the aforesaid explosion/fire, whether such claim is made by way of indemnity, contribution, subrogation or otherwise."*[6]

The Sanders *court concluded that this was too unclear, stating, and I quote, "After carefully reviewing the agreement, we conclude that it is neither explicit nor unambiguous. Initially, we note that the agreement is poorly drafted and that the use of legalese, such as 'aforesaid,' makes the meaning of the contract terms unclear."*[7]

Reliable's indemnity clause is virtually identical to the confusing, legalese-laden clause in Sanders*, and I agree with the court's reasoning in* Sanders*. I have considered some of the other evidence, and I see that the parties never intended for the State to indemnify Reliable under the present circumstances. Reliable's case is dismissed.*

"Reliable is one of my good clients, Spirit. It's not a big company, but it's been with me for years." But the spirit offered no solace or reply — not even a nod. Instead, it raised its gavel again and pointed, and they were soon in another courthouse.

Thank you, counsel. I'm prepared to rule. This is the bank's motion to dismiss its former customer's suit to rescind a loan transaction. The bank relies on a signed "Acknowledgment of Waiver of Right to Rescind" form, which says this:

> *Whereas more than three (3) business days have elapsed since the undersigned received my/our Notice of Right to Rescind and the Truth-in-Lending Disclosure Statement concerning the transaction identified above; in order to induce aforesaid to proceed with full performance under the agreement in question, the undersigned do herewith warrant, covenant and certify that I/we, jointly and separately,*

> *have not exercised my/our Right to Rescind; that I/we do hereby ratify and confirm the same in all respects. I/we further represent that the undersigned is/are the only person(s) entitled to rescind, in that I/we am/are all of the person(s) who have an ownership interest in the real property or I/we am/are all of the person(s) who will be subject to the security interest in the real property.*

I decline to enforce this document because the Truth in Lending Act requires lenders to clearly disclose the terms of a loan, including the right to rescind, and this document is not clear. I rely on cases like Tenney v. Deutsche Bank Trust Corp,[8] *where the United States District Court refused to enforce a bank's "Certificate of Confirmation of Notice of Right to Rescind," which was virtually identical to the bank's form in the present case. The* Tenney *court noted that this was "legalese that [was] unnecessarily convoluted and difficult for the average consumer to read."[9] Given the legalese and other misleading circumstances, the court there held that the certificate violated the Truth in Lending Act because it "would confuse and mislead the average consumer."[10] I see no difference here. The bank here didn't overreach as much as the bank in* Tenney *did. Nevertheless, the bank's form is dense, impenetrable boilerplate — classic legalese in the worst sense. Therefore, the bank's motion is denied.*

"But Spirit, I drafted that form, too, just as I always have. I don't … I don't understand …" Scribe's voice trailed off.

"Please tell me, Spirit. Are these the images of court decisions that *will* be, or court decisions that *might* be? Oh, Spirit, do I still have time? Do I have time to change my ways — to change my attitudes and techniques? Is there time for me to redraft these documents and others like them? Can I develop the confidence to shed the inflated language that is chaining me as surely as it chained my partner, Morley? To shed the style that shuts out readers rather than inviting them in? Please tell me, Spirit. Tell me. I beg of you," Scribe pleaded, tugging at the bottom of the phantom jurist's robe.

But when Scribe opened his eyes, the mahogany-paneled walls, bench, and pews were gone, as was the terrifying specter. Scribe found himself on his knees on his bedroom's hardwood floor, tugging at the bottom of his bedskirt. A sudden wave of relief hit him. He took in a deep breath and exhaled. The morning sun's friendly rays shone in, and Scribe had the newfound buoyancy of a schoolboy released for recess. He ran to his window and flung it open.

"Young lad," he called to a boy on the sidewalk below. "My good lad, do you know the bookstore around the corner?"

"Of course, sir. It's the last bookstore in town."

"Indeed it is, dear boy. Such a smart lad. And have you seen the books in the window: *Plain English for Lawyers*, by Richard Wydick; *Legal Writing in Plain English*, by Bryan Garner; and *Lifting the Fog of Legalese*, by Joseph Kimble?"

"Yes, sir."

"Well, I want you to go buy the whole lot of them for me, and I'll pay you $20 to do it. And if you bring them back to me within 10 minutes, I'll throw in an extra $30!"

"$50, sir? I'll do it, sir! Right away, sir!"

"Excellent! Then be off with you!" Scribe barked good-naturedly. "What a wonderful boy. *Delightful* boy."

And when the boy returned with the books, Scribe made good on his promise to the boy — and to the spirits. From that day on, Scribe's letters, contracts, and court briefs were pictures of clarity. Clients praised his knack for making the complex seem simple. In Scribe, they'd found a lawyer whose writing empowered them rather than disenfranchised them. And Scribe's court briefs, with their direct and nimble prose, built a wall of credibility that grew taller with every page. Yes, every day, Ebenezer Scribe was doing the hard work necessary to make his writing easier for readers to understand, and his stock rose with every word.

Mark Cooney is a professor at WMU–Cooley Law School, where he chairs the legal-writing department. He is a senior editor of *The Scribes Journal of Legal Writing* and author of *Sketches on Legal Style*. He was co-recipient (with Joseph Kimble) of the 2018 ClearMark Award for legal drafting and is a past chair of the SBM Appellate Practice Section.

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BEST PRACTICES

Best practices in state trial courts

BY GEORGE M. STRANDER

As I take over editorship of the Best Practices column from the capable hands of Gerard and Theresamarie Mantese, I would like to contribute to this column's ongoing narrative. From a court administrator's perspective, I write here of some best practices for attorneys working in state trial courts.

Despite the historical trend for legal work to take place outside and in lieu of courts,[1] the court system is unavoidable for most attorneys. Prosecutions and lawsuits are filed, evictions and fiduciary appointments sought, and one finds attorneys at practice in all these court actions and more.

IN GENERAL

Trial courts represent an interesting mix of state governmental institution and local authority; neither element necessarily meshes well with the multi-court, results-oriented work of most attorneys. On the one hand, any trial court is part of a regimented whole — it is subsumed in Michigan's One Court of Justice.[2] On the other hand, and despite attempts at mandated uniformity,[3] each court and each judge have tailored policies and procedures for others to follow.

Courts must follow a variety of statewide directives from statute to Supreme Court rule and administrative order to State Court Administrative Office (SCAO) guidance and oversight. In this way, courts do not have the flexibility of the private sector even in cases where the variance seems minor but would make the attorney's day much easier. An attorney would do well to understand the elements and scope of this bureaucracy to prepare properly for court.[4]

In contraposition to the above, each trial court employs custom rules. These include the largely uniform SCAO-approved operational local administrative orders (LAOs) ranging in topic from access to records to case assignments to alternative dispute resolution to specialty dockets.[5] Some courts also have (less uniform) local court rules. Additionally, trial courts often have written policies on matters from jury procedures to interpreter use. Various courthouse offices may have custom procedures — e.g., on the delivery of judge's copies. Finally, every judge has her or his own style in running the courtroom. Knowing this "local bureaucracy" will likely save an attorney time and headaches.

CLERK'S OFFICE

Whether you are in circuit, district, or probate court, you will typically start by filing pleadings or other documents in the court clerk's office. Here are some general tips.

- Bring or send what you need. Have you brought a draft order to go with your motion and a self-addressed stamped envelope to receive your executed copies? Are you using the current SCAO form?[6] Does local practice require you to follow the court rule and file a motion for adjournment?
- Use modern techniques. Have you avoided tabbing your brief so it can go through the court's scanner? Have you checked your case online for the information you need?
- Check beforehand. Have you called to verify the filing fee? Can you get a motion date beforehand to put in your notice of hearing?
- Understand case type codes. Have you captioned your pleading with the right case type code, a designation trial courts must use for case processing and SCAO caseload reports? Is there is any type of business or commercial dispute requiring use of the business court code (CB)? Is your decedent estate filing an unsupervised administration (DE) whether you are asking for formal proceedings to initiate or is it a supervised administration (DA)?

"Best Practices" is a regular column of the Michigan Bar Journal, edited by Georger Strander for the Michigan Bar Journal Committee. To contribute an article, contact Mr. Strander at gstrander@ingham.org.

- Be civil. Don't shoot the messenger … or the clerk on the other side of the counter. It is important to understand that even in the face of professional frustrations, the deputy clerk you deal with is constrained by the aforementioned multi-layered bureaucracy. Good relations are not just proper, but prudent.

MOTION PRACTICE

The basic steps of how to proceed in any given case are largely defined by statute, court rule, and local circumstances. The opportunity for instructive best practices tips usually arises in cases of new laws or court rules that mandate a change in the process and where an attorney must venture into legal practice areas outside of the lawyer's bailiwick. Below are a few examples.

Expungements

With clean slate legislation,[7] the opportunities for individuals to apply for their past convictions to be set aside have greatly increased. Successful applications will be on the proper form, signed, include a return mailing address as well as additional copies and a prepared order, and be filed after the appropriate waiting period after a qualifying conviction (which does not include a deferred dismissal under HYTA, MCL 769.4a, or MCL 333.7411 or most instances of operating a vehicle while intoxicated).

Attorneys must ensure that notice to the prosecuting official and the Michigan attorney general, memorialized in a proof of service, includes the date of the expungement hearing. Finally, the applicant's Michigan State Police (MSP) criminal history report, based on submission of fingerprints and payment of MSP application fee, should be secured so the attorney general will prepare an opinion on the motion for the judge; substituting an MSP Internet Criminal History Access Tool (ICHAT) report is not sufficient.

FIGCs and Investigations in the Friend of the Court

With the enactment of MCR 3.224, the new friend of the court (FOC) alternative dispute resolution court rule, the process for issuing custody and parenting time orders has changed. Facilitative information gathering conferences (FIGCs) typically result in a recommended order but if the case screens out for domestic violence or neglect/abuse, the parties object, or the FOC does not employ FIGCs, an investigation may be conducted which may result in a recommendation and report without an order. Attorneys are best to remember that when there is just an investigation recommendation, no objection should be filed.

