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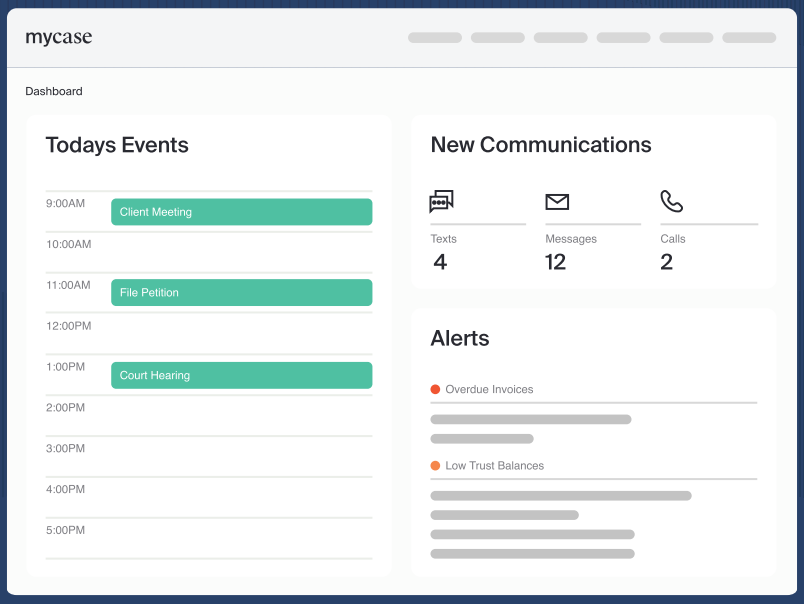

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ON THE COVER: The Grand Hotel on Mackinac Island is the site of the SBM Great Lakes Legal Conference on June 9-10.

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COLUMNS

NOTICES

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SEPTEMBER 21, 2023

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FOR NONPAYMENT OF DUES

The list of active attorneys who are suspended for nonpayment of their State Bar of Michigan 2022-2023 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, 2023, 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

SBM BOARD SEEKS APPLICANTS FOR AGENGY VACANCIES

The State Bar of Michigan Board of Commissioners is seeking for persons interested in filling the following agency vacancies:

Institute of Continuing Legal Education Executive Committee

One vacancy for a four-year term beginning Oct. 1, 2023. Committee members assist with the development and approval of ICLE education policies; formulate and promulgate necessary rules and regulations for the administration and coordination of the institute's work; review and approve the annual budget and activities contemplated to support the budget; and promote ICLE activities whenever possible. The board meets three times a year, usually in February, June, and October.

Michigan Indian Legal Services Board of Trustees

Two vacancies for three-year terms beginning Oct. 1, 2023. MILS bylaws require that a majority of the board be American Indians. The board sets policy for a legal staff that provides specialized Indian law services to Indian communities statewide. The board hires an executive director. The board is responsible for operating the corporation in compliance with applicable law and grant requirements. Board members should have an understanding and appreciation for the unique legal problems faced by American Indians. Board members are responsible for setting priorities for the allocation of the scarce resources of the program. The board is accountable to its funding sources. The board meets on Saturdays in Traverse City on a minimum quarterly basis.

The deadline for responses for the ICLE and MILS vacancies is WEDNESDAY, JULY 5.

Applications received after the deadline will not be considered. Applicants should submit a resume and a letter outlining their background and nature of interest in the position via email to Marge Bossenbery at mbossenbery@michbar.org. Please DO NOT send via U.S. mail.

ALTERNATIVE DISPUTE RESOLUTION SECTION

The ADR annual conference is scheduled for Friday-Saturday, Sept. 29-30. Additional events, registrations, past event materials, and the latest Michigan Dispute Resolution Journal can be found at connect.michbar.org/adr/home.

GOVERNMENT LAW SECTION

The 23rd annual Michigan Association of Municipal Attorneys/Government Law Section Summer Joint Educational Conference will take place on Friday-Saturday, June 23-24, at Crystal Mountain Resort in Thompsonville. The conference will focus on issues related to housing and homelessness. Visit the section's website at connect.michbar.org/adr/home to register.

REAL PROPERTY LAW SECTION

Register now for the Real Property Law Section Annual Summer Conference titled, "Reply Hazy, Try Again — What's Next in Real Estate." The conference is set for Wednesday-Saturday, July 19-22, at Mission Point on Mackinac Island. The three days of learning will include expert panel discussions, workshops, and interactive roundtables. Conference signup is at na.eventscloud.com/rplssc23. Room reservations can be made at www.reseze.net/servlet/SendPage?hotelid=1720&skipfirstpage=true&page=10448 or by calling 800.833.7711.

RELIGIOUS LIBERTY LAW SECTION

On Feb. 16, the Religious Liberty Law Section hosted a presentation by Noah Hurwitz and Grant Vlahopoulos on religious accommodation cases under Title VII of the federal Civil Rights Act. The presentation was recorded; it can be accessed at bit.ly/3JMvFAM.

NEWS & MOVES

ARRIVALS AND PROMOTIONS

MICHAEL P. ASHCRAFT JR., **MICHAEL S. BOGREN**, and **AUDREY J. FORBUSH** with Plunkett Cooney were elected to officer positions with the law firm.

MATTHEW J. CONSOLO with Secrest Wardle has been promoted to senior partner.

ANDREW CREAL has joined Maddin Hauser.

GEORGE B. DONNINI with Butzel was elected to serve on the firm's board of directors.

ARTHUR DORE has joined Collins Einhorn Farrell.

STEVEN HURBIS and **KENNETH LEE** with McKeen & Associates were promoted to co-vice chairs of the firm's executive committee.

KEVIN MACKENZIE has joined Fishman Stewart.

PHILIP MILLER has been named a partner with Fink Bressack.

NICHOLAS M. OHANESIAN was named hearing office chief administrative law judge for the Social Security Administration Office of Hearings Operations in Grand Rapids.

MORGAN STOWELL has joined Kreis Enderle.

ROBERT M. UNATIN with Secrest Wardle has been promoted to partner.

DARICE E. WEBER with Secrest Wardle has been promoted to executive partner.

AWARDS AND HONORS

PHILLIP G. ALBER with Lipson Neilson was inducted as a fellow in the American College of Construction Lawyers at its annual meeting in February.

CHARLES N. ASH and **AMANDA FIELDER** with Warner Norcross & Judd have been recognized on the Grand Rapids Business Journal list of Notable West Michigan Lawyers.

MONIQUE C. FIELD-FOSTER, an executive partner with Warner Norcross & Judd, has been recognized on the Lawyers of Color's 2023 Power List.

MICHAEL L. GUTIERREZ and **LEE T. SILVER** with Butzel have been recognized on the Grand Rapids Business Journal list of Notable West Michigan Lawyers.

STACEY M. WASHINGTON with the Archdiocese of Detroit has been promoted to director of compliance.

LEADERSHIP

ROZANNE M. GIUNTA with the Midland office of Warner Norcross & Judd has been elected to the board of regents of the American College of Bankruptcy.

CLAIRE D. VERGARA MACATULA with Plunkett Cooney was appointed to the executive board of the Michigan Asian-Pacific American Bar Association and was elected to serve as its secretary.

MOVES

The **LAW FIRM OF MCGINTY, HITCH, PERSON, ANDERSON & REVORE** has moved to 3410 Belle Chase Way, Suite 600, Lansing, MI 48911. The phone number remains 517.351.0280.

PRESENTATIONS, PUBLICATIONS, AND EVENTS

The **INGHAM COUNTY BAR ASSOCIATION** hosts its annual shrimp dinner on May 17.

IN MEMORIAM

EDWARD H. CRAWFORD, P12327, of West Branch, died March 11, 2023. He was born in 1945, graduated from Wayne State University Law School, and was admitted to the Bar in 1970.

MARILYN S. DIREZZE, P55254, of Linden, died March 1, 2023. She was born in 1962, graduated from Michigan State University College of Law, and was admitted to the Bar in 2000.

LAWRENCE D. EGAN, P13116, of Plymouth, died April 12, 2023. He was born in 1929, graduated from Detroit College of Law, and was admitted to the Bar in 1960.

CHARLES V. FELLRATH, P13363, of Northville, died Aug. 23, 2022. He was born in 1943, graduated from the University of Detroit School of Law, and was admitted to the Bar in 1970.

GARY W. JONES, P56072, of Detroit, died March 25, 2023. He was born in 1970 and was admitted to the Bar in 1997.

MICHAEL J. MULCAHY, P28335, of Novi, died Nov. 25, 2022. He was born in 1944, graduated from the University of Detroit School of Law, and was admitted to the Bar in 1969.

EDGAR W. PUGH JR., P19130, of Bloomfield Hills, died March 25, 2023. He was born in 1944, graduated from Wayne State University Law School, and was admitted to the Bar in 1971.

GUY DANIEL SILVASI, P77099, of Traverse City, died March 16, 2023. He was born in 1986, graduated from Wayne State University Law School, and was admitted to the Bar in 2013.

RICHARD W. SNYDER, P23057, of Marana, Arizona, died Feb. 15, 2023. He was born in 1947, graduated from University of Michigan Law School, and was admitted to the Bar in 1973.

ROBERT H. TIDERINGTON III, P21453, of Lake Leelanau, died April 8, 2023. He was born in 1947 and was admitted to the Bar in 1972.

PAULSEN K. VANDEVERT, P52438, of Dearborn, died March 14, 2023. He was born in 1958 and was admitted to the Bar in 1995.

HON. JAMES L. WITTENBERG, P62323, of Royal Oak, died Nov. 20, 2022. He was born in 1974, graduated from Wayne State University Law School, and was admitted to the Bar in 2002.

WILLIAM M. WRIGHT, P23110, of Caledonia, died Feb. 6, 2023. He was born in 1948, graduated from Wayne State University Law School, and was admitted to the Bar in 1973.

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.

PUBLIC POLICY REPORT

AT THE CAPITOL

Executive Budget for the Michigan Indigent Defense Commission for the 2023-2024 Fiscal Year

POSITION: Support the executive budget and oppose any reduction in MIDC funding below the executive budget, because such reduced funding will leave MIDC unable to implement its mandatory standards and to meet the state's constitutional obligation to provide counsel to indigent criminal defendants.

Executive Budget for the Department of the Judiciary for the 2023-2024 Fiscal Year

POSITION: Support.

(Unanimous vote by Board of Commissioners with one abstention.)

HB 4173 (Aiyash) **Criminal procedure: sentencing; Corrections: jails; State agencies (existing): corrections.** Criminal procedure: sentencing; criminal justice policy commission; create. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding secs. 34a & 34b to ch. IX.

POSITION: Support HB 4173, specifically the (H-1) substitute, with the following amendments:

- The membership of the commission should be altered to ensure that it is balanced, and representative of the interests and stakeholders involved in, and impacted by, sentencing policy. Similar to the Joint Task Force on Jail and Pretrial Incarceration. The (H-1) membership is too heavily weighted toward law enforcement and prosecutors, while leaving out or underrepresenting other valuable perspectives.
- The chair of the commission should not be the commission's "chief of staff," nor should the chair be a paid position.
- The Legislature should also give consideration to language charging the commission with making recommendations as to the extent to which sentencing guidelines should or should not apply to habitual offenders and the extent to which sentencing guidelines should apply to probation violations or be modified if applied to probation violations.

SB 0073 (Shink) **Civil rights: public records; Crime victims: rights; Crimes: criminal sexual conduct.** Civil rights: public records; identity of parties proceeding anonymously in civil actions alleging sexual misconduct; exempt from disclosure under freedom of information act. Amends sec. 13 of 1976 PA 442 (MCL 15.243).

POSITION: Support.

SB 0134 (Johnson) **Courts: drug court; Courts: mental health court; Vehicles: equipment; Traffic control: driver license; State agencies (existing): state.** Courts: drug court; specialty court authorization to issue a restricted license requiring an ignition interlock device; modify. Amends secs. 1084 & 1091 of 1961 PA 236 (MCL 600.1084 & 600.1091).

POSITION: Support.

SB 0135 (Hertel) **Vehicles: registration; Vehicles: equipment; Traffic control: driver license; State agencies (existing): state; Courts: drug court; Courts: mental health court.** Vehicles: registration; issuance of a restricted license requiring the installation of ignition interlock device and specialty court admission; modify. Amends secs. 83 & 304 of 1949 PA 300 (MCL 257.83 & 257.304).

POSITION: Support.

SB 0150 (Chang) **Property tax: tax tribunal; Property tax: assessments; Communications: technology.** Property tax: tax tribunal; methods for tax tribunal to hold small claims hearings; expand to include telephonically or by videoconferencing. Amends sec. 62 of 1973 PA 186 (MCL 205.762).

POSITION: Support.

IN THE HALL OF JUSTICE

Proposed Amendment of Rule 1.109 of the Michigan Court Rules (ADM File No. 2022-03) – Court Records Defined; Document Defined; Filing Standards; Signatures; Electronic Filing and Service; Access (See *Michigan Bar Journal* March 2023, p 62).

STATUS: Comment period expired May 1, 2023; public hearing to be scheduled.

POSITION: Support ADM File No. 2022-03, and authorize all sections to advocate their respective positions, including inconsistent positions.

Proposed Amendment of Rule 7.211 of the Michigan Court Rules (ADM File No. 2022-16) – Motions in Court of Appeals (See *Michigan Bar Journal* March 2023, p 62).

STATUS: Comment period expired May 1, 2023; public hearing to be scheduled.

POSITION: Support.

Proposed Amendment of Rule 9.123 of the Michigan Court Rules (ADM File No. 2022-13) – Eligibility for Reinstatement (See *Michigan Bar Journal* March 2023, p 63).

