MICHIGAN
BAR JOURNAL
FEBRUARY 2023

- The history of attorney fee calculations
- Reflections on civility and ethics
- Michigan's conflicting interpretations: Are reunification efforts required when a parent sexually abuses an unrelated child?

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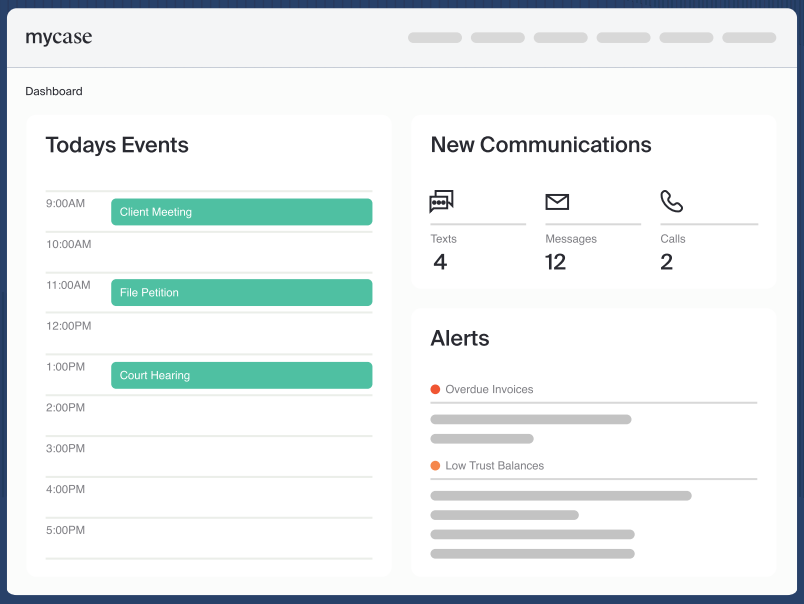

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MICHIGAN
BAR JOURNAL

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OF INTEREST

ON THE COVER

The official bench portrait of the Michigan Supreme Court.
BACK FROM LEFT: Justice Elizabeth M. Welch, Justice Richard Bernstein, Justice Megan K. Cavanagh, and Justice Kyra H. Bolden.
FRONT FROM LEFT: Justice Brian K. Zahra, Chief Justice Elizabeth T. Clement, and Justice David F. Viviano.

MICHIGAN
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NOTICES

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MARCH 3, 2023 (IF NECESSARY)
APRIL 28, 2023
JUNE 9, 2023
JULY 21, 2023
SEPTEMBER 22, 2023

REPRESENTATIVE ASSEMBLY

APRIL 29, 2023
SEPTEMBER 23, 2023

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MEMBER SUSPENSIONS
FOR NONPAYMENT OF DUES

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

In accordance with Rule 4 of the Supreme Court's Rules Concerning the State Bar of Michigan, these attorneys are suspended from active membership effective 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

ALTERNATIVE DISPUTE RESOLUTION SECTION

Upcoming section events include arbitration webinars on Feb. 7 and Feb. 21, the ADR Summit on March 21 and 28, and the ADR Annual Conference on Sept. 29-30. Future events, past event materials, and the latest Michigan Dispute Resolution Journal can be found at connect.michbar.org/adr/home.

ARTS, COMMUNICATIONS, ENTERTAINMENT & SPORTS SECTION

The ACES Section held its annual meeting on Dec. 6, attended by both longtime members and those new to the section. After election of officers and council members and discussion of the 2023 Founders' Award, which has been awarded annually since the early 1980s, Richard Herman provided an excellent presentation on "NIL — Name, Image, Likeness in College Sports," which will be the focus of a section seminar this spring.

CANNABIS LAW SECTION

Save the date: April 20 is the Cannabis Law Section spring seminar at the Kensington in Ann Arbor. We will feature experts in the field of cannabis law and also celebrate 4/20. Registration details are coming soon to the section listserv. The section will also bring back free educational webinars for its members throughout the year. Stay tuned to our listserv for more details.

ENVIRONMENTAL LAW SECTION

The Spring Air Conference, cosponsored with the Michigan Manufacturing Association, will be held on April 18 at the MMA offices at 620 S. Capitol Ave. in Lansing. Detailed event information and past event materials are available at connect.michbar.org/envlaw.

FAMILY LAW SECTION

The Family Law Section Council next meets on Saturday, March 4, at the Grand Rapids Courtyard by Marriott. Join us for breakfast and networking at 9 a.m. with the meeting to follow. Members are encouraged to use their talents and passion to help influence legislation, court rules, court forms, and much more by joining one of the many standing and ad hoc committees. Contact information for committee chairs and other details can be found at the section's website.

GOVERNMENT LAW SECTION

The Government Law Section winter seminar, "The Ever-Changing Landscape of Elections in Michigan," will be held on Feb. 17 and will tackle election-related issues affecting local governments. The all-day conference at Summit on the Park in Canton will include several guest speakers, a moderated panel, and lunch. The agenda and registration information are available on the section website. We hope to see you there!

IMMIGRATION LAW SECTION

The section is collaborating with the Children's Law Section and the Young Lawyers Section for two events in 2023. We will hold monthly meetings on the last Wednesday of every month at noon via Zoom.

INFORMATION TECHNOLOGY LAW SECTION

Mark your calendars for several upcoming events. The next section council meeting will take place on March 16 via Zoom. On May 18, our council meeting will take place in person in Grand Rapids. The section annual meeting will take place on Sept. 21. Check In Brief for additional upcoming events across the state.

LAW PRACTICE MANAGEMENT SECTION

The section is hosting free webinars to help lawyers achieve greater personal and professional satisfaction through services that are ethical, fiscally sound, and economically rewarding. Upcoming seminars include Successful Practice Management Tips on Feb. 16 from noon-1 p.m., Ground Up Social Media Marketing on March 16 from noon-1 p.m., Succession Planning Guidelines on April 20 from noon-1 p.m., and the section's annual meeting and workshop on Oct. 20 from 8:30 a.m.-4:30 p.m. Check the section listserv and newsletter for more details.

LITIGATION SECTION

The SBM Litigation Section is pleased to announce that on Dec. 21, its members elected Anthony Gonzalez and Ryanne Rizzo as members-at-large to the governing council. Questions, inquiries, or concerns should be directed to section chair Edward Perdue at eperdue@perduelawgroup.com.

REAL PROPERTY LAW SECTION

Join the Real Property Law Section for its 2023 winter conference at The Don CeSar in St. Pete Beach, Florida, for its "Surfing the Legal Landscape" program from March 9-11. Register at na.eventscloud.com/ereg/index.php?eventid=720645&. Limited rooms are available at book.passkey.com/event/50399048/owner/50154506/home or by calling 1.800.282.1116. Use code RPL307 for a special rate.

NEWS & MOVES

ARRIVALS AND PROMOTIONS

ASHLEY ALDEA, **SCOTT J. FISHWICK**, **MARK W. JANE**, and **STEVEN R. POHL** with Butzel have been elected shareholders.

NICHOLAS BADALAMENTI, **SEAN BARRY**, **RYAN MISIAK**, **DAYNE ROGERS**, **SEAN SERAFINI**, **RITA SOKA**, and **TERA WATSON** have joined Secrest Wardle as associates.

DREW L. BLOCK, **MICHAEL C. DENNIS**, and **JESSE A. ZAPCZYNSKI** have been promoted to shareholders by vote of Plunkett Cooney's board of directors.

BRIANA L. COMBS has joined the appellate law practice group of Plunkett Cooney.

SAMUEL GILBERTSON of Willis Law has been named the firm's managing partner.

ERIC T. JOHNSON has joined the Troy office of Secrest Wardle as a partner.

JORDAN SMALL has joined Maddin Hauser Roth & Heller.

KATELYN L. WIERENGA has joined the Lansing office of Fraser Trebilcock.

AWARDS AND HONORS

MONIQUE C. FIELD-FOSTER and **HOMAYUNE A. GHAUSSI**, partners with Warner Norcross & Judd, have been selected for Lawyers of Color's Law Firm Leaders 2022 list.

M. JOHNNY PINJUV with Warner Norcross & Judd has been selected for the Innovating Commerce Serving Communities' Next Generation Leadership Network 2022-24 cohort.

WARNER NORCROSS & JUDD has been recognized on the list of the top 10 health law firms in the Midwest by the American Bar Association.

PRESENTATIONS, PUBLICATIONS, AND EVENTS

JENNIFER DUKARSKI and **CLAUDIA RAST** with Butzel will be featured during a webinar called "Cyber in the Real World" hosted by the Original Equipment Suppliers Association on Friday, February 10.

IN MEMORIAM

JANET ANDERSON-DAVIS, P29499, of West Bloomfield, died Jan. 30, 2022. She was born in 1954, graduated from University of Michigan Law School, and was admitted to the Bar in 1978.

JOHN D. BARTLEY, P55792, of Sterling Heights, died Dec. 31, 2022. He was born in 1957, graduated from Detroit College of Law at Michigan State University, and was admitted to the Bar in 1996.

ALEXIS M. BECK, P30406, of Pleasant Ridge, died Aug. 10, 2022. She was born in 1954, graduated from University of Detroit School of Law, and was admitted to the Bar in 1979.

DON R. BERSCHBACK, P10757, of Saint Clair Shores, died Dec. 16, 2022. He was born in 1942, graduated from University of Detroit School of Law, and was admitted to the Bar in 1969.

H. JAMES BOYES, P11081, of Farmington Hills, died July 26, 2022. He was born in 1941, graduated from Wayne State University Law School, and was admitted to the Bar in 1968.

KATHLEEN C. BOYLE, P27671, of East Lansing, died Feb. 3, 2022. She was born in 1949 and was admitted to the Bar in 1977.

KENNETH B. BREESE, P27177, of Holland, died Aug. 5, 2022. He was born in 1948, graduated from University of Michigan Law School, and was admitted to the Bar in 1977.

KENNETH BRENNER, P11177, of Farmington Hills, died Feb. 16, 2022. He was born in 1945, graduated from Wayne State University Law School, and was admitted to the Bar in 1972.

ROGER L. CASWELL, P25704, of Marshall, died Sept. 21, 2022. He was born in 1947 and was admitted to the Bar in 1975.

ARTHUR F. DEVAUX, P47381, of Troy, died Dec. 11, 2022. He was born in 1967, graduated from University of Michigan Law School, and was admitted to the Bar in 1992.

GARNER F. DEWEY, P27265, of Standish, died April 30, 2022. He was born in 1950, graduated from Detroit College of Law, and was admitted to the Bar in 1977.

DENNIS DONOHUE, P12884, of East Lansing, died Sept. 6, 2022. He was born in 1940, graduated from University of Detroit School of Law, and was admitted to the Bar in 1966.

J. MCKENZIE DUKE, P70410, of Grosse Pointe Park, died Dec. 2, 2022. She was born in 1954, graduated from Detroit School of Law, and was admitted to the Bar in 2007.

FULTON B. EAGLIN, P24834, of Claremont, California, died Nov. 18, 2022. He was born in 1941 and was admitted to the Bar in 1975.

WALTER F. FINAN, P25711, of Royal Oak, died May 17, 2022. He was born in 1947, graduated from University of Detroit School of Law, and was admitted to the Bar in 1975.

GORDON A. GREGORY, P14359, of Novi, died Dec. 9, 2022. He was born in 1930 and was admitted to the Bar in 1956.

WILLIAM T. HECTOR, P30664, of Wyandotte, died Oct. 11, 2022. He was born in 1945, graduated from Detroit College of Law, and was admitted to the Bar in 1979.

MICHAEL J. HOULIHAN, P15157, of Traverse City, died April 24, 2022. He was born in 1943, graduated from University of Michigan Law School, and was admitted to the Bar in 1968.

PHILIP M. IDEMA, P15328, of Grand Rapids, died Sept. 15, 2022. He was born in 1939 and was admitted to the Bar in 1966.

JAMES A. KEEDY, P27699, of Traverse City, died Feb. 1, 2022. He was born in 1952, graduated from Wayne State University Law School, and was admitted to the Bar in 1977.

ALBERT N. KENNEDY, P26965, of Portland, Oregon, died Dec. 19, 2022. He was born in 1951 and was admitted to the Bar in 1976.

ELLIOT P. KRAMER, P24811, of West Bloomfield, died Aug. 5, 2022. He was born in 1949, graduated from Detroit College of Law, and was admitted to the Bar in 1975.

SAMUEL A. LEONARD, P27859, of White Lake, died April 28, 2022. He was born in 1947, graduated from Wayne State University Law School, and was admitted to the Bar in 1977.

THOMAS L. LOCKHART, P31525, of Rockford, died July 1, 2022. He was born in 1946 and was admitted to the Bar in 1980.

JOHN C. LOUISELL, P24658, of Grosse Pointe Woods, died Nov. 19, 2022. He was born in 1947, graduated from Detroit College of Law, and was admitted to the Bar in 1975.

HON. PETER J. MACERONI, P16922, of Sterling Heights, died Sept. 28, 2022. He was born in 1940, graduated from Wayne State University Law School, and was admitted to the Bar in 1966.

HON. JAMES B. MACKIE, P16939, of Alma, died Nov. 17, 2022. He was born in 1938, graduated from Detroit College of Law, and was admitted to the Bar in 1970.

JOSEPH F. MAYCOCK JR., P17236, of Grosse Pointe Farms, died July 28, 2022. He was born in 1930, graduated from University of Michigan Law School, and was admitted to the Bar in 1956.

JOHN C. MCCOLL, P17320, of Marysville, died Aug. 29, 2022. He was born in 1944, graduated from University of Michigan Law School, and was admitted to the Bar in 1970.

AUBREY V. MCCUTCHEON JR., P17355, of Ypsilanti, died Dec. 30, 2022. He was born in 1930, graduated from Detroit College of Law, and was admitted to the Bar in 1962.

JAY M. MITZNER, P17847, of Mason, died May 22, 2022. He was born in 1945 and was admitted to the Bar in 1972.

H. WALLACE PARKER, P18647, of Bloomfield Hills, died Dec. 9, 2022. He was born in 1941 and was admitted to the Bar in 1972.

JOHN F. POTTS, P31049, of Toledo, Ohio, died Feb. 26, 2022. He was born in 1952 and was admitted to the Bar in 1978.

HAMILTON M. ROBICHAUD, P19513, of Grosse Pointe Woods, died Oct. 24, 2022. He was born in 1936, graduated from Wayne State University Law School, and was admitted to the Bar in 1963.

WILLIAM F. ROLINSKI, P24874, of Gaylord, died April 15, 2022. He was born in 1947, graduated from Detroit College of Law, and was admitted to the Bar in 1975.

ADAM A. SHAKOOR, P27327, of Detroit, died March 20, 2022. He was born in 1947, graduated from Wayne State University Law School, and was admitted to the Bar in 1977.

WILLIAM J. SHEEHY, P20322, of Northville, died Nov. 9, 2022. He was born in 1944, graduated from University of Michigan Law School, and was admitted to the Bar in 1969.

MICHAEL F. SIMON, P20505, of Portage, died Dec. 16, 2022. He was born in 1939 and was admitted to the Bar in 1965.

MICHAEL G. SLAUGHTER, P24181, of Ypsilanti, died March 14, 2022. He was born in 1949, graduated from University of Michigan Law School, and was admitted to the Bar in 1974.

DALE L. SMITH, P56522, of Adrian, died Dec. 2, 2022. He was born in 1962 and was admitted to the Bar in 1997.

DAVID L. STEENO, P26906, of Big Rapids, died May 4, 2022. He was born in 1944, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1976.

RONALD J. STYKA, P21117, of Okemos, died Feb. 15, 2022. He was born in 1946, graduated from University of Michigan Law School, and was admitted to the Bar in 1971.

THOMAS J. TATE, P21275, of Indianapolis, Indiana, died Aug. 4, 2022. He was born in 1948, graduated from Wayne State University Law School, and was admitted to the Bar in 1973.

PAUL S. TERANES, P21332, of Grosse Pointe, died May 9, 2022. He was born in 1935, graduated from University of Michigan Law School, and was admitted to the Bar in 1961.

LOUIS V. VENDITTELLI, P23617, of Lake Mary, Florida, died April 30, 2022. He was born in 1947, graduated from Wayne State University Law School, and was admitted to the Bar in 1972.

ROGER WATSON, P22037, of Traverse City, died Aug. 18, 2022. He was born in 1932, graduated from University of Michigan Law School, and was admitted to the Bar in 1957.

FRANCIS J. ZANARDI, P22690, of Platteville, Wisconsin, died May 27, 2022. He was born in 1933 and was admitted to the Bar in 1958.

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.

FROM THE PRESIDENT

JAMES W. HEATH

New generation of attorneys increases profession's diversity

BUT WE'VE STILL GOT WORK TO DO

The best of the best of the next generation of lawyers descended on the 36th District Court late last year. The downtown Detroit court led by Chief Judge Bill McConico is the largest, busiest, and most diverse court in the country, and it cleared its docket for three days to host top law students from across the country to compete in the National Trial Advocacy Competition. Sponsored by the State Bar of Michigan Young Lawyers and Litigation sections, these 115 students — and the event itself — left me in awe.