Orders to Reduce Child Support in the Friend of the Court

Payor overpayment can arise when there is a delay between the effective date and entry date of a uniform child support order (UCSO) for a lower support amount. Unless the attorney for the payor drafts a UCSO to include language to address the overpayment (e.g., specifying a short-term reduction of support for a specified duration until the overpayment is extinguished) it will remain on the account, causing confusion until a subsequent order is submitted by the attorney to address the overpayment.

Juvenile Waiver Cases

Actions to waive a youth into the adult criminal system require the juvenile's defense attorney to straddle two worlds. In phase II hearings under waiver statute MCL 712a.4, the attorney must understand the six factors considered in determining if the best interests of the juvenile and the public would be served by the waiver. Later in the process, if the juvenile is convicted, the attorney must understand the applicability of the sentencing guidelines including the offense variables and their explication through the use notes. Later still, should the juvenile be lodged in the jail, the attorney must be familiar with what is required under the federal Juvenile Justice and Delinquency Prevention Act, including sight-and-sound separation of the youth from adult prisoners.

Family Division Jurisdiction and *In re Seay*

In cases where an adult is charged with a crime allegedly committed while a juvenile — these delayed allegations often involve criminal sexual conduct — statute requires the case to be transferred to the court's family division. However, defense counsel should be prepared if the defendant is beyond the personal jurisdiction age limit of the family division; according to *In re Seay,*[8] the only jurisdiction that division has is conducting a waiver proceeding to send the case back to the adult criminal system.

The Uniqueness of Probate Court

Criminal and civil work is dominated by a rather simple adversarial model — there is a plaintiff and a defendant, and they are the parties to the case. Attorneys who do not typically work in probate court but may need to open a decedent's estate, trust, conservatorship, or guardianship benefit from understanding that, in general, this simple model does not apply.

While the probate court sees lawsuits on occasion (e.g., when brought by an aggrieved creditor), the vast majority of its actions involve a petitioner, a respondent, and a potentially large group of interested parties. Probate court matters are typically about a status (e.g., an appointed or removed fiduciary or an admitted will) and not about seeking damages, and involve others beyond the respondent who need notice since they have an interest in the status being sought.

Motion for Bond and Pretrial Services

Criminal defense attorneys often move for jailed clients awaiting trial to be allowed to post a pretrial release bond. In counties with pretrial services, it is typical that in such cases they will be called upon to conduct a risk assessment and offer a report for the judge's review. A simple time-saving step in such a situation is to ensure pretrial services receives a copy of the motion sooner rather than later.

CONCLUSION

Trial courts are part of Michigan's One Court of Justice, employ some custom procedures for their operations, and are the venues in which novel and disparate laws are applied. Best practice counsels an attorney's appreciation of these complex arrangements.

George M. Strander is court administrator for the 30th Circuit Court in Lansing. A graduate of the University of Michigan Law School, he serves on the State Bar of Michigan Bar Journal Committee and Civil Procedure and Courts Committee as well as the Governor's Mental Health Diversion Council.

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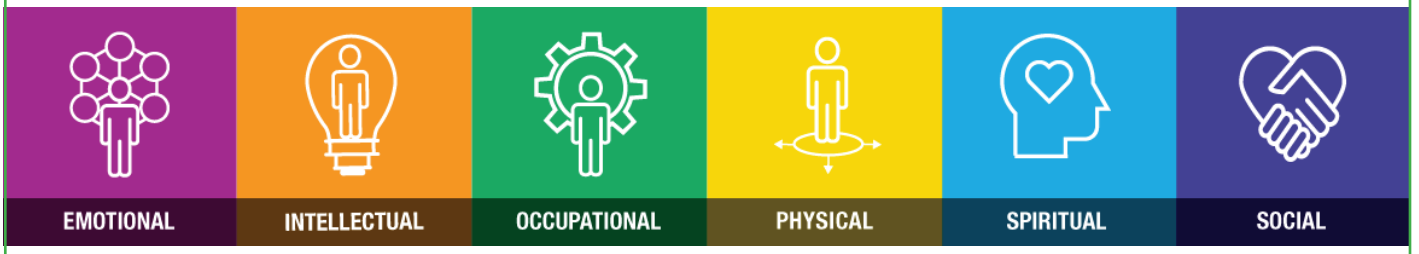

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LIBRARIES & LEGAL RESEARCH

Researching food laws and food safety

BY MICHELLE M. LaLONDE

What do produce, French-style cheeses, Coney dogs, and baby formula have in common? The answer is all have been featured in news stories this year about Michigan-based food producers or restaurants that were the focus of food safety investigations, closures, and recalls by local, state, and federal authorities.[1]

According to estimates by the Centers for Disease Control and Prevention, nearly 1 in 6 Americans suffers from foodborne illnesses annually, with approximately 130,000 hospitalized and 3,000 dying from contaminated food products.[2] Knowing where to find information about food-based disease outbreaks, product recalls, and food laws is important not just for attorneys representing restaurants, food producers, or those injured by tainted food products, but also for anyone interested in health matters.

STARTING YOUR RESEARCH

It is often best to start your research with official state and/or federal government websites to find regulations and statutes on food law and safety. Among the most important Michigan laws are the Michigan Food Law, passed in 2000 and substantially updated in 2015,[3] and the 2012 Michigan Modified Food Code, an amended version of the federal Food & Drug Administration 2009 Food Code.[4] Additionally, Michigan's current food and dairy laws, recent food code changes, and updated fact sheets are all available on the Michigan Department of Agriculture and Rural Development website.[5] At the federal level, Title 21 of the Code of Federal Regulations and Title 21 of the United States Code deal with food and drug regulations.[6] The United Nations' Codex Alimentarius works to develop international food standards, which may be most useful for attorneys representing clients who import or export food items.[7]

RESEARCHING OUTBREAKS AND RECALLS

One way to get started is to use terms like "track food outbreak Michigan 2022" in Google to find news stories on outbreaks and related state and federal laws. Another good source is looking for terms such as "food," "restaurant," or the specific food product type within the same sentence as illness (/s ill!) in Westlaw's American Law Reports or the news, law journals, and law review databases in either LexisNexis or Westlaw.

Foodborne outbreak information and reports of specific incidents can be researched on county, state, and federal government websites. At the federal level, the Centers for Disease Control (CDC) maintains several useful websites including the National Outbreak Reporting System.[8] Among the most useful is the CDC List of Multistate Foodborne Outbreak Notices, which gives detailed information on the types of illnesses, product brand names and retailers, actions consumers can take, details about investigations, and states affected by outbreaks.[9] The CDC also maintains an Active Investigations of Multistate Foodborne Outbreaks website, which is updated every Wednesday[10] and includes a list of multiple food- and water-based disease monitoring projects around the country on its Surveillance and Data Systems page.[11] For scientific investigations into recent outbreaks, the CDC Morbidity and Mortality Weekly Reports on Foodborne Illness and Outbreaks is a good resource for papers from public health experts.[12]

After investigating outbreaks and determining that specific food products have harmed people, the U.S. Food and Drug Administration (FDA) or Department of Agriculture's Food Safety and Inspection Service take action, generally in the form of mandatory or voluntary product recalls or product withdrawals.[13] Current information is found on the FDA Recalls, Market Withdrawals, and Safety Alerts and the USDA Recalls and Public Health Alerts websites.[14] For attorneys working with food producers, the FDA Industry Guidance for Recalls provides information on recalls, relevant Code of Federal Regulations sections, definitions, and model press releases.[15]

In Michigan, the Department of Agriculture and Rural Development Foodborne Illness, Food Security, and Recalls website allows individuals to submit requests for investigation and learn about active food recalls statewide.[16] Consumers can also report illnesses through many Michigan counties' health department websites; some also have links to state and CDC websites for additional reporting.[17]

PREPARING SAFE FOODS FOR SALE

In addition to the Michigan and federal food laws previously mentioned, there are additional authorities to consult regarding the safe preparation of food for sale.[18] Much of this regulation is done at the local level in municipal ordinances, and many of these local codes and ordinances on food service operations are available on Municode's Michigan page listed A-Z by municipality.[19] The Michigan Restaurant and Lodging Association MichiganFoodSafety.com website has information on safe food handling techniques and relevant laws for businesses and the public.[20] Finally, individuals preparing food in home kitchens for sale can refer to the Michigan Cottage Food Law, which provides guidance for production facilities and preparation methods that should keep customers safe.[21]

CONCLUSION

Legal professionals who need to research food safety laws, product recalls, or submit reports of harm to individuals have a variety of very good, free resources to use as a starting point. It may be most helpful to work with local, state, and federal websites to research a case to make a more accurate determination if a local foodborne illness might be statewide or national in scope.

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PRACTICING WELLNESS

Examine your devotion to the practice of law

BY THOMAS GRDEN

My father was a prosecutor for the entirety of his legal career, a span of more than 30 years. I wish I could say he rode off into the sunset of retirement with his law career nothing but a distant memory. Alas, he passed away from a heart attack on Nov. 18, 2020, at the relatively young age of 60. I can't tell you how much longer he planned to work, but I do know that had he wanted to retire, he could have.

The months leading up to his death were tense. As I'm sure some prosecutors can attest, election season brings with it stress and uncertainty: what happens if the boss loses? Every four years, it was the same old song and dance; those around him knew his worries were misplaced, but he took nothing for granted even after watching four different prosecutors come and go. It isn't fair to blame his loss entirely on the dynamics of his profession — pandemic fatigue and family history certainly played a role — but at the same time, it would take a special kind of willful ignorance to ascribe the timing to coincidence.