STATUS: Comment period expired May 1, 2023; public hearing to be scheduled.

POSITION: Support.

Proposed Amendment of Rules 9.220, 9.221, 9.223, 9.232, and 9.261 of the Michigan Court Rules (ADM File No. 2021-30) – Preliminary Investigation; Evidence; Conclusion of Investigation; Notice; Discovery; Confidentiality; Disclosure (See *Michigan Bar Journal* March 2023, p 64).

STATUS: Comment period expired May 1, 2023; public hearing to be scheduled.

POSITION: Oppose.

EXERCISING CAUTION

Sending legal mail to incarcerated clients

BY AUSTIN D. BLESSING-NELSON

The Michigan Department of Corrections (MDOC) has recently seen multiple instances of contraband attempting to be smuggled through legal mail, including legal documents on drug-laced paper.[1] MDOC has also seen a rise in contraband being sent through the regular mail and has taken steps to combat the issue such as photocopying mail and delivering the copies to prisoners instead of the originals.[2] Of course, contraband being smuggled into prisons poses a serious safety and security risk for prison staff and incarcerated individuals alike.

In order to prevent the introduction of contraband into prisons, strict rules and procedures are applied regarding incoming mail.[3] However, due to the nature of legal mail and the sanctity of the attorney-client relationship, incoming legal mail from a prisoner's attorney is treated differently and subject to special handling.[4] Unlike regular mail, legal mail is ordinarily not read by prison staff and prisoners can typically receive the original documents instead of just copies.[5] This difference in treatment between regular mail and legal mail has led to some individuals attempting to smuggle contraband through legal mail.

Often, the attorney is not intentionally trying to smuggle contraband but has instead been given the documents by someone else and unknowingly sends the contraband to prison. It is vital that attorneys be cognizant of attempts to use them as conduits to smuggle contraband and take appropriate measures to avoid any participation in it. Attorneys should also ensure that any document sent as legal mail actually qualifies as legal mail.

Attorneys may face professional discipline, as well as potential criminal charges, for taking part in smuggling contraband into prisons. Other individuals involved, including the incarcerated client, could be exposed to criminal charges. In addition, your client will likely be subject to prison discipline for abusing the legal mail system and/or contraband rules even if the conduct does not result in criminal charges.

It is therefore important for attorneys to be wary of acting as conduits for documents and other items from outside sources to their clients. Before forwarding any document to an incarcerated client given to them by a member of the public, including family members

and friends of the client, the attorney should review it to verify that it truly qualifies as legal mail.[6] If there is any doubt that the document is legal mail, the attorney should decline to provide it to his client and instead advise the person who gave them the document to send it through regular mail. If the attorney determines that the document is indeed legal mail, they should refrain from sending the original document and instead send a photocopy to avoid unwittingly sending drug-laced paper into the prison. Similar precautions should obviously also be taken when delivering anything to an incarcerated individual by hand.

Similar precautions should also be taken when sending mail to jails. Jails are not centrally operated like Michigan's prisons and have rules that vary from jail to jail. Attorneys should familiarize themselves with a particular jail's rules before transmitting any documents to a client.

MDOC has also reported issues with attorneys making calls to clients that are actually three-way calls involving non-lawyers. This violates MDOC's policies and presents a security risk because calls with prisoners are subject to monitoring and recording for security purposes, but legal calls are treated differently and are not recorded in order to protect the lawyer-client relationship.[7] Much like violations of mail rules, prisoners can be subject to discipline for these violations. Also, the involvement of an unnecessary third party can result in the loss of attorney-client privilege over the call. Furthermore, knowingly assisting a prisoner in circumventing prison rules like this could subject an attorney to professional discipline.

In conclusion, in order to avoid unintentionally sending contraband to incarcerated clients, it is of the utmost importance that attorneys exercise due caution and remain aware of any developments or changes in prison policies.

Austin D. Blessing-Nelson (Blessing) is an associate counsel at the Michigan Attorney Grievance Commission. Representatives of MDOC provided valuable information and guidance in drafting this article.

ENDNOTES

1. Signs of drug-laced paper include stains, discoloration, and wavy paper, which is an indication that liquid was applied to the paper and has dried. This and other pieces of information were gathered from author's discussions with Mich Dep't of Corrections representatives.
2. Gautz, *Michigan Department of Corrections Takes Steps to Help Prevent Introduction of Contraband Through Updated Mail Procedures*, Mich Dep't of Corrections (October 16, 2020) <https://www.michigan.gov/corrections/press-releases/2020/10/16/michigan-department-of-corrections-takes-steps-to-help-prevent-introduction-of-contraband-through-u> [https://perma.cc/FMJ3-SC6E] and Memorandum 2023-18R2 from Mich Dep't of Corrections Director Heidi Washington regarding PD 05.03.118 "Prisoner Mail" (March 10, 2023), available at https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Directors-Office-Memoranda/DOMS-2023/DOM--2023-18--Final.pdf?rev=3d6704b0514945378c28c345496279fa [https://perma.cc/NT4T-U7DN]. All websites cited in this article were accessed March 31, 2023.
3. Mich Dep't of Corrections, Prisoner Mail, PD 05.03.118 (March 1, 2018). This and other Mich Dep't of Corrections policy directives can be found at <https://www.michigan.gov/corrections/public-information/statistics-and-reports/policy-directives> [https://perma.cc/D8KE-47Y2].
4. *Id.* and Memorandum 2023-18R2.
5. *Id.*
6. Mich Dep't of Corrections, Prisoner Mail, PD 05.03.118.
7. Mich Dep't of Corrections, Prisoner Telephone Use, PD 05.03.130 (December 20, 2021).

Not the time for bail reform

BY HON. BILL RICHARDS

In the February 2022 issue of the Michigan Bar Journal, two authors argued that it is "past time" to turn the page on a "badly broken cash bail system" and abolish it altogether.[1] While the article cited three cases where a trial judge set an unreasonably high cash bond, in each instance the defendant appealed and won a reversal. Even without those successful appeals, three mistakes in setting bond do not demonstrate a "broken" cash bail system that needs to be abolished.

Rather than abolish the cash bail system, this article proposes a middle ground that protects the public and ensures that defendants return to court. Judges should avoid setting cash bail that results in lengthy pretrial detentions in non-violent criminal cases, especially if the defendant is indigent. But under current law, most judges do a good job in exercising discretion. That discretion is needed. Personal bond cannot be justified for defendants with flagrant histories of failing to appear in court. Judges need the option to order cash bail for those defendants whose records of failing to appear make them untrustworthy for release on a mere promise to return to court.

As a district judge, I have set and reviewed bonds on many occasions. Usually, a magistrate has set the initial bond at the arraignment, and the district judge reviews it at a later hearing like a pretrial conference. That point deserves emphasis, because it shows that in an ordinary criminal case, there is a speedy bail review process within the district court. I do not disagree that there are occasional abuses and mistakes in the bail-setting business — such as the three examples the bail reform article cited. But as that article also acknowledged, defendants can appeal bond rulings to the district judge, circuit court, or Michigan Court of Appeals and gain a speedy reversal.[2] Interlocutory appeals address the occasional mistakes and leave the cash bail option available where appropriate.

IS THE CASH BAIL SYSTEM "BROKEN"?

To try to broaden their attack on the cash bail system, the authors

cited the American Civil Liberty Union (ACLU) 2019 federal class action lawsuit challenging the cash bail practices in the 36th District Court in Detroit.[3] The article appeared to argue that the mere filing of the lawsuit gives merit to their allegations. Of course, that is not true.

In July 2022, the lawsuit was settled.[4] Although the ACLU touted the settlement as a "great victory," its own press release acknowledged that there would be circumstances that justify setting a cash bail:

> The Court has agreed to greatly curtail the use of cash bail so that it will only rarely result in someone's detention. People will not be detained unless, after reviewing evidence presented, a judge determines that releasing a person would create an unmanageable flight risk or danger to the public.[5]

To say that cash bail will only be allowed in Detroit courts when the evidence shows the defendant is a flight risk or a danger to the public hardly moves the needle from what was permitted before the lawsuit was filed. Flight risk and danger to the public have been baked into the Michigan court rule on bail for decades. The court rule explicitly allows judges to deny pretrial release if the court determines it would "not reasonably ensure the appearance of the defendant" or "present a danger to the public."[6]

The February 2022 article quoted all too sparingly from an excellent report[7] by the Michigan Joint Task Force on Jail and Pretrial Incarceration.[8] The authors used one quote in particular — that "half of the state's jail population are pretrial detainees" — to imply that the task force blamed the rising pretrial detainee jail population on the cash bail system.[9] But the task force did not say that, nor did it conclude that a 50% pretrial detainee population was too high, nor did it recommend that cash bail be abolished.[10]

Moreover, the task force report does not support the authors' conclusion that "pretrial incarceration in Michigan is the rule, rather than the exception."[11] That conclusion would require taking the total number of defendants charged with crimes and comparing how many were released on bond to how many were detained in jail. Neither the authors nor the task force cited such data.

ANALYTICAL ERRORS

The authors argue that too much pretrial detention is "disastrous for both defendants and society."[12] In reaching that conclusion, they commit multiple analytical errors.

IN PERSPECTIVE

HON. BILL RICHARDS

How Many is Too Many?

First, in arguing that 50% of the jail population consisted of pretrial detainees is disastrous, they fail to suggest standards for what would be an acceptable pretrial component of the jail population. Would a population of just 40% pretrial detainees be acceptable? If not, is 30% OK? The authors gave no hint regarding how many is too many.

How Did They Get There?

The authors fail to recognize that every defendant who sits in jail unable to post their cash bond is there because a judge considered their individual circumstances and decided that they did not qualify for a personal bond. Perhaps the detainee is charged with murder or another violent felony. Maybe the defendant's criminal history reveals multiple failures to appear in court. Under MCR 6.106, the seriousness of the offense, the defendant's criminal history, and previous failures to appear in court can weigh against unconditional release.

Does Pretrial Incarceration Induce Guilty Pleas?

The authors commit a third analytic error by concluding that pretrial incarceration "induces guilty pleas" because defendants do so in order to speed their release from jail.[13] But if guilty people are pleading guilty, what is the issue?

The authors do not suggest that pretrial detention causes *innocent* defendants to plead guilty; Michigan court rules require the judge taking the plea to ensure that it is voluntary and there is a factual basis to support it.[14] The defendant must admit to committing the crime, and the court rules assure that the vast majority of criminal defendants plead guilty because they are guilty. If pretrial detention

merely prompts them to plead guilty earlier than they would otherwise, there appears to be no harm done.

Does Pretrial Detention Increase Crime?

According to the authors, another disaster resulting from cash bail is increasing crime. They cited a study that claimed defendants detained before trial "are 1.3 times more likely to recidivate ... likely because of the economic havoc pretrial incarceration wreaks on them and their families."[15] This argument suffers from multiple fallacies.

First, the authors run afoul of the *post hoc ergo propter hoc* fallacy — just because one event precedes another, the first did not necessarily cause the second. The authors offer no evidence proving any causal relationship between a defendant's pretrial detention and a later crime. Even their citation to an American Economic Review article refutes their conclusion.[16] That article concluded that "pretrial detention has no net effect on future crime[.]"[17]

Second, the article fails to distinguish between correlation and causation.[18] For example, if a baseball team wins 60% of its night games but only 50% of its day games, that only proves a correlation. Without further analysis, the correlation does not prove that playing at night contributed to a higher winning percentage. Likewise, even assuming defendants detained prior to trial committed 1.3 more crimes than defendants released on bond merely shows correlation, not causation.

The failure to prove causation is not a surprise. If a defendant was detained before trial, was convicted, and commits another crime, how can one separate the downstream effect of pretrial incarceration from other possible causes? For example, some defendants have substance abuse or mental health issues. Those issues do not magically disappear after a conviction. If mental health or an addiction contribute to an ensuing crime, how do we separate the causative effect of that problem from pretrial detention?

Finally, the studies cited by the authors do not support the conclusion they draw. For example, the 2013 study by Lowenkamp, VanNostrand, and Holsinger cited by the authors[19] concluded that the "1.3 times more like to commit another crime" statistic indicated an association, not causation. They concluded that "[t]his association could indicate that there are unknown factors that cause both detention and recidivism, but it is an association worthy of further exploration."[20]

A TASTE OF REALITY

As I wrote this article, I served as a visiting judge in the 44th District Court. While I respect the ambitions of those trying to reform our criminal justice system, my wish is that those advocates could spend some time in the trenches. Every week, there were instances in which defendants released on a personal bond failed to appear in court. Usually, we give them a second chance to appear voluntarily by issuing a show cause order. Many fail to appear again. Then, we reluctantly issue bench warrants for their arrest and set a small cash or surety bond, usually with a 10% deposit provision that allows them to post bond for their release without paying a bondsman.

Here are a couple of specific examples. Defendant R failed to appear five times for a speeding ticket. Each time, the court reset his appearance date. After the fifth failure to appear, I issued a bench warrant for his arrest and set bond at $2,500 cash or surety with a 10% provision. If Defendant R ever posts a $250 bond (10%) to gain his release, the bond will be applied to his fines and costs, which will likely finish his case. Bench warrants for civil infractions are regrettable, but what is the alternative?

Defendant Y was charged with first-degree home invasion (occupied dwelling with intent to commit an assault). He had lived in a group home for less than a year, so his roots in the community are not strong. He uses alcohol excessively. He failed to appear on previous charges five times. Pretrial services, the court agency that advises judges on bonds, said he is not recommended for release on his own recognizance. Should I override that recommendation and release him on a personal bond?