The talent, commitment, and intelligence of the competitors and organizers was inspiring — so much so that I found myself unabashedly collecting résumés by the end. I reveled in the brilliance of these bright minds that hailed from all corners of our nation. This talented class of future lawyers was a beautiful collection of cultures and backgrounds.

It was a noticeable contrast to the delightful group of attorneys I met one month prior at the annual Golden Celebration honoring attorneys who achieved 50 years of membership in the State Bar of Michigan. Here, lawyers from across Michigan came together to bask in their accomplishments. It was an honor to acknowledge them as well. These members joined the State Bar of Michigan in the early '70s. The room was filled with our role models and the legal masterminds who argued cases that shaped our state and our country. However, there were noticeably fewer women and people of color among them. One of the few Black honorees was Wayne County Circuit Judge Edward Thomas. I was particularly honored to celebrate Judge Thomas, who swore me in as a member of the Bar, as a member of the class of 1972.

Our past and our future make me proud. The fact is that historically, the legal profession in Michigan and nationwide was almost exclusively a profession of white men. However, the bar leaders we hold dear, of all races, understood and respected the need for diversity. Fueled by the powerful leadership of trailblazers such as former Michigan Supreme Court justice and Detroit Mayor Dennis Archer, our 50th State Bar president, and federal judge Victoria Roberts, our 62nd president and the first Black woman to lead the State Bar of Michigan, our legal predecessors came together to open doors for those of us who followed.

Their work has had an impact. The State Bar of Michigan annually issues a report with statewide, county, and section demographic information. It includes hundreds of tables packed with data. The report tells a story about the evolution of the legal profession in Michigan.

We have seen increased diversity among Michigan attorneys. When looking at the entire membership of the State Bar of Michigan, 18% of attorneys are people of color. However, among those admitted in the last 10 years, 34% come from diverse backgrounds according to the 2022 State Bar of Michigan Demographics Report. An excerpt from this report is at the bottom of the next page. (The full report is available online at michbar.org/demographics.)

The rate of growth was encouraging when assessing the class of 1982 versus the class of 2021-2022: Arab origin grew from 0.2% to 11.5%; Asian/Pacific Islander climbed from 0.0% to 3%; Hispanic/Latino rose from 1% to 4.4%; and multi-racial increased from 1% to 3.4%. Not only has the representation of those groups increased compared to the overall membership of the State Bar of Michigan, but women also have increased their numbers, accounting for 36.6% of all members. Among attorneys admitted to the Bar in the last 10 years, 47% are women.

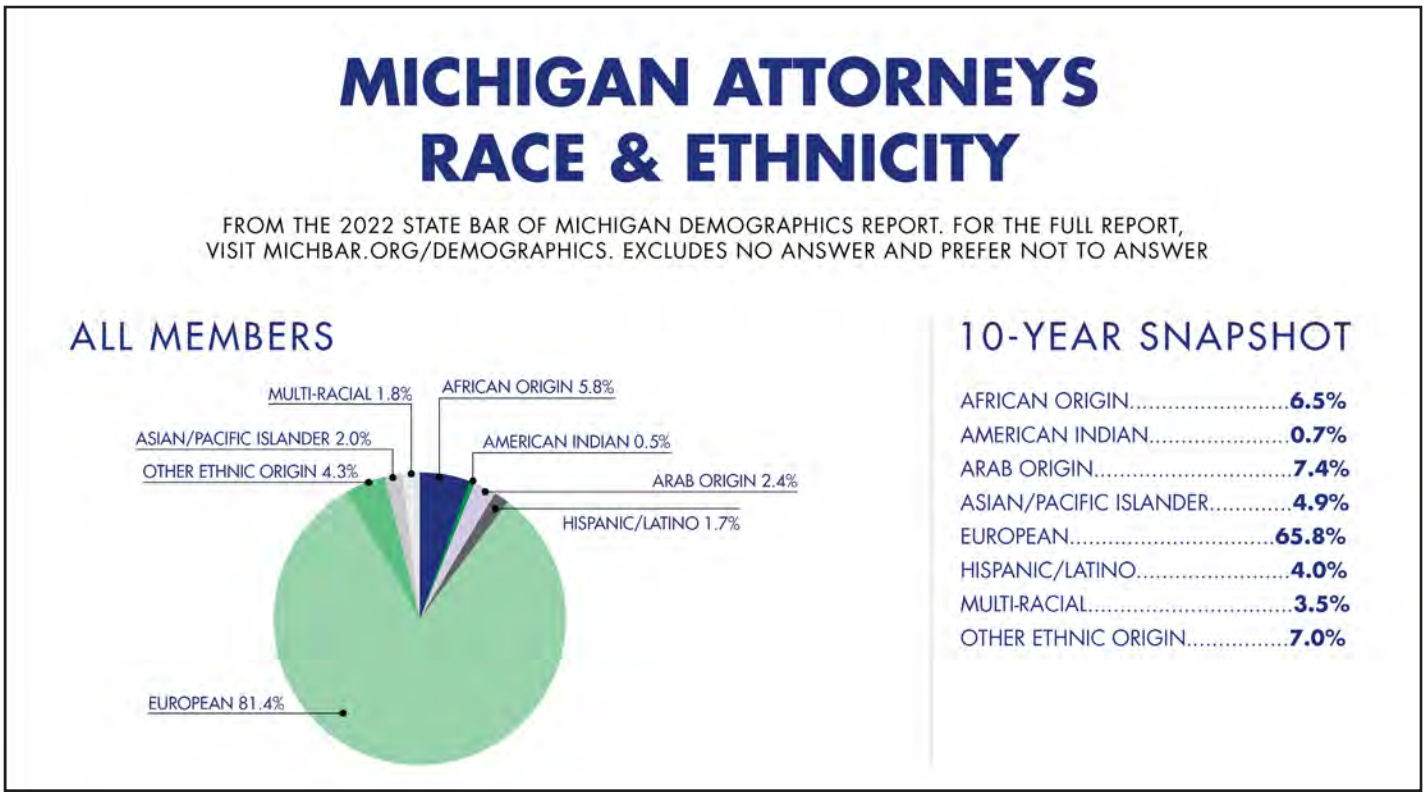
Still, when looking at raw numbers, it is humbling to see how much work we have left to do. There are fewer than 1,300 attorneys who identify as Black in our state of 10 million residents. And while there have been large gains among some demographic groups in the State Bar, others — including African American and Native Americans — have just inched forward during the last 40 years.

Michigan actually outpaced the national average for the percentage of Black attorneys. Black attorneys account for 5.8% of the total in Michigan; nationally, that number is 4.5%. However, Michigan trailed the national average for all other racial and ethnic categories except for Native American, which came in at 0.5% for both the state and nation.

We can and should learn so much from this data. It validates the work of our historical leaders, but it also shows us that we have more work to do. It's on us to pick up the torch and carry it forward. I commend my fellow Board of Commissioners who have ardently ensured that the State Bar of Michigan will continue leading the charge for diversity in the legal profession, even identifying diversity as a top strategic plan priority.

I applaud when I see State Bar of Michigan Director of Diversity Gregory Conyers expand the Face of Justice program to law schools to provide support and mentorship to help students succeed in their quest to become attorneys. I cheer when I see State Bar of Michigan Treasurer Erika Bryant providing statewide leadership on the newly formed Commission on Diversity, Equity, and Inclusion created by the Michigan Supreme Court. I celebrate when I see Coleman Potts leading the Young Lawyers Section and putting on that extraordinary National Trial Advocacy Competition at the 36th District Court.

It is critical to celebrate our achievements to date while acknowledging the long road we have ahead to make our profession truly diverse. I encourage my fellow attorneys to learn more about our demographics and then to join us. We've got work to do.



The history of attorney fee calculations in Michigan

BY GARY M. VICTOR

There are myriad statutes and court rules in Michigan that provide for awards of reasonable attorney fees. A simple Westlaw search shows hundreds of such statutes and court rules. Statutes containing attorney fee provisions vary from those in the well-known Elliot-Larson Civil Rights Act[1] or Freedom of Information Act[2] to perhaps less-familiar provisions in the Whistle Blowers Act[3] or the Motor Vehicle Service and Repair Act.[4] Court rule provisions also vary from the common rules on case evaluations[5] or offers of judgment[6] to rules regarding vexatious pleadings in the Court of Appeals[7] or garnishments after judgment.[8]

Michigan courts have long been plagued with trying to find some method of establishing consistency and objectivity in awards of "reasonable" attorney fees across these different statutes and court rules. This goal is important as it, hopefully, would encourage more accurate attorney fee determinations in trial courts as well as provide appellate courts with a better opportunity to analyze trial court decisions. This article tracks the cases involved in the longtime effort to objectify and unify attorney fee calculations in Michigan and the state's current position on the issue.

THE EARLY CASES

Perhaps the first case to delineate criteria for attorney fee calculations was the 1928 Michigan Supreme Court case of *Fry v. Montague*. It arose out of the sale of 58 pairs of silver black foxes for which payment was not made. The attorney seeking fees had represented the trustee for the nearly bankrupt seller in negotiating a settlement with the buyer. A dispute developed and the attorney

filed suit, asking for $4,000 in fees. The attorney was awarded $2,000 and both parties appealed.[9]

In discussing what should be considered in such a case, the Court stated:

> We should, of course, consider the time spent, the amount involved, the character of the service rendered, the skill and experience called for in the performance of the work, and the results achieved.[10]

Without discussing these criteria in any detail, the Court affirmed the $2,000 award, relying principally on the experience of the trial judge as to whether there was an abuse of discretion.[11]

Another early Michigan Supreme Court case is *Becht v. Miller*.[12] This 1937 case arose out of an estate dispute over an allowance of $7,500 in attorney fees. The Court quoted *Fry*'s criteria, spent considerable effort analyzing the attorney's work, held that the trial court had abused its discretion by setting the fee too high, and reduced it to $2,000.[13] It is odd for appellate courts to hold a trial court's award of attorney fees as being too high but, again, the overall emphasis was on abuse of discretion.[14]

The *Fry* criteria was the most notable set of court-articulated principles to be used in attorney fee calculations for more than 40 years. The next case in this line came in 1973, when the Michigan Court of Appeals took on *Crawley v. Schick*.[15]

THE *CRAWLEY v. SCHICK* CRITERIA

Crawley v. Schick arose out of an automobile accident wrongful death case in which Karen Crawley, the administrator, negotiated a settlement of $55,000. The trial court awarded Crawley one-third of the settlement as attorney fees. Liberty Mutual Insurance Company intervened to recoup workers' compensation benefits. One issue on appeal was inclusion of attorney fees as part of the costs of the settlement.

In discussing the attorney fee issue, the Court of Appeals stated:

> Where the amount of attorney fees is in dispute each case must be reviewed in light of its own particular facts. There is no precise formula for computing the reasonableness of an attorney's fee. However, among the facts to be taken into consideration in determining the reasonableness of a fee include, but are not limited to, the following: (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.[16]

Without thoroughly examining its own criteria, the court concluded that the fee was "not in excess in reasonable fees for the services performed."[17]

The next step in the journey came nearly a decade later with *Wood v. Detroit Automobile Inter-Insurance Exchange*.[18]

IN *WOOD*, THE COURT ADOPTS THE *CRAWLEY* CRITERIA

Theodore Wood was a motorcyclist injured in an accident with a car, the driver of which was insured by the defendant. Wood sued for an unreasonable denial of personal injury protection (PIP) benefits. Eventually, a default judgment was entered for Wood which included $50,000 for mental anguish and a $5,000 attorney fee.[19] The Michigan Court of Appeals reversed the $50,000 for mental anguish and affirmed the remainder. The Supreme Court granted leave.[20]

On the issue of attorney fees, the court specifically adopted the *Crawley* factors and further instructed trial courts as follows:

> While a trial court should consider the guidelines of *Crawley*, it is not limited to those factors in making its determination. Further, the trial court need not detail its findings as to each specific factor considered. The award will be upheld unless it appears upon appellate review that the trial court's finding on the "reasonableness" issue was an abuse of discretion.[21]

The court remanded for the trial court to consider an adjustment in the attorney fee as a result of the reversal of the mental anguish award.

As of *Wood*, whether or not trial courts detailed their findings on the *Crawley* guidelines, the emphasis was on abuse of discretion. A further clarification and objectification of attorney fee decisions would have to wait for another Supreme Court decision. In the interim, two Court of Appeals cases relating to a more objective approach to fee determinations — the lodestar — deserve mention.

The first is *Smolen v. Dahlman Apartments, Ltd.*[22] *Smolen* was a Landlord-Tenant Relationships Act[23]/Michigan Consumer Protection Act[24](MCPA) case involving the question of whether residential landlords could retain security deposits for costs associated with apartment cleaning. After some 400 hours of time, the trial court awarded $2,000 in attorney fees under the MCPA. On appeal, the plaintiffs argued that the court should adopt a lodestar — a reasonable hourly rate multiplied by the reasonable number of hours worked — as the starting point in attorney fee calculations. The Court of Appeals remanded the case for a new fee hearing while declining to adopt the lodestar approach,[25] instead reiterating a reliance of the factors outlined in *Crawley*.[26]

The second case, *Howard v. Canteen Corp,*[27] was brought under the Civil Rights Act[28] and reached a contrary decision less than a year after *Smolen*. The Court of Appeals approved a lodestar:

> The most useful starting point for determining the amount of a reasonable attorney fee is the number of hours reasonably expended on the case multiplied by a reasonable hourly rate.[29]

After the contradictory holdings of *Smolen* and *Howard*, some trial courts used a lodestar approach in calculating attorney fees while others relied on *Crawley*. The adoption of the lodestar approach as the standard for Michigan would come nine years later with the Supreme Court decision in *Smith v. Khouri*.[30]

Michigan courts have long been plagued with trying to find some method of establishing consistency and objectivity in awards of "reasonable" attorney fees across different statutes and court rules.

MSC ADOPTS THE LODESTAR APPROACH

Smith v. Khouri was the first Supreme Court case to hold that some version of the lodestar should be used as the beginning point in calculating attorney fee awards. *Smith* was an appeal of an attorney fee award under case evaluations rule MCR 2403(O). After examining the existing methods of calculating a reasonable attorney fee, the Court stated:

> We conclude that our current multifactor approach needs some fine-tuning. We hold that a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5(a) and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that having the trial court consider these two factors first will lead to greater consistency in awards.[31]

Some commentators suggested that there were several problems with the Court's fee analysis.[32] Despite its shortcomings, *Smith* at least established a form of lodestar as a beginning point for use in calculating reasonable attorney fees. One cannot fault the Court's intention.[33]

The *Smith* lodestar became the primary method of determining attorney fees under both statute and court rules for the next eight years. The latest attempt by the Supreme Court to tinker with attorney fee calculations came in the 2016 case of *Pirgu v. United Services Automobile Association*.[34]

PIRGU: THE LATEST STEP IN THE ATTORNEY FEE JOURNEY

Pirgu, like *Wood*, is an unreasonable denial of PIP benefits case. The trial court stated the issue was application of the *Smith* framework to the no-fault insurance act,[35] but the Court of Appeals had held otherwise. Leave to appeal was made to the Supreme Court; however, in lieu of granting leave, the Court reversed with new guidance on attorney fee calculations.[36]

After examining the history of fee determinations under *Wood* and *Smith*, the Court expressed the need for an adjustment and a new approach as follows:

> *Smith* requires trial courts to consult two different lists of factors containing significant overlap, which unnecessarily complicates the analysis and increases the risk that courts may engage in incomplete or duplicative consideration of the enumerated factors. Therefore, we distill the remaining *Wood* and MRPC 1.5(a) factors into one list to assist trial courts in this endeavor:
>
> 1. the experience, reputation, and ability of the lawyer or lawyers performing the services,
> 2. the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,
> 3. the amount in question and the results obtained,
> 4. the expenses incurred,
> 5. the nature and length of the professional relationship with the client,
> 6. the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer,
> 7. the time limitations imposed by the client or by the circumstances, and
> 8. whether the fee is fixed or contingent.
>
> These factors are not exclusive, and the trial court may consider any additional relevant factors. In order to facilitate appellate

review, the trial court should briefly discuss its view of each of the factors above on the record and justify the relevance and use of any additional factors.[37]

Under *Pirgu*, an objective approach to attorney fee calculations seems to be a bit closer to fruition. Consolidating the two sources makes the latest criteria more specific. Perhaps more important is the requirement that trial judges should discuss each of the factors on the record and justify the relevance and use of any additional factors which, hopefully, leads trial judges to make more reasonable fee awards in the first place and allows for more successful appeals when judges stray from that path.

Before we conclude, one other case should be discussed: *Jordan v. Transnational Motors, Inc*.[38]

JORDAN AND CONSUMER PROTECTION

Prior to 1995, trial courts often made low fee awards in consumer protection-type cases, relying on *Crawley* and/or Rule of Professional Conduct criteria of the "amount involved and the results achieved." *Jordan*, a defective vehicle case brought under the Magnuson-Moss Warranty Act[39] and the MCPA, appears to make doing that a reversible error.[40] *Jordan* held that in consumer protection cases, trial courts must consider the remedial purposes of the statutes involved when making attorney fee awards.[41]

CONCLUSION

Given Michigan's hundreds of statutes and court rules providing for awards of reasonable attorney fees, considerable judicial effort has been expended over time in attempts to unify and objectify fee determinations. The history of those efforts — starting with cases in the 1920s and 1930s to *Crawley v. Schick* in 1973 and *Wood v. Detroit Automobile Inter-Insurance Exchange* in 1982 — focused on delineated guidelines. But the Michigan Supreme Court in 2008's *Smith v. Khouri* adopted a lodestar approach as the beginning point in fee calculations by multiplying a reasonable hourly rate by the reasonable number of hours worked. That approach was refined in 2016 in *Pirgu v. United Services Automobile Association*. Trial courts must now start with the lodestar and explain, at least briefly, its application of other criteria. Hopefully, attorney fee decisions will now be more accurate and more easily reviewed upon appeal.