At this point you may be thinking, "So what? Go tell it to your therapist. Leave the wellness column to the experts. Where's the wellness advice?" You might even be channeling noted 21st century philosopher Chris Rock: "He ain't talkin' about *me*."[1]

Thoughts of retirement, aging, and death are uncomfortable and much more easily pushed aside than pondered. Yet, the idea of lawyers overworking themselves dates back to ancient Rome, with Seneca lamenting the lawyers chasing earthly accolades, accumulating more wealth than they needed, and arguing on behalf of clients who didn't care about them, stating, "For what will you leave behind you that you can imagine yourself reluctant to leave? Your clients? But none of these men courts you for yourself; they merely court something from you."[2]

No, there won't be much concrete advice offered this time around. Instead, hear this plea to contemplate how your hours are spent and whether it might be judicious to reallocate them elsewhere. To be clear, this is not meant to excoriate attorneys with a passion for law that carries them strong into their golden years or push seasoned attorneys toward retirement. On the contrary, it's an appeal to attorneys young and old to examine where health falls on their list of career priorities.

With the average American lifespan rising from 70 in 1970 to 78 in 2020[3], law careers are longer than ever before. No less than the Michigan Supreme Court has acknowledged the need for lawyers to envision the near future of their practice by issuing Administrative Order No. 2020-15, which amends MCR 9.119 effective Sept. 1, 2023, to require an interim administrator as part of the annual licensing statement. This reflects the unfortunate reality that the number of attorneys who work until they are physically incapacitated is rising. While some may experience financial constraints that leave them with no choice, others reach this point through pursuit of wealth, prestige, or the inextricable entanglement of identity and profession (which I suspect is most common.) Consider how you would answer if a stranger asked you what you're good at. I'm willing to bet that for many of you, "I'm a good lawyer" was your immediate answer. Regardless of the reason, those who willfully choose to overwork themselves are trading their health for whatever benefits they believe they derive.

We know the toll the legal profession takes on lawyer health and wellness thanks to the 2022 ABA Profile of the Legal Profession. In it, 30% of respondents reported hazardous drinking, 58% reported moderate to severe stress, 19% reported moderate or severe anxiety, and 17% reported moderate or severe depression. Just as alarming are the responses regarding the legal culture and

"Practicing Wellness" is a regular column of the Michigan Bar Journal presented by the State Bar of Michigan Lawyers and Judges Assistance Program. If you'd like to contribute a guest column, please email contactljap@michbar.org

time management. When asked to characterize their work weeks, 51% responded they often work long hours, 17% indicated their job does not allow them to spend adequate time with their families, 19% do not make time for themselves, 28% do not take adequate breaks during the workday, and a whopping 56% of respondents indicated they feel pressure not to take vacation time.[4]

Despite those sobering statistics, the impulse to risk health and well-being past the point of what is reasonable is understandably strong. Earning a law license is a monomaniacal effort (or so I've been told) that requires a prominent internal drive. It's a daunting task, then, to decelerate after maintaining that momentum for so long. As former French President Charles De Gaulle noted, "It isn't easy for a man to force himself into a discipline of idleness, but it is essential."[5] The process requires effort, whether it be creating a more distinct boundary between work and home, allowing a practice to shrink, or fully committing to retirement. As Seneca wrote, "Reflect how many hazards you have ventured for the sake of money, and how much toil you have undertaken for a title! You must dare something to gain leisure, also."[6]

Austrian psychiatrist Victor Frankl famously listed love and purposeful work as two of his three pillars of meaning,[7] and few occupations are as purposeful as practicing law. Not coincidentally, the third pillar is suffering. If you've concluded that you find more meaning in your suffering than in your practice, it may be time to evaluate where your health falls in your overall hierarchy.

Whether you're a big law attorney whose identity is interwoven with being a lawyer, a solo practitioner accepting every case out of fear it might be the last, a public servant diligently donating extra hours to Uncle Sam, or a general practitioner who's realized their reason for continuing to practice law is not the same as their reason for entering the field, when you're ready to make changes to improve your overall well-being, the Lawyers and Judges Assistance Program exists to offer resources, guidance, and support.

Thomas Grden is a clinical case manager with the State Bar of Michigan Lawyers and Judges Assistance Program.

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LAW PRACTICE SOLUTIONS

How to collect, preserve, and produce text messages from mobile devices

BY BRETT BURNEY

It's a mobile world, and we're just living (and practicing) in it.

Most assuredly, you use a mobile device of some kind (phone, tablet, smart watch, etc.) and, even more assuredly, your clients use mobile devices in every part of their lives. Mobile devices are becoming more prominent and vital to how we all communicate and interact with the world.

When it comes to getting business done, it's estimated that between 80 and 90% of workers in the U.S. use text messaging for business purposes.[1] If people are using mobile devices to communicate, that means lawyers have to get information from those devices to find out what people were saying. Adding to the complexity, many people don't like to separate their digital lives between a personal mobile device and a work-issued device; many companies adopt either a bring-your-own device (BYOD) or company owned but personally enabled (COPE) policy, allowing employees to blur the lines between personal and business use.

And to add another layer of complexity, collecting information from mobile devices is not limited to corporate civil litigation. Since mobile devices are used in all aspects of our lives, mobile information is sought in all kinds of cases from criminal issues to domestic complaints to construction litigation.

The U.S. Supreme Court in *Riley v. California* addressed the issue of collecting information from a mobile device after police officers seized a man's phone during a traffic stop and charged him with a crime based on texts and photographs found on the phone.[2] In a unanimous ruling, the Court held that the warrantless search and seizure of digital contents of a cell phone during an arrest is unconstitutional, writing:

> First, a cell phone collects in one place many distinct types of information that reveal much more in combination than any isolated record. Second, the phone's capacity allows even just one type of information to convey far more than previously possible. Third, data on the phone can date back for years. ... Finally, there is an element of pervasiveness that characterizes cell phones ... it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives — from the mundane to the intimate.[3]

If you haven't had to collect information from a mobile device yet, you will. It's only a matter of time. The prevalence of mobile devices in our society today cannot be ignored and it's just going to continue to grow.

DIY METHODS FOR COLLECTING TEXT MESSAGES

There are a couple simple, do-it-yourself options for collecting text messages from mobile devices. The biggest consideration with these methods is whether they are adequate for properly preserving text messages in a litigation matter or admittance into court.

On the most basic end of the spectrum, individuals can take screenshots of text messages which can then be stitched together to create a full conversation. Simply pull up the text message conversation, take a screenshot, scroll up through the text message, take another screenshot, and so on and so forth until the entire conversation is preserved as screenshots. The client can send you all the pictures or use an app such as Stitch It (iPhone and Android)[4] or Picsew (iPhone)[5] to paste the photos together so it looks like one continuous text conversation one would see on the phone itself.

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.

There are also software applications that allow users to copy text messages from a mobile device to a computer. For iPhones, the iMazing software ($49.99 for a single license)[6] lets users plug an iPhone into their computer via a USB cable. iMazing imports the text messages from the iPhone onto the computer in a format that looks very similar to what a text conversation looks like on an iPhone. The software can also export conversations as text files or PDFs.

If people are using mobile devices to communicate, that means lawyers have to get information from those devices to find out what people were saying.

For Android devices, a mobile app from the Google Play store called SMS Backup and Restore made by SyncTech[7] creates a backup file of text messages on the Android device that can be shared with others. The backup file is in XML format, which means you'll need help from someone to parse through the file. The SyncTech website also has an online viewer users can access.

If you allow your client to collect text messages using these options, be sure they document the date and time when they created the screenshots or backups so you can authenticate the files later. You should also document the model of the mobile device and the version of the operating system it's running.

FORENSIC IMAGES: THE MOST COMPREHENSIVE METHOD FOR COLLECTING TEXT MESSAGES

If you need the most comprehensive method for collecting and preserving text messages, find a professional forensics examiner. The forensics examiner will need the phone to create a full backup of the device, using specific tools and software to create an "image" of the data from the phone. Once that's complete, you can work with the examiner to determine what information you need exported from that image, including text messages. These professionals are usually skilled in providing affidavits or other expert testimony regarding the soundness of the collection efforts.

Examples of tools that forensics professionals use to copy data from a mobile device include EnCase from OpenText, Forensic ToolKit from AccessData, and X-Ways Forensic.[8] Arguably the leading tool for mobile device forensics is the Universal Forensic Extraction Device Touch by Cellebrite.[9] Cellebrite has the advantage of working with many different cell phone manufacturers and models since they construct the data transfer devices cellular carrier technicians use to move your information when you upgrade your phone.

CONCLUSION

Whichever method you choose, be sure to weigh the risks and costs associated with each. Taking screenshots is an inexpensive DIY method, but the client may need to testify as to when and how they created those screenshots. Engaging a forensic professional to create an "image" of a mobile device is the most expensive method, but it is also the most comprehensive collection and can be backed up by the testimony of a third-party expert.

Brett Burney helps law firms and corporate legal departments successfully navigate their e-discovery challenges. He teaches lawyers how to integrate Macs and iOS devices in their practice and coauthored the ABA-published book Macs in Law: The Definitive Guide for the Mac-Curious, Windows-Using Attorney. Burney was chair of the 2015 ABA TECHSHOW planning board and regularly speaks to lawyers and legal groups around the country on technology-related topics. Visit his Apps in Law blog at www.appsinlaw.com or contact him at burney@burneyconsultants.com.

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ETHICAL PERSPECTIVE

The ethics in publicity

BY ROBINJIT EAGLESON

If you think about it, lawyers are storytellers by nature. We must find the truest story that advocates for the client. At times, that story can inextricably intertwine with the lawyer's professional life.

But what happens when the lawyer wants to change or add paths to their own story by capitalizing on the stories they have come across? What happens when the lawyer wants to become a writer, whether in print or digitally? What happens when the lawyer wishes to participate in a documentary, podcast, TV series, or movie? The inevitable questions that come to light are what the lawyer may write and share with the public and what falls under the attorney-client privilege.