And finally, just as critics can cite instances where judges have set bond amounts too high, one can easily cite examples of judges who set bond too low. In 2022, the Detroit News reported on Brandon Williams-Griffin, who was arrested by Detroit police for possession of 50 grams of cocaine. Williams-Griffin had 10 drug and domestic violence convictions in two different states, 11 failures to appear in court, and a pending outstanding probation violation. A magistrate released him on a $50,000 personal bond with a tether, meaning he had to put up nothing to gain his release.

Williams-Griffin pleaded guilty to delivery and manufacture of 50-449 grams of cocaine. He failed to appear for sentencing, cut off his tether, and allegedly killed his father in Georgia three months later.[21]

CONCLUSION

Certainly, cash bail poses equal protection issues. A wealthy defendant can post a cash bond more readily than an indigent one. But eliminating cash bail entirely means losing it as an option — even for those who can afford it. Some defendants post cash bail and appear in court when they are supposed to. While that does not prove that the fear of losing money prompted the defendant to show up, it is reasonable to infer that it was one reason why they did.

While acknowledging wealth disparity, the Michigan Joint Task Force on Jail and Pretrial Incarceration did not recommend eliminating cash bail as an option. That omission carries significance because it recommended 18 changes to Michigan laws and procedures. Rather, it recommended the court "conduct an inquiry" into the defendant's ability to pay before imposing a cash bail.[22]

Courts need a variety of means to ensure defendants appear in court when they are supposed to. Abolishing cash bail would take away one option for dealing with defendants whose records of non-appearances make them poor candidates for unconditional release. We should retain that option.

Hon. Bill Richards graduated from the University of Michigan and the University of Michigan Law School. He practiced law for 43 years, including 13 years as an assistant U.S. attorney, 10 years in private practice including criminal defense, four years as a deputy attorney general, and eight years as district judge. Since retiring in 2015, he has served as a visiting judge in Oakland County Circuit Court and eight different district courts.

ENDNOTES

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8. *Bail reform: The time is now*, 101 Mich B J at 28.
9. *Id.*
10. *Report and Recommendations.*
11. *Bail reform: The time is now*, 101 Mich B J at 28 and *Report and Recommendations.*
12. *Bail reform: The time is now*, 101 Mich B J at 28.
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14. MCR 6.610(F)(1) and MCR 6.302(D).
15. *Bail reform: The time is now*, 101 Mich B J at 29.
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FORGOTTEN BUT NOT FORSAKEN

The doctrine of conditional relevancy

BY HON. CURT A. BENSON

The doctrine of conditional relevancy, which in Michigan is found in MRE 104(b), is the Rodney Dangerfield of evidence: it gets no respect. It's rarely mentioned at trial. It's hardly ever discussed in appellate cases. When scholars take notice of it, most of them condemn it as "nonsensical" and even urge that it "be dismantled at the earliest opportunity."[1] And yet the doctrine of conditional relevance has been a part of American jurisprudence for nearly 100 years.[2] It's an important concept that deserves our attention, if not our respect.

Conditional relevancy is the recognition that sometimes the relevancy of an item of evidence depends on the answer to a preliminary question. The Advisory Committee on Proposed Rules note to FRE 104(b) gives two examples:

> [W]hen a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labelled "conditional relevancy."

The purpose of MRE 104(b) is not merely to recognize the existence of preliminary questions. Rather, MRE 104(b) takes on what was once a very stormy controversy in Anglo-American jurisprudence: namely, during a jury trial is the judge or the jury responsible for answering these preliminary questions?

To be sure, the doctrine of conditional relevancy applies equally to both jury and nonjury trials, but the historic basis for the doctrine is juries. For decades, dating as far back as the Andrew Jackson administration, legal reformers complained that judges, under the guise of deciding preliminary questions of fact to determine the admissibility of evidence, were deciding cases on the merits,

thereby depriving American citizens of their constitutional right to trial by jury.[3]

WHO ANSWERS PRELIMINARY QUESTIONS OF FACT?

By way of example, the admissibility of the following items of evidence depends on how the preliminary questions are answered. Who answers the following questions: the judge or the jury?

- In deciding on the admissibility of a statement of a co-conspirator against another co-conspirator, the preliminary questions of fact are these: Was there a conspiracy? If so, were the statements made during the course of, and in furtherance of, the conspiracy?[4]
- In deciding on the admissibility of a self-incriminating social media post by the defendant in a criminal case, the preliminary questions of fact are these: Did the defendant write or authorize the incriminating post, or did someone else write it?[5]
- In deciding whether a murder victim's last statement constituted a "dying declaration" and is thus admissible as an exception to the rule against hearsay, the preliminary questions of fact are these: Did the declarant speak in extremis while truly believing that his death was approaching and was inevitable?[6]

A TALE OF TWO SUBPARTS: MRE 104(A) AND MRE 104(B)

To understand the doctrine of conditional relevancy, MRE 104(b), must be read in conjunction with MRE 104(a). The two subparts read as follows:

> **(a) Questions of Admissibility Generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the Rules of Evidence except those with respect to privileges.
>
> **(b) Relevancy Conditioned on Fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.[7]

The language of MRE 104(A) and MRE 104(B) were identical to its federal counterpart until the federal rules were restyled in 2011 to make them more easily understood.[8] In 1993, the Michigan Supreme Court made the rather unremarkable observation that inasmuch as the Michigan Rules are based on the federal ones, federal case law interpreting federal rules are persuasive authority.[9] Since Congress' restyling of the federal rules did not change the substance of the law, any federal case interpreting the pre-2011 federal rules remains persuasive, though obviously not binding on Michigan courts.[10]

Both the Michigan Supreme Court[11] and the United States Supreme Court[12] have done a fairly good job in drawing the distinction between subparts (a) and (b) in MRE 104. But neither court has ever taken the time to explain in any detail when a trial court decides admissibility under subpart (a) and when a trial court decides it under subpart (b). This is too bad, because knowing which subpart applies is critically important for several reasons. First, if the court has to decide a preliminary question of fact under subpart (a), the court and the court alone answers the question. The jury plays no role whatsoever. Moreover, in deciding the question, the Rules of Evidence do not apply (except regarding privilege) so the judge can consider anything in resolving the preliminary question of fact, even inadmissible evidence. And since the formal trappings of a trial are not necessary, the court can decide these questions during a sidebar conference or in chambers.

In sharp contrast, if the preliminary question is decided under subpart (b), the judge plays a very limited "screening" role. In deciding the preliminary question of fact under MRE 104(b), the judge need not be convinced of the answer; the judge's only determination is whether there is sufficient evidence that a reasonable jury could find, by a preponderance of the evidence, the fulfillment of the condition of fact. The jury must ultimately decide the question of fact and thus, in effect, decide the admissibility of the evidence and, in so doing, the jury can only consider admissible evidence as presented during the formal procedures of a trial.

UNDERSTANDING THE DISTINCTIONS

Learning to distinguish MRE 104(a) and MRE 104(b) begins by examining the single most important theory that motivates the Rules of Evidence: all relevant evidence is admissible unless otherwise excluded by, among other things, the Rules themselves.[13] Irrelevant evidence is never admissible.[14] Thus, the rules generally exclude relevant evidence.

Broadly speaking, we exclude relevant evidence for policy reasons. For example, the law excludes evidence of subsequent remedial measures so as not to discourage people from taking steps necessary to protect the safety of the public.[15] As for evidentiary privileges, society values certain therapeutic relationships such as attorney-client, doctor-patient, clergy-penitent and married couples. To protect and foster these special relationships, the law excludes from evidence some of the confidential communications that occur within them.[16] To ensure reliability, the law generally excludes hearsay, though this rule is famously subject to dozens of exceptions.[17]

Add up all the rules, including their subparts, and there are perhaps hundreds of measures specifically written to keep relevant — and often even essential — information from the jury.

In short, MRE 104(a) addresses policy questions. MRE 104(b) addresses relevance questions. If the preliminary question of fact must be answered only to establish the relevancy of the evidence

and not for a policy reason, MRE 104(b) applies, and the question is for the jury.[18]

MRE 104(a) recognizes the simple reality that in the short time we have our jurors, we cannot explain the myriad policy reasons behind exclusionary rules. Moreover, even if we could give juries a proper education on those matters, they might disagree with the policy behind the exclusion and ignore them anyway.

Accordingly, the rules leave these exclusions, which for the purpose of this article we will call policy exclusions, exclusively for the judge to enforce. This makes good sense. Imagine a murder case where the defendant confessed to her lawyer but her confession is protected by attorney-client privilege. If a juror learned of the confession and heard in court that the client calmly and under no duress confessed to her lawyer that she indeed murdered the victim, we cannot reasonably expect the jury to consider the utilitarian philosophy behind attorney-client privilege: that the privilege encourages full and frank communication between attorneys and their clients and thereby promotes a broader public interest in the administration of justice.[19] The juror is likely to fail to appreciate or even understand such abstract reasoning and vote guilty based primarily on the defendant's confession to her lawyer. Even if the juror acknowledged the role of privilege, it is simply asking too much for a juror to disregard the confession. So, the judge excludes the confession altogether. The juror never hears about it.

Likewise, to use an example referencing the Constitution rather than the rules, if the police fail to obtain a search warrant before entering an accused person's house and finding evidence of a crime, we certainly do not expect jurors to disregard the defendant's obvious guilt in order to achieve the abstract, higher goal of vindicating the Fourth Amendment and preserving the integrity of the judicial process.[20]

These policy exclusions — whether based in the Rules of Evidence, federal or state constitutions, or otherwise — are left to the judge to decide under Rule 104(a). The judge alone decides the admissibility of the evidence. If there is a preliminary question of fact that must be answered to determine the admissibility of the evidence, the judge alone answers that question. Under state and federal rules, the trial judge must be personally convinced by a preponderance of the evidence of the answer to the question.[21] The juries play no role whatsoever. To the extent possible, they are kept in the dark about the evidence.

Deciding preliminary questions under Rule 104(b) is quite different. Evidence decided under Rule 104(b) is not based on a sophisticated or controversial social policy. It is based squarely and exclusively on relevance. Here, the jury can play an important role because your average juror understands the concept of relevance. And even more to the point, the average juror has no trouble disregarding information he decides is irrelevant.

Here is an example. Let's say a landowner is sued because someone was injured by a dangerous condition on the property. The evidence against the landowner includes a letter written before the accident warning the landowner of the dangerous condition. If the landowner read the letter, it goes to notice and it's relevant. If he never saw it, the letter is irrelevant.

There is no policy that would exclude the letter. It's a simple question of relevancy. Whether the landowner read the letter is the preliminary question of fact. If the jury decides that the landowner read the letter, it'll be instructed to consider the letter when deciding the question of liability. If, in contrast, the jury decides that the landowner never saw the letter, it will have no difficulty disregarding the letter when it deliberates the question of liability. Here, the judge's role is quite limited. She will only exclude the letter if she finds that no reasonable jury could find by a preponderance of the evidence that the landowner saw the letter. Her personal belief on the issue is irrelevant.

PRELIMINARY QUESTIONS OF FACT ANSWERED

Applying MRE 104 to the hypothetical cases mentioned previously, the answers are clear.

- Assuming that the co-conspirator's statement is relevant, whether to introduce it against a different co-conspirator is grounded in policy. The judge therefore answers the preliminary questions of fact under Rule 104(a).[22]
- Authenticating the Facebook post is purely a question of relevance. If the jury determines that the defendant did not post it, it is irrelevant, and they will disregard it. If the jury decides that he posted it, it is relevant, and the jury will take it into account as they decide his guilt or innocence. Thus, in determining the authenticity of the Facebook post, the judge only plays a limited screening role under MRE 104(b).[23]
- Finally, the rule against hearsay, with its potential for excluding highly probative statements, is grounded in policy. In determining the subjective beliefs of the declarant, the judge answers the preliminary questions of fact under Rule 104(a).[24]

CONCLUSION

To repeat a common complaint made by members of the judiciary against their brothers and sisters in the legislature, MRE 104(b) is not a model of clarity. But over 90 years of (often disparaging) scholarship, the committee notes to the federal rules, along with federal and state case law, leave no doubt of its meaning: Judges, without any input from juries, decide the admissibility of evidence when the answers to preliminary questions of fact involve the policies driving the Rules of Evidence, the federal or state constitutions, or statutes. Judges play a more limited screening role when considering a preliminary question of fact that must be answered only to establish the relevance of the evidence.

Hon. Curt A. Benson is a Kent County Circuit Court judge assigned to the civil/criminal division and distinguished professor emeritus at Western Michigan University Cooley Law School, where he taught evidence, civil procedure, contracts, tort, and insurance law. Benson's private practice focused on civil and criminal litigation. He is a published legal author and frequent public speaker.

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2. The formative article is Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact,* 43 Harv L Rev 165, 171 (1929).
3. Imwinkelried, *Judge Versus Jury: Who Should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence?* 25 Wm & Mary L Rev 577, 585 (1984).
4. MRE 801(d)(2)(E).
5. MRE 901(a).
6. MRE 804(b)(2).
7. MRE 104(a) and (b).
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13. MRE 402.
14. *Id.*
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16. *People v Stanaway,* 446 Mich 643, 658; 521 NW2d 557 (1994).
17. MRE 802.
18. Robinson & Longhofer, 1 Michigan Court Rules Practice (Vol 4): Evidence, § 104.3, Relevancy conditioned on fact.
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21. *People v Barrett*, 480 Mich 125, 135; 747 NW2d 797 (2008).
22. *Bourjaily v United States*, 483 US 171, 202, n 11; 107 S Ct 2775; 97 L Ed 2d 144 (1987).
23. The "governing" rule is MRE 901, but "showing authentication and identification falls in the category of relevancy dependent upon fulfillment of a condition of fact *and is governed by the procedure set forth in Rule 104(b),*" FRE 901, Committee Notes (Emphasis added).
24. "Though some states used to send preliminary facts regarding dying declarations to the jury, Rule 104(a) gives that task to the judge," Wright & Miller, 21A Federal Practice and Procedure (2d ed): Evidence, § 5053.3, Preliminary Fact Determinations by Judge – "Admissibility of Evidence."