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ENDNOTES

1. MCL 37.2802.
2. MCL 15.240.
3. MCL 15.363.
4. MCL 257.1336.
5. MCR 2.403.
6. MCR 2.405.
7. MCR 7.216.
8. MCR 3.101.
9. *Fry v Montague*, 242 Mich 391; 218 NW 691 (1928).
10. *Id.* at 393.
11. *Id.* at 394.
12. *Becht v Miller*, 279 Mich 629; 273 NW 294 (1937).
13. *Id.* at 641-43.
14. *Id.* Additionally, the court held that it was not bound by the expert opinion of attorneys who had testified that the reasonable value of services of the attorney in question was approximately $10,000. The issue of other attorneys testifying to the value of a fee applicant's services, in terms of reasonable hourly rates, will present itself later on.
15. *Crawley v Schick*, 48 Mich App 728; 211 NW2d 217 (1973).
16. *Id.* at 737.
17. *Id.* at 738.
18. *Wood v Detroit Automobile Inter-Insurance Exchange*, 413 Mich 573; 321 NW2d 653 (1982).
19. *Id.* at 577. Reasonable attorney fees are available to the prevailing pary pursuant to MCL 500.3148(1).
20. *Id.* at 577-578.
21. *Id.* at 588.
22. *Smolen v Dahlman Apartments*, 186 Mich App 292; 463 NW2d 261 (1990).
23. MCL 540.601 *et seq.*
24. MCL 445.901, *et seq.*
25. *Smolen*, 186 Mich App at 296.
26. On a positive note, the court held that attorney fees were available for work on appeal, *Smolen*, 186 Mich App at 298.
27. *Howard v Canteen Corp*, 192 Mich App 427; 481 NW2d 718 (192).
28. MCL 27.2101 *et seq.*
29. *Howard*, 192 Mich App at 437.
30. *Smith v Khouri, DDS*, 481 Mich 519; 751 NW2d 472 (2008).
31. *Id.* at 530-531.
32. Victor, *Smith vs Khori, the Supreme Court Adopts a Modified Lodestar Likely to Produce Lower Fee Awards*, 13 Consumer L Newsletter 5 (August, 2009), available at <https://higherlogicdownload.s3.amazonaws.com/MICHBAR/3b217bd2-fb65-46ff-86c0-ea1a7b303b13/UploadedImages/pdfs/newsletters/aug09.pdf> [https://perma.cc/KWT5-ZBTG] (website accessed January 14, 2023).
33. "[W]e choose to provide the guidance that has been … sorely lacking for the many Michigan courts that are asked to impose 'reasonable attorney fees' under our fee-shifting rules and statutes," *Smith*, 481 Mich at 536.
34. *Pirgu v United Svcs Automobile Ass'n*, 499 Mich 269; 884 NW2d 257 (2016).
35. MCL 500.3148(1).
36. *Pirgu*, 499 Mich at 271.
37. *Id.* at 281-282.
38. *Jordan v Transnational Motors*, 212 Mich App 94; 537 NW2d 471 (1995).
39. 15 USC 2301, *et seq.*
40. Victor, *Recent Attorney Fee Cases and Their Potential Effect in Consumer Protection Cases*, 78 Mich B J 278, 279-280 (1999).
41. *Jordan*, 212 Mich App at 98-99.

Reflections on civility and ethics

BY LEE HORNBERGER

While accepting the 1964 Republican presidential nomination, Sen. Barry Goldwater said, "I would remind you that extremism in the defense of liberty is no vice. And let me remind you also that moderation in the pursuit of justice is no virtue."[1]

When it comes to civility and ethics, Sen. Goldwater's advice concerning extremism and moderation would usually be counterproductive. As noted in a 1993 Wisconsin Court of Appeals opinion in *Chevron Chemical Co v. Deloitte & Touche*, "There is a perception both inside and outside the legal community that civility, candor, and professionalism are on the decline in the legal profession and that unethical, win-at-all-costs, scorched-earth tactics are on the rise."[2]

U.S. Supreme Court Justice Sandra Day O'Connor advised that "[m]ore civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers."[3]

FAIRNESS AND CANDOR TO THE TRIBUNAL

Courtesy and civility are governed to some extent by the attorney's duty of candor and fairness to counsel and the tribunal.[4] The conduct of a U.S. Department of Justice attorney scribbling the word "wrong" in the margin next to several findings in a federal district court judge's opinion and submitting it as an appendix to the department's appellate brief was held to be "indecorous and unprofessional conduct."[5] In addition, a Justice Department attorney was reprimanded for misquoting and failing to quote fully two judicial opinions in a motion.[6] On the other hand, a federal district court order suspending an attorney from practice for two years for impugning the integrity of the court was reversed; according to an

appeals court, the attorney's claims that the judge was anti-Semitic and dishonest were statements of opinion protected by the First Amendment and the attorney's statement that the judge was drunk on the bench, although a statement of fact, was not shown to be false.[7]

ATTORNEY COMMUNICATIONS WITH WITNESSES

There are ongoing ethical issues concerning attorney communication with other individuals. When representing a client, an attorney should not discuss the subject matter of the representation with a party whom the attorney knows to be represented in the matter by another attorney unless the attorney has the consent of the other attorney or is authorized to do so.[8] This ethical rule can raise issues when an attorney wants to communicate with the present employees of the other side.

There are several guidelines we should heed in this situation. First, the attorney may not interview an incumbent management employee. Second, there cannot be communication with a non-managerial employee regarding matters within the scope of his or her employment. Third, there cannot be communication with an employee whose act or commission may be imputed to the other side. Fourth, there cannot be communication with an employee whose statements may be an admission.[9]

Some courts have held that this includes mere evidentiary admissions. Other courts have held that the admission must be a binding judicial admission. The latter occurred in a case that held that ethics rules did not prohibit an employee's attorneys from interviewing Harvard employees and the trial court's sanctions against the employee's attorneys were vacated.[10]

An attorney cannot communicate directly with a represented party even if the adverse party initiates the communication.[11] An attorney may not instruct a client to tender a settlement offer directly to an opposing party represented by an attorney unless the opposing party's attorney consents;[12] the communicating attorney might be subject to disqualification.[13] However, under some circumstances, an attorney can obtain leave of court to contact groups of incumbent employees with whom contact might otherwise be foreclosed.[14]

The requirements for communicating with former employees are generally more lenient. Typically, an attorney can talk with a former employee if that employee is not personally represented in the matter.[15] The proscription against communications with represented parties generally does not extend to former employees of a represented entity.[16] Nevertheless, there are several *Miranda*-type warnings which should be given by the interviewer attorney to the

former employee. These warnings include clearly telling the former employee that they are not required to talk with the attorney, the former employee is not to divulge any information subject to attorney-client privilege, and the communication cannot occur if the former employee is represented by his or her own counsel or the entity's counsel on the subject matter of the communication. In addition, the communicating attorney cannot give legal advice to the individual.

ATTORNEY RECORDING

Secret recording by an attorney may raise delicate issues. MCL 750.539c, in part, provides:

> Any person who is present or who is not present during a private conversation and who willfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs, or procures another person to do the same in violation of this section, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than $2,000.00, or both.[17]

It is generally unethical in many states for an attorney to record any person without that person's consent.[18] The mere act of secretly but lawfully recording a conversation might not be inherently deceitful.[19] In spite of this, it has been held that the witness interview work-product privilege was destroyed because a secret recording by the attorney was done without consent.[20]

The inadvertent acquisition of privileged documents also creates ethical dilemmas. Receipt of brown envelope and dickie-bird deliveries fall into this category. An attorney who, without solicitation, receives materials which are obviously privileged and/or confidential has a professional obligation to notify the adverse party's attorney, after which the receiving attorney can follow the instructions of the adverse party's attorney concerning disposition of the materials or refrain from using them until a resolution of their proper disposition is obtained from the court.[21]

This includes inadvertent receipt of attorney-client privileged letters.[22]

In *AFT Michigan v. Project Veritas*,[23] the district court certified an interlocutory appeal to the U.S. Sixth Circuit Court of Appeals regarding whether MCL 750.59a and 750.539c prohibit a party to a conversation from recording it absent the consent of all other participants. The Michigan Supreme Court had declined the district court request to answer a certified question on the same issue in *In re Certified Question from the United States District Court of Michigan, Southern Division*.[24] The Sixth Circuit denied hearing the appeal on August 16, 2019, stating, "The district court certified for an interlocutory appeal under § 1292(b) whether Michigan's eavesdropping statute prohibits a participant from recording, without the consent of all parties thereto, a private conversation. The Michigan Supreme Court has not addressed this question, which may be controlling as to some of the claims asserted below. The defendants have not demonstrated … that an immediate appeal will advance the termination of the litigation because the litigation is likely to proceed in substantially the same manner regardless of its outcome."[25]

In *Tyler v. Findling*,[26] the Supreme Court enforced mediation confidentiality in a defamation case where one attorney secretly recorded a conversation with another attorney.[27]

ATTORNEY REVIEW OF MEDICAL RECORDS

Issues can arise concerning the timing of review of an individual's medical records by the opposing party. For example, in one case, a defendant university's attorney was sanctioned for unilaterally reviewing the plaintiff's student medical records while there were pending objections to the discovery and before the return date in the subpoena duces tecum issued by the attorney for those records.[28]

CONCLUSION

Ethical issues force the conscientious attorney to practice both moderation and civility in the pursuit of justice. These issues repeatedly raise concerns in many areas including interaction with the court and other counsel, brief writing, contacting witnesses, and document retention and review. As the Michigan Supreme Court has stated, "[i]n fulfilling our professional responsibilities, we as attorneys, officers of the court, and custodians of our legal system, must remain ever-mindful of our obligations of civility in pursuit of justice, the rule of law, and the fair and peaceable resolution of disputes and controversies."[29]

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ENDNOTES

1. Goldwater Institute, *Barry Goldwater Quotes That Inspire Us* <https://www.goldwaterinstitute.org/barry-goldwater-quotes-that-inspire-us/> [https://perma.cc/8QRS-47PN] (accessed January 19, 2023).
2. *Chevron Chemical Co v Deloitte & Touche*, 176 Wis 2d 935, 944-45; 501 NW2d 15 (App, 1993).
3. O'Connor, *Professionalism*, 76 Wash U L Q 5, 8 (1998).

4. Generally, MRPC 3.3, MPRC 3.5(c), MRPC 6.5(a), and 29 USC 1927. See also *In re Lewellen*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit issued January 17, 2003 (Case No 00-2028) and *Bearden v Ballard Health*, 967 F 3d 513, 515 (CA 6, 2020) (citing in part from *Bennett v State Farm Mut Auto Ins Co*, 731 F3d 584, 585 (CA 6, 2013), "There are good reasons not to disparage your opponent, especially in court filings. 'The reasons include civility; the near-certainty that overstatement will only push the reader away ... and that, even where the record supports an extreme modifier, the better practice is usually to lay out the facts and let the court reach its own conclusions.'").
5. *Allen v Seidman*, 881 F2d 375, 381 (CA 7, 1989).
6. *Precision Specialty Metals, Inc v United States*, 315 F 3d 1346, 1357 (Fed Cir, 2003) and MRPC 3.3.
7. *Standing Comm v Yagman*, 55 F3d 1430 (CA 9, 1995).
8. MRPC 4.2 and *Valassis v Samelson*, 143 FRD 118, 123 (ED Mich, 1992).
9. FRE 801(d)(2)(D).
10. *Messing, Rudavsky & Weliky, PC v President and Fellows of Harvard College*, 436 Mass 347, 764 NE2d 825 (2002).
11. *In the Matter of Searer*, 950 F Supp 811, 814 (WD Mich, 1996).
12. Ethics Opinion RI-171 (September 17, 1993).
13. *Shoney's v Lewis*, 875 SW2d 514 (Ky, 1994).
14. *Morrison v Brandeis Univ*, 125 FRD 14 (D Mass, 1989).
15. Ethics Opinions RI-120 (1992), RI-44 (1990), and R-2 (1989). See generally, *Kitchen v Aristech Chemical*, 769 F Supp 254 (SD Ohio, 1991) and *Upjohn Co v Aetna Casualty and Surety Co*, 768 F Supp 1186 (WD Mich, 1991).
16. *Smith v Kalamazoo Ophthalmology,* 322 F Supp 2d 883 (WD Mich, 2004), *US v Beiersdorf-Jobst*, 980 F Supp 257 (ND Ohio, 1997), and Ethics Opinion RI-360 (2013).
17. *Sullivan v Gray*, 117 Mich App 476; 324 NW2d 58 (1982).
18. ABA Formal Opinion 337 (1974) but see Ethics Opinion RI-309 (1998) (determined on a case-by-case basis).
19. ABA Formal Opinion 01-422 (2001).
20. *Wilson v Lamb*, 125 FRD 142 (ED Ky, 1989).
21. ABA Formal Opinion 92-368 (1992) and ABA Formal Opinion 94-382 (1994). But see District of Columbia Ethics Opinion 356 (1995), Maryland Bar Ass'n Opinion 89-53 (1989), Ohio Opinion 93-11, Virginia Opinion 1076 (1988), and Ethics Opinion C1-970 (1983). Regarding inadvertent disclosure in Michigan, see generally Ethics Opinion RI-179 (1993) and Proctor, *Counsel's Corner: Inadvertent Disclosure,* 75 Mich Bar J 418 (1996).
22. *Trans Equip Sales Corp v BMY Wheeled Vehicles*, 930 F Supp 1187 (ND Ohio, 1996) and *Resolution Trust Corp v First of Am Bank*, 868 F Supp 217 (WD Mich, 1994).
23. *AFT Michigan v Project Veritas*, 397 F Supp 3d 981 (ED Mich, 2019).
24. *In re Certified Question from the United States District Court of Michigan, Southern Division*, 954 NW2d 212 (2021).
25. *In re Project Veritas*, unpublished order of the United States Court of Appeals for the Sixth Circuit, issued August 16, 2019 (Case No 19-0109).
26. *Tyler v Findling*, 508 Mich 364; 972 NW2d 833 (2021).
27. Hornberger, *Michigan Supreme Court enforces mediation confidentiality*, Oakland County Legal News (December 8, 2021) <https://www.leehornberger.com/files/Findling,%20OCLN%20(Dec2021).pdf> [https://perma.cc/N39L-YK5V] (accessed January 19, 2023).
28. *Mann v Univ of Cincinnati*, 824 F Supp 1190 (SD Ohio, 1993) and *Mann v Univ of Cincinnati,* 152 FRD 119 (SD Ohio, 1993), but see *Domako v Rowe*, 438 Mich 347; 475 NW2d 30 (1991).
29. Administrative Order No 2020-23 (December 16, 2020, amended December 14, 2022).

MICHIGAN'S CONFLICTING INTERPRETATIONS

Are reunification efforts required when a parent sexually abuses an unrelated child?

BY THOMAS ROBERTSON

When a court assumes personal jurisdiction of a parent for abuse or neglect of the parent's child and the child is removed and placed with the Department of Health and Human Services (DHHS), MCL 712A.19a(2) provides that:

> Reasonable efforts to reunify the child and family must be made in all cases except if any of the following apply:
>
> (a) There is a judicial determination that the parent has subjected the child to aggravated circumstances as provided in section 18(1) and (2) of the child protection law, 1975 PA 238, MCL 722.638. [...]
> (d) The parent is required by court order to register under the sex offenders registration act.

MCL 722.638(18)(1) provides for only one exception that relates to criminal sexual conduct:

> The department shall submit a petition for authorization by the court under section 2(b) of chapter XIIA of 1939 PA 288, MCL 712A.2, if 1 or more of the following apply:
>
> (a) The department determines that a parent, guardian, or custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home, has abused the child or a sibling of the child and the abuse included 1 or more of the following: [...]
> (ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

If an exception applies, DHHS may proceed directly to a request for termination of parental rights without attempting reunification. The exceptions under MCL 722.638 include sexual abuse of siblings of the parent's child as well as the parent's biological child. In *In re Jenks*,[1] the Michigan Court of Appeals concluded that a 1997 amendment to MCL 712A.19b(3)(b)(i) defined "sibling" to include a half-sibling and a step-sibling — neither of whom are biological children of the parent. I will use the term "related child" to refer collectively to a biological child, the biological child's half-sibling, and the biological child's step-sibling.

In sum, if a parent has sexually abused an unrelated child but is not a registered sex offender, it would appear that reunification efforts are statutorily mandated.