Lawyers[1] have fallen into the trap of violating a former client's confidences while trying to branch out as a professional writer, consultant, or participant in a docuseries. One example is that of an Illinois lawyer suspended after a judge found that he could not violate a former client's confidences by revealing what happened to a missing woman.[2] The lawyer argued that he would not be violating attorney-client privilege because his former client lied about him, claimed ineffective assistance of counsel, and would not harm or disadvantage his client since the client would not get out of jail for convictions on other crimes. The former client's public defender argued that the lawyer's revelation may harm his bid for a new trial. Another example is an Indiana lawyer disbarred after writing a book for his own monetary gain about a former client that revealed information that fell under attorney-client privilege.[3] A third example is that of an Arizona lawyer disbarred after writing a tell-all book without receiving prior permission from a former client.[4]

Lawyers receive calls from the media or publishers wanting to know their client's side of the story. The argument is that the public has a right to know when, in reality, it is the public demanding to know without any right to the information the lawyer possesses. Revealing information without the proper releases may subject Bar members to discipline; therefore, it is important to understand the various restrictions contained in the Rules of Professional Conduct. It is also important to remember that "the privilege of practicing law has required lawyers to hold inviolate information about a client or a client's representation beyond that which is protected by the attorney-client privilege."[5]

Because storytelling, and visual storytelling, was put in the hands of everybody, and we have all now become storytellers.

— LEVAR BURTON

There are those who argue that all persons have the freedom of speech under the First Amendment of the U.S. Constitution and that the First Amendment and associated freedoms of the press dictate that the government and/or ethical rules cannot prevent the media from covering cases or giving airtime to attorneys. However, courts can place some limits on media coverage of a trial. Further, lawyers have been subject to limitations on their speech, and the U.S. Supreme Court has upheld state ethical limitations on what lawyers may say publicly regarding a pending or anticipated proceeding.[6] The biggest concern here is the lawyer inadvertently (or intentionally) divulging client confidences in return for profit and possibly revealing strategies in the middle of a case.

"Ethical Perspective" is a regular column providing the drafter's opinion regarding the application of the Michigan Rules of Professional Conduct. It is not legal advice. To contribute an article, please contact SBM Ethics at ethics@michbar.org.

In a review of Michigan's limitations, let's begin with Michigan Rule of Professional Conduct (MRPC) 1.6(b), which states that "[e]xcept when permitted under paragraph (c), a lawyer shall not knowingly: (1) reveal a confidence or secret of a client; (2) use a confidence or secret of a client to the disadvantage of the client; or (3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure." None of the exceptions in MRPC 1.6(c) would authorize a lawyer's use of client information that falls under the MRPC 1.6 provisions in a book or interview.

The next provision we need to look at is MRPC 3.6.[7, 8] MRPC 3.6(a) states that "[a] lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Further, MRPC 3.6(b) provides that "a lawyer who is participating or has participated in the investigation or litigation of a matter may state *without elaboration*" certain details as stated within the rule (emphasis added).

MRPC 3.6 prohibits certain statements from being made and publicly disseminated to preserve "the right to a fair trial" and "sets forth a basic general prohibition against a lawyer making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[9] Further, "the rule applies only to lawyers who are, *or who have been,* involved in the investigation or litigation of a case, and their associates"[10] (emphasis added). It should be noted that a provision regarding statements made by prosecutors is covered under MRPC 3.8(e), which provides that a prosecutor must "exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6."

Further, MRPC 1.8(d) states that "[p]rior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation." While Rule 1.8(d) does not prevent a lawyer from negotiating media rights once the representation is concluded, lawyers need to be aware and concerned about violating Rule 1.6 on confidentiality during those media negotiations.

For example, in *Pike v. State of Tennessee,* the petitioner asserted that a conflict of interest existed due to the petitioner releasing media rights to their lead and co-counsel regarding her story.[11] Lead counsel spoke with the petitioner's family regarding authoring a book about the petitioner's life and criminal prosecution. The petitioner was found guilty and sentenced to death but prior to her appeal, she signed a release giving her attorney permission to retell her story but was "limited to information which is public information, e.g., evidence at trial and in my court file, and their own personal experiences while working on (the Petitioner's) behalf."[12] It also acknowledged that the attorneys may "eventually gain a pecuniary benefit from the retelling" of the story.[13]

The court found that per Rule 1.8(a) of the Tennessee Rules of Professional Conduct, a lawyer must not enter into a transaction or interest that may negatively affect a client "unless there is full disclosure, the client is given the opportunity to seek independent counsel, and the agreement is in writing and signed."[14] Further, the court found that "[g]enerally an agreement by which a lawyer acquires literary or media rights concerning the *conduct of the representation* creates a conflict of interest between the attorney and the client"[15] (emphasis added). It should be noted that the court further found that the client must also prove "that the conflict of interest adversely affected his counsel's performance."[16]

Discussing or writing about a past client is not just about the right of publicity. If a lawyer is discussing or writing about a matter that can still be appealed, where a new trial may be requested, where new evidence could be found, or where attorney-client privilege may be included, written consent from the client is critical. Even if those time frames have passed, attorneys have a duty to former clients to maintain confidences. "Loyalty is an essential element in the lawyer's relationship to a client"[17] and does not end when the representation ends. It continues even after death.[18] "When transmitting a communication that contains confidential and/or privileged information relating to the representation of a client, the lawyer should take reasonable measures and act competently so that ... client information will not be revealed to unintended third parties."[19]

Lawyers may argue, as we routinely do, that we should be able to write a book or provide an interview with only generally known information.[20] However, this can be a slippery slope. Even with the best intentions, lawyers may let slip knowledge that is not generally

known such as a meeting with an unknown associate or the location of certain documents.

We can't know when a highly publicized case will come through our door or which cases will grab the media's attention. Preparing to handle reporters or publishers in an ethical and professional manner will lead to a trusted relationship with clients. Lawyers must be cautious of getting involved with the media for the sake of publicity. The primary duties are to the client and the justice system. If a lawyer decides he or she wants to explore a career path as a storyteller, they must recognize that the Michigan Rules of Professional Conduct limit how the lawyer can proceed.

Robinjit K. Eagleson is ethics counsel at the State Bar of Michigan. She is also a member of the State Bar of Michigan and staffs the Professional Ethics Committee and the Judicial Ethics Committee.

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DUTY TO REPORT AN ATTORNEY'S CRIMINAL CONVICTION

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

WHAT TO REPORT:

A lawyer's conviction of any crime, including misdemeanors. 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-month intervals in January and July of each year from when the complaint was filed as is compounded annually.

For a complaint filed after Dec. 31, 1986, the rate as of July 1, 2022, is 3.458%. 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.

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ORDERS OF DISCIPLINE & DISABILITY

AUTOMATIC INTERIM SUSPENSION

Amanda Ann-Carmen Andrews, P75823, Port Clinton, Ohio, effective Sept. 6, 2022.

On Sept. 6, 2022, the respondent was convicted by guilty verdict of three separate felonies: Menacing by stalking, a felony, in violation of ORC 2903.11; nonsupport of dependents, a felony, in violation of ORC 2912.21(A)(2); and nonsupport of dependents, a felony, in violation of ORC 2912.21(A)(2) in a matter titled *State of Ohio v. Amanda Ann-Carmen Andrews,* Common Pleas Court of Ottawa County, Ohio, Case No. 2021-CR-I-243A. In accordance with MCR 9.120(B)(1), the respondent's license to practice law in Michigan was automatically suspended on the date of her felony convictions.

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.

DISBARMENT AND RESTITUTION

Scott E. Combs, P37554, Plymouth, by the Attorney Discipline Board Tri-County Hearing Panel #14. Disbarment effective Sept. 29, 2021.[1]

After proceedings conducted pursuant to MCR 9.115, the panel found that the respondent committed professional misconduct during his representation of a client in a wrongful discharge from employment claim.

The panel specifically found that the respondent failed to keep his client reasonably informed about the status of his matter and comply properly with reasonable requests for information including, but not limited to, notifying his client promptly as to the status of settlement proceeds in violation of MRPC 1.4(a); failed to explain a matter to his client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation in violation of MRPC 1.4(b); after having modified his fee agreement to accept as his attorney fee for the employment matter

the amount his client decided was fair, the respondent charged and/or collected a clearly excessive fee in violation of MRPC 1.5(a); after having modified his fee agreement to accept as his attorney fee for the employment matter the amount his client decided was fair and upon keeping the entire $3,600 settlement check for himself, the respondent failed to communicate the basis or rate of his fee to his client in violation of MRPC 1.5(b); failed to promptly deliver funds that his client was entitled to receive in violation of MRPC 1.15(b)(3); failed to promptly render a full accounting to his client of the funds in his possession in violation of MRPC 1.15(b)(3); when two or more persons, one of whom was the respondent and the other of whom was his client, claimed an interest in all or part of the June 29, 2017, settlement check in the amount of $3,600, the respondent failed to keep it separate in trust until the dispute was resolved in violation of MRPC 1.15(c); failed to safeguard and hold property (funds) of a client in connection with the representation separate from the lawyer's own property in violation of MRPC 1.15(d); and engaged in conduct that involved deceit or misrepresentation where such conduct reflected adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b). Respondent was also found to have violated MCR 9.104(1)-(3); and MRPC 8.4(c).

The panel ordered that the respondent be disbarred from the practice of law and pay restitution in the total amount of $3,100.

The respondent filed a timely petition for review. After proceedings conducted in accordance with MCR 9.118, the board issued an order on March 11, 2022, affirming in part and reversing in part the hearing panel's findings of misconduct[2] and affirming the order of disbarment and restitution. On April 8, 2022, the respondent filed a timely application for leave to appeal with the Michigan Supreme Court pursuant to MCR 9.122. On Sept. 27, 2022, the Court issued an order denying the respondent's application for leave to appeal. Costs were assessed in the total amount of $3,616.84.

1. The respondent has been continuously suspended from the practice of law in Michigan since Oct. 14, 2020. Please see Notice of Suspension and Restitution issued Dec. 8, 2021, in *Grievance Administrator v Scott E. Combs*, Case No. 15 154 GA.