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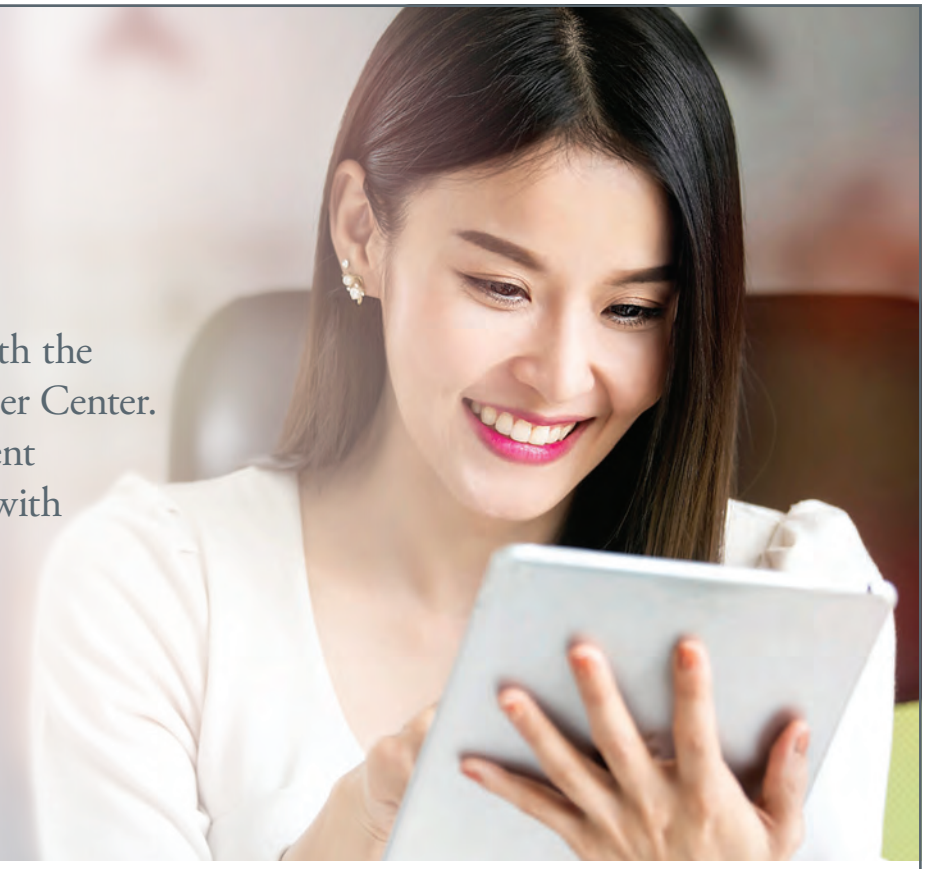

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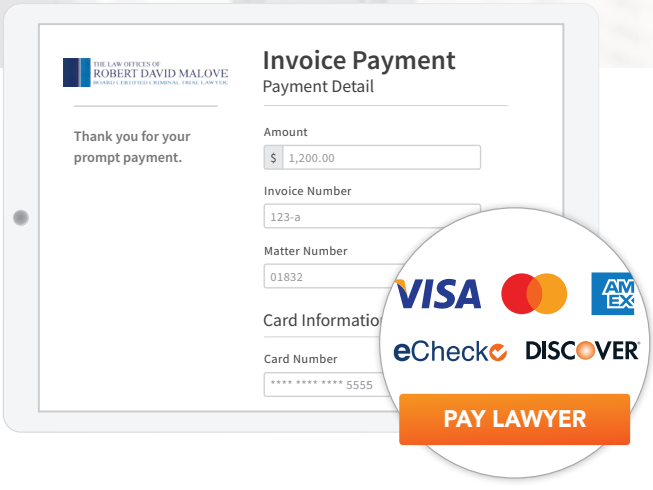

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ETHICAL PERSPECTIVE

The banking crisis and lawyer trust accounts

BY ROBINJIT K. EAGLESON

On March 10, news organizations in the United States and around the world reported on the biggest failure of a U.S. bank since the last global financial crisis in 2007.[1] It played out in real time as Silicon Valley Bank, a major lender to the tech industry, succumbed to a bank run.[2] Customers frantically flocked to the bank, withdrawing money from their accounts. The initial collapse panicked markets and weakened financial institutions already struggling with soaring interest rates.[3]

After the initial panic, the markets calmed until a week later when a second bank, New York-based Signature Bank, was shut down and a third bank, San Francisco's First Republic Bank, was found to be teetering on the brink. The collapse of a Swiss bank, Credit Suisse, was saved by that country's biggest bank, UBS, which provided Credit Suisse with a $54 billion emergency loan.[4]

Since then, the relative calm had been restored to the banking industry thanks to large sums of emergency cash from some of the country's strongest financial institutions — more than $400 billion in all to stop the bleeding.[5] Additionally, the U.S. Federal Reserve said it would guarantee all deposits at Silicon Valley Bank and Signature Bank, putting the federal government on the hook for $140 billion.[6] The federal government also agreed to provide a record amount of loans to banks; institutions nationwide tapped the new emergency lending program for billions of dollars.[7]

Thankfully, the banking crisis seems to have settled and economists are easing consumer fears. That said, in the aftermath many have wondered, is my money safe?

Lawyers are not immune to this concern. In fact, lawyers not only wondered about their own money, but also the money they safeguard, protect, and hold as fiduciaries.[8] Of course, I speak of the client funds placed in lawyer trust accounts including IOLTAs and non-IOLTAs as required by MRPC 1.15 and 1.15A. Therefore, when a banking crisis hits, the obvious question becomes, what about my client's money?

This is where the Federal Deposit Insurance Corporation (FDIC)[9] and the Credit Union Share Insurance Fund Parity Act[10] come into play. The FDIC insures U.S. bank accounts "up to at least $250,000 per depositor, per FDIC-insured bank, per ownership category."[11] Under the Credit Union Share Insurance Fund Parity Act, the National Credit Union Administration (NCUA) provides enhanced pass-through share insurance coverage for IOLTAs and other similar escrow accounts.

What exactly does that mean for IOLTAs? Though many lawyers keep their clients' funds in a pooled IOLTA, each individual client is insured for up to at least $250,000 held at the financial institution.[12] This is another reason why it is critical for lawyers to keep meticulous records[13] regarding the amount of money held for each client in a lawyer trust account — not only do they need to show how much money in the account is owned by each client, but it's also important in the event of a banking crisis where the lawyer must rely on FDIC or NCUA insurance.

There is a wrinkle, however. The maximum coverage of $250,000 applies to the institution, not just the account.[14] For example, if a client banks at the financial intuition where their lawyer has an IOLTA, that may affect how much is insured. Remember, FDIC and NCUA insure $250,000 per person or entity per financial institution regardless of how many accounts it is spread across. Therefore, it's important to ask clients where they bank to ensure they still have the maximum amount of insurance coverage.

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What about clients for whom you hold more than $250,000? What is a lawyer supposed to do when insurance does not cover the full amount?

Lawyers should investigate their clients' objectives before keeping large sums in a trust account for longer periods of time, especially when the sum is larger than the deposit insurance limit. Once lawyers understand and agree with the clients' objectives, the simplest option is for the lawyer to do their due diligence and investigate the security of the financial institution in which the lawyer trust accounts are held. This may result in opening new IOLTAs and non-IOLTAs at more stable financial institutions where the likelihood of the institution failing is smaller.[15]

It is critical for lawyers to keep meticulous records regarding the amount of money held for each client in a lawyer trust account — not only do they need to show how much money in the account is owned by each client, but it's also important in the event of a banking crisis where the lawyer must rely on FDIC or NCUA insurance.

Lawyers must determine what is best for themselves and their clients. They must also be aware that their obligation does not simply end with making sure that the funds they hold for clients are insured by the FDIC. For lawyers worried about their clients' funds, the best course of action is contacting their financial institution and asking about security options regarding lawyer trust accounts while considering the amount of money in that account. Further, as required under MRPC 1.4, lawyers must have open communication with clients to provide them with a sense of security regarding their funds before accepting them to hold. Ultimately, it is the lawyer's decision where the funds are held.

Currently, there are no Michigan ethics opinions regarding this matter. However, other states such as Florida and Virginia published opinions in 2008 when banks experienced similar issues. In an ethics opinion still pertinent today, the State Bar of Florida provided the following information:

> [T]here is no ethical requirement that a lawyer divide trust funds in order to ensure complete FDIC coverage, he is nevertheless to act prudently and consider the deposits' size and reputation of the financial institutions concerned.[16]

No one can predict when the next banking crisis will happen or which financial institution it may affect. After all, we are lawyers, not oracles. The only thing lawyers can do to protect clients is get as much information as possible to pass on to clients and provide the best security possible.

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LIBRARIES & LEGAL RESEARCH

Exploring Michigan's right-to-work law through legislative history

BY JANE MELAND

In 2012, Michigan became the 24th state to enact a right-to-work (RTW) law.[1] The legislation, enshrined in Michigan Public Act 348, stunned many.[2] In a state reliant on manufacturing and boasting a strong union presence, it was mystifying that the Michigan Legislature would boldly pursue such controversial legislation. Adding to the controversy was the fact that the measure was rushed through both the Michigan House and Senate, providing little opportunity for legislative reflection and public input.[3]

Fast forward to 2023, and RTW laws remain a polarizing issue in Michigan — so much so that one of the first orders of business for the Democratic-led Legislature was repealing the 2012 RTW laws by passing Michigan Public Act 8,[4] making Michigan the first state in nearly 60 years to abolish its RTW laws.[5]

Michigan's tug of war over RTW serves as the inspiration for this article. When the RTW legislation passed in 2012, I wondered what lawmakers hoped to achieve by enacting the law. Was it simply to weaken organized labor as some suggested?[6] Or was it to "give workers more choice" and encourage economic growth, as others suggested?[7] With these questions in mind, I set out to explore the legislative history of the 2012 act to better understand what lawmakers intended when passing this law.

LEGISLATIVE HISTORY: THE QUEST FOR INTENT

Using legislative history materials to ascertain intent is particularly tricky, especially at the state level. Unlike federal legislative history documentation, the breadth and depth of state legislative history materials is scant and, not surprisingly, the range and accessibility of legislative history materials varies from state to state. When researching Michigan legislative history, a good starting point is consulting a research guide, which will list categories of legislative history documentation and access points for finding these materials (selected guides are noted below).[8]

Additionally, when attempting to discern intent, there's a chance that the intended outcome of the legislation may not be documented in official records. As such, it's important to moderate expectations when approaching a state legislative history research project.

SUMMARY OF STRATEGY AND FINDINGS

In this section, I've used Michigan's 2012 RTW law to serve as a framework for demonstrating the peculiarities inherent in researching state legislative history materials and how those peculiarities can impact what a researcher might find.[9]

Research Steps and Strategy

When I began my research into 2012 PA 348, I knew that background materials would be meager given how quickly the legislation was passed,[10] but I expected to at least find a summary bill analysis, multiple versions of bills for comparison purposes, and possibly relevant entries from the Michigan House and Senate journals. My suspicions were confirmed when I reviewed the landing page for 2011 SB 116.[11] There, I found four versions of the bill, one summary bill analysis, and multiple references to entries in the House and Senate journals.

LESSONS LEARNED

- Legislative intent will always be elusive — the official record only tells us so much.
- Use multiple sources to better understand the meaning and potential impact of the legislation.

I opted not to review the House and Senate committee archives, because the committees had been discharged and did not hold public hearings.[12]

What I Found

The bill analysis serves as one of the most authoritative sources for discovering legislative intent, and its level of detail significantly affects the amount of contextual information available to a researcher. The Michigan House and Senate fiscal agencies produce two types of analysis — a summary analysis and a detailed analysis. A summary analysis provides a concise description of the bill, including its fiscal impact. A detailed analysis describes the problem being addressed by the bill, arguments for and against it, and its fiscal impact.

Unfortunately, only a summary analysis was drafted for SB 116, which didn't provide the desired background information.[13] I moved on to the House and Senate journals.

The House and Senate journals lack complete transcripts of proceedings, making them a less reliable source for determining legislative intent. However, they include no-vote explanations, which were helpful in my investigation of SB 116. Specifically, the House Journal included detailed statements from members explaining their opposition to the legislation.[14] These no-vote explanations provided insight into the perceived motivations for this measure.

Finally, I reviewed the various versions of the bills and discovered that the original version of SB 116 authorized creation of RTW zones within municipality boundaries, which is markedly different from the final version establishing statewide RTW laws.[15]

Not finding much in the official legislative record, I broadened my research to encompass news sources and scholarly publications. These unofficial sources can be useful in legislative history research; they may offer evidence of intent not found in the official records. For example, while researching SB 116, I discovered news articles containing statements from lawmakers both in support of and opposed to the legislation as well as opinion pieces from RTW observers. Additionally, I unearthed an academic study that analyzed the factors leading to Michigan's adoption of RTW laws including behind-the-scenes details of the politicking that influenced legislators.[16]

While news stories and scholarly publications may be useful in our understanding of legislative intent, it's important to remember that these sources can be biased and at best serve as persuasive authority of intent.