MCL 28.722 and 28.723 provide that an individual is only required to register under the sex offenders registration act if the individual is criminally convicted of a listed offense. For a child protection adjudication, MCR 3.972(C)(1) provides that proof of any relevant fact requires a lesser standard of a preponderance of the evidence. It is conceivable, then, that in a child protection case, a parent who is not a registered sex offender could be found by a preponderance of the evidence to have sexually abused an unrelated child, but reunification efforts with the parent's biological child would be mandatory. It is difficult to conceive of reunification services that could convince a trial court that reuniting a parent with his or her child would ever be safe if the parent has sexually abused an unrelated child. But an even more quizzical question is presented: can the trial court even gain jurisdiction over a parent for sexual abuse of an unrelated child?

This question was raised in the unpublished Michigan Court of Appeals case of *In re Johnson*.[2] The respondent father had been criminally convicted of sexual abuse of an unrelated minor. The trial court found jurisdiction based on the conviction and his imprisonment. The respondent's parental rights were terminated at a disposition immediately following the adjudicatory hearing. The Court of Appeals reversed, finding that the offenses were committed against an unrelated minor and there was no evidence that his child was affected by his offenses. On those facts, the court found that the trial court lacked jurisdiction and without proper jurisdiction, termination of parental rights was also found to be improper.

However, in the unpublished case of *In re Smith* issued June 7, 2018, the Court of Appeals reached the opposite conclusion.[3] The trial court found jurisdiction based on the fact that the respondent

mother was in a romantic relationship with a man with a criminal sexual history involving minors. The Court of Appeals affirmed the finding of jurisdiction (and eventually termination of parental rights) and invoked the doctrine of anticipatory neglect. As the court noted, "Respondent attempts to minimize these allegations of present risk of harm to [the minor], but these allegations were serious, more than merely anticipatory, and not frivolous."[4] The order terminating parental rights was affirmed, in part, based upon MCL 712A.19b(3)(j), which allows termination when "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent."

It is conceivable that in a child protection case, a parent who is not a registered sex offender could be found by a preponderance of evidence to have sexually abused an unrelated child, but reunification efforts with the parent's biological child would be mandatory.

The conflict between the cases is significant. Where a parent has sexually abused an unrelated minor, the doctrine of anticipatory neglect more logically supports an irremediable risk to the parent's biological child than when the parent is simply in a relationship with a person who has sexually abused a minor.

A middle-ground approach, given the diametrically opposed conclusions of the *Johnson* and *Smith* cases, is that a trial court could assume jurisdiction over a parent who has sexually abused an unrelated minor, but reunification efforts would have to be ordered. But can the parent ever cast doubt on the termination ground of MCL 712A.19b(3)(j) that, based upon the parent's conduct, the child would be harmed if returned to the care of the parent? Can reunification efforts ever assure a trial court that the offending respondent parent would never sexually abuse his or her related child?

A simple solution to the dilemma would be for the Michigan Legislature to amend MCL 712A.19a(2) or MCL 722.638 to provide that reunification efforts are not required if the parent is alleged to have sexually abused any minor child. DHHS would then be permitted to seek termination of parental rights at the initial disposition. MCL 712A.19b(3)(b) might also have to be amended because as written, that statute only permits termination of parental rights if "the child or a sibling of the child" has suffered sexual abuse by the parent. The article "the" in the statute arguably refers to a child of the parent or a sibling of that child and not to an unrelated child.

Of course, the allegation of sexual abuse of an unrelated child would have to be proven with admissible evidence at the adjudicatory trial, and that termination of parental rights to the biological child would be in the child's best interests. This approach requires a presumption that a person who sexually abuses an unrelated minor poses a risk to sexually abuse any minor — even his or her biological child. Such a presumption does not seem any less well-founded, and perhaps is more well-founded, than the already existing presumption under MCL 712A.19a(2)(d) that a parent who is required to register as a sex offender poses a risk to his or her biological child. It might be helpful to a trial court if expert testimony regarding that risk were introduced at the adjudicatory trial.

CONCLUSION

MCL 712A.19a(2), 722.638, and 712A.19(b)(3)(b) could be amended to allow that reunification efforts are not required if there is a preponderance of evidence that the parent had sexually abused his or her child or an unrelated child. It might be helpful to a trial court if expert testimony established that there is an increased risk of sexual abuse of the biological child if the unrelated child had been sexually abused.

Tom Robertson retired after seven years as St. Joseph County juvenile court director and referee. His prior private practice included a substantial concentration in juvenile law. He graduated with a bachelor's degree from Kalamazoo College and earned his law degree from the Franklin Pierce Law Center (now University of New Hampshire Law School.)

ENDNOTES

1. *In re Jenks*, 281 Mich App 514, 518; 760 NW2d, (2008).
2. *In re Johnson*, unpublished per curiam opinion of the Court of Appeals, issued November 17,2009 (Docket No. 292545).
3. *In re Smith*, unpublished per curiam opinion of the Court of Appeals, issued June 7, 2018 (Docket No. 341733).
4. *Id.* at p 2.

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PLAIN LANGUAGE

Bring your writing to life: Use recognizable characters and action verbs

BY IAN LEWENSTEIN

Legal writing shares with officialese and bureaucratese an affinity for abstractitis[1] — a malady that robs prose of its vitality and clarity. This kind of writing clouds a writer's message by stuffing it with zombie nouns (abstract nouns where a strong verb should be), weak verbs (such as forms of *to be*), and passive voice. Abstractitis has been addressed in this column before,[2] but it's so pervasive and deadly that it deserves another pass.

ABSTRACT NOUNS AND HIDDEN ACTION

Abstractitis begins with missing characters, abstract nouns, and hidden action.

1. It was found that the initiation of the lawsuit was not done in a timely manner.
2. The judge ruled the lawsuit untimely.

In #1, we find no recognizable characters, a zombie noun (*initiation*), and passive voice. But in #2, we provide a character (*judge*) and active voice paired with an action verb (*ruled*).

Abstractitis flourishes when we neglect to name recognizable characters in the subjects of sentences: we then confuse our readers,[3] who look for action and crave characters that they can recognize as capable of acting; recognizable characters and action verbs combine to produce clear, direct, and readable prose.[4]

Take another example (to be discussed later) in which the writer discarded commonly recognizable characters and used abstract nouns instead of verbs to express crucial actions: "The project scope is the broad features and functions of the new comment portal." *Project scope* isn't a concrete, recognizable character. The verb is lifeless. And now the reader is confused and, unless required by circumstances, unlikely to read on.

ABSTRACTITIS ABOUNDS

The following example comes from an email that I and other Minnesota rule writers received from an administrative agency, the Office of Administrative Hearings. OAH oversees Minnesota rulemaking, which includes managing an online portal at which the public can comment on an agency's proposed administrative rule. OAH is developing a new portal — I think:

> The **project scope** is the broad features and functions of the new comment portal. **This scope statement** provides a common understanding of the project scope among all project stakeholders and describes the project's major objectives. **It** also enables the project team to perform more detailed planning, guides the project team's work during execution, and provides the baseline for evaluating whether requests for changes or additional work are contained within or outside the project's boundaries.
>
> **This** is different from requirements, which specify in detail the capabilities, features or attributes of the new system. **Stakeholder needs, wants and wishes** are gathered and assessed to derive the requirements. **Requirements** are prioritized to determine which requirements are must-haves, could-haves, or nice-to-haves. **Requirements gathering** is the next step in the project. There will be numerous **opportunities** for engagement across the enterprise to gather requirements.

In boldface are the characters in the subject position; in two of the sentences in the second paragraph, passive voice results in no characters at all. Without any characters, readers are stripped of critical information that tells them who or what is acting. Who is gathering and assessing? Who is prioritizing? Readers are left with nettlesome abstractions. Welcome to abstractitis.

"Plain Language," edited by Joseph Kimble, has been a regular feature of the *Michigan Bar Journal* for 38 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.

THE FIX

To eliminate the fuzziness, start by identifying each sentence's subject and then rework the sentences, using identifiable characters in the subject position. Because OAH maintains the comment portal, OAH is a suitable character. Next, we must rewrite the sentence to place OAH (*we* in this instance) as a character in the subject position.

Let's try the first paragraph, first sentence (#1 in the chart below). The revision (#2) is a bit longer, but it fixes the original's limpness.

Language	Characters – verbs
1. The **project scope** is the broad features and functions of the new comment portal.	Character in subject position: Project scope – is
2. In our project statement, **we** describe our goals for a new comment portal and how **we** seek to build a better one.	Character in subject position: We – describe, seek

In the next sentence, let's continue using OAH as the character.

Language	Characters – verbs
1. This **scope statement** provides a common understanding of the project scope among all project stakeholders and describes the project's major objectives.	Character in subject position: Scope statement – provides, describes Other character: stakeholders
2. **We** explain why we—together with **state agencies**—are developing a new portal and outline our main goals for the portal.	Character in subject position: We – explain, outline Other character and concrete noun: state agencies, portal

The original uses action verbs, but *project scope* could be more concrete. Ostensibly, the new comment portal is the project. Just say *comment portal* or *portal*.

So far, we've identified the main character as OAH (*we*)—plus a few recognizable nouns that don't act but are important to the reader (project *statement*, *portal*). Now the third sentence.

Language	Characters – verbs
1. **It** also enables the project team to perform more detailed planning, guides the project team's work during execution, and provides the baseline for evaluating whether requests for changes or additional work are contained within or outside the project's boundaries.	Character in subject position: It – enables, perform, guides, provides Other character and concrete nouns: project team, work, requests
2. **We** use our project statement to help us: • plan and guide our work on the portal; and • decide how to respond to agency suggestions.	Character in subject position: We – use, help, plan, guide, decide Concrete nouns: statement, work, portal, suggestions

Compare the original to the revision. Note how the characters are paired with strong verbs, resulting in a smoother flow. Not perfect, but a definite improvement.

Original	Revised
The project scope is the broad features and functions of the new comment portal. This scope statement provides a common understanding of the project scope among all project stakeholders and describes the project's major objectives. It also enables the project team to perform more detailed planning, guides the project team's work during execution, and provides the baseline for evaluating whether requests for changes or additional work are contained within or outside the project's boundaries.	In our project statement, we describe our goals for a new comment portal and how we seek to build a better one. We explain why we—together with state agencies—are developing a new portal and outline our main goals for the portal. We use our project statement to help us: • plan and guide our work on the portal; and • decide how to respond to agency suggestions.

Readers want recognizable characters and action verbs, not the misery of abstractitis. Write accordingly if you expect your reader to easily understand you.

Note to readers: Take a stab at rewriting the second paragraph from the example. Substitute recognizable characters in the subject position and use action verbs. See what you come up with and submit your revision to me at lewe0039@umn.edu. I'll send you a rewrite to compare with yours. Have at it.

Ian Lewenstein works for the State of Minnesota, helping agencies write clear regulations in plain language. He also runs his own consulting business, which tracks state and federal rulemaking and provides writing expertise to businesses, nonprofit organizations, city governments, and individuals.

ENDNOTES

1. Garner, *Garner's Modern English Usage* (New York: Oxford University Press, 5th ed, 2022), pp 11–12.
2. Garner, *Eliminate Zombie Nouns and Minimize Passive Voice*, 98 Mich B J 34 (December 2019); Schiess, *Editing for Concision*, 95 Mich B J 34 (December 2016); Williams, *An Excerpt from Style: Toward Clarity and Grace (Part Two)*, 71 Mich B J 196 (1992); Williams, *An Excerpt from Style: Toward Clarity and Grace (Part One)*, 71 Mich B J 71 (1992); Wing, *Where's the Verb?*, 68 Mich B J 150 (1989).
3. Williams, *Style: Toward Clarity and Grace* (Chicago: University of Chicago Press, 1990).
4. Williams & Bizup, *Style: The Basics of Clarity and Grace* (Upper Saddle River: Pearson Education, 5th ed, 2015), p 13.

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BEST PRACTICES

Building a sustainable employment practice

BY JOHN R. RUNYAN

Unless you can afford billboards across the state, you may wonder whether you can sustain a practice representing discharged employees, rejected applicants for employment, victims of sexual harassment, and others who cannot afford to pay for your services on an hourly basis. Although it is not as easy as taking a job with a firm being paid a considerable hourly rate to represent employers doing the discharging, rejecting, and harassing, my experience tells me that it is not only possible to sustain such a practice, but it is incredibly rewarding. Here are few suggestions for doing so based upon 50 years in the practice of labor and employment law.

SURROUND YOURSELF WITH DIVERSE COWORKERS WHO SHARE YOUR VALUES

Practice what you preach. Surrounding yourself from top to bottom with a diverse group of coworkers sends a powerful message to both potential clients and the legal community at large. Judges and juries admire a diverse legal team that works well together and embodies the principles they espouse. Clients appreciate being represented by someone who not only looks like them but may have shared experiences. A woman complaining of sexual harassment in the workplace may find it difficult to describe the graphic details of her ordeal to a conference room full of men.

BE ACTIVE IN THE BAR AND OTHER ORGANIZATIONS OF LAWYERS AND JUDGES

Unless you believe in advertising, most potential clients will be referred to you from one of two sources: former clients or other lawyers and judges. In terms of former clients, of course, providing good, ethical representation is probably the surest way to earn referrals of family and friends who later encounter a problem at work. Consider everyone you meet to be a potential referral source — court staff, opposing counsel, opposing witnesses, arbitrators, etc. Remember that you only have one chance to make a first impression.

Good representation and good results for your clients will lead other lawyers and judges to refer potential clients to you. It also helps to be active in bar organizations and take on leadership positions and opportunities to write in legal journals so other lawyers and judges will know who you are and what you can do. Build strong relationships within the bar and maintain a professional approach to your cases.

BE CAUTIOUS AND SELECTIVE IN DECIDING WHOM YOU WILL REPRESENT

The importance of this suggestion cannot be overstated. It is probably the single most significant determinant of whether you will be able to sustain a practice representing those who cannot afford to pay your fees on an hourly basis. Once you have started to build your practice, you will be flooded with calls from potential clients who have sad stories to tell. Your job is determining which of these sad stories you will be able to turn into a successful outcome for you and your client. You must remember that unless you are successful, you will have accomplished nothing for your client and you may have diverted time and attention away from clients whose claims have a greater likelihood of success.

Gathering the facts

The first step to determining whether to represent a potential client is gathering all of the facts. If the potential client is an incumbent employee, start with a request to the employer for the employee's personnel records. In Michigan, an employee is entitled to periodically review their personnel records under the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 *et seq.*[1]

It is also important to determine from the outset whether the employee is unrepresented or employed in a bargaining unit represented by a labor organization. If so, the employee may have

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

contractual rights under a collective bargaining agreement, such as a right to file a grievance challenging any adverse employment action including harassment and discharge. Because employers must bear the burden of proving just cause for any adverse employment action under a collective bargaining agreement, the grievance procedure is the preferred remedy for a bargaining unit employee seeking your advice and counsel. You may be able to assist the employee in filing a grievance or seeking the assistance of their collective bargaining representative. An occasional unrepresented employee may also enjoy contractual rights under a written employment agreement.

Pay close attention to the terms of an employment agreement that shorten the applicable limitations periods or require the employee to vindicate their rights through arbitration rather than in court. An employee's initial application for employment or an employee handbook may also contain terms shortening limitations periods or requiring that the employee vindicate their rights, including statutory rights, through arbitration.[2] Such terms may be enforceable even if the employee is not aware what they have signed or never received a copy of the employee handbook.

Gathering the facts requires you to carefully interview potential clients and any supporting witnesses, probably more than once. You need to listen carefully not only to gather all the facts, both favorable and unfavorable, but also to determine how your clients and supporting witnesses will stand up during deposition and come across at trial. Are your clients likeable? Chances are if you do not find your clients likeable, neither will a jury.

Researching and knowing the law

In addition to knowing whether there is an enforceable shortened limitations period or arbitration clause, it is important to know whether there is a contractual, common law, or statutory basis for a potential client to challenge the adverse action of which they complain. Absent a contractual limitation, illegal motivation, or discharge in violation of public policy, there is simply no claim for wrongful termination.

If a potential client's claim is based upon a statutory or constitutional claim that the adverse action was illegally motivated, it is also important to know the standard to which your client's proofs will be held. In *Gross v. FBL Financial Services*, for example, the United States Supreme Court distinguished the standard of proof in age bias cases from the standard applied in claims filed under Title VII of the Civil Rights Act of 1964.[3] Under Title VII, an employee must prove only that a protected criterion (e.g., race, sex, or religion) was a motivating factor for an adverse employment decision, so the employee can prevail even if there were other reasons for the adverse action. Under *Gross*, employees filing claims under the Age Discrimination in Employment Act must show age was the "but for" reason for the employment action, which is a higher standard of proof.[4]

Anticipating the employer's inevitable motion for summary disposition/judgment

Motions for summary judgment have become inevitable in employment litigation because employers and their attorneys correctly perceive judges to be more receptive to their defenses than juries. Skilled defense counsel has become adept at obtaining the factual concessions necessary to have employees' claims determined as a matter of law by a court rather than as a question of fact by a jury. Concerned with docket control, federal courts in particular have eased the standards under which defendants may obtain summary judgment.[5]

Defeating the employer's motion for summary judgment must begin well before the motion itself is filed. It starts with the initial interview of the plaintiff and the evaluation of potential claims and the employer's defenses. In a garden-variety disparate treatment case, for example, the plaintiff's attorney must be on the lookout from the initial interview for the evidence which will create a factual issue with respect to the employer's motivation: Is there direct evidence of the employer's discriminatory intent, such as discriminatory remarks made by the decision makers?[6] If not, is there circumstantial evidence from which an inference of discrimination can be drawn, such as evidence that similarly situated employees of another race or gender were treated differently, or evidence that the employer has deviated from its normal procedures in reaching the decision complained of?[7]

DEVELOP A CADRE OF EXPERTS WITH WHOM YOU CAN CONSULT

Second opinions are as important in law as in medicine. After everyone in your office has weighed in on whether to accept representation of a potential client, it is often valuable to seek a second opinion from an attorney whose judgment you respect. Another set of eyes reviewing the critical documents and summaries of the interviews of a potential client and supporting witnesses will often bring a fresh perspective. If your proofs involve statistical evidence or your potential client's damages claims involve actuarial calculations, it may also be worthwhile to consult an expert in advance of the determination to accept representation.