2. The board's order reversed the panel's finding that respondent violated MRPC 1.5(a) and (b).

SUSPENSION AND RESTITUTION (BY CONSENT)

Phillip D. Comorski, P46413, Detroit, by the Attorney Discipline Board Tri-County Hearing Panel #9. Suspension, 90 days, effective Oct. 13, 2022.

The respondent and the grievance administrator filed a Stipulation for Consent Order Discipline in accordance with MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contained the respondent's admissions that he committed professional misconduct in his representation of a client after he was retained and paid $15,000 to file a motion for relief from judgment and any other available post-conviction relief, including a federal habeas petition, on his client's behalf; that he failed to timely file the motion for relief from judgment on his client's behalf and eventually stopped communicating with his client or updating him on the status of his case; and failed to advise him of the final outcome of his matter. The client utilized the prison law library to check the status of his case and discovered that his federal habeas petition had been denied and that the respondent had filed an appeal on his behalf without his approval.

Based upon the respondent's admissions as set forth in the parties' stipulation, the panel found that the respondent failed to

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

competently represent his client in violation of MRPC 1.1(a); failed to seek the lawful objectives of the client in violation of MRPC 1.2(a); failed to act with diligence and promptness in representing a client in violation of MRPC 1.3; failed to keep the client informed of the status of the matter and comply promptly with reasonable requests for information in violation of MRPC 1.4(a); failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation in violation of MRPC 1.4(b); and engaged in conduct that involved dishonesty, fraud, deceit, or misrepresentation where such conduct reflected adversely on the lawyer's honesty, trustworthiness, or fitness in violation of MRPC 8.4(b). The panel also found that the respondent violated MCR 9.104(1)-(3).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent's license to practice law in Michigan be suspended for 90 days and that he pay restitution in the total amount of $7,000. Costs were assessed in the amount of $926.63.

SUSPENSION (BY CONSENT)

David R. Fantera, P40305, Brighton, by the Attorney Discipline Board Genesee County Hearing Panel #1. Suspension, 30 days, effective Nov. 30, 2022.

The respondent and the grievance administrator filed a Stipulation for Consent Order Discipline in accordance with MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contained the respondent's admissions that he committed professional misconduct by improperly using his IOLTA as a business account into which he deposited and maintained earned funds and by doing so, he effectively shielded those funds from federal and state tax authorities and/or other creditors to whom he owed payment.

Based upon the respondent's admissions as set forth in the parties' stipulation, the panel found that the respondent held funds other than client or third-person funds in an IOLTA in violation of MRPC 1.15(b)(3); failed to hold property of his clients or third persons separate from his own in violation of MRPC 1.15(d); and deposited his own funds into an IOLTA in an amount more than reasonably necessary to pay financial institution service charges or fees in violation of MRPC 1.15(f). The panel also found that the respondent violated MCR 9.104(2) and MRPC 8.4(a).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent's license to practice law in Michigan be suspended for 30 days effective Nov. 30, 2022, as agreed to by the parties. Costs were assessed in the amount of $800.66.

DISBARMENT AND RESTITUTION

James M. Harris, P24939, Chicago, Illinois, by the Attorney Discipline Board Tri-County Hearing Panel #13. Disbarment, effective Oct. 26, 2022.

After proceedings conducted pursuant to MCR 9.115, the panel found by default that the respondent committed professional misconduct as charged in a two-count formal complaint. As alleged in Count 1, the panel found that the respondent had been unauthorized to practice law before the United States Patent and Trademark Office (USPTO) since 1990, yet knowingly and wrongfully failed to disclose that fact to his client when he was engaged to apply for a patent at the USPTO. After the USPTO rejected the patent application, the respondent's client demanded that the respondent return the fee paid to him. The respondent refused;

instead, he refiled the patent application and listed his client as the filing party in pro per. The respondent's client never procured the patent or received a refund from respondent. As alleged in Count 2, the panel found that the respondent failed to answer a grievance administrator's request for investigation.

Based on the respondent's default, the panel found that as to Count 1, the respondent handled a legal matter the lawyer was not competent to handle in violation of MRPC 1.1(a); neglected a client's legal matter in violation of MRPC 1.1(c); failed to act with reasonable diligence and promptness in representing a client 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); failed to take reasonable steps to protect a client's interests upon termination of representation including a failure to refund any advance payment of fee that has not been earned in violation of MRPC 1.16(d); failed to give candid advice to a client in violation of MRPC 2.1; engaged in the unauthorized practice of law before the USPTO in violation of MRPC 5.5(a); created an unjustified expectation about the results the lawyer can achieve in violation of MRPC 7.1(b); and engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law in violation of MRPC 8.4(b).

As to Count 2, the panel found that the respondent failed to knowingly answer a request for investigation or demand for information in conformity with MCR 9.113(A)-(B)(2) in violation of MCR 9.104(7) and MRPC 8.1(a)(2) and engaged in conduct that violated the Michigan Rules of Professional Conduct in violation of MCR 9.104(4).

The respondent was also found to have violated MCR 9.104(1)-(3) and MRPC 8.4(c) as charged in both counts of the formal complaint.

The panel ordered that the respondent be disbarred from the practice of law and pay restitution in the total amount of $9,695. Costs were assessed in the amount of $1,727.81.

SUSPENSION AND RESTITUTION

Samuel P. Henkel, P70586, Grand Rapids, by the Attorney Discipline Board Kent County Hearing Panel #1. Suspension, 270 days, effective Oct. 1, 2022.

After proceedings conducted pursuant to MCR 9.115, the panel found that the respondent committed professional misconduct in his representation of a client in a custody and parenting time matter. The panel found that once the respondent received the advance retainer fee, he ceased communication with his client despite his client's multiple attempts to communicate with him regarding the status of his matter. It was additionally found that the respondent made false representations in his answer to the request for investigation and follow-up communications with the Attorney Grievance Commission and failed to refund unearned fees.

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

Based on the testimony and evidence presented at the hearing, the hearing panel found that the respondent neglected a legal matter entrusted to the lawyer in violation of MRPC 1.1(c); failed to act with reasonable diligence and promptness in violation of MRPC 1.3; failed to keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information in violation of MRPC 1.4(a); upon termination of representation, failed to refund any advanced payment of fee that had not been earned in violation of MRPC 1.16(d); knowingly made a false statement of material fact in connection with a disciplinary matter in violation of MRPC 8.1(a)(1); failed to disclose a fact necessary to correct a misapprehension known by the person to have arisen in a disciplinary matter in violation of MRPC 8.1(a)(2); knowingly failed to respond to a lawful demand for information from a disciplinary authority in violation of MRPC 8.1(a)(2); engaged in conduct that involved dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b); engaged in conduct that was prejudicial to the administration of justice in violation of MCR 9.104(1) and MRPC 8.4(c); 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).

The panel ordered that the respondent's license to practice law be suspended for a period of 270 days and that he pay restitution in the total amount of $3,000. Costs were assessed in the amount of $2,403.09.

DISBARMENT (BY CONSENT)

Alexandra Ichim, P79557, Waterford, by the Attorney Discipline Board Tri-County Hearing Panel #68. Disbarment, effective Oct. 8, 2022.[1]

The respondent and the grievance administrator filed a Stipulation for Consent Order of Disbarment which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contained the respondent's admission that she was convicted by guilty plea of one count of forgery, a felony, in violation of MCL 750.248, in *People of the State of Michigan v. Alexandra Ichim*, 7th Circuit Court Case No. 22-049158-FH. In accordance with MCR 9.120(B)(1), the respondent's license to practice law in Michigan was automatically suspended effective April 25, 2022, the date of her felony conviction.

Based on the respondent's conviction, admissions, and the parties' stipulation, the panel found that the respondent committed professional misconduct when she engaged in conduct that violated a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615 in violation of MCR 9.104(5) and engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law in violation of MRPC 8.4(b).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be disbarred from the practice of law in Michigan. Total costs were assessed in the amount of $790.64.

1. Respondent has been continuously suspended from the practice of law in Michigan since April 25, 2022. Please see Notice of Automatic Interim Suspension issued June 3, 2022.

REPRIMAND WITH CONDITIONS (BY CONSENT)

James A. Murray III, P85490, Southfield, by the Attorney Discipline Board Tri-County Hearing Panel #52. Reprimand, effective Oct. 8, 2022.

The respondent and the grievance administrator filed a Revised Stipulation for Consent Order of Reprimand with Conditions in accordance with MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contained the respondent's admission that he was convicted by guilty plea of impaired driving, second offense, a misdemeanor, in violation of MCL 257.6256B, in *People v. James Arthur Murray,* Oakland County Circuit Court Case No. 2280129-FH.

Based on the respondent's admissions and the stipulation of the parties, the panel found that the respondent engaged in conduct that violated a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615 in violation of MCR 9.104(5); engaged in conduct prejudicial to the administration of justice in violation of MCR 9.104(1) and MRPC 8.4(c); exposed the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3); and violated the standards or rules of professional responsibility adopted by the Supreme Court in violation of MCR 9.104(4).

In accordance with the parties' stipulation, the panel ordered that the respondent be reprimanded and that he be subject to conditions relevant to the established misconduct. Total costs were assessed in the amount of $759.41.

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

Jennifer Michelle Paine, P72037, Novi, by the Attorney Discipline Board Tri-County Hearing Panel #59. Interim suspension, effective Nov. 1, 2022.

The respondent failed to appear at a Oct. 25, 2022, 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 Nov. 1, 2022, and until further order of the panel or the board.

SECOND AMENDED NOTICE OF AUTOMATIC INTERIM SUSPENSION[1]

Andrew J. Paluda, P42890, Royal Oak, effective June 10, 2022.

On June 10, 2022, the respondent pleaded no contest to Operating While Intoxicated, Third Offense, in violation of MCL 257.6256(D), a felony, in the matter titled *People v. Andrew J. Paluda*, Oakland County Circuit Court Case No. 21-278749-FH. The respondent's plea was accepted by the court the same day. 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.