CONCLUSION

Many factors impact our ability to ascertain legislative intent including availability of resources, timing of legislation, and more. I hope the strategies described in this article will be of help the next time you're asked to compile a legislative history.[17]

Jane Meland is director for the John F. Schaefer Law Library at Michigan State University College of Law. She has been with MSU since 2002 and has worked as a librarian since 1997. Meland has a J.D. from the University of Detroit School of Law and a master's degree in library and information science from Wayne State University. She is a member of the State Bar of Michigan.

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17. Special thanks to the students in my spring 2023 Advanced Legal Research class for inspiring this article and for their grace through a very challenging semester.

LAW PRACTICE SOLUTIONS

LEAN in: A LEAN practitioner discusses optimizing your practice

BY REBECCA ZARRAS AND VICTOR WANDZEL

LEAN is a method of optimizing the people, resources, and processes in your organization to create value for the customer and eliminate waste. It started in the manufacturing world, with many crediting the Toyota production system as its inception. LEAN is not a one-time implementation; it is a process of continuous assessment and improvement. LEAN practices have since migrated from the manufacturing world to the practice of law.

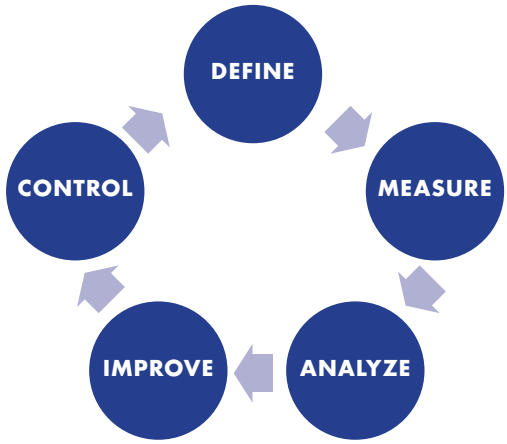
The authors, both of whom are members of the State Bar of Michigan's Affordable Legal Services Committee, interviewed Portage attorney Mechelle Woznicki and gained insight on how she implemented LEAN into her legal practice. She offered invaluable tips and tricks which save time and improve the overall efficiency of legal services.

Woznicki is a family law and estate planning attorney who offers limited-scope legal services and operates as a LEAN law firm. She also helps other attorneys integrate LEAN into their practices. Before starting her own firm, Woznicki was in the United States Navy for 10 years. She worked as a global sourcing manager in the pharmaceutical industry for 20 years. Her experience in manufacturing introduced her to LEAN, and she eventually became a team trainer in LEAN methodology. As Woznicki explained, LEAN is not just one technology or program. It is an approach, a concept of increasing value to your clients while decreasing waste in your processes, and a continuous cycle that can always be improved upon.

Woznicki outlined five LEAN steps she uses (see the graphic to the right) when targeting when targeting a process for improvement:

- First, define your process. This includes charting out your process and laying out each step from start to finish.
- Second, measure your process. Ask yourself or your staff how long each step takes and who does each step.
- Third, analyze your process. Ask: Is this working for us? Identify waste and how to reduce it. Not making a profit on certain types of cases is a sign of waste, she said.
- Fourth, improve your process. Modify your steps or create new if-then charts as issues arise.
- Fifth, control your process. This is essentially maintaining your process and improving it when needed.

If-then charts are excellent tools for automating legal tasks and training future employees. These charts can be used to write your organization's policies and procedures. They should clearly outline procedures for staff. Woznicki uses different charts for specific types of cases to outline what she and her staff will do for each part of that case. She says that such charts can be modified and shared with clients to lay out the timeline of their case. Proactively showing your client the steps from start to finish helps them understand where they are in their case at all times.

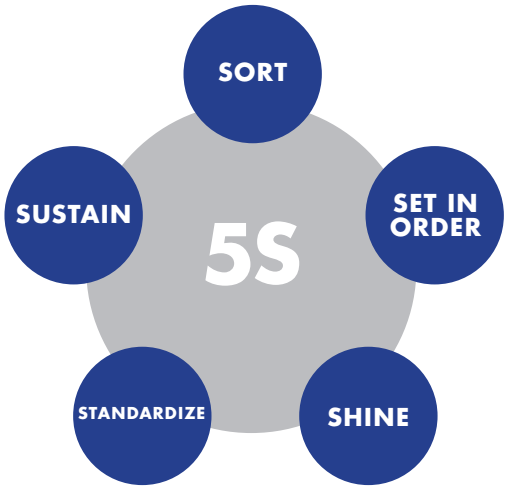


Law Practice Solutions is a regular column from the State Bar of Michigan Practice Management Resource Center (PMRC) featuring articles on practice, technology, and risk management for lawyers and staff. For more resources, visit the PMRC website at www.michbar.org/pmrc/content or call our Helpline at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

While Woznicki has a physical office, implementing LEAN into her legal practice has reduced the need for her to meet with clients in person. She also has a virtual receptionist. By using LEAN methodology, she can do most of her client interaction virtually. She utilizes email drip campaigns — a series of automated emails with a predetermined timing sent to individuals who interact with her website — to follow up with potential clients. For instance, her drip campaign may automatically send two follow-up emails to an individual who reached out to her on her website about services. Such practices cut down on the amount of time spent on client intake.

Once hired, Woznicki outlines how she will communicate with her clients throughout their case. Utilizing a client portal, she sends videos to demonstrate to her clients different aspects of their case. The videos usually explain hearings that do not require client preparation. For example, Woznicki has a pretrial hearing video that explains to the client what the pretrial hearing is and what they can expect. She can also share documents through the client portal if needed and if clients have questions, they can reach out to her via the portal. The prerecorded videos decrease Woznicki's time on the phone with clients, aligning with her view that clients would rather watch an informative video than pay $150 for a short phone call.

LEAN methodology can also be used outside your legal practice. Woznicki implemented a "5-S" concept for keeping work desks clean: sort, set in order, shine, standardize, and sustain (see the graphic below). For example, sort your client files in an organized way; set your stapler in the same place so it is easily accessible; shine your computer monitors, pens, desks, and chairs so they are clean; and sustain this process over time. Following this mantra leads to every item on your desk (or even in your house) having a place and a purpose and helps you end each workday with a clean, organized desk, ready to start on your next case the following day.



NEW FROM THE STATE BAR:

LEAN RESOURCE CENTER HERE TO HELP LAWYERS MAXIMIZE EFFIENCY

A new collection of LEAN resources specially cultivated for attorneys to help improve your time management and practice processes is now available through the State Bar of Michigan.

LEAN is a system designed to eliminate waste and inefficiency while creating opportunities to increase quality while reducing costs. By incorporating LEAN principles into your practice, you can maximize your efficiency as a practitioner to help achieve your personal and professional goals.

Compiled by the LEAN/Continuous Improvement Subcommittee of the SBM Affordable Legal Services Committee, LEAN resources are available at michbar.org/LEAN including detailed information on what LEAN is, why you should use LEAN, and how you can incorporate LEAN. There are also explanations for documenting automation using the LEAN triad, implementing LEAN with the DMAIC process, and continuously improving your practice by eliminating downtime.

The SBM LEAN site also includes a question-and-answer video with an attorney who is also a LEAN practitioner, a collection of useful tools, and more.

CHECK OUT THE NEW LEAN RESOURCES AT **MICHBAR.ORG/LEAN.**

When asked if she encountered challenges implementing LEAN into her legal practice, Woznicki, as a former LEAN trainer, unsurprisingly said she had none. She started implementing LEAN about a year into her practice and as a solo practitioner with one employee, putting LEAN practices in place was easy for her. For larger firms, she recommends engagement for stakeholder buy-in. If the owner of a law firm or its employees are not persuaded to implement LEAN, it will not work well, she explained. All staff members need to be engaged. If one employee is not on board and not willing to change, that could slow the entire implementation process. Woznicki recommended assigning reluctant team members to join the charting process. If they work on charts designed to streamline legal tasks and services, they will be more engaged and more likely to see the value of LEAN for both the law practice and its clients. Woznicki also suggested using financial incentives such as bonuses to garner staff support for implementing LEAN.

The benefits of implementing LEAN methodology in your legal practice are numerous. When Woznicki implemented LEAN into her firm, it was the first time she experienced LEAN as a business owner. The impact on revenues and her profits exceeded even her expectations. Plus, LEAN made her life simpler, saved her more time so she could spend it on other endeavors, and cut costs for her clients. The biggest payoff? Woznicki has rarely worked Fridays since implementing LEAN.

As for when attorneys should implement LEAN, Woznicki's advice is simple: Start today and remember LEAN is a process of continuous improvement.

For more information, check out the State Bar of Michigan LEAN resources page at michbar.org/LEAN.

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Victor Wandzel, the founder of Wandzel Law, specializes in providing transactional legal services including drafting sweepstakes rules, software service agreements, and end-user license agreements and buying and selling franchise businesses. A member of the State Bar of Michigan Affordable Legal Services Committee and a director for the Oakland County Bar Association New Lawyers Committee, Wandzel earned his undergraduate degree from James Madison College in 2016 and his law degree from Michigan State University College of Law in 2021.

PLAIN LANGUAGE

"May" for granting discretion

BY MARK COONEY

"May" does not just suggest discretion, it clearly connotes it.
— U.S. Supreme Court Chief Justice John G. Roberts[1]

While debate continues over some finer points of legal drafting, one little word has risen above the fray: *may*. Experts spar over the merits of *shall*, *must*, *will*, and more. But those same experts find common ground with *may*: it unmistakably grants discretion.[2]

Chief Justice Roberts said so just last June. The case, *Biden v. Texas*,[3] concerned the Immigration and Nationality Act. The act says that the government "may return" border crossers to their country of origin while their immigration cases are pending.[4] When the Biden administration balked at enforcing the Trump administration's return policy, two border states sued. They alleged that because mandatory detention language appears elsewhere in the act, the Biden administration's inaction under the "may return" section was unlawful.

Chief Justice Roberts, writing for the Court's majority, rejected this argument because the statute "plainly confers a discretionary authority."[5] His elaboration was emphatic:

> The statute says "may." And "may" does not just suggest discretion, it "clearly connotes" it.[6]

In fact, wrote Roberts, *may* is an "expressly discretionary" term.[7] This is especially clear when *may* "is used in contraposition to the word 'shall.'"[8] Had Congress intended the act's nearby detention provision "to operate as a mandatory cure" of government inaction under the "may return" provision, Congress "would not have conveyed that intention through an unspoken inference in conflict with the unambiguous, express term 'may.'"[9] In short, the statute's "use of the word 'may' … makes clear that contiguous-territory return is a tool that the Secretary 'has the authority, but not the duty,' to use."[10]

This reading of *may*, though spirited, was hardly new — and Roberts took pains to show it. He cited four modern Supreme Court cases in support, noting that the Court "has 'repeatedly observed' that 'the word "may" *clearly* connotes discretion.'"[11]

History buffs might note that the point wasn't always so settled. One pre–Civil War opinion observed that "[t]he sense in which this word [may] is to be taken, whether permissive or compulsory in various statutes, has been a fruitful source of difficulty and discussion in the courts and at the bar, both in England and America."[12] That court, writing in 1859, fell on the side of a permissive meaning, holding that "the word 'may' is used in the section under consideration to confer … discretionary powers."[13]

In the ensuing decades, the case law was uneven, but courts became more confident in announcing, as one did in 1933, that "[t]he primary or ordinary meaning of the word 'may' is undoubtedly permissive and discretionary."[14]

Modern case law reflects this view. In the past decade alone, California's appellate courts have confirmed *may*'s permissive meaning at least a dozen times.[15] Here in Michigan, the court of appeals recently rejected an argument for a mandatory *may* because the argument was "inconsistent with the [statute's] plain language."[16] The court explained that *may* "typically reflects a permissive condition, entrusting a particular choice to a party's discretion."[17]

Courts have, unsurprisingly, rejected arguments straining *may*'s permissive meaning past its breaking point. An isolated or inapt *may* won't, for example, allow litigants to flout an entire mandatory administrative-remedy scheme[18] or ignore a statute's list of official designees for service of process.[19] And cautious courts, while acknowledging *may*'s "customary meaning of being permissive

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

or providing for discretion," accept the possibility of exceptions when "indications of legislative intent … or obvious inferences from the structure and purpose of the statute" show otherwise.[20] These would-be anomalies, besides being logical upon close inspection, are overwhelmed by the cases, too numerous to cite, applying *may*'s discretionary meaning without hesitation.

Leading commentators have likewise tabbed *may* as the choice for expressing "has discretion to; is permitted to; has a right to; is authorized to."[21] In Justice Antonin Scalia and Bryan Garner's *Reading Law*, this idea takes on canonical status. For the mandatory/permissive canon, they state that "[m]andatory words impose a duty; permissive words grant discretion."[22] In the supporting illustrations, *may* is their lone choice for correct permissive language.[23]

Given *may*'s precedential and canonical standing as a permissive term, it's puzzling how timid — and elaborately roundabout — some drafters are when granting discretion. I've barely scratched the surface in this short article, yet even here I've offered five post-2000 U.S. Supreme Court cases confirming that *may* "clearly" connotes discretion. *May*, with active-voice phrasing — *the court may award costs* — should be a mainstay in our documents.

Yet it isn't.

I recently checked a form contract for style. What I found was typical:

- "If …, then the Publisher **shall have the right to** terminate this Agreement …."

Edit: then the Publisher **may** terminate this Agreement

- "If …, then the Publisher **shall have the unqualified right to** terminate this Agreement …."

Edit: then the Publisher **may** terminate this Agreement

- "[T]he Publisher **shall have the right, but not the obligation, to** acquire or prepare …."