LOOK FOR OPPORTUNITIES TO REPRESENT CLIENTS WHO CAN AFFORD TO PAY A REASONABLE HOURLY RATE

Sustaining a practice representing clients who cannot afford to pay on an hourly basis may require that you occasionally supplement

that practice by taking on clients who can. Among the fertile sources for such representation are labor organizations, employee benefit plans (including pensions), non-profit organizations (including political organizations), corporate executives who occasionally need help negotiating or evaluating an employment or severance agreement, and, finally, serving as a mediator or arbitrator. You should also consider having clients agree to pay actual costs as a case progresses. Not only is this ethically preferable, but there is a lot to be said for clients having something invested in the process.

John R. Runyan is of counsel to Nickelhoff & Widick. He currently serves as chair of the SBM Labor and Employment Law Section and the Standing Committee on the Michigan Bar Journal. He is a past president of the College of Labor and Employment Lawyers, the Detroit Bar Association, and the Detroit chapter of the Federal Bar Association.

ENDNOTES

1. "An employer, upon written request which describes the personnel record, shall provide the employee with an opportunity to periodically review at reasonable intervals, generally not more than 2 times in a calendar year or as otherwise provided by law or a collective bargaining agreement, the employee's personnel record if the employer has a personnel record for that employee. The review shall take place at a location reasonably near the employee's place of employment and during normal office hours. If a review during normal office hours would require an employee to take time off from work with that employer, then the employer shall provide some other reasonable time for the review. The employer may allow the review to take place at another time or location that would be more convenient to the employee," MCL 423.503.
2. The United States Court of Appeals for the Sixth Circuit recently ruled that a contractually shortened six-month limitations period cannot supersede the statutory limitations period for bringing suit under Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq*, *Logan v MGM Grand Detroit Casino,* 939 F3d 824 (CA 6, 2019).
3. *Gross v FBL Financial Services, Inc,* 557 US 167; 129 S Ct 2343; 174 L Ed 2d 119 (2009).
4. *Id.* at 176.
5. E.g., *Celotex Corp v Catrett,* 477 US 317; 106 S Ct 2548; 91 L Ed 2d 265 (1986); *Anderson v Liberty Lobby, Inc,* 477 US 242; 106 S Ct 2505; 91 L Ed 202 (1986); and *Matsushita Electric Industrial Co v Zenith Radio Corp,* 475 US 574; 106 S Ct 1348; 89 L Ed 2d 538 (1986).
6. E.g., *Price Waterhouse v Hopkins,* 490 US 228, 251-252, 256-258; 109 S Ct 1775; 104 L Ed 2d 268 (1989); *Sharp v Aker Plant Services Group, Inc,* 726 F3d 789, 795-799 (CA 6, 2013); *DiCarlo v Potter,* 358 F3d 408, 415 (CA 6, 2004); and *Talley v Bravo Pitino Restaurant, Ltd,* 61 F3d 1241, 1249-1250 (CA 6, 1995), overruled on other grounds by *Gross v FBL Financial Services, Inc.*
7. E.g., *Reeves v Sanderson Plumbing Products, Inc,* 530 US 133, 143-149; 120 S Ct 2097; 147 L Ed 2d 105 (2000); *Wheat v Fifth Third Bank,* 785 F3d 230, 237-241 (CA 6, 2015); *Ondricko v MGM Grand Detroit, LLC,* 689 F3d 642, 651-652 (CA 6, 2012); *Chattman v Toho Tenax America, Inc,* 686 F3d 339, 348-350 (CA 6, 2012); *White v Baxter Healthcare Corp,* 533 F3d 381, 393-396 (CA 6, 2008); and *Tinker v Sears, Roebuck & Co,* 127 F3d 519, 523-524 (CA 6, 1997).

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ETHICAL PERSPECTIVE

Looking back at 2022: Ethics news

BY ROBINJIT EAGLESON

At the nucleus of legal ethics are the principles that govern the conduct of members of the legal profession — attorneys and judges alike — that they are expected to observe throughout their legal career. Or, in other words, as so eloquently stated by former U.S. Supreme Court Associate Justice Potter Stewart, "Ethics is knowing the difference between what you have the right to do and what is the right thing to do."[1]

At times, it seems simple enough to live up to this standard of honor and dignity. However, there are times when the issue is not so clear, especially when the issue falls into the gray area. That is where the State Bar of Michigan's Judicial Ethics Committee and the Standing Committee on Professional Ethics assist members of the Bar with application of the Rules of Professional Conduct through ethics opinions.

The Standing Committee on Professional Ethics recognized that as the use of technology grows, so does the use of online reviews by consumers. To help Michigan lawyers with how to ethically interact with clients and non-clients online without violating Michigan Rule of Professional Conduct 1.6, it published Ethics Opinion R-26 (Feb. 25, 2022).[2] The State Bar of Michigan Ethics Helpline routinely receives calls from attorneys inquiring about how to respond to negative online reviews without violating MRPC 1.6; at the same time, correcting false or unfair statements while also protecting the attorney's business is important, as the legal profession continues to rely on word-of-mouth referrals. Michigan attorneys have a duty to protect client confidences and secrets under MRPC 1.6, which includes any comment made by a client or former client on an online forum. The opinion provides guidance on appropriate responses for various scenarios and provides examples of effective language to use when responding to online reviews. Examples include when a review is written by a client, opposing party, or a third party not affiliated with the attorney through any case.

The Standing Committee on Professional Ethics was also asked to explore and provide an analysis on measures that must be taken by lawyers who are supervised in legal services programs by lawyers or non-lawyers, which it did in Ethics Opinion RI-383 (May 20, 2022). Callers to the helpline inquire about management and oversight, program management, and confidentiality. This opinion seeks to provide guidance on organizational structures, analyzes MRPC rules 5.4 and 1.8, and offers direction regarding access to client confidences, secrets, and other information. It further provides guidance about the overall policies that legal service programs should have in place and the roles that should not be part of the entity's governing body or administration.

The Judicial Ethics Committee reviewed various topics in 2022. It published three ethics opinions addressing simultaneous employment as a quasi-judicial officer and law clerk, participation on an election planning committee, and disclosure to all parties of prior relationships and children in common.

Referees and magistrates inquired whether they may be employed as a part-time, quasi-judicial officer and as a full-time staff attorney or law clerk, a scenario analyzed in Ethics Opinion JI-151 (May 13, 2022). This opinion provides an analysis regarding people employed within the same jurisdiction and those employed in different jurisdictions. The opinion affirms that a quasi-judicial officer is subject to the Michigan Code of Judicial Conduct and, therefore, must avoid the appearance of impropriety and maintain the independence of the judiciary.

During election years, the helpline receives numerous inquiries on a variety of campaign issues. One issue that the committee wanted to clarify was whether a judge may participate on their own election planning committee. Specifically, Ethics Opinion

"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.

JI-14 (Oct. 12, 1989) made it clear that a judicial candidate may not be a member of another judge's or candidate's election planning committee but did not address whether a judicial candidate may be a member of their own election planning committee. Ethics Opinion JI-152 (Aug. 24, 2022) removes this confusion by providing that a judicial candidate may be a member of their own election planning committee and provides clarification of membership on their own campaign committee, a scenario that was not addressed in JI-14.

One judge asked whether a lawyer appearing before a judicial officer who has divorced or terminated a prior dating relationship must disclose that prior relationship to all parties. Further inquiry was made regarding whether disclosure is required if the lawyer and the judicial officer have a child in common. Both issues were analyzed in Ethics Opinion JI-153 (Nov. 4, 2022). The opinion analyzes the divorce and termination of a relationship without children, with children, and how the elapse of time affects that disclosure. In order to avoid the appearance of impropriety and ensure the neutrality of the bench, disclosure is required, and the judicial officer must consider disqualification under MCR 2.003.

The Professional Ethics Committee and Judicial Ethics Committee provide advisory, nonbinding, written ethics opinions. Requests for ethics opinions may be made by any attorney. Information on requesting an opinion is available at the State Bar of Michigan website on the "How to Request an Ethics Opinion" page at michbar.org/generalinfo/ethics/request. Ethics opinions are researched and drafted by the committees. As a way to encourage members to seek guidance and facilitate open deliberations on issues, requests for written ethics opinions — including the identity of the inquirer, identifying facts, and draft opinions — are confidential pursuant to Rule 6 of the rules governing both committees.

Navigating the complex world of ethics can seem daunting at times. However, ethics rules create a foundation for professionals and the profession in a modern society. Navigating these issues requires guidance and ethics opinions assist us in understanding how to apply the complexities of situations the Bar may face on a day-to-day basis. There is no denying that the practice of law is becoming more complex with the increased use of technology and other systems; it is important to develop frameworks to ensure we are making consistent decisions aligned with the core of the practice of law. To accomplish this, Bar members must be aware of the Rules of Professional Conduct and how to apply them. The simplest way to do so is through the ethics opinions written by attorneys and judges who face these issues every day.

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.

ENDNOTES

1. *Potter Stewart Quotes,* AZ Quotes <https://www.azquotes.com/author/14137-Potter_Stewart> [https://perma.cc/7ZYG-6RAE] (site accessed January 11, 2023).
2. This and the other ethics opinions cited in this article can be found at Ethics, SBM <https://www.michbar.org/opinions/ethicsopinions#opinions> [https://perma.cc/5XZ9-D7Q5] (site accessed January 11, 2023).

LIBRARIES & LEGAL RESEARCH

By any other name

BY SHAY ELBAUM

The use of names to refer to individuals is probably as old as language itself, but many features of naming in the United States are much newer. For the most part, our naming laws and norms derive from England, where the use of surnames, for example, can be traced back to the Norman conquest and did not become a common practice until the 13th or 14th century.[1] The idea of a surname as a *family* name, permanent and hereditary, is even newer.[2]

The common law method of changing one's name — simply using a different name, for non-fraudulent purposes — is still valid in most states, including Michigan.[3] However, the practical impact of a common law name change is limited since it may not be sufficient for a name change on identification documents. The Social Security Administration, for example, will not change the name associated with a Social Security number based on evidence of a common law name change.[4]

This column discusses Michigan's name change laws and the requirements for a name change on one's driver's license, Social Security card, and passport. It focuses on two categories of name change and the issues they may present: name changes upon marriage and name changes by transgender or non-binary people.

MICHIGAN LAW

Chapter 711 of the Michigan Probate Code contains the statutory procedures for changing a person's name. Under MCL 711.1(1), an adult seeking to change their name must petition the family division of the county's circuit court "showing a sufficient reason for the proposed change and that the change is not sought with fraudulent intent." The court will hold a hearing and — hopefully — issue an order changing the petitioner's name.

The petitioner must have been a resident of the county for one year or more and must publish a notice of the proceedings that contains their current and proposed names.[5] The publication requirement may be waived and the record of the proceeding kept confidential for good cause, including evidence that publication could put the petitioner or someone else in physical danger.[6]

An individual who is 22 years old or above must have fingerprints taken and forwarded to the state police, who will report any pending criminal charges or convictions to the court.[7] A criminal record does not preclude a name change but it does give rise to a rebuttable presumption of fraudulent intent.[8]

The process is similar for minors except that the petition must be signed by both parents, with some exceptions.[9] However, courts have allowed minors to change their names without the consent of one parent in some instances by treating the petition as one for recognition of a common law name change.[10] A minor 14 years old or above must give written consent to the change.[11] The court may consult and consider the wishes of a minor under 14 years old.[12]

There are fees associated with each of these steps. Fees vary by county, but petitioners pay $280 on average before the hearing for the initial filing, background check, and publication, then an

AT A GLANCE

The common law method of changing one's name — simply using a different name, for non-fraudulent purposes — is still valid in most states, including Michigan. However, the practical impact of a common law name change is limited since it may not be sufficient for a name change on identification documents.

additional $10 for the order itself and any copies.[13] The Michigan State University webpage cited in the preceding endnote is an excellent practical guide to the statutory name change process.

MARRIAGE

A marriage certificate alone can be evidence of a name change, or at least a surname change. The Michigan Department of State, the Social Security Administration, and the U.S. Department of State — and State Bar of Michigan — all accept marriage certificates as evidence of a name change.[14]

However, this begs the question: Evidence of what changes, and for whom? Same-sex couples, men seeking to adopt their wives' surnames or a hyphenated name, and anyone adopting an entirely new name on marriage may face obstacles using a marriage certificate to prove the name change. Unlike some states, Michigan's marriage license does not include a space for either spouse to indicate if they would like to change their name.[15] I have found no official policy describing which name changes can currently be proven with a marriage certificate at the Michigan Department of State. Anecdotally, I am aware of men whose marriage certificates were accepted as proof of a name change, and other men whose certificates were not. This is an area where people may encounter what Elizabeth Emens has called desk-clerk law: "Desk-clerk law is what the person at the desk tells you the law is[.] In this informal way, desk clerks effectively make the rules for many citizens."[16]

The Social Security Administration and U.S. Department of State have much clearer policies for name changes on Social Security cards and passports. For both, a marriage certificate can serve as proof of a name change by a spouse of any gender as long as the new name can be derived from the surnames on the certificate.[17] There are some minor differences between the policies which could result in discrepancies between a Social Security card and passport, but both policies are fairly broad.

TRANSGENDER AND NON-BINARY PEOPLE

For many transgender and non-binary people, choosing a new name is an immensely meaningful event and an important step in moving through the world as the person they know themselves to be. Having a name that aligns with one's gender — and having that name used by others — is a source of self-actualization and empowerment; conversely, the use of a birth name that does not align with one's gender can cause significant distress. Moreover, the presence of an incorrect name on identification documents can "out" someone, revealing private and sensitive information and risking discrimination or violence.

The legal process for changing one's name is no different for transgender and non-binary people than for anyone else. They may, however, have a well-founded fear of judicial bias.[19] In a 2019 article, Milo Primeaux describes his own difficult name change process including the judge's "barrage of increasingly invasive, dehumanizing, and irrelevant questions."[20] Now, as an attorney, Primeaux helps his transgender clients have better name change experiences and offers some suggestions for attorneys in his article.

First, simply demonstrating awareness of these issues and empathy for transgender clients' concerns can build trust and make the process more comfortable. Primeaux suggests reviewing your intake forms and client management systems to make sure they're inclusive of transgender and non-binary clients. He also urges attorneys to take on these matters at affordable rates. For the attorney, the process is usually formulaic and not particularly time consuming; for the transgender client, the process may be confusing, intimidating, and prohibitively expensive. It may also be "life-changing and life-saving."[21]

CONCLUSION

There are numerous other reasons one might wish to change their name; in particular, this column does not discuss immigration-related name changes or name changes in a divorce.[22] There are also numerous other government agencies and private entities one must contact to really effectuate the change.[23] The legal processes discussed here, however, are essential for providing proof of the name change in most cases and the occasion of a legal name change can have great personal significance.

Shay Elbaum is faculty research librarian at the University of Michigan Law Library. He received his law degree from the University of Michigan Law School and his master's degree in library and information science from Simmons College. He is a member of the Alaska Bar Association.

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3. Baker & Green, *There is No Such Thing As a 'Legal Name,'* 53 Columbia Hum Rights L Rev 129, 140 (2021); *Rappleye v Rappleye*, 183 Mich App 396, 398-99; 454 NW2d 231 (1990); and *Piotrowski v Piotrowski*, 71 Mich App 213, 216-17; 247 NW2d 354 (1976).
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5. MCL 711.1(1) and MCR 3.613.
6. MCL 711.3.
7. MCL 711.1(2).
8. *Id.* For more on what evidence suffices to rebut the presumption, *compare In re Pearson,* unpublished per curiam opinion of the Court of Appeals, issued March 25, 2021 (Docket No 352377) with *In re Morgan,* unpublished per curiam opinion of the Court of Appeals, issued April 14, 2011 (Docket No 296678).
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10. *E.g., In re Warshefski,* 331 Mich App 83; 951 NW2d 90 (2020); *Kratzer v Lambright,* unpublished per curiam opinion of the Court of Appeals, issued May 20, 2003 (Docket No 235336); and *Rappleye v Rappleye.*
11. MCL 711.1(6).
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PRACTICING WELLNESS

The dangerous and unspoken nature of shame and how to be shame resilient

BY MOLLY RANNS

Renowned professor, lecturer, and author Dr. Brené Brown has been studying shame for more than two decades. Shame, she wrote, is "the intensely painful feeling or experience of believing that we are flawed and therefore unworthy of love, belonging, and connection."[1] Through her work, we have begun to understand that shame is truly an epidemic that spreads fear and negative thinking and is highly correlated with addiction, depression, eating disorders, violence, bullying, and aggression.[2]

With too many of our colleagues in the legal field suffering from substance use and mental health concerns, it's time we talk about shame and the role it plays in our lives. Brown also helps us differentiate between guilt and shame — namely, that guilt is helpful and adaptive while shame is harmful and destructive.[3] The two are often dangerously confused, leading to issues with how we engage in relationships with others, how we give and receive feedback, and how we make decisions, all of which are critical components to practicing law.