1. A first amended notice was issued to correct the referenced offense respondent was convicted of. A second amended notice was issued to remove non-public information.

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FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instruction, M Crim JI 11.25a (Brandishing a Firearm) for the offense found at MCL 750.234e. This new instruction is effective Dec. 1, 2022.

[NEW] M Crim JI 11.25a
Brandishing a Firearm

(1) The defendant is charged with the crime of brandishing a firearm. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant possessed a firearm or had control of a firearm. A firearm is a weapon that will shoot out a projectile by explosive action, is designed to shoot out a projectile by explosive action, or can readily be converted to shoot out a projectile by explosive action.[1]

(3) Second, that while possessing or controlling the firearm, the defendant was in a public place.

(4) Third, that while possessing or controlling the firearm in a public place, the defendant deliberately pointed it, waved it about, or displayed it in a threatening manner.

(5) Fourth, that when the defendant pointed, waved about, or displayed the firearm, [he/she] did so intending to cause another person or other persons to be fearful.[2]

Use Note

The Committee on Model Criminal Jury Instruction recognizes that in certain circumstances a claim of self-defense or defense of others may apply to a charge of brandishing a firearm. If the evidence provides a basis for such a defense, the court may provide an instruction patterned after M Crim JI 7.25 (Self-Defense as Defense to Felon in Possession of a Firearm).

1. The court need not read this sentence where it is undisputed that the weapon alleged to have been brandished was a firearm.

2. This is a specific intent crime.

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instruction, M Crim JI 19.1a (Taking a Child by Force or Enticement) for the offense found at MCL 750.350. This new instruction is effective Dec. 1, 2022.

[NEW] M Crim JI 19.1a
Taking a Child by Force or Enticement

(1) The defendant is charged with unlawfully taking a child by force or enticement. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant used force or trickery to take, carry, lure, or lead away [*state name of child*].

(3) Second, that when the defendant took, carried, lured or led [him/her] away, [*state name of child*] was less than fourteen years old.

(4) Third, that the defendant intended to keep or conceal [*state name of child*] from

[*Choose from the following:*]

(a) the parent or legal guardian who had legal [custody/visitation rights] at the time.

(b) [his/her] adoptive parent.

(c) the person who had lawful charge of [*state name of child*] at the time.

(5) Fourth, that the defendant was not the adoptive or natural parent of [*state name of child*].[1]

Use Note

1. Read this paragraph only where the defendant offers evidence of adoptive or natural parenthood.

The Committee on Model Criminal Jury Instructions has adopted the following amended model criminal jury instruction, M Crim JI 19.6 (Parental Taking or Retaining a Child) for the offense found at MCL 750.350a. This new instruction is effective Dec. 1, 2022.

[AMENDED] M Crim JI 19.6
Parental Taking or Retaining a Child

(1) The defendant is charged with unlawfully taking or retaining a child. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that on [*date and time alleged*], [*name complainant*].

[*Choose one of the following:*]

(a) was the [parent/legal guardian] of [*name of child*] who had [custody of (*name of child*)/parenting time rights with (*name of child*)] under a court order.

(b) was the adoptive parent of [*name of child*].

(c) had lawful charge of [*name of child*].

(3) Second, that on [*date and time alleged*], the defendant [took (*name of child*)/kept (*name of child*) for more than 24 hours].

(4) Third, that when the defendant [took (*name of child*)/kept (*name of child*) for more than 24 hours], [he/she] intended to keep or conceal [*name child*] from [*name complainant*].[1]

Use Note

This instruction applies only where parental kidnapping is charged under MCL 750.350a. The Committee on Model Criminal Jury Instructions takes the view that whether a defendant is a "parent" under the statute is a legal question for the court, not a factual question for the jury. *See People v Wambar,* 300 Mich App 121, 124-126; 831 NW2d 891 (2013).

1. This is a specific intent crime. Neither MCL 750.350a nor the House Legislative Analysis accompanying it directly addresses the question as to whether apparent consent or a reasonable belief that lawful authority to take or keep the child exists, may be a defense to this crime, or otherwise negates an essential element of the crime.

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instruction, M Crim JI 19.9 (Prisoner Taking a Person Hostage) for the offense found at MCL 750.349a. This new instruction is effective Dec. 1, 2022.

[NEW] M Crim JI 19.9
Prisoner Taking a Person Hostage

(1) The defendant is charged with being a prisoner and taking a person hostage. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was a prisoner at [*identify facility where the defendant was incarcerated*].

(3) Second, that while still subject to incarceration at [*identify facility where the defendant was incarcerated*], the defendant used threats, intimidation, or physical force to take, lure away, hold, or hide [*name complainant*].

(4) Third, that the defendant took, lured away, held, or hid [*name complainant*] as a hostage. To hold a person hostage means that the defendant intended to use the person as a shield or to use the person as security to force someone else to [do something/perform some act] or [not do something/to refrain from performing some act/delay in performing some act].[1]

(5) Fourth, that the defendant intended to hold *[name complainant*] as a hostage and knew [he/she] did not have the authority to do so.

Use Note

1. The court may read all of the options in this paragraph or only those that apply according to the charges and evidence.

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instructions, M Crim JI 34.7 (Medicaid Fraud — False Statement), M Crim JI 34.7a (Medicaid Fraud — Concealing Events), M Crim JI 34.8 (Public Welfare Program — Kickback, Bribe, Payment, or Rebate), M Crim JI 34.9 (Medicaid Facilities — False Statement), M Crim JI 34.10 (Making a False Claim for Goods or Services Under the Social Welfare Act), M Crim JI 34.11 (Making a False Claim That Goods or Services Were Medically Necessary Under the Social Welfare Act), M Crim JI 34.12 (Making a False Statement or Record to Avoid or Decrease a Payment to the State Under the Social Welfare Act), M Crim JI 34.13 (Medicaid False Claims — Knowledge), M Crim JI 34.14 (Medicaid Claims — Rebuttable Presumption), and M Crim JI 34.15 (Medicaid False Claims — Venue) for the Medicaid offenses found at MCL 400.603-611. These new instructions are effective Dec. 1, 2022.

[NEW] M Crim JI 34.7
Medicaid Fraud — False Statement

(1) The defendant is charged with making a false statement or representation to obtain Medicaid benefits. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was [making an application for Medicaid benefits/having rights to a Medicaid benefit determined].

(3) Second, that when the defendant was [making an application for Medicaid benefits/having rights to a Medicaid benefit determined], [he/she] made a false statement or false representation.

(4) Third, that the defendant knew the statement or representation was false.

(5) Fourth, that the false statement or false representation would matter or make a difference to a decision about benefits or the rights to benefits.

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS (CONTINUED)

[NEW] M Crim JI 34.7a
Medicaid Fraud — Concealing Events

(1) The defendant is charged with the crime of concealing or failing to disclose an event affecting the right to Medicaid benefits. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [was initially applying for Medicaid/was receiving a Medicaid benefit/was initially applying for Medicaid on another person's behalf/had applied on another person's behalf for Medicaid benefits and the other person was receiving Medicaid benefits].

(3) Second, that an event occurred that affected [the defendant's initial right to receive a Medicaid benefit/the defendant's continuing right to receive a Medicaid benefit/the other person's initial right to receive a Medicaid benefit/the other person's continuing right to receive a Medicaid benefit].

In this case, the event that is alleged to have occurred was [*describe event that affected right to benefits*].

(4) Third, that the defendant had knowledge of the occurrence of the event.

(5) Fourth, that the defendant concealed or failed to disclose the event.

(6) Fifth, that at the time the defendant concealed or failed to disclose the event that affected [the defendant's right to receive a Medicaid benefit/the other person's right to receive a Medicaid benefit], [he/she] did so with an intent to obtain a benefit to which [the defendant/the other person] was not entitled or a benefit in an amount greater than [the defendant/the other person] was entitled.

[NEW] M Crim JI 34.8
Public Welfare Program — Kickback, Bribe, Payment, or Rebate

(1) The defendant is charged with the crime of making or receiving a kickback, bribe, payment, or rebate in connection with public welfare program goods or services. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [solicited, offered, or received a kickback or bribe/made or received a payment in connection with a kickback or bribe/received a rebate of a fee or charge for referring an individual to another person for the furnishing of goods and services].

(3) Second, that the [kickback or bribe/payment made or received in connection with a kickback or bribe/rebate of a fee or charge for referring an individual to another person] was intended to secure the furnishing of goods or services for which payment was or could have been made in whole or in part under the Social Welfare Act.

[NEW] M Crim JI 34.9
Medicaid Facilities — False Statement

(1) The defendant is charged with the crime of making or inducing a false statement or representation about an institution or facility. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant knowingly and willfully [made/induced the making of/tried to cause someone to make] a false statement or false representation.

(3) Second, that the false statement or false representation was about the conditions in or operation of an institution or facility.

(4) Third, that the defendant knew at the time [he/she] [made/induced the making of/tried to cause someone to make] the statement or representation that it was false.

(5) Fourth, that when the defendant [made/induced the making of/tried to cause someone to make] the false statement or representation, [he/she] intended that it would be used for initial certification or recertification to qualify the institution or facility as a hospital, skilled nursing facility, intermediate care facility, or home health agency.

(6) Fifth, that the false statement or representation would have mattered or made a difference in the initial certification or recertification decision.

[NEW] M Crim JI 34.10
Making a False Claim for Goods or Services Under the Social Welfare Act

(1) The defendant is charged with the crime of making a false claim under the Social Welfare Act. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant made, presented, or caused to be made or presented a claim to a state employee or officer.

(3) Second, that the claim that the defendant made, presented, or caused to be made or presented was to obtain goods or services under the Social Welfare Act.

(4) Third, that the claim was false.

(5) Fourth, that the defendant knew the claim was false.