Edit: the Publisher **may** acquire or prepare

The problem with the original versions goes beyond wordiness. True, the original versions used five, six, even nine words to express what *may* expresses in one word. But let's look past that.

Consider the rampant misuse of *shall*. Drafting experts who view *shall* as a legitimate term of art wouldn't defend *shall*'s use in terms granting discretion (as seen above). In fact, those experts are unwavering in their advice: use *shall* to impose a duty and only to impose a duty.[24] Documents send mixed, contradicting messages when the mandatory *shall* appears in terms that confer discretion. To grant discretion, the experts say, use *may*.[25]

Yet in the form contract I studied, 28% of the *shall*s (22 of 78) appeared in clauses granting discretion. That's worth repeating: more than a quarter of the contract's *shall*s appeared in passages that did not impose a duty but instead granted discretion. Under any definition, that's loose drafting.

Infusing *shall*s into discretionary terms risks clouding the duty *shall*s. After all (a court might ask), if 22 *shall*s appear in permissive passages, why should *shall* have an ironclad mandatory meaning elsewhere?

Far-fetched? No. Consider one court's refusal to find a mandatory duty in this seemingly clear language: "'[T]he code official shall employ the necessary labor and materials to perform the required work.'"[26] The court concluded that this *shall* was "intended simply to signify the future tense," was meant "to invest the code official with authority to act," and was used "in its directory, not mandatory, sense."[27] Why no duty? The court explained that "because the word 'shall' is overused, it is not examined critically before placed in a statute and, thus, can convey a diversity of meanings."[28] Given cases like this, drafters' quick trigger with *shall* is puzzling.

But we're not done with potential ambiguity. Take another peek at the examples above; note how inconsistent the language is from one to the next. These examples show three language scenarios for granting discretionary authority. Whenever a drafter uses different words to express the same idea within a document or related documents, the drafter risks contextual ambiguity.[29]

Here, for instance, only one of the three examples includes the adjective *unqualified* before the noun *right*. ("[T]he Publisher shall have the **unqualified** right to ….") Does this mean that the discretion granted in the other examples is in some way qualified? Inserting *unqualified* in one place but not in others needlessly opens the door to that argument.[30]

In contrast, the consistent use of *may*, with active-voice phrasing, removes the risk of ambiguity.

The examples above only hint at how frequently *shall* alternatives appeared in the form contract I studied. All should meet the delete key:

- "The Publisher **shall have the right to** edit and revise the Work …." [**may** edit and revise, etc.]

- "[T]he Author **shall have the right to** review and approve … the title …." [**may** review and approve, etc.]

- "The Publisher **shall have the right to** manufacture…." [**may** manufacture]

- "The Publisher **shall have the right to** use ...." [**may** use]
- "The Publisher **shall have the right to** debit the account ...." [**may** debit, etc.]

In several provisions scattered here and there, the form contract used the active-voice construction that experts recommend:

- "If the Author fails to [timely] return the corrected page proofs ..., **the Publisher may publish** the Work without the Author's approval ...."
- "If ... a claim ~~shall arise~~ [arises] ..., **the parties may [sue]** jointly or separately."

Ironically, this correct — but only occasional — use of *may* only adds to the contract's overall inconsistency. *May*'s correct, consistent use would have, as Scalia and Garner put it, worked "beautifully."[31] We see its seamlessness in these last two examples. But *may*'s use in only occasional places suggests, again, some possible difference in meaning from the elaborate *shall have the right to* phrases found elsewhere. Do these *may* terms mean something slightly different from the wordy *shall* alternatives? No. But alas, the door to interpretive mischief is by now wide open.

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ENDNOTES

1. *Biden v Texas*, ___ US ___; 142 S Ct 2528, 2541; 213 L Ed 2nd 956 (2022) (Cleaned up).
2. Adams, *A Manual of Style for Contract Drafting (4th Ed)* (Chicago: ABA Publishing, 2018); Garner, *Garner's Guidelines for Drafting & Editing Contracts* (St. Paul: West Academic Publishing, 2019), pp 161-62; Neumann, Jr. & Entrikin, *Legal Drafting by Design: A Unified Approach* (Frederick: Aspen Publishing, 2018), p 144; Stark, *Drafting Contracts: How and Why Lawyers Do What They Do (2nd Ed)* (Frederick: Aspen Publishing, 2014), p 174; and Schiess, *'may' vs. 'reserves the right to,'* Legalwriting.net (May 13, 2005) <https://law.utexas.edu/faculty/wschiess/legalwriting/2005/05/may-vs-reserves-right-to.html> [https://perma.cc/9ZTS-BVF5]. All websites cited in this article were accessed April 4, 2023.
3. *Biden v Texas*, ___ US ___; 142 S Ct 2528; 213 L Ed 2nd 956 (2022).
4. *Id.* at 2535 (quoting 8 USC 1225(b)(2)(C)).
5. *Id.* at 2541.
6. *Id.* (quoting *Opati* v *Republic of Sudan*, 590 US ___; 140 S Ct 1601, 1609; 206 L Ed 2d 904 (2020)).
7. *Id.* at 2542.
8. *Id.* at 2541 (quoting *Jama v Immig & Cust Enforcement*, 543 US 335, 346; 125 S Ct 694; 160 L Ed 2d 708 (2005))(Cleaned up).
9. *Id.*
10. *Id.* (quoting *Lopez v Davis*, 531 US 230, 241; 121 S Ct 714; 148 L Ed 2d 635 (2001)).
11. *Id.* at 2541–42 (quoting *Opati*, 140 S Ct at 1609, emphasis in *Opati*).
12. *Cutler v Howard*, 9 Wis 309, 311 (1859).
13. *Id.* at 315–316 (stray comma removed).
14. *Bechtel v Bd of Supervisors of Winnebago Cty*, 217 Iowa 251; 251 NW 633, 635 (1933) ("As a general rule, the word 'may' when used in a statute is permissive only and operates to confer discretion. ... The primary or ordinary meaning of the word 'may' is undoubtedly permissive and discretionary.").
15. See, e.g., *People v Moine*, 62 Cal App 5th 440, 448; 276 Cal Rptr 3d 668 (2021) ("[I]n delineating the trial court's authority by use of the word 'may,' the statutory language itself indicates the trial court has broad discretion ....").
16. *Ass'n of Home Help Care Agencies v Dep't of Health & Human Servs*, 334 Mich App 674, 687; 965 NW2d 707 (2020).
17. *Id.* (quoting *In re Complaint of Mich Cable Telecom Ass'n*, 241 Mich App 344, 361; 615 NW2d 255 (2000)).
18. See, e.g., *Mullenaux v Graham Co*, 207 Ariz 1, 3; 82 P3d 362 (App, 2004).
19. *City of Mesquite v Bellingar*, 701 SW2d 335, 336 (Texas App, 1985).
20. *Yoo v United States*, 43 F4th 64, 73, 74, 80 (CA 2, 2022).
21. *Garner's Guidelines for Drafting & Editing Contracts.* p162.
22. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan: West Group, 2012), p 112.
23. *Id.*
24. *A Manual of Style for Contract Drafting*, pp 57 ("This manual recommends not using shall in contract drafting to express any other meaning" than to impose a duty). and 62 ("Using shall to mean only 'has a duty to' ... is a big step toward curing the ailment" of "chaotic verb structures" in contracts.) and *Drafting Contracts: How and Why Lawyers Do What They Do*, p 183 ("[Y]ou should use shall only to signal an obligation. But drafters incorrectly use shall so frequently that they think they are using it correctly, even when they are not.").
25. *A Manual of Style for Contract Drafting*, p 76 n 2; *Legal Drafting by Design: A Unified Approach*m, p 144 n 2; and *Drafting Contracts: How and Why Lawyers Do What They Do*, p 174 n 2.
26. *South End Enterprises, Inc v City of York*, 913 A2d 354, 358–59, 360 (Pa Commw, 2006) (Quoting ordinance).
27. *Id.* at 359.
28. *Id.* at 358–59 (Cleaned up).
29. Sepinuck & Hilson, *Transactional Skills: How to Structure and Document a Deal* (St. Paul: West Academic Publishing, 2015), pp 150-51.
30. See *Garner's Guidelines for Drafting & Editing Contracts*, pp 20–21.
31. *Reading Law: The Interpretation of Legal Texts*, p 112 ("When drafters use shall and may correctly, the traditional rule holds — beautifully.").

MONEY JUDGMENT INTEREST RATE

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

For a complaint filed after Dec. 31, 1986, the rate as of Jan. 1, 2023, is 3.743%. This rate includes the statutory 1%.

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

13% per year, compounded annually; or

The specified rate, if it is fixed — or if it is variable, the variable rate when the complaint was filed if that rate was legal.

For past rates, see https://www.michigan.gov/taxes/interest-rates-for-money-judgments.

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

DUTY TO REPORT AN ATTORNEY'S CRIMINAL CONVICTION

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

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

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

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

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

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

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

PRACTICING WELLNESS

Letting go of others' expectations

BY MOLLY RANNS

Over the course of the last month, I have made presentations on an array of lawyer well-being topics to a number of law firms, a prosecutor's office, legal aid clinics, two State Bar sections, and three Michigan law schools. In each of these instances, vibrant discussions ensued about the vital need to support the emotional health of today's lawyers and the troubles that can arise when wellness is ignored.

As I sit back and reflect on what was discussed, what was learned, and what more I can do to help lawyers, judges, and law students thrive both personally and professionally, the words of those with whom I've spoken echo in my mind. These words repeatedly hold a central theme, and that theme seems to constantly circle back to expectations — not only the difficulties in managing one's own expectations, but also the difficulties in managing the expectations of others.

An expectation is defined as "a strong belief that something will happen or be the case in the future; a belief that someone will or should achieve something."[1] These beliefs may or may not be realistic. We all have them and not all expectations are harmful — for example, we expect people to behave a certain way in certain situations, follow traffic laws, and show up to work on time. Our parents placed expectations on us as children, and our teachers did the same once we entered the educational system. Likewise, employers hold expectations about our abilities to perform certain tasks at work. The expectations we hold not only impact the relationship we have with ourselves, but the relationships we have with those around us.

Problems seem to arise when far too much weight is placed on the expectations of others, blurring the line between how others view us and how we really are. I hear about this dilemma often from law students struggling to live up to their parents' expectations of their academic performance or chosen career path, the daily efforts of lawyers in solo practice to manage the demanding and often unrealistic expectations of their clients, and legal employers' expectations of their attorneys' billable hour requirements or ability to manage overly full and high-stress caseloads. The pressures that result from trying to live a life based upon the beliefs of others can cause significant internal conflicts, stress, and even anxiousness and depression.[2]

In order to begin living for ourselves, it's important to understand that others' expectations of us aren't actually about us at all — they're really about the person or people who hold them.[3] Even with the best of intentions, the expectations others hold are directly related to their own personal values, morals, experiences, triumphs, and tragedies. In other words, the expectations someone holds for you aren't an accurate gauge of what is right for you.

Why, then, do we find it necessary to measure our own success using someone else's measuring stick? That stick could be irrelevant to what we deem as important or worthwhile in life and will surely lead toward the trap of expectation vs. reality.[4] As no two individuals in our lives will have the same exact expectations for us because they differ in terms of values, morals, and personal experiences, living solely for others will ultimately result in letting someone down.[5] A phrase commonly heard in 12-step programs is that "expectations are premeditated resentments."[6] They aren't always grounded in reality and don't take into account one's personal desires, abilities, or even what's reasonable or possible in a given situation.[7] When we deny our own desires in favor of the desires of others, it's no surprise that resentment, anger, and even envy arise.

Attorneys and judges face many daunting tasks every day. One of the many responsibilities is the need to make decisions — decisions that have a significant impact on the lives of others. It's important, then, to understand that living under others' expectations can hinder decision making.[8] When the voices and opinions of those around you drown out what you want for yourself, the ability to

"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

make accurate and clear decisions is lost. This can have dramatically negative consequences both personally and professionally and lead to living a life simply based on the need for approval.

How, then, do we stop living for others, let go of their expectations, and start (or return) to living for ourselves?[9] First, we must have perspective. An immediate way to ease distress is by simply remembering that someone else's expectations for you aren't about you at all, but about them. This provides clarity and the ability to accept these beliefs as the beholder's problem, not your own. Second, examine your own judgements.[10] Understanding the beliefs you hold toward others may also allow you to understand how others come to have certain expectations of you. This can help to more easily dismiss what others expect from you and instead live a life based upon your own needs, wants, and values. Third, find your voice.[11] Be firm, not defensive. Begin identifying and expressing your emotions, opinions, wants, and needs. Help others understand that while their feelings are valid, so are yours.

As Paulo Coelho, author of my favorite novel, "The Alchemist", said, "Everyone seems to have a clear idea of how other people should lead their lives, but none about his or her own."[12] It's time we begin enjoying our own journey. Be present, pay attention, and trust yourself.