As a trained therapist for the past 15 years, I find shame grows and thrives in environments where it is kept secret and silenced. While guilt arises when someone feels they've done wrong and is followed by feelings of remorse and attempts at making amends, shame seems to be unspeakable. It's kept hidden, and individuals experiencing shame fail to make the distinction between the action or perceived transgression and the self.[4] Someone who lied internalizes that shame and labels themselves a liar; someone who cheated is a cheater; and someone who made a mistake becomes the mistake. Understanding this phenomenon could have profound implications on how we parent our children; deal with colleagues, friends, and family members; and even how we interact with and represent clients.

Shame is often associated with a past or present experience over which we have very little control[5] — feelings experienced by family or criminal defense lawyers who represented dishonorable individuals for heinous crimes, prosecutors unable to get the conviction on which they worked tirelessly, or legal professionals who have struggled with mental health issues in law school or as a practicing attorney, resulting in poor outcomes. I'd venture to assert that most of us have experienced shame at one time or another. It's a feeling that appears to be a universal emotion arising from an array of circumstances or events.

Understanding shame as toxic and fear-based is backed by neuroscience. The ability for human beings to regulate their internal organs without having to think about them consciously is due to our autonomic nervous system, which is made up of both sympathetic and parasympathetic components.[6] Our sympathetic nervous system perceives danger; prepares us for flight, fight, or freeze; and increases our heart rate and blood flow.[7] In other words, it's excitatory. The parasympathetic nervous system, by contrast, calms the body by reducing our heart rate and decreasing arousal.[8] After what we've learned so far about shame, it is likely no surprise that when someone is faced with shame, the brain reacts as if it were truly facing physical danger by activating the flight, fight, or freeze response. This can cause us to want to slink away or disappear (flight), become aggressive toward those that have shamed us (fight), or even impact our ability to think clearly (freeze).

Though shame is universal, gender impacts how it is experienced. Women tend to internalize humiliation more intensely than men, making them more likely to feel the negative effects of shame, and the same is true for adolescents.[9] During interviews investigating the relationship between shame and gender differences, shame

"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

for women tends to relate to attempts at "doing it all" perfectly without anyone seeing the hidden struggles of such unrealistic and unattainable demands. It also relates to women's conflicting experiences of who they are told they're supposed to be — caretaker, wife, mother, careerist.[10] Men, on the other hand, tend to experience shame when they are perceived as weak.[11] Understanding shame and its impact is critical to combating it.

Vulnerability, defined as "the quality or state of being exposed to the possibility of being harmed emotionally" or "uncertainty, risk, and emotional exposure,"[12] requires us to accept the risks that accompany being emotionally open with ourselves and with others. It is fundamental to emotional and mental health. It means being authentic, transparent, and true to oneself despite fears of rejection. Vulnerability is powerful because it is necessary to combat shame, and the myth that vulnerability equates to weakness is a dangerous one. Only through vulnerability can we understand what triggers our shame and build the courage to begin problem solving and develop shame resiliency.[13] Vulnerability makes it possible for us to recognize when we are experiencing shame, practice critical awareness of how the messages that drive shame (I am a flawed human being, I am not good enough, I am unworthy) are irrational, reach out to others for help and support, and begin to openly talk about, and thus quiet, shame.[14]

The SBM Lawyers and Judges Assistance Program has a team of skilled clinicians on staff ready to help members of the legal community looking to optimize their well-being and address concerns related to substance use or mental health.[15] This certainly includes those reading this article who perhaps recognize a tendency to evaluate themselves in an overly harsh manner, are unforgiving in their own self-judgment, and lean toward identifying mistakes not as behaviors but as flaws.

As one of my favorite authors, Charles Dickens, said, "Heaven knows we need never be ashamed of our tears, for they are rain upon the blinding dust of earth, overlying our hard hearts. I was better after I had cried, than before — more sorry, more aware of my own ingratitude, more gentle."[16] To me, this means practicing vulnerability to foster shame resilience, gain insight, and garner greater self-awareness.

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INTEREST RATES FOR MONEY JUDGMENTS

Subsection 6 of Section 6013 and Subsection 2 of Section 6455 of Public Act No. 236 of 1961, as amended, (M.C.L. Sections 600.6013and 600.6455) state the following:

Sec. 6013(6) Except as otherwise provided by subsection (5) and subject to subsection (11), for complaints filed on or after Jan. 1,1987, interest on a money judgment recovered in a civil action shall be calculated at six month intervals from the date of filing the complaint at a rate of interest which is equal to 1% plus the average interest rate paid at auctions of five-year United States treasury notes during the six months immediately preceding July 1 and Jan. 1, as certified by the state treasurer, and compounded annually, pursuant to this section.

Sec. 6455 (2) Except as otherwise provided in this subsection, for complaints filed on or after Jan. 1, 1987, interest on a money judgment recovered in a civil action shall be calculated from the date of filing the complaint at a rate of interest which is equal to 1% plus the average interest rate paid at auctions of five-year United States treasury notes during the six months immediately preceding July 1 and Jan. 1, as certified by the state treasurer, and compounded annually, pursuant to this section.

Pursuant to the above requirements, the state treasurer of the state of Michigan hereby certifies that 3.743% was the average high yield paid at auctions of five-year U.S. treasury notes during the six months preceding Jan. 1, 2023.

TIME PERIOD	INTEREST RATE	TIME PERIOD	INTEREST RATE
1/1/2023	3.743%	7/1/2004	3.357%
7/1/2022	2.458%	1/1/2004	3.295%
1/1/2022	1.045%	7/1/2003	2.603%
7/1/2021	0.739%	1/1/2003	3.189%
1/1/2021	0.330%	7/1/2002	4.360%
7/1/2020	0.699%	1/1/2002	4.140%
1/1/2020	1.617%	7/1/2001	4.782%
7/1/2019	2.235%	1/1/2001	5.965%
1/1/2019	2.848%	7/1/2000	6.473%
7/1/2018	2.687%	1/1/2000	5.756%
1/1/2018	1.984%	7/1/1999	5.067%
7/1/2017	1.902%	1/1/1999	4.834%
1/1/2017	1.426%	7/1/1998	5.601%
7/1/2016	1.337%	1/1/1998	5.920%
1/1/2016	1.571%	7/1/1997	6.497%
7/1/2015	1.468%	1/1/1997	6.340%
1/1/2015	1.678%	7/1/1996	6.162%
7/1/2014	1.622%	1/1/1996	5.953%
1/1/2014	1.452%	7/1/1995	6.813%
7/1/2013	0.944%	1/1/1995	7.380%
1/1/2013	0.687%	7/1/1994	6.128%
7/1/2012	0.871%	1/1/1994	5.025%
1/1/2012	1.083%	7/1/1993	5.313%
7/1/2011	2.007%	1/1/1993	5.797%
1/1/2011	1.553%	7/1/1992	6.680%
7/1/2010	2.339%	1/1/1992	7.002%
1/1/2010	2.480%	7/1/1991	7.715%
7/1/2009	2.101%	1/1/1991	8.260%
1/1/2009	2.695%	7/1/1990	8.535%
7/1/2008	3.063%	1/1/1990	8.015%
1/1/2008	4.033%	7/1/1989	9.105%
7/1/2007	4.741%	1/1/1989	9.005%
1/1/2007	4.701%	7/1/1988	8.210%
7/1/2006	4.815%	1/1/1988	8.390%
1/1/2006	4.221%	7/1/1987	7.500%
7/1/2005	3.845%	1/1/1987	6.660%
1/1/2005	3.529%		

PUBLIC POLICY REPORT

IN THE HALL OF JUSTICE

Proposed Addition of Rule 2.421 of the Michigan Court Rules (ADM File No. 2021-50) – Notice of Bankruptcy Proceedings (See Michigan Bar Journal December 2022, p 64).

STATUS: Comment period expires Feb. 1, 2023; public hearing to be scheduled.

POSITION: Support and recommend that the Court consider the amendments proposed by Trent Collier in his letter dated Dec. 16, 2022.

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 (ADM File No. 2022-34) – Referees; Advice of Appellate Rights; Dispositional Hearing; Termination of Parental Rights; Appeals (See Michigan Bar Journal December 2022, p 66).

STATUS: Comment period expires March 1, 2023; public hearing to be scheduled.

POSITION: Support with an amendment adding (F) to Rule 3.993 as follows:

> **If a party was denied the right to appellate review or the appointment of appellate counsel due to errors by the party's prior attorney or the court, or other factors outside the party's control, the trial court must issue an order restating the time in which to file an appeal or request counsel, except that the court must not issue any order which would extend the time for appealing an order terminating parental rights beyond 63 days from entry of the order terminating rights.**

Proposed Amendments of Rules 3.977, 3.993, 7.311, and 7.316 of the Michigan Court Rules (ADM File No. 2022-05) – Termination of Parental Rights; Appeals; Motions in Supreme Court; Miscellaneous Relief (See Michigan Bar Journal December 2022, p 65).

STATUS: Comment Period Expires Feb. 1, 2023; public hearing to be scheduled.

POSITION: Support.

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 (ADM File No. 2022-32) – Organization and Operation of Court of Appeals; Definitions; Jurisdiction of the Court of Appeals; Filing Appeal of Right; Appearance; Application for Leave to Appeal; Extraordinary Writs; Original Actions and Enforcement Actions; Cross Appeals; Authority of Court or Tribunal Appealed Form; Bond; Stay of Proceedings; Record on Appeal; Motions in Court of Appeals; Briefs; Calendar Cases; Opinions, Order, Judgments, and Final Process for Court of Appeals; Miscellaneous Relief; Involuntary Dismissal of Cases; Taxation of Costs; Fees (See Michigan Bar Journal December 2022, p 63).

STATUS: Comment period expires Feb. 1, 2023; public hearing to be scheduled.

POSITION: Support.

NOTICE TO ATTORNEYS IN THE EASTERN DISTRICT OF MICHIGAN

Applications are now being accepted from attorneys seeking admission to the Criminal Justice Act (CJA) Panel Attorney Program to represent indigent defendants in the U.S. District Court for the Eastern District of Michigan (Detroit, Ann Arbor, Flint, Port Huron and Bay City). To download an application and/or obtain additional information regarding the CJA Panel, please visit the Federal Community Defender website at www.mie.fd.org. Please return completed applications to:

Federal Community Defender Attn: CJA Panel
613 Abbott Street, Suite 500
Detroit, Michigan 48226
Fax: (313) 962-0685

The deadline for applications is April 1, 2023. Applications will first be screened by a panel composed of attorneys representing various Bar Associations in the Southern and Northern Divisions, and then by the U.S. District Court. Sixth Circuit Rules require that an attorney appointed at trial continue through appeal.

All attorneys who are currently on the CJA Panel for the Eastern District of Michigan must renew their applications this year.

ORDERS OF DISCIPLINE & DISABILITY

SUSPENSION

L. David Bush, P51870, Berkley, by the Attorney Discipline Board affirming the Tri-County Hearing Panel #66 Order Denying Motion to Set Aside the Default and Order of Two-Year Suspension. Suspension, two years, effective July 14, 2022.[1]

After proceedings conducted pursuant to MCR 9.115, the panel found by default[2] that the respondent committed professional misconduct during his representation of clients in two separate medical malpractice actions (counts 1 and 2) and appeared for closing arguments in *In re Bourbeau Minors,* Oakland County Circuit Court Case No. 2015-832568-NA, at a time when his license to practice law was suspended (count 3). The respondent was also alleged to have failed to answer or respond in any way to four separate requests for investigation (count 4).

Based on the respondent's default and the evidence presented at the hearing, the panel found that as to count 1, the respondent neglected a legal matter entrusted to him 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 a 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); failed to take reasonable steps to protect a client's interests upon the termination of a representation in violation of MRPC 1.16(d); knowingly made a false statement of material fact or law to a tribunal in violation of MRPC 3.3(a)(1); knowingly made a false statement of material fact or law to a third person in violation of MRPC 4.1; engaged in the unauthorized practice of law in violation of MRPC 5.5(a); engaged in conduct that involved dishonesty, fraud, 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); engaged in conduct that was prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); engaged in conduct that was contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3); and engaged in conduct that violated the standards or rules of professional conduct adopted by the Michigan Supreme Court in violation of MRPC 8.4(a) and MCR 9.104(4).

As to count 2, the panel found that the respondent neglected a legal matter entrusted to him 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 a 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); failed to take reasonable steps to protect a client's interests upon the termination of a representation in violation of MRPC 1.16(d); engaged in conduct that involved dishonesty, fraud, 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); engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); engaged in conduct that was contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3); and engaged in conduct that violated the standards or rules of professional conduct adopted by the Michigan Supreme Court in violation of MRPC 8.4(a) and MCR 9.104(4).

As to count 3, the panel found that the respondent engaged in the unauthorized practice of law in violation of MRPC 5.5(a); engaged in conduct that involved dishonesty, fraud, 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); engaged in conduct that was prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); engaged in conduct that was contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3); engaged in conduct that violated the standards or rules of professional conduct adopted by the Michigan Supreme Court in violation of MRPC 8.4(a) and MCR 9.104(4); failed to notify clients and courts of his suspension in violation of MCR 9.119(A) and (B); failed to file a proof of compliance for his suspension in violation of MCR 9.119(C); and failed to cease practicing law after the effective date of his suspension in violation of MCR 9.119(E)(1)-(4).

As to count 4, the panel found that the respondent failed to answer requests for investigation in violation of MCR 9.104(7), 9.113(A), and 9.113(B)(2); knowingly failed to respond to a disciplinary authority's request for information in violation of MRPC 8.1(a)(2); engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); engaged in conduct that was contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3); and engaged in conduct that violated the standards or rules of professional conduct adopted by the Michigan Supreme Court in violation of MRPC 8.4(a) and MCR 9.104(4).

The panel ordered that the respondent's license to practice law be suspended for a period of two years. The respondent filed a timely petition for review in accordance with MCR 9.118, arguing that the hearing panel abused its discretion in failing to grant his motion to set aside the default and requesting that the board set aside his default and remand to the hearing panel for a hearing on the merits.

The Attorney Discipline Board conducted review proceedings in accordance with MCR 9.118 on Oct. 19, 2022, which included a review of the evidentiary record before the

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

panel and consideration of the briefs and arguments presented by the parties. On Nov. 22, 2022, the board issued an order affirming the hearing panel's order denying the respondent's motion to set aside default and order of suspension. Total costs were assessed in the amount of $2,137.47.

1. The respondent has been continuously suspended from the practice of law in Michigan since Feb. 12, 2020, as a result of his failure to pay bar dues to the State Bar of Michigan. The respondent's license to practice law was also suspended for a period of one year in *Grievance Administrator v. L. David Bush*, 20-40-GA, effective Nov. 18, 2020.

2. After the record was closed and the panel was preparing its report, the respondent filed two belated Motions to Set Aside the Default and an Addendum, which were all denied by the hearing panel in an Order Denying Respondent's Motion to Set Aside Default entered on May 17, 2022.

REINSTATEMENT

On Sept. 21, 2022, Tri-County Hearing Panel #9 entered an Order of Suspension and Restitution (By Consent) suspending the respondent from the practice of law in Michigan for 90 days, effective Oct. 13, 2022. On Jan. 4, 2023, the respondent, Phillip D. Comorski, submitted an affidavit pursuant to MCR 9.123(A) attesting that he has fully complied with all requirements of the panel's order and will continue to comply with the order until and unless reinstated. The board was advised that the grievance administrator has no objection to the affidavit, and the board being otherwise advised;

NOW THEREFORE,

IT IS ORDERED that the respondent, Phillip D. Comorski, is **REINSTATED** to the practice of law in Michigan, effective Jan. 11, 2023.

REINSTATEMENT

On Oct. 10, 2022, Genesee County Hearing Panel #1 entered an Order of Suspension (By Consent) suspending the respondent from the practice law in Michigan for 30 days, effective Nov. 30, 2022. On Dec. 28, 2022, the respondent, David R. Fantera, submitted an affidavit pursuant to MCR 9.123(A) showing that he has fully complied with all requirements of the panel's order and will continue to comply with the order until and unless reinstated. The board was advised that the grievance administrator has no objection to the affidavit, and the board being otherwise advised;

NOW THEREFORE,

IT IS ORDERED that respondent, David R. Fantera, is **REINSTATED** to the practice of law in Michigan, effective Jan. 4, 2023.

SUSPENSION AND RESTITUTION (WITH CONDITION)

Austin M. Hirschhorn, P15001, Huntington Woods, by the Attorney Discipline Board Tri-County Hearing Panel #60. Suspension, 90 days, effective Jan. 5, 2023.

Based on the respondent's default and evidence presented at hearings held in this matter in accordance with MCR 9.115, the hearing panel found that the respondent committed professional misconduct as set forth in a two-count formal complaint filed by the administrator.