This means that the defendant was aware or should have been aware of the wrongful nature of [his/her/their] conduct and aware that what [he/she/they] said or did could cause the payment of a Medicaid benefit. This includes acting in deliberate ignorance of the truth or falsity of facts or acting in reckless disregard of the truth or falsity of facts. Proof of an intent to defraud is not required, but it may be considered as evidence that the defendant knew a claim to be false.

[NEW] M Crim JI 34.11
Making a False Claim That Goods or Services Were Medically Necessary Under the Social Welfare Act

(1) The defendant is charged with the crime of making a false statement that goods or services were medically necessary under the Social Welfare Act. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant made, presented, or caused to be made or presented a claim for goods or services under the Social Welfare Act, [*describe goods or services claimed*].

(3) Second, that the defendant claimed that [*describe goods or services claimed*] [was/were] medically necessary according to professionally accepted standards.

(4) Third, that the claim that the [*describe goods or services claimed*] [was/were] medically necessary was false.

(5) Fourth, that the defendant knew the claim was false.

This means that the defendant was aware or should have been aware of the wrongful nature of [his/her/their] conduct and aware that what [he/she/they] said or did could cause the payment of a Medicaid benefit for goods or services that were not medically necessary. This includes acting in deliberate ignorance of the truth or falsity of facts or acting in reckless disregard of the truth or falsity of facts. Proof of an intent to defraud is not required, but it may be considered as evidence that the defendant knew a claim to be false.

[NEW] M Crim JI 34.12
Making a False Statement or Record to Avoid or Decrease a Payment to the State Under the Social Welfare Act

(1) The defendant is charged with the crime of making or using a false record or statement to conceal, avoid, or decrease an obligation to pay money or transmit property to the state under the Social Welfare Act. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant made, used, or caused to be made or used a record or statement to a state employee or an officer. The [record/statement] was [*describe record or statement alleged*].

(3) Second, that the record or statement related to a claim made under the Social Welfare Act.

(4) Third, that the record or statement concealed, avoided, or decreased an obligation to pay or send money or property to the state of Michigan, or could have concealed, avoided, or decreased such an obligation.

(5) Fourth, that the record or statement was false.

(6) Fifth, that the defendant knew the claim was false.

This means that the defendant was aware or should have been aware of the wrongful nature of [his/her/their] conduct and aware that what [he/she/they] said or did could avoid or decrease a payment or transfer of money or property to the state of Michigan. This includes acting in deliberate ignorance of the truth or falsity of facts or acting in reckless disregard of the truth or falsity of facts. Proof of an intent to defraud is not required, but it may be considered as evidence that the defendant knew a claim to be false.

[NEW] M Crim JI 34.13
Medicaid False Claims — Knowledge

It is not necessary that the prosecutor show that the defendant had knowledge of similar acts having been performed in the past by a person acting on the defendant's behalf, nor to show that the defendant had actual notice that the acts by the persons acting on the defendant's behalf occurred to establish the fact that a false statement or representation was knowingly made.

Use Note

The Committee on Model Criminal Jury Instructions is uncertain of the meaning or application of MCL 400.608(1), which is the statutory basis for this instruction. It may be for use in cases where someone other than the defendant made a false claim that caused a benefit to be paid or provided to the defendant.

[NEW] M Crim JI 34.14
Medicaid Claims — Rebuttable Presumption

(1) You may, but you do not have to, infer that a claim for a Medicaid benefit was knowingly made [if the defendant's actual, facsimile, stamped, typewritten, or similar signature was used on the form required for the making of a claim/if the claim was submitted by computer billing tapes or other electronic means and the defendant had previously notified the Michigan Department of Social

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS (CONTINUED)

Services that claims will be submitted by computer billing tapes or other electronic means].

(2) The prosecutor still bears the burden of proving all of the elements beyond a reasonable doubt.

[NEW] M Crim JI 34.15
Medicaid False Claims — Venue

The prosecutor must also prove beyond a reasonable doubt that the crime[s] occurred on or about [*state date alleged*] within [*identify county*] County.

Use Note

The language describing the county should be omitted if the attorney general has chosen Ingham County as the venue under MCL 400.611.

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instruction, M Crim JI 41.1 (Trespassing for Eavesdropping or Surveillance) for the offense found at MCL 750.539b. This new instruction is effective Dec. 1, 2022.

[NEW] M Crim JI 41.1
Trespassing for Eavesdropping or Surveillance

(1) The defendant is charged with the crime of trespassing to engage in eavesdropping or surveillance. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was on property owned or possessed by [*name owner(s)* or *possessor(s)*] without [his/her/their] permission or without [his/her/their] knowledge.

(3) Second, that the defendant went on [*identify complainant(s)*]'s property to [listen to, record, amplify, or transmit any part of a private conversation, discussion, or discourse/secretly observe the activities of another person or other persons].

(4) Third, that the defendant intended to [listen to, record, amplify, or transmit the private conversation of (*identify complainant(s)*) without the permission of all participants in the conversation/spy on and invade the privacy of the person or persons (he/she) was observing].

FROM THE MICHIGAN SUPREME COURT

ADM File No. 2022-32
Proposed Amendments of Rules 7.201, 7.202, 7.203, 7.204, 7.205, 7.206, 7.207, 7.208, 7.209, 7.210, 7.211, 7.212, 7.213, 7.215, 7.216, 7.217, and 7.219 of the Michigan Court Rules

To read ADM File No. 2022-32, dated October 26, 2022, visit http://courts.michigan.gov/courts/michigansupremecourt and click "Administrative Matters & Court Rules" and "Proposed & Recently Adopted Orders on Admin Matters."

ADM File No. 2022-06
Amendment of Rule 3.101 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 amendment of Rule 3.101 of the Michigan Court Rules is adopted, effective Jan. 1, 2023.

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

Rule 3.101 Garnishment After Judgment

(A)-(E) [Unchanged.]

(F) Service of Writ.

(1) The plaintiff shall serve the writ of garnishment, a copy of the writ for the defendant, the disclosure form, and any applicable fees, on the garnishee within 182 days after the date the writ was issued in the manner provided for the service of a summons and complaint in MCR 2.105, except that service upon the state treasurer may be made in the manner provided under subrule (3).

(2) [Unchanged.]

(3) Unless service is subject to electronic filing under MCR 1.109(G), service upon the state treasurer or any designated employee may be completed electronically in a manner provided under guidelines established by the state treasurer. Guidelines established under this subsection shall be published on the Department of Treasury's website and shall identify, at a minimum, each acceptable method of electronic service, the requirements necessary to complete service, and the address or location for each acceptable method of service. For purposes of this subsection:

(i) Electronic service authorized under the guidelines shall include magnetic media, e-mail, and any other method permitted at the discretion of the state treasurer.

(ii) Service in the manner provided under this subsection shall be treated as completed as of the date and time submitted by the plaintiff, except that any submission made on a Saturday, Sunday, or legal holiday shall be deemed to be served on the next business day.

(G)-(T) [Unchanged.]

Staff Comment (ADM File No. 2022-06): The amendment of MCR 3.101 allows writs of garnishment to be served electronically on the Department of Treasury, subject to current e-filing requirements and guidelines established by the Department of Treasury.

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.

ADM File No. 2020-13
Amendment of Rule 6.005 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 amendment of Rule 6.005 of the Michigan Court Rules is adopted, effective Jan. 1, 2023.

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

Rule 6.005 Right to Assistance of Lawyer; Advice; Appointment for Indigents; Waiver; Joint Representation; Grand Jury Proceedings

(A)-(G) [Unchanged.]

(H) Scope of Trial Lawyer's Responsibilities.

(1) The responsibilities of the trial lawyer who represents the defendant include

(a~~1~~) representing the defendant in all trial court proceedings through initial sentencing,

(b2) filing of interlocutory appeals the lawyer deems appropriate, and

(c3) responding to any preconviction appeals by the prosecutor. Unless an appellate lawyer has been appointed or retained, tThe defendant's trial lawyer must either:

(i) file a ~~substantive brief in~~ response to any~~the prosecutor's interlocutory~~ application for leave to appeal, appellant's brief, or substantive motion; or

(ii) notify the Court of Appeals in writing that the defendant has knowingly elected not to file a respons~~ethat the lawyer will not be filing a brief in response to the application~~.

(24) [Renumbered but otherwise unchanged.]

(35) W~~w~~hen an appellate lawyer has been appointed or retained, the trial lawyer is responsible for promptly making the defendant's file, including all discovery material obtained and exhibits in the trial lawyer's possession, reasonably available ~~for copying~~ upon request of the appellate~~that~~ lawyer. The trial lawyer must retain the materials in the defendant's file for at least five years after the case is disposed in the trial court.

(I) [Unchanged.]

Staff Comment (ADM File No. 2020-13): The amendment of MCR 6.005 clarifies the duties of attorneys in preconviction appeals.

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.