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

ENDNOTES

1. *Expectation,* Google Oxford Languages <https://www.google.com/search?q=expectation&si=AMnBZoG02AsyB2D3tpIDPnmqC2HF92P4VZ8VQwJLhhYrfkR_pq7ewei-7A1cdX5UXeVg5d40Ht_GvaKBMvNboqCV5Icqz0x-zIJn7nmVT-6GUz1uT8LR47KI%3D&expnd=1&sa=X&ved=2ahUKEwim48X-05P-AhUcj4kEHQkQCggQ2v4IegQIDxBM&biw=1863&bih=929&dpr=1> [https://perma.cc/CPL4-TRYY]. All websites cited in this article were accessed April 5, 2023.
2. Scott, *The Expectations vs. Reality Trap,* Verywell Mind (April 18, 2022) <https://www.verywellmind.com/expectation-vs-reality-trap-4570968> [https://perma.cc/D6CK-YE29].
3. *How to Let Go of the Expectations of Others,* Manhattan Mental Health Counseling <https://manhattanmentalhealthcounseling.com/how-to-let-go-of-the-expectations-of-others/#:~:text=Put%20the%20expectations%20in%20perspective,your%20own%20expectations%20of%20others> [https://perma.cc/YW4Y-8K8C].
4. *The Expectations vs. Reality Trap.*
5. Razzetti, *Live Your Life for You, Not to Please Expectations,* Psychology Today (October 24, 2018) <https://www.psychologytoday.com/us/blog/the-adaptive-mind/201810/live-your-life-you-not-please-expectations> [https://perma.cc/E6HG-9U23].
6. Johnson, *The Psychology of Expectations,* Psychology Today (February 17, 2018) <https://www.psychologytoday.com/us/blog/cui-bono/201802/the-psychology-expectations> [https://perma.cc/M7HX-TEK7].
7. *Id.*
8. *How to Let Go of the Expectations of Others.*
9. *Id.*
10. *Id.*
11. *Id.*
12. Gizzi, *18 Of The Most Powerful & Inspiring Quotes On Expectations,* Fearless Motivation (September 23, 2015) <https://www.fearlessmotivation.com/2015/09/23/10-of-the-most-powerful-inspiring-quotes-on-expectations/> [https://perma.cc/S2F9-ZEKM].

ORDERS OF DISCIPLINE & DISABILITY

REPRIMAND AND RESTITUTION (BY CONSENT)

Yvette M. Barrett, P58142, Detroit, by the Attorney Discipline Board Tri-County Hearing Panel #12. Reprimand, effective March 31, 2023.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Discipline pursuant to MCR 9.115(F)(5) that was approved by the Attorney Grievance Commission and accepted by the hearing panel. Based upon the respondent's admissions and no contest plea as set forth in the parties' stipulation, the panel found that the respondent committed professional misconduct during her representation of a client in various post verdict proceedings after the client was found guilty of Criminal Sexual Conduct — First Degree.

Based on the respondent's admissions, no contest plea, and the stipulation of the parties, the panel found that the respondent failed to act with reasonable diligence and promptness in representing a client in violation of MRPC 1.3; failed to keep her client reasonably informed about the status of a matter in violation of MRPC 1.4(a); charged or collected a clearly excessive fee in violation of MRPC 1.5(a); failed to hold property of clients or third persons in connection with a representation separate from the lawyer's own property in violation of MRPC 1.15(d); failed to refund an unearned fee paid in advance in violation of MRPC 1.16(d); engaged in conduct prejudicial to the administration of justice in violation of MCR 9.104(1) and 8.4(c); and engaged in conduct contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be reprimanded and pay $12,500 in restitution. Costs were assessed in the amount of $1,495.43.

DISBARMENT (BY CONSENT)

Jeffrey S. Freeman, P46712, West Bloomfield, by the Attorney Discipline Board Tri-County Hearing Panel #51. Disbarment, effective March 29, 2023.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Disbarment which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contained the respondent's no contest plea to the factual statements and misconduct allegations set forth in the three-count formal

complaint in its entirety. Specifically, the respondent pleaded no contest to committing professional misconduct while assisting a client with a tax investigation being conducted by the Internal Revenue Service (IRS) by converting approximately $6.5 million from his client and making false representations to his client about the status of the IRS investigation and amounts he supposedly paid to the IRS on his client's behalf.

Based on the respondent's no contest plea and the stipulation of the parties, the panel found that as to count one of the formal complaint, the respondent charged or collected a clearly excessive fee in violation of MRPC 1.5(a); failed to promptly pay or deliver funds to which a client is entitled in violation of MRPC 1.15(b)(3); failed to hold property (funds) of clients or third persons in connection with a representation separate from the lawyer's own property in violation of MRPC 1.15(d); engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b); engaged in conduct that exposes the legal profession to obloquy, contempt, censure, and/or reproach in violation of MCR 9.104(2); engaged in conduct contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3); and engaged in conduct that violates the standards or rules of professional conduct adopted by the Supreme Court in violation of MCR 9.104(4).

As to count two of the formal complaint, the panel found that the respondent 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 promptly render a full accounting of all funds upon the client's request in violation of MRPC 1.15(b)(3); charged or collected a clearly excessive fee in violation of MRPC 1.5(a); failed to take reasonable steps to protect a client's interests, such as surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned in violation of MRPC 1.16(d); engaged in conduct involving dishonesty, fraud, deceit, and/or misrepresentation where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b); engaged in conduct that exposes the legal profession to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); engaged in conduct contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3); and engaged in conduct that violates the standards or rules of professional conduct adopted by the Supreme Court in violation of MCR 9.104(4).

As to count three of the formal complaint, the panel found that the respondent failed to safeguard and hold property (funds) of a client in connection with the representation separate from the lawyer's own property in violation of MRPC 1.15(d); engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b); engaged in conduct that exposes the legal profession to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); engaged in conduct contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3); engaged in conduct that violates the standards or rules of professional conduct adopted by the Supreme Court in violation of MCR 9.104(4); and engaged

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

in conduct that violated a criminal law of a state or of the United States in violation of MCR 9.104(5).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be disbarred from the practice of law in Michigan effective March 29, 2023.[1] Total costs were assessed in the amount of $1,347.76.

1. Restitution was not included in the parties' stipulation, and thereafter the hearing panel's order because a financial settlement was reached in an underlying civil suit filed against the respondent in the U.S. District Court for the Eastern District of Michigan to the satisfaction of the respondent's former client, her counsel, the respondent, and his counsel in the civil action.

REPRIMAND WITH CONDITIONS (BY CONSENT)

Elana H. Gloetzner, P62997, Novi, by the Attorney Discipline Board Tri-County Hearing Panel #72. Reprimand, effective March 29, 2023.

The respondent and the grievance administrator filed an Amended Stipulation for Consent Order of Discipline pursuant to MCR 9.115(F)(5) that was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contained the respondent's admissions that she was convicted on July 13, 2017, by no contest plea of Disorderly Person/Drunk/Intoxicated, a misdemeanor, in violation of MCL/PACC Code 750.1671E in a matter titled *People v. Elana Hope Gloetzner,* 52 1 Judicial District Court, Case No. 17 000120 SM and on June 7, 2019, by no contest plea of Operating While Intoxicated/Impaired — Second Offense in violation of MCL/PACC Code 257.625B in a matter tilted *People v. Elana Hope Gloetzner,* 35th District Court, Case No. 18N838. The respondent also admitted that she did not give notice of either conviction to the grievance administrator and the Attorney Discipline Board as set forth in the combined Notice of Filing of Judgments of Conviction and Formal Complaint filed by the grievance administrator.

Based on the respondent's admissions and the stipulation of the parties, the panel found that the respondent engaged in conduct that violated a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615 in violation of MCR 9.104(5). The panel also found that the respondent failed notify the grievance administrator and Attorney Discipline Board of her convictions in violation of MCR 9.120(A)(1).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be reprimanded and subject to conditions relevant to the established misconduct. Costs were assessed in the amount of $962.62.

DISBARMENT AND RESTITUTION (WITH CONDITIONS)

Kimberly Shea Grzic, P79927, Howell, by the Attorney Discipline Board Ingham County Hearing Panel #3. Disbarment, effective April 4, 2023.[1]

After proceedings conducted pursuant to MCR 9.115, the panel found by default that the respondent committed professional misconduct in her handling of five different legal matters and as charged in a six-count formal complaint. The legal matters included a driver's license restoration matter, two

child custody matters, a contract and fee dispute matter, and a post-divorce judgment matter. The respondent also failed to timely respond to a request for investigation and failed to answer four others.

Based on the respondent's default and the evidence presented at the hearing, the panel found that the respondent neglected a legal matter entrusted to her in violation of MRPC 1.1(c) (counts 1-5); failed to seek the lawful objectives of the client in violation of MRPC 1.2(a) (counts 1-5); failed to act with reasonable diligence and promptness in representing a client in violation of MRPC 1.3 (counts 1-5); failed to keep a client reasonably informed about the status of the matter and to comply with reasonable requests for information in violation of MRPC 1.4(a) (counts 1-5); failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation in violation of MRPC 1.4(b) (counts 1-5); failed to return property to which the client is entitled in violation of MRPC 1.16(d) (count 2); failed to refund an unearned fee in violation of MRPC 1.16(d) (count 5); engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of criminal law in violation of MRPC 8.4(b) (counts 1, 3, and 4); knowingly failed to respond to a lawful demand for information from a disciplinary authority in violation of MRPC 8.1(a)(2) (count 6); and failed to timely answer a request for investigation in violation of MRPC 9.104(7) and MCR 9.113(A)(2) and MCR 9.113(B)(2) (count 6). The respondent was also found to have violated MRPC 8.4(a) and (c) and MCR 9.104(1)-(3) (counts 1-6).

The panel ordered that the respondent be disbarred, pay restitution in the total amount of $3,660, and be subject to conditions relevant to the established misconduct. Costs were assessed in the amount of $2,010.45.

1. The respondent's license to practice law in Michigan has been continuously suspended since Nov. 8, 2022. See Notice of Interim Suspension Pursuant to MCR 9.115(H)(1) issued Nov. 10, 2022.

REPRIMAND WITH CONDITIONS (BY CONSENT)

Michael G. Mack, P31173, Alpena, by the Attorney Discipline Board Emmet County Hearing Panel #3. Reprimand, effective April 4, 2023.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Reprimand with Conditions pursuant to MCR 9.115(F)(5) that was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contained the respondent's admissions that he was convicted on March 28, 2022, by guilty plea of two counts of operating a motor vehicle with a blood alcohol content in excess of .17, a misdemeanor, in violation of MCL 257.625(1)(c) in matters titled *People v. Michael Gerard Mack,* 88-1 Judicial District Court, Case Nos. 21-0326-SD and 21-0329-SD. Additionally, the stipulation contained the respondent's admission that he did not give notice of either conviction to the grievance administrator and the Attorney Discipline Board, violated the conditions of his bond, failed to timely turn himself into the jail as ordered, and failed to timely answer a grievance administrator's request for investigation relating to the bond violation and convictions.

Based on the respondent's admissions and the stipulation of the parties, the panel found that the respondent engaged in conduct that violated a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615 in violation of MCR 9.104(5); failed notify the grievance administrator and Attorney Discipline Board of his convictions in violation of MCR 9.120(A)(1); knowingly disobeyed an obligation under the rules of a tribunal in violation of MRPC 3.4(c); failed to timely answer a request for investigation in conformity with MCR 9.113(A) and (B)(2) in violation of MCR 9.104(7); engaged in conduct that is prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); and engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be reprimanded and subject to conditions relevant to the established misconduct. Costs were assessed in the amount of $1,359.46.

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

SUSPENSION AND RESTITUTION

Matthew D. Novello, P63269, Highland, by the Attorney Discipline Board Tri-County Hearing Panel #58. Suspension, 180 days, effective March 11, 2023.[1]

After proceedings conducted pursuant to MCR 9.115, the panel found by default that the respondent committed professional misconduct by abandoning his representation of three separate clients and failed to answer four requests for investigation.

Based on the respondent's default and the evidence presented at the hearing, the panel found that the respondent neglected a matter in violation of MRPC 1.1(c) (counts 1-3); failed to seek the lawful objectives of a client in violation of MRPC 1.2(a) (counts 1-3); failed to act with reasonable diligence and promptness in representing a client in violation of MRPC 1.3 (counts 1-3); failed to keep his client reasonably informed about the status of a matter and comply promptly with reasonable requests for information in violation of 1.4(a) (counts 1-3); failed to explain a matter to the extent reasonably necessary to permit the client to make an informed decision regarding the representation in violation of MRPC 1.4(b) (counts 1-3); failed to take reasonable steps to protect the client's interests after termination of representation in violation of MRPC 1.16(d) (count 3); failed to respond to a lawful demand for information from a disciplinary authority in violation of MRPC 8.1(a)(2) (count 4); engaged in conduct that violates the Rules of Professional Conduct in violation of MRPC 8.4(a) and MCR 9.104(4) (all counts); engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b) (counts 1-2); engaged in conduct that is prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1) (all counts); engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2) (all counts); engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3) (all counts); and failed to answer a request for investigation in violation of MCR 9.104(7), MCR 9.113(A) and MCR 9.113(B)(2) (count 4).

The panel ordered that the respondent's license to practice law be suspended for 180 days, effective March 11, 2023, and that the respondent pay restitution totaling $3,000. Costs were assessed in the amount of $1,750.86.

1. The respondent has been continuously suspended from the practice of law in Michigan since Dec. 8, 2022. Please see Notice of Interim Suspension Pursuant to MCR 9.115(H)(1), issued Dec. 12, 2022, in *Grievance Administrator v. Matthew D. Novello*, 22-76-GA.

REPRIMAND (BY CONSENT)

Kathleen K. Shannon, P54261, Traverse City, by the Attorney Discipline Board Grand Traverse County Hearing Panel #1. Reprimand, effective April 5, 2023.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Reprimand pursuant to MCR 9.115(F)(5) that was approved by the Attorney Grievance

Commission and accepted by the hearing panel. The stipulation contained the respondent's admission that she was convicted on August 10, 2022, by guilty plea of Operating While Intoxicated, a misdemeanor, in violation of MCL/PACC Code 257.6251-A in *People v. Kathleen K. Shannon,* 87-B District Court, Case No. 22-26261-SD-2.