Count 1 of the complaint alleged that the respondent was hired to transfer the title of

his client's late husband's home to the client's grandson. The respondent failed to have a written fee agreement with the client upon her payment of a $500 retainer. The complaint further alleged that the respondent opened a probate matter but failed to appear for a hearing, which resulted in the dismissal of the client's matter. It was further alleged that once the probate matter was opened, the respondent stopped communicating with his client, including failing to notify her that the probate case was dismissed. The respondent failed to answer a grievance administrator's request for investigation but did appear when subpoenaed for a sworn statement. At the sworn statement, the respondent promised to reopen the probate matter and resolve any pending issues with the client at his own expense. However, when the formal complaint was filed, the probate matter had not been resolved nor had the respondent refunded any unearned fees to his client.

Count 2 of the formal complaint alleged that the respondent again failed to provide a written retainer agreement to his client in a child custody and parenting time matter and failed to take any action whatsoever once he was paid a $500 fee. Upon the filing of a request for investigation by the client, the respondent refunded the client her monies, requested that she advise the Attorney Grievance Commission that she received a refund, and requested that she remove a negative review she wrote online. When the client refused, the respondent repeatedly called the client until she finally blocked his number. Lastly, the respondent failed to answer the request for investigation.

The panel found that the respondent neglected a legal matter entrusted to him in violation of MRPC 1.1(c) (counts 1-2); failed to act with reasonable diligence and promptness in representing his clients in violation of MRPC 1.3 (counts 1-2); failed to keep his clients reasonably informed about the status of their matters in violation of MRPC 1.4(a) (counts 1-2); failed to refund an advance fee that had not been earned in violation of MRPC 1.16(d) (count 1); engaged in conduct that was prejudicial to the administration of justice in violation of MRPC 8.4(c) and MRPC 9.104(1) (counts 1-2); engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2) (counts 1-2); engaged in conduct that was contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3) (counts 1-2); engaged in conduct that was in violation of the Rules of Professional Conduct in violation of MRPC 8.4(a) and MCR 9.104(4) (counts 1-2); and

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

failed to answer a request for investigation in violation of MCR 9.104(7), MCR 9.113(A), and MCR 9.113(B)(2) (counts 1-2).

The panel ordered that the respondent's license to practice law be suspended for a period of 90 days, that he pay restitution in the total amount of $500, and he be subject to a condition relevant to the established misconduct. Costs were assessed in the amount of $1,733.44.

REINSTATEMENT

On Nov. 15, 2022, Tri-County Hearing Panel #56 entered an Order of Suspension (By Consent) suspending the respondent, Michael D. Langnas, from the practice of law in Michigan for 30 days, effective Dec. 12, 2022. On Jan. 4, 2023, the respondent filed an affidavit pursuant to MCR 9.123(A) attesting that he has fully complied with all requirements of the panel's order and will continue to comply with the order until and unless reinstated. The board was advised that the grievance administrator has no objection to the affidavit, and the board being otherwise advised;

NOW THEREFORE,

IT IS ORDERED that the respondent, Michael D. Langnas, is **REINSTATED** to the practice of law in Michigan, effective Jan. 11, 2023.

FROM THE MICHIGAN SUPREME COURT

ADM File No. 2021-35
Proposed Amendment of Rules 7.202 and 7.209 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering amendments of Rule 7.202 and 7.209 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 7.202 Definitions

For purposes of this subchapter:

(1)-(5) [Unchanged.]

(6) "final judgment" or "final order" means:

(a) In a civil case,

(i)-(iv) [Unchanged.]

~~(v) an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity.~~

(b) [Unchanged.]

Rule 7.209 Bond; Stay of Proceedings

(A)-(D) [Unchanged.]

(E) Stay of Proceedings by Trial Court.

(1)-(6) [Unchanged.]

~~(7) If a government party files a claim of appeal from an order described in MCR 7.202(6)(a)(v), the proceedings shall be stayed during the pendency of the appeal, unless the Court of Appeals directs otherwise.~~

Staff Comment (ADM File No. 2021-35): The proposed amendments of MCR 7.202 and MCR 7.209 offer an alternative to the proposal published for comment on June 22, 2022. The proposed amendments would eliminate certain orders denying governmental immunity to a governmental party from the definition of a "final judgment" or "final order" for purposes of subchapter 7.200 of the Michigan Court Rules, thereby eliminating the need for a stay of proceedings in those cases under MCR 7.209(E)(7).

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

A copy of this order will be given to the secretary of the State Bar and to the state court administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by April 1, 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. 2021-35. Your comments and the comments of others will be posted under the chapter affected by this proposal.

CAVANAGH, J. (*concurring*).

I agree with the Court's order publishing for comment proposed amendments to remove MCR 7.202(6)(a)(v) and MCR 7.209(E)(7) from the court rules. I write to provide some context for these provisions and to identify specific issues to facilitate public comment.

In 2002, this Court amended the court rules to provide for an interlocutory appeal of right and an automatic stay of trial court proceedings if a party appeals a trial court's denial of governmental immunity. ADM File No. 2001-07, 466 Mich xc (2002). In most other contexts, a party must file an application for leave to appeal an order that does not entirely dispose of that party's claims,[1] with the Court of Appeals having discretion to either resolve the issue raised at that time or decline to do so until proceedings in the trial court are complete.[2] Similarly, a party seeking interlocutory appellate review in the Court of Appeals is generally not entitled to an automatic stay of trial court proceedings, but rather is required to

file a motion in the trial court or the Court of Appeals requesting a stay.[3] The justification for treating denials of governmental immunity differently was that "the government is different" because "[u]nlike other litigants, the government cannot be sued, unless, by legislation, it has affirmatively allowed a particular type of suit to proceed. This immunity…is of considerably diminished value when the government, i.e., the taxpayer, must incur the costs of extended litigation before being able to invoke the principle of immunity." ADM File No. 2001-07, 466 Mich at xciv (TAYLOR, J., concurring).

With the benefit of 20 years of experience, I believe it is appropriate to reevaluate with the input of the bench and the bar whether the unique interests identified by Justice TAYLOR justify retaining these amendments. Stated broadly, the issue the Court needs to consider is whether, in practical application, these rules have struck the proper balance between protecting taxpayers from the expense of unnecessary litigation and ensuring prompt and efficient resolution of claims against governmental entities that are not barred by governmental immunity. Public comment on the following specific issues would assist the Court in making this determination:

- Michigan's court rules currently allow litigants to file an interlocutory application for leave to appeal a nonfinal order. See MCR 7.203(B). In such an application, the appellant must "set[] forth facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal[.]" MCR 7.205(B)(1)(d). In the absence of MCR 7.202(6)(a)(v) and MCR 7.209(E)(7), would the ability to file an application for leave to appeal (and a motion to stay trial court proceedings pending appeal) adequately protect a governmental entity's interest in the swift dismissal of claims barred by governmental immunity? In other words, could the government's unique interest in preserving taxpayer dollars be adequately considered by the Court of Appeals on a case-by-case basis through the "substantial harm" requirement of MCR 7.205(B)(1)(d)?

- Over the years, Michigan appellate courts have considered the proper scope and application of MCR 7.202(6)(a)(v).4 Has this rule been easy to interpret and apply in practice? Or have courts and litigants been required to expend significant resources litigating whether a particular order falls within the scope of this rule?

- How have these rules affected the resources expended by litigants in claims brought against governmental entities? Have these rules actually resulted in expedited resolution of claims barred by governmental immunity and a decreased cost to taxpayers? Conversely, what effect have these rules had on private litigants filing claims against the state when governmental immunity did not bar the claim (either as a matter of law or because there were questions of fact that precluded summary disposition)?

- How frequently have trial court decisions denying claims of governmental immunity been reversed on appeal? Have governmental entities used these rules for gamesmanship? For example, as has been suggested, have governmental entities been filing unmeritorious claims of appeal simply to delay proceedings and increase the litigation costs to plaintiffs, or in the hope that after the appeal is resolved the case will be presided over by a different Court of Claims judge that the governmental entity views as more favorable to its position?

- In practice and in theory, how do these rules apply in the context of an unmeritorious motion to dismiss on governmental immunity grounds? Does the denial of such a claim automatically trigger these provisions?5 If so, is the rule susceptible to possible abuse, given that a clearly unmeritorious claim for governmental immunity that is barred by binding precedent could be used to delay proceedings? If not, would it be problematic to require the Court of Appeals to assess in some respect the merits of an assertion of governmental immunity to determine whether it is required to hear the appeal as of right under MCR 7.202(6)(a)(v)?

- How have these rules affected the administration of claims against governmental entities in the Court of Claims? For example, given that the right to appeal and an automatic stay applies only to denials of governmental immunity, have trial courts regularly been required to parse claims and divide them up by issue or party such that claims in which governmental immunity is asserted are not litigated pending appeal while other claims are permitted to proceed? If so, does this unduly hamper trial courts in efficiently and effectively adjudicating the cases pending before them?

- Similarly, how have these rules affected the Court of Appeals' administration of appeals arising from claims against governmental entities? For example, is it common for litigants in such cases to file multiple appeals stemming from one lawsuit, either because not all the claims raised are subject to governmental immunity or because there is uncertainty as to whether a particular order falls within the scope of MCR 7.202(6)(a)(v)?6 If so, to what extent does this create administrative difficulties for the Court of Appeals?

- How does the Court of Appeals administratively consider whether a claim of appeal falls within the scope of MCR 7.202(6)(a)(v)? If the Court of Appeals determines that a claim of appeal is not properly filed under this rule, how does it treat that appeal? As previously noted by Chief Justice Clement, the Court of Appeals has at times dismissed an appeal as of right for lack of jurisdiction if it determines that the order is outside the scope of MCR 7.202(6)(a)(v). See Hart, 506 Mich at 861 (Clement, J., concurring), citing Pierce v City of Lansing, 265

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

Mich App 174, 182 (2005). However, more recently it appears that the general practice has been to "assert[] discretion to treat an improper claim of appeal as an application, and then grant[] this constructive application in order to reach the legal questions presented in the name of judicial economy." Hart, 506 Mich at 863 (Clement, J., concurring). Is this practice a reflection of the administrative difficulties in distinguishing between final orders under MCR 7.202(6)(a)(v) and nonfinal orders and in enforcing that distinction?

- If there are inefficiencies with the current process, are there amendments this Court could adopt, short of a complete elimination of these provisions, that would mitigate these problems while continuing to advance the interests underlying these provisions? Do other jurisdictions provide preferential rights of appellate review for denials of governmental immunity? If so, are there any lessons we can take from their experiences to improve our own court rules?

I look forward to the public comment addressing these and other issues.

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1. See generally MCR 7.203 (distinguishing an "appeal of right," which may be brought after entry of "a final judgment or final order," from an "appeal by leave," which may be brought after entry of "a judgment or order...that is not a final judgment appealable by right"); MCR 7.202(6) (defining " 'final judgment' or 'final order'").

2. See MCR 7.205(E) (providing the Court of Appeals the authority to "grant or deny the application [for leave to appeal], enter a final decision, grant other relief, or request additional material from the record"). In practice, when the Court of Appeals denies an application or leave to appeal, it does so either "for lack of merit in the grounds presented" or "for failure to persuade the Court of the need for immediate appellate review." A denial "for lack of merit" resolves the issue raised in the application, and the appellant is generally precluded from raising that same issue in any subsequent appeal. See, e.g., *Pioneer State Mut Ins Co v Michalek*, 330 Mich App 138, 144 (2019). By contrast, a denial for "failure to persuade" is a nonsubstantive disposition that "'does not foreclose the parties from pursuit of the same or related issues on later appeals of right.'" *Rott v Rott,* 508 Mich 274, 289 (2021), quoting *People v Willis,* 182 Mich App 706, 708 (1990).

3. See MCR 7.209(A); MCR 7.209(D).

4. See, e.g., *Watts v Nevils,* 477 Mich 856, 856 (2006) (resolving a conflict between published Court of Appeals decisions and holding that a denial of summary disposition under MCR 2.116(C)(10) instead of (C)(7) triggered an appeal as of right where "the circuit court order denied governmental immunity to these defendants"); *Star Tickets v Chumash Casino Resort,* unpublished per curiam opinion of the Court of Appeals, issued October 22, 2015 (Docket No. 322371), p 5 n 7 (noting that whether a denial of tribal immunity triggers a right to an interlocutory appeal under this rule is an "intriguing question" but declining to resolve it and instead treating defendant's claim of appeal as an application for leave and granting it); *Hart v Michigan,* 506 Mich 857, 858 (2020) (Clement, J., concurring) (questioning whether the Court of Appeals has the authority to treat an improper claim of appeal as if it were an application for leave to appeal and whether a state defendant that invoked sovereign immunity is entitled to an appeal as of right under the rule); *Roberts v Kalkaska Co Rd Comm,* unpublished order of the Court of Appeals, entered September 23, 2020 (Docket No. 354228) (holding that "'governmental immunity' is a term of art referring to the general immunity of governmental actors from tort liability" and that "a claim of immunity from non-tort property law claims under MCL 600.5821(2) does not constitute a claim of governmental immunity within the meaning of MCR 7.202(6)(a)(v)"); *Tyrrell v Univ of Mich,* 335 Mich App 254, 264-265 (2020) (holding that the defendants were not entitled to an appeal as of right where the claim of governmental immunity was based on the plaintiff's failure to comply with MCL 600.6431 when filing a claim in circuit court under Michigan's Persons with Disabilities Civil Rights Act); *Krieger v Dep't of Environment, Great Lakes, and Energy,* unpublished order of the Court of Appeals, entered November 8, 2021 (Docket No. 358076 and others) (dismissing a claim of appeal where "the gravamen of defendants' motion for summary disposition...was not a claim of immunity...but rather an assertion that plaintiffs did not adequately plead" their claims under MCR 2.116(C)(8)).

5. See *Tyrrell,* 335 Mich App at 264-265 (holding that there was no appeal of right because the defendants' argument for dismissal was not premised on a statute conferring governmental immunity); *Christie v Wayne State Univ,* 508 Mich 1003 (2021) (directing oral argument on the issues addressed in *Tyrrell*).

6. See, e.g., *Roberts v Kalkaska Co Rd Comm,* 508 Mich 894 (2021) (addressing defendant's appeal as of right that was dismissed by the Court of Appeals for lack of jurisdiction); *Roberts v Kalkaska Co Rd Comm,* 508 Mich 893 (2021) (addressing defendant's application for leave to appeal the same trial court order.)

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by June 1, 2023. Comments may be sent in writing to Andrea Crumback, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The committee proposes amending jury instruction M Crim JI 4.11a, the "Other Acts" jury instruction, to add acts of sexual assault per the language of MCL 768.27b, which includes acts of sexual assault with acts of domestic assault as other acts that a jury can consider. Additionally, a few linguistic changes were made to improve readability and understandability of the instruction. The instruction's use note was also amended. Deletions are in strikethrough, and new language is underlined.

[AMENDED] M Crim JI 4.11a
Evidence of Other Acts of Domestic Violence or Sexual Assault

(1) ~~The prosecutor has introduced evidence of claimed acts of domestic violence* by the defendant for which [he/she] is not on trial.~~ You have heard evidence that the defendant [*describe the alleged conduct by the defendant*]. [He/she] is not on trial for [that/those] [act/acts].

(2) Before you may consider ~~such alleged acts as~~ this evidence ~~against the defendant~~, you must first find that the defendant actually committed ~~such~~ the [act/acts].

(3) If you find that the defendant did commit ~~those~~ the [act/acts], you may consider [it/them] in deciding ~~if~~ whether the defendant committed the [offense/offenses] for which [he/she] is now on trial.

(4) You must not convict the defendant ~~here~~ in this case solely because you think [he/she] is guilty of other bad conduct. The evidence must convince you beyond a reasonable doubt that the defendant committed the ~~alleged crime~~ offense for which [he/she] is now on trial, or you must find [him/her] not guilty.

Use Note

* "Domestic violence" for purposes of this instruction is defined in MCL 768.27b(~~5~~ 6) (a) and (b). "Sexual assault" crimes are those offenses under the Sex Offenders Registration Act found at MCL 28.722(r), (t), and (v).

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by June 1, 2023. Comments may be sent in writing to Andrea Crumback, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The committee proposes a jury instruction, M Crim JI 7.26, for the defense to parental kidnapping (M Crim JI 19.6) found in MCL 750.350a(7) — protecting the child from an immediate and actual threat of physical or mental harm. The instruction is entirely new.

[NEW] M Crim JI 7.26
Parental Kidnapping — Defense of Protecting Child; Burden of Proof

(1) The defendant says that [he/she] is not guilty of parental kidnapping because [he/she] was acting to protect [*name child*] from an immediate and actual threat of physical or mental harm, abuse, or neglect. A person is not guilty of parental kidnapping when [he/she] proves this defense.

(2) Before considering the defense of protecting the child, you must be convinced beyond a reasonable doubt that the defendant committed the crime of parental kidnapping. If you are not, your verdict should simply be not guilty of that offense. If you are convinced that the defendant committed the offense, you should consider the defendant's claim that [he/she] was protecting the child from an immediate and actual threat of physical or mental harm, abuse, or neglect.