WELCH, J. (*concurring*). I fully support the Court's efforts to clarify a criminal defense trial attorney's responsibilities regarding preconviction appeals. The importance of representation for defendants at the early stage of criminal proceedings cannot be overstated. However, many of the concerns that I previously raised when this rule was published for comment remain. See Proposed Amendment of MCR 6.005, 507 Mich ___, ___ (2021) (WELCH, J., concurring). Under the amended rule, unless separate appellate counsel has been retained or appointed, a trial attorney is required to respond to any preconviction appeal filings submitted by a prosecutor, MCR 6.005(H)(1)(c)(*i*), or "notify the Court of Appeals in writing that defendant has knowingly elected not to file a response," MCR 6.005(H)(1)(c)(*ii*). These options are likely sufficient in most circumstances. But what if no competent appellate attorney is willing to take the case and the trial attorney does not believe they are sufficiently competent in appellate practice or believes that their busy trial schedule will make it unreasonably difficult to provide effective representation in the Court of Appeals? In such circumstances, MRPC 1.1 might require the attorney to consider asking to withdraw as counsel for the accused. Courts generally have broad discretion to decide whether to allow counsel to withdraw. See, e.g., *People v Williams*, 386 Mich 565 (1972); *People v Echavarria*, 233 Mich App 356 (1999). If the trial court grants a request to withdraw, then the attorney's ethical conundrum is solved, but the accused will need a new attorney. If the trial court denies a request to withdraw, then that could increase the likelihood of ineffective-assistance-of-counsel concerns before the Court of Appeals. Additionally, if a client is unable or unwilling to pay any additional fee that a retained trial attorney charges for a preconviction appeal, is the retained attorney now required to work for free? If so, what effect would that have on the attorney-client relationship? While attorney ethics rules have been modified to allow for unbundled representation in civil litigation, similar modifications have not been made in the criminal context. Thus, I question whether criminal defense trial attorneys can solve the challenges I have raised by entering into limited-scope representation agreements with their clients. See MCR 6.005(H)(1) (scope of trial lawyer's responsibilities); MCR 2.117 (effect of appearance by attorney in an action); MRPC 1.1 (duty to provide competent representation); and MRPC 1.2 (scope of representation). Although in most cases a transition to or partnership with appellate counsel will likely occur, it also seems predictable that there will be situations where one of the scenarios I have outlined could arise. My concerns cause me to believe that we should state explicitly in this rule that trial attorneys are permitted to withdraw if they reasonably believe that they are unable to represent the accused competently and ethically before the Court of Appeals. In summary, while the adopted amendments are an important improvement, I remain concerned that lingering ambiguity in the court rule will lead to situations that we may be required to address in the future.

ADM File No. 2021-50 Proposed Addition of Rule 2.421 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an addition of Rule 2.421 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 each 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.

[NEW] Rule 2.421 Notice of Bankruptcy Proceedings

(A) Applicability. This rule applies to all pending state court actions in which a party is either:

(1) a named debtor in a bankruptcy proceeding; or

(2) an officer, director, or majority equity holder of a named debtor in a bankruptcy proceeding.

(B) Party Subject to Bankruptcy Proceeding. Any party in a pending state court action who is or becomes subject to a bankruptcy proceeding as provided in subrule (A) must file notice of the bankruptcy proceeding in the pending state court action no later than 7 days after becoming subject to bankruptcy proceedings.

(C) Other Parties. If a party to a pending state court action learns of a bankruptcy proceeding described in subrule (A) and notice of the bankruptcy proceeding has not previously been filed and served, the party that learned of the bankruptcy proceeding may file notice of the bankruptcy proceeding in the pending state court action.

(D) Notice Contents. Notice of a bankruptcy proceeding filed under this rule must, at a minimum, include all of the following:

(1) name(s) of the party described in subrule (A) and his or her designation as the named debtor, officer, director, or major equity holder of a named debtor;

(2) the court name and case number of the bankruptcy proceeding; and, if available,

(3) the name, telephone number, physical address, and email address for the debtor's attorney in the bankruptcy proceeding.

(E) Service of Notice. Notice of a bankruptcy proceeding filed under this rule must be served on all parties to the pending state court action as provided in MCR 2.107.

(F) Effect of Notice. If a notice is filed under this rule, the court may, on the motion of a party or on its own initiative, order the administrative closure of the state court action or set the matter for a status conference to determine if the case is subject to an automatic stay. If the state court action has been administratively closed under this subrule or otherwise, it may be reopened if, on the motion of a party or on the court's own initiative, the court determines that the automatic bankruptcy stay has been lifted, removed, or otherwise no longer impairs adjudication.

Staff Comment (ADM File No. 2021-50): The proposed addition of MCR 2.421 would address notice of a bankruptcy proceeding that affects a pending state court action.

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 Feb. 1, 2023 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 submitting a comment, please refer to ADM File No. 2021-50. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2022-05
Proposed Amendments of Rules 3.977, 3.993, 7.311, and 7.316 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering amendments of Rules 3.977, 3.993, 7.311, and 7.316 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 each 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 3.977 Termination of Parental Rights

(A)-(J) [Unchanged.]

(K) Review Standard. The clearly erroneous standard shall be used in reviewing the court's findings on appeal from an order terminating parental rights. On application in accordance with Chapter 7 of these rules, the Supreme Court may consider a claim of ineffective assistance of appellate counsel, and the Court will review such a claim using the standards that apply to criminal law.

Rule 3.993 Appeals

(A)-(B) [Unchanged.]

(C) Procedure; Delayed Appeals.

(1) [Unchanged.]

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

(2) Ineffective Assistance of Appellate Counsel Claims. In accordance with MCR 7.316(D), the Supreme Court may consider a claim of ineffective assistance of appellate counsel in cases involving termination of parental rights.

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

(D)-(E) [Unchanged.]

Rule 7.311 Motions in Supreme Court

(A)-(G) [Unchanged.]

(H) Motion to Expand Record in Cases Involving Termination of Parental Rights. In a case involving termination of parental rights, a respondent who claims ineffective assistance of appellate counsel under MCR 7.316(D) may file a motion to expand the record to support that claim if appellate counsel's errors are not evident on the record. The motion must be filed no later than the date the application is due.

Rule 7.316 Miscellaneous Relief

(A)-(C) [Unchanged.]

(D) Ineffective Assistance of Appellate Counsel Claims in Appeals Involving Termination of Parental Rights. If a respondent's application for leave to appeal raises the issue of ineffective assistance of appellate counsel, the Court may consider the claim. In making its determination and in addition to any other action allowed by these rules or law, the Court may take the following actions:

(1) order the trial court to appoint new appellate counsel under MCR 3.993(D),

(2) allow the respondent time to retain new appellate counsel,

(3) grant a motion to expand the record under MCR 7.311(H), or

(4) remand the case to the Court of Appeals for a new appeal.

Staff Comment (ADM File No. 2022-05): The proposed amendments of MCR 3.977, 3.993, 7.311, and 7.316 would establish a procedure for assessing whether a respondent in a termination of parental rights case was denied the effective assistance of appellate counsel, and if so, provide relief.

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 Feb. 1, 2023 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 submitting a comment, please refer to ADM File No. 2022-05. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2022-01
Assignment of Business Court Judge in the 3rd Circuit Court (Wayne County)

On order of the Court, effective Jan. 1, 2023, Hon. Annette J. Berry is assigned to serve as a business court judge in the 3rd Circuit Court for a term expiring April 1, 2025.

ADM File No. 2022-34
Proposed Amendments of Rules 3.913, 3.943, 3.977, and 3.993 and Proposed Addition of Rule 3.937 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering amendments of Rules 3.913, 3.943, 3.977, and 3.993 and a proposed addition of Rule 3.937 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 each 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 3.913 Referees

(A)-(B) [Unchanged.]

(C) Advice of Rights ~~to Review of Referee's Recommendations~~.

(1) During a hearing held by a referee, the referee must inform the parties of the right to file a request for review of the referee's recommended findings and conclusions as provided in MCR 3.991(B).

(2) At the conclusion of a hearing described in MCR 3.937(A), the referee must provide the juvenile with advice of appellate rights in accordance with MCR 3.937. When providing this advice, the referee must state that the appellate rights do not attach until the judge enters an order described in MCR 3.993(A).

[NEW] Rule 3.937 Advice of Appellate Rights

(A) At the conclusion of a dispositional hearing under MCR 3.943 or any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody, the court must advise the juvenile on the record that:

(1) The juvenile has a right to appellate review of the order.

(2) If the juvenile cannot afford an attorney for appeal, the court will appoint an attorney at public expense and provide the attorney with the complete transcripts and record of all proceedings.

(3) A request for the appointment of an appellate attorney must be made within 21 days after notice of the order is given or an order is entered denying a timely-filed postjudgment motion.

(B) An advisement of rights must be made in plain, age-appropriate language designed to ensure the juvenile's understanding of their rights. After advising a juvenile of their rights, the court must inquire whether the juvenile understands each of their rights.

(C) The court must provide the juvenile with a request for appointment of appellate counsel form containing an instruction that the form must be completed and filed as required by MCR 3.993(D) if the juvenile wants the court to appoint an appellate attorney.

Rule 3.943 Dispositional Hearing

(A)-(E) [Unchanged.]

(F) Advice of Appellate Rights. At the conclusion of the dispositional hearing, the court must provide the juvenile with advice of appellate rights in accordance with MCR 3.937.

Rule 3.977 Termination of Parental Rights

(A)-(I) [Unchanged.]

(J) Respondent's Rights Following Termination.

(1) Advice. Immediately after entry of an order terminating parental rights, the court shall advise the respondent parent orally or in writing that:

(a)-(b) [Unchanged.]

(c) A request for the assistance of an attorney must be made within 21~~14~~ days after notice of the order is given or an order is entered denying timely filed postjudgment motion. The court must then give a form to the respondent with the instructions (to be repeated on the form) that if the respondent desires the appointment of an attorney, the form must be returned to the court within the required period (to be stated on the form).

(d)-(e) [Unchanged.]

(2) [Unchanged.]

(K) [Unchanged.]

Rule 3.993 Appeals

(A)-(C) [Unchanged.]

(D) Request and Appointment of Counsel.

(1) A request for appointment of appellate counsel must be made within 21~~14~~ days after notice of the order is given or an order is entered denying a timely filed postjudgment motion.

(2)-(3) [Unchanged.]

(E) [Unchanged.]

Staff Comment (ADM File No. 2022-34): The proposed amendments of MCR 3.913 and 3.943 and proposed addition of MCR 3.937 would provide greater due process protections for juveniles in the justice system by ensuring that they are fully advised of their appellate rights at appropriate times and in a manner that is designed to ensure understanding of those rights. The proposed amendments of MCR 3.977 and 3.993 would extend the timeframe for requesting appointment of appellate counsel to 21 days, which mirrors the timeframe for filing a claim of appeal in cases subject to those rules.

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, 2023, 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 submitting a comment, please refer to ADM File No. 2022-34. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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