Based on the respondent's conviction, admission, and the parties' stipulation, the panel found that the respondent engaged in conduct that violated a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615 in violation of MCR 9.104(5).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be reprimanded. Costs were assessed in the amount of $806.93.

REPRIMAND (BY CONSENT)

Thomas R. Warnicke, P47148, Detroit, by the Attorney Discipline Board Tri-County Hearing Panel #21. Reprimand, effective April 6, 2023.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Discipline pursuant to MCR 9.115(F)(5) that was approved by the Attorney Grievance Commission and accepted by the hearing panel. Based upon the respondent's no contest plea as set forth in the parties' stipulation, the panel found that the respondent committed professional misconduct while representing a client in a civil action. Based upon the respondent's no contest plea and the stipulation of the parties, the panel found that the respondent failed to make reasonable efforts to expedite litigation consistent with the interests of the client in violation of MRPC 3.2; in representing a client, used means that had no substantial purpose other than to embarrass, delay, or burden a third party in violation of MRPC 4.4; and engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be reprimanded. Costs were assessed in the amount of $772.67.

NOTICE OF HEARINGS ON PETITIONS FOR REINSTATEMENT

State of Michigan Attorney Discipline Board

In the Matter of the Reinstatement Petition of Brian D. Albritton, P46197, ADB Case No. 23-14-RP

Petitioner

Notice is given that Brian D. Albritton (P46197) has filed a petition with the Michigan Supreme Court, the Attorney Discipline Board, and the Attorney Grievance Commission seeking reinstatement as a member of the State Bar and restoration of his license to practice law in accordance with MCR 9.124(A). *In the Matter of the Reinstatement Petition of Brian D. Albritton (P46197)*, ADB Case No. 23-14-RP.

Effective Oct. 31, 1998, the petitioner was reprimanded for failure to answer a request for investigation in ADB Case No. 98-29-GA. The grievance administrator filed a petition for review. Effective Oct. 6, 1999, the board increased the discipline to a 30-day suspension. The board also reversed dismissal of a count and found that the respondent knowingly disobeyed an obligation under the rules of a tribunal.

Effective Oct. 7, 2000, the petitioner was reprimanded by consent in ADB Case No. 00-36-GA. The panel found that the respondent engaged in neglect, failure to communicate, failure to execute a written fee agreement in a contingency matter and entered into an improper loan with a client.

Effective March 28, 2000, the petitioner was reprimanded in ADB Case No. 99-14-GA. The panel found that the petitioner failed to notify his client when he received funds on the client's behalf and failed to provide a full accounting of the funds when requested by the client.

Effective Feb. 22, 2003, the petitioner was suspended for 90 days in ADB Case No. 00-200-GA. The hearing panel found that the petitioner failed to promptly notify his client of receipt of settlement funds, failed to promptly deliver the funds, and failed to answer a request for investigation. The hearing panel reprimanded the petitioner. The grievance administrator appealed, and the board entered an order of 90-day suspension.

Effective Dec. 30, 2003, the petitioner's license was revoked in ADB Case No. 03-86-GA. The petitioner failed to file a more definite answer to the formal complaint and failed to appear at the hearing. The panel found that the petitioner engaged in neglect, failed to provide his client with truthful information, failed to return his client's file, failed to refund an unearned fee, and failed to cooperate with the Attorney Grievance Commission.

The Attorney Discipline Board has assigned the reinstatement petition to Tri-County Hearing Panel #16. A hearing is scheduled for Wednesday, June 7, 2023, commencing at 9:30 a.m. at the Attorney Discipline Board at 333 W. Fort St., Ste. 1700, in Detroit (on the corner of Cass and Fort Streets).

In the interest of maintaining the high standards imposed upon the legal profession as conditions for the privilege to practice law in this state and of protecting the public, the judiciary, and the legal profession against conduct contrary to such standards, the petitioner will be required to establish his eligibility for reinstatement by clear and convincing evidence.

Any interested person may appear at the hearing and request to be heard in support of or in opposition to the petition for reinstatement.

Any person having information bearing on the petitioner's eligibility for reinstatement should contact:

Emily A. Downey
Senior Associate Counsel
Attorney Grievance Commission
755 W. Big Beaver Road, Suite 2100
Troy, MI 48084
313.961.6585

Requirements of the Petitioner

The petitioner is required to establish by clear and convincing evidence the following:

1. He desires in good faith to be restored to the privilege to practice law in this state;

2. The term of the suspension or revocation of his license, whichever is applicable, has elapsed;

3. He has not practiced or attempted to practice law contrary to the requirement of his suspension or revocation;

4. He has complied fully with the terms of the order of discipline;

5. His conduct since the order of discipline has been exemplary and above reproach;

6. He has a proper understanding of and attitude toward the standards that are imposed on members of the Bar and will conduct himself in conformity with those standards;

7. He can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence

and, in general, to aid in the administration of justice as a member of the Bar and as an officer of the court;

8. That if he has been out of the practice of law for three years or more, he has been recertified by the Board of Law Examiners; and

9. He has reimbursed or has agreed to reimburse the Client Protection Fund any money paid from the fund as a result of his conduct. Failure to fully reimburse as agreed is grounds for revocation of a reinstatement.

State of Michigan Attorney Discipline Board

In the Matter of the Reinstatement Petition of Valerie L. Lippman, P43619, ADB Case No. 23-15-RP

Petitioner

Notice is given that Valerie L. Lippman (P43619) has filed a petition with the Michigan Supreme Court, the Attorney Discipline Board, and the Attorney Grievance Commission seeking reinstatement as a member of the State Bar and restoration of her license to practice law in accordance with MCR 9.124(A). *In the Matter of the Reinstatement Petition of Valerie L. Lippman (P43619)*, ADB Case No. 23-15-RP.

Effective Dec. 20, 2000, the petitioner was suspended for 180 days in ADB Case No. 00-27-GA per the stipulation for consent order of discipline filed by the petitioner and the grievance administrator in accordance with MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The panel found in three immigration matters that the petitioner made false statements to her clients regarding the status of their matters and failed to keep her clients reasonably informed of the status of their matters. The panel also found in an immigration employment matter that the petitioner failed to timely file her client's documents and failed to inform her client of the delay.

Effective Dec. 20, 2000, the petitioner was suspended for 18 months in 01-115-GA per the stipulation for consent order of discipline filed by the petitioner and the grievance administrator in accordance with MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The panel found that the petitioner neglected her clients' legal matters, failed to keep her clients reasonably informed about the status of their matters, made false statements to her clients, failed to take prompt action to rectify the consequence of her client's false testimony in an immigration matter, and made false statements in her answers to the requests for investigation.

The Attorney Discipline Board has assigned the reinstatement petition to Tri-County Hearing Panel #16. A hearing is scheduled for Thursday, June 8, 2023, commencing at 9:30 a.m. at the Attorney Discipline Board at 333 W. Fort St., Ste. 1700, in Detroit (on the corner of Cass and Fort Streets).

In the interest of maintaining the high standards imposed upon the legal profession as conditions for the privilege to practice law in this state and of protecting the public, the judiciary, and the legal profession against conduct contrary to such standards, the petitioner will be required to establish her eligibility for reinstatement by clear and convincing evidence.

Any interested person may appear at the hearing and request to be heard in support of or in opposition to the petition for reinstatement.

Any person having information bearing on the petitioner's eligibility for reinstatement should contact:

Mary A. Bowen
Associate Counsel
Attorney Grievance Commission
755 W. Big Beaver Road, Suite 2100
Troy, MI 48084
313.961.6585

Requirements of the Petitioner

The petitioner is required to establish by clear and convincing evidence the following:

1. She desires in good faith to be restored to the privilege to practice law in this state;

2. The term of the suspension or revocation of her license, whichever is applicable, has elapsed;

3. She has not practiced or attempted to practice law contrary to the requirement of her suspension or revocation;

4. She has complied fully with the terms of the order of discipline;

5. Her conduct since the order of discipline has been exemplary and above reproach;

6. She has a proper understanding of and attitude toward the standards that are imposed on members of the Bar and will conduct herself in conformity with those standards;

7. She can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence and, in general, to aid in the administration of justice as a member of the Bar and as an officer of the court;

8. That if she has been out of the practice of law for three years or more, she has been recertified by the Board of Law Examiners; and

9. She has reimbursed or has agreed to reimburse the Client Protection Fund any money paid from the fund as a result of her conduct. Failure to fully reimburse as agreed is grounds for revocation of a reinstatement.

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by Aug. 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 new jury instruction, M Crim JI 37.1c (Using False Documents to Deceive Principal or Employer), for the crime found at MCL 750.125(3). The instruction is entirely new.

[NEW] M Crim JI 37.1c
Using False Documents to Deceive Principal or Employer

(1) The defendant is charged with the crime of using a false document(s) to deceive a principal or employer. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [(*identify agent or employee*)/the defendant] was the agent or employee of [name principal or employer].

(3) Second, that the defendant

[*Select (a) or (b)*][1]

(a) [gave/used] a [receipt/account/invoice/(*describe other document*)] concerning the business of [*name principal or employer*] to [*identify agent or employee*].

(b) [used/approved/certified] [a receipt/an account/an invoice/a (*describe other document*)] concerning the business of [*name principal or employer*].

(4) Third, that the [receipt/account/invoice/(*describe other document*)] contained a statement that [was materially false, erroneous, or defective/failed to fully state any commission, money, property, or other valuable item[2] given to ([*identify agent or employee*]/the defendant) or agreed to be given to (him/her)].

(5) Fourth, that when the defendant [gave/used/approved/certified] the [receipt/account/invoice/(*describe other document*)], [he/she] intended to deceive [*name principal or employer*].

Use Note

1. Use "(a)" where it is alleged that the defendant gave a document to the agent/employee of the principal in order to deceive or cheat the principal. Use "(b)" where the defendant is an agent/employee of the principal and was the person who is alleged to have approved or used a document to deceive or cheat the employer/principal.

2. The court may identify the specific money or property in lieu of reading this entire

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The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by Aug. 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 new jury instruction, M Crim JI 40.4 (Furnishing Alcohol to a Minor), for the crime found at MCL 436.1701. The instruction is entirely new.

[NEW] M Crim JI 40.4
Furnishing Alcohol to a Minor

(1) Defendant is charged with the crime of selling or furnishing alcohol to a minor. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant knowingly sold or furnished[1] alcohol to [*name minor complainant*].

(3) Second, that [*name minor complainant*] was under 21 years of age.

(4) Third, that when defendant sold or furnished the alcohol, the defendant knew or should have known that [*name minor complainant*] was under 21 years of age or failed to make a diligent effort[2] to determine whether [*name minor complainant*] was under 21 years of age by inspecting [*name minor complainant*]'s pictured identification.

[*Where the aggravating element has been charged under MCL 436.1701(2):*]

(5) Fourth, that the consumption of the alcohol obtained by [*name minor complainant*] was a direct and substantial cause of [(*name minor complainant*)'s death/an accidental injury that caused (*name minor complainant*)'s death].

Use Note

1. *People v. Neumann,* 85 Mich 98, 102; 48 NW 290 (1891), provided a definition of *furnishing:* "letting a minor have liquor."

2. *Diligent inquiry* is further defined in MCL 436.1701(11)(b).

ADOPTED

The Committee on Model Criminal Jury Instructions has adopted the following amended and combined model criminal jury instructions, M Crim JI 7.16 and 7.19, addressing conditions for the use of force or deadly force in self-defense or the defense of others in different contexts. The combination and amendment are aimed at reducing confusion in the use of the self-defense instructions involving the duty to retreat. This amended instruction is effective May 1, 2023.

M Crim JI 7.16
Conditions for Using Force or Deadly Force

[*Select from the following depending on the evidence and circumstances:*]

(1) A person can use [force/deadly force] in self-defense only where it is necessary to do so. If the defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the defendant honestly and reasonably believed [he/she] needed to use [force/deadly force] in self-defense.[1]

[*or*]

(1) A defendant who [assaults someone else with fists or a weapon that is not deadly/insults someone with words/trespasses on someone else's property/tries to take someone else's property in a nonviolent way] does not lose all right to self-defense. If someone else assaults [him/her] with deadly force, the defendant may act in self-defense but only if [he/she] retreated where it would have been safe to do so.[1]

(2) However,[1] a person is never required to retreat under some circumstances. [He/She] does not need to retreat if [attacked in (his/her) own home/(he/she) reasonably believes that an attacker is about to use a deadly weapon/(he/she) is subjected to a sudden, fierce, and violent attack].[2]

(3) Further, a person is not required to retreat if he or she

(a) has not or is not engaged in the commission of a crime at the time the [force/deadly force] is used,

(b) has a legal right to be where he or she is at that time, and

[*Select from the following according to whether the defendant used deadly force or nondeadly force:*]

(c) has an honest and reasonable belief that the use of deadly force is necessary to prevent imminent [death/great bodily harm/sexual assault] of [himself/herself] or another person.

[*or*]

(c) has an honest and reasonable belief that the use of force is necessary to prevent the imminent unlawful use of force ~~of~~ against [himself/herself] or another person.

Use Note

Use this instruction when requested where some evidence of self-defense has been introduced or elicited. Where there is evidence that, at the time that the defendant used force or deadly force, he or she was engaged in the commission of some other crime, the Committee on Model Criminal Jury Instructions believes that circumstances of the case may provide the court with a basis to instruct the jury that the defendant does not lose the right to self-defense if the commission of that other offense was not likely to lead to the other person's assaultive behavior. *See People v. Townes,* 391 Mich 578, 593; 218 NW2d 136 (1974). The committee expresses no opinion regarding the availability of self-defense where the other offense may lead to assaultive behavior by another.

1. Paragraph (1) and "