(3) To establish that [he/she] was acting to protect the child, the defendant must prove three elements by a preponderance of the evidence. A preponderance of the evidence means that [he/she] must prove that it is more likely than not that each of the following elements is true.

(4) First, the defendant must prove that [*name child*] was in actual danger of physical or mental harm, abuse or neglect.[1]

(5) Second, the defendant must prove that the danger of physical or mental harm, abuse, or neglect to [*name child*] was immediate. That is, if the defendant failed to act, [*name child*] would have been physically or mentally harmed or would have suffered abuse or neglect very soon.

(6) Third, the defendant must prove that [his/her] actions were reasonably intended to prevent the danger of physical or mental harm, abuse, or neglect to [*name child*].

(7) You should consider these elements separately. If you find that the defendant has proved all three of these elements by a preponderance

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS (CONTINUED)

of the evidence, you must find [him/her] not guilty of parental kidnapping. If the defendant has failed to prove any of these elements, the defense fails.

Use Note

1. The terms "physical harm," "mental harm," "abuse," and "neglect" are not defined in MCL 750.350a. The Committee on Model Criminal Jury Instructions does not recommend importing definitions from other statutory provisions if the jury questions the meaning of the terms but suggests the use of dictionary meanings.

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by June 1, 2023. Comments may be sent in writing to Andrea Crumback, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The committee proposes a jury instruction, M Crim JI 13.19b, for the offense of using a 9-1-1 service for a prohibited purpose, contrary to MCL 484.1605. The instruction is entirely new.

[NEW] M Crim JI 13.19b
Prohibited Use of Emergency 9-1-1 Service

(1) The defendant is charged with the crime of prohibited use of emergency 9-1-1 service. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [used/attempted to use] an emergency 9-1-1 service.

(3) Second, that the defendant [used/attempted to use] the emergency 9-1-1 service [for a reason other than to call for an emergency response service[1]/more than one time to report a crime or seek nonemergency assistance and was told on the first call to call a different number].

(4) Third, that when the defendant [used/attempted to use] the emergency 9-1-1 service [for a reason other than to call for an emergency response service/more than one time to report a crime or seek nonemergency assistance and was told on the first call to call a different number], [he/she] knew that [he/she] was using the service for a reason other than to call for an emergency response service.

Use Note

1. An *emergency response service* is defined by MCL 484.1102(m) and means a public or private agency that responds to events or situations that are dangerous or that are considered by a member of the public to threaten the public safety. An emergency response service includes a police or fire department, an ambulance service, or any other public or private entity trained and able to alleviate a dangerous or threatening situation.

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by June 1, 2023. Comments may be sent in writing to Andrea Crumback, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The committee proposes a jury instruction, M Crim JI 33.2, for the offense of cruel and inhumane treatment of an animal, contrary to MCL 750.50. The instruction is entirely new.

[NEW] M Crim JI 33.2
Cruel and Inhumane Treatment of an Animal

(1) The defendant is charged with the crime of cruel and inhumane treatment of an animal. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [owned, possessed, or had custody of (a/an) (*identify vertebrate*)/was (an animal breeder/a pet shop operator)[1] with (a/an) (*identify vertebrate*) under (his/her) care].

(3) Second, that the defendant

[*Select from the following according to the charges and evidence:*]

(a) failed to provide the [*identify vertebrate(s)*] with adequate care. "Adequate care" means providing enough water, food, and exercise and providing sufficient shelter, sanitary conditions, and veterinary care to keep an animal in a state of good health.[2]

(b) drove, worked, or beat [*identify vertebrate(s)*] cruelly, or caused [*identify vertebrate(s*)] to be driven, worked or beaten.[3]

(c) carried [*identify vertebrate(s)*] in a vehicle or caused the [animal/animals] to be carried in a vehicle with [its/their] feet tied together.

(d) carried [*identify vertebrate(s)*] in or on a vehicle or caused the [animal/animals] to be carried in or on a vehicle without a secure space or cage for the [*(identify livestock vertebrate[s])*[4] to stand/*identify vertebrate(s)* to stand, turnaround, and lie down].

(e) abandoned the [*identify vertebrate(s)*] or caused the [animal/animals] to be abandoned without making provision for adequate care of the [animal/animals].[5] "Adequate care" means providing enough water, food, and exercise and providing sufficient shelter, sanitary conditions, and veterinary care to keep an animal in a state of good health.[2]

(f) was negligent in allowing [*identify vertebrate(s)*], including aged, diseased, maimed, or disabled animals, to suffer unnecessary neglect, torture, or pain. "Neglect" means failing to sufficiently and properly care for an animal to a degree that the animal's health is jeopardized.[6]

(g) tethered the dog with a rope, chain, or similar device that was less than three times the length of the dog from nose to the base of its tail.[7]

(4) Third,[8]

[*Select from the following aggravating factors according to the charges and evidence*:]

(a) [the offense involved two or three animals/an/the) animal died as a result of the offense].

(b) the offense involved four to nine animals.

(c) the offense involved ten to twenty-four animals.

(d) the offense involved twenty-five or more animals.

Use Note

1. *Breeder* is defined at MCL 750.50(1)(e), referencing MCL 287.331. *Pet shop* is defined at MCL 750.50(1)(j), also referencing MCL 287.331.

2. *Adequate care* is defined in MCL 750.50(1)(a). "Shelter" is further defined in MCL 750.50(1)(l), and "water" is defined in MCL 750.50(1)(o).

3. *Cruelly* is not defined in MCL 750.50. The Committee on Model Criminal Jury Instructions does not recommend importing definitions from other statutory provisions but notes that the child abuse statute, MCL 750.136b(1)(b), defines "cruel" as "... brutal, inhumane, sadistic, or that which torments."

4. In MCL 750.50(1)(g), the definition of "livestock" references MCL 287.703.

5. There are exceptions to the abandonment provision found at MCL 750.50(2)(e) involving premises abandoned to protect human life or prevent human injury or lost animals. It appears that the defendant would have to offer evidence to interpose such defenses.

6. *Neglect* is defined in MCL 750.50(1)(h).

7. *Tethering* is defined in MCL 750.50(1)(n).

8. Provide this instruction only when the prosecution seeks sentence enhancement based on these factors.

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by June 1, 2023. Comments may be sent in writing to Andrea Crumback, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The committee proposes jury instructions, M Crim JI 33.4, 33.4a and 33.4b for the offenses involving killing or torturing animals, contrary to MCL 750.50b(2) to (7), and M Crim JI 33.4c for a "just cause" defense to such charges. These instructions are entirely new.

[NEW] M Crim JI 33.4
First-Degree Killing or Torturing an Animal

(1) The defendant is charged with the crime of first-degree killing or torturing an animal. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant intentionally

[*Choose any supported by the charges and the evidence*:]

(a) [killed/tortured/mutilated, maimed, or disfigured] [a/an] [*identify vertebrate*].

[or]

(b) poisoned [a/an] [*identify vertebrate*] or caused the animal to be exposed to a poisonous substance intending that the substance be taken or swallowed.

(3) Second, that the [*identify vertebrate*] that the defendant [killed/tortured/mutilated, maimed, or disfigured/poisoned or caused to be exposed to a poisonous substance] was a companion animal. A "companion animal" is a vertebrate commonly considered to be a pet or considered by [*identify complainant*] to be a pet.[1]

(4) Third, that the defendant intended to cause [*identify complainant*] mental anguish or distress or intended to exert control over [*identify complainant*][2]

[*Select the appropriate option according to the evidence*:]

(a) by [(killing/torturing/mutilating, maiming, or disfiguring) the animal/poisoning the animal or causing the animal to be exposed to a poisonous substance].

[or]

(b) by threatening to [(kill/torture/mutilate, maim, or disfigure) the animal/poison the animal or cause the animal to be exposed to a poisonous substance].

[*Read the following bracketed material only where the charge involves a threat:*]

[A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been meant as a true threat and not, for example, idle talk, a statement made in jest, or a solely political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage. It does not matter whether the defendant actually intended to carry out the threat or could carry out the threat.]

Use Note

1. *Companion animal* is defined in MCL 750.50b(1)(b).

2. This is a specific intent crime.

[NEW] M Crim JI 33.4a
Second-Degree Killing or Torturing an Animal

(1) [The defendant is charged with the crime/You may also consider the lesser offense] of second-degree killing or torturing an animal. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant

[*Choose any supported by the charges and the evidence:*]

(a) intentionally [killed/tortured/mutilated, maimed, or disfigured] [a/an] [*identify vertebrate*].

[or]

(b) intentionally poisoned [a/an] [*identify vertebrate*] or caused the animal to be exposed to a poisonous substance intending that the substance be taken or swallowed.

[or]

(c) intended to cause [*identify complainant*] mental anguish or distress or intended to exert control over [*identify complainant*][1]

[*Select the appropriate option according to the evidence:*]

(i) by [(killing/torturing/mutilating, maiming, or disfiguring) the animal/poisoning the animal or causing the animal to be exposed to a poisonous substance].

[or]

(ii) by threatening to [(kill/torture/mutilate, maim, or disfigure) the animal/poison the animal or cause the animal to be exposed to a poisonous substance].

[Read the following bracketed material only where the charge involves a threat:]

[A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been meant as a true threat and not, for example, idle talk, a statement made in jest, or a solely political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage. It does not matter whether the defendant actually intended to carry out the threat or could carry out the threat.]

[I have just described the (two/three) alternatives that the prosecutor may use to prove this element. To find that this element has been proven, you must all agree that the same alternative or alternatives has or have been proved beyond a reasonable doubt.][2]

(3) Second, that the [*identify vertebrate*] that the defendant [killed/tortured/mutilated, maimed, or disfigured/poisoned or caused to be exposed to a poisonous substance] was a companion animal. A "companion animal" is a vertebrate commonly considered to be a pet or considered by [*identify complainant*] to be a pet.[3]

Use Note

1. This is a specific intent crime.

2. Read this paragraph only where two or three alternatives for this element were read to the jury.

3. *Companion animal* is defined in MCL 750.50b(1)(b).

[NEW] M Crim JI 33.4b
Third-Degree Killing or Torturing an Animal

(1) [The defendant is charged with the crime/You may also consider the lesser offense] of third-degree killing or torturing an animal. To prove this charge, the prosecutor must prove the following element beyond a reasonable doubt:

(2) That the defendant

[*Choose any supported by the charges and the evidence*:]

(a) intentionally [killed/tortured/mutilated, maimed, or disfigured] [a/an] [*identify vertebrate*].

[or]

(b) intentionally poisoned [a/an] [*identify vertebrate*] or caused the animal to be exposed to a poisonous substance intending that the substance be taken or swallowed.

[or]

(c) committed a reckless act[1] that the defendant knew or had reason to know would cause [an animal/(a/an) (*identify vertebrate*)] to be [killed/tortured/mutilated, maimed, or disfigured].

[or]

(d) intended to cause [*identify complainant*] mental anguish or distress or intended to exert control over [*identify complainant*][2]

[*Select the appropriate option according to the evidence*:]

(i) by [(killing/torturing/mutilating, maiming, or disfiguring) the animal/poisoning the animal or causing the animal to be exposed to a poisonous substance].

[or]

(ii) by threatening to [(kill/torture/mutilate, maim, or disfigure) the animal/poison the animal or cause the animal to be exposed to a poisonous substance].

[*Read the following bracketed material only where the charge involves a threat*:]

[A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been meant as a true threat and not, for example, idle talk, a statement made in jest, or a solely political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage. It does not matter whether

the defendant actually intended to carry out the threat or could carry out the threat.]

[I have just described the (two/three/four) alternatives that the prosecutor may use to prove this element. To find that this element has been proven, you must all agree that the same alternative or alternatives has or have been proved beyond a reasonable doubt.][3]

Use Note

1. *Reckless act* is not defined in MCL 750.50b. In the context of driving offenses, it is defined as willful and wanton disregard for the safety of persons or property or knowingly disregarding the possible risks to the safety of people or property.

2. This is a specific intent crime.

3. Read this paragraph only where two, three, or four alternatives for this element were read to the jury.

[NEW] M Crim JI 33.4c
Just Cause as a Defense to Killing or Torturing an Animal

(1) The defendant claims that [he/she] had just cause to commit the acts alleged by the prosecutor. Where a person has just cause for killing or harming an animal, [he/she] is not guilty of the crime of killing or torturing an animal.

(2) You should consider all of the evidence and the following rules when deciding whether there was just cause for the defendant's actions.

(3) The defendant must have honestly and reasonably believed that [his/her] conduct was necessary or just, considering the circumstances as they appeared to the defendant at that time.

(4) It is for you to decide whether those circumstances called for the defendant's conduct and whether [his/her] conduct was necessary to address those circumstances.

(5) The defendant does not need to prove that [he/she] had just cause to kill or harm the animal. Instead, the prosecutor must prove beyond a reasonable doubt that the defendant did not have just cause to kill or harm the animal.

Use Note

This instruction should only be read where evidence of just cause has been introduced.

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS (CONTINUED)

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by Sept. 1, 2023. Comments may be sent in writing to Andrea Crumback, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The committee proposes amending the reasonable doubt instructions found in M Crim JI 1.9(3) and 3.2(3) to add the sentence, "Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt." The amendment was prompted by research showing that the clear and convincing standard was considered by the general public to be higher than the beyond a reasonable doubt standard. The Model Jury Instruction Committee proposes the additional sentence to impress upon the jurors the level of certainty required for a criminal conviction. A number of committee members preferred not to make any change to the instruction but agreed to publication of the proposal for public consideration. Comments suggesting other wording for the reasonable doubt instructions are welcome, but the committee is only considering whether to adopt the change proposed or wording substantially similar to the proposal. The added language is underlined. There is an extended comment period for this proposal.

[AMENDED] M Crim JI 1.9(3) and 3.2(3)
Reasonable Doubt

(3) Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that: a doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case.

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3. The prosecutor or other authority

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LAWYERS & JUDGES ASSISTANCE

MEETING DIRECTORY

The following list reflects the latest information about lawyers and judges AA and NA meetings. Meetings marked with "*" have been designated for lawyers, judges, and law students only. All other meetings are attended primarily by lawyers, judges, and law students, but also are attended by others seeking recovery. In addition, we have listed "Other Meetings," which others in recovery have recommended as being good meetings for those in the legal profession.

For questions about any of the meetings listed, please contact the Lawyers and Judges Assistance Program at 800.996.5522 or jclark@michbar.org.

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ALCOHOLICS ANONYMOUS & OTHER SUPPORT GROUPS

Bloomfield Hills
WEDNESDAY 6 PM*
Kirk in the Hills Presbyterian Church
1340 W. Long Lake Rd.
1/2 mile west of Telegraph

Detroit
MONDAY 7 PM*
Lawyers and Judges AA
St. Paul of the Cross
23333 Schoolcraft Rd.
Just east of I-96 and Telegraph *(This is both an AA and NA meeting.)*

East Lansing
WEDNESDAY 8 PM
Sense of Humor AA Meeting
Michigan State University Union
Lake Michigan Room
S.E. corner of Abbot and Grand River Ave.

Houghton Lake
SECOND SATURDAY OF THE MONTH 1 PM
Lawyers and Judges AA Meeting
Houghton Lake Alano Club
2410 N. Markey Rd.
Contact Scott with questions 989.246.1200

Lansing
THURSDAY 7 PM*
Virtual meeting
Contact Mike M. for meeting information
517.242.4792

Lansing
SUNDAY 7 PM*
Virtual Lawyers and Judges AA Meeting
(Contact Arvin P. at 248.310.6360
for Zoom login information)

Lansing
SUNDAY 7 PM*
Virtual meeting
Contact Mike M. for meeting information
517.242.4792

Royal Oak
TUESDAY 7 PM*
Lawyers and Judges AA
St. John's Episcopal Church
26998 Woodward Ave.

Stevensville
THURSDAY 4 PM*
Al-Anon of Berrien County
4162 Red Arrow Highway

THURSDAY 7:30 PM
Zoom
(Contact Arvin P. at 248.310.6360
for Zoom login information)

GAMBLERS ANONYMOUS

For a list of meetings, visit
gamblersanonymous.org/mtgdirMI.html.

Please note that these meetings are not specifically for lawyers and judges.

OTHER MEETINGS

Bloomfield Hills
THURSDAY & SUNDAY 8 PM
Manresa Stag
1390 Quarton Rd.

Detroit
TUESDAY 6 PM
St. Aloysius Church Office
1232 Washington Blvd.

Detroit
FRIDAY 12 PM
Detroit Metropolitan Bar Association
645 Griswold
3550 Penobscot Bldg., 13th Floor
Smart Detroit Global Board Room 2

Farmington Hills
TUESDAY 7 AM
Antioch Lutheran Church
33360 W. 13 Mile
Corner of 13 Mile and Farmington Rd., use back entrance, basement

Monroe
TUESDAY 12:05 PM
Professionals in Recovery
Human Potential Center
22 W. 2nd St.
Closed meeting; restricted to professionals who are addicted to drugs and/or alcohol

Rochester
FRIDAY 8 PM
Rochester Presbyterian Church
1385 S. Adams
South of Avon Rd.
Closed meeting; men's group

Troy
FRIDAY 6 PM
The Business & Professional (STAG)
Closed Meeting of Narcotics Anonymous
Pilgrim Congregational Church
3061 N. Adams
2 blocks north of Big Beaver (16 Mile Rd.)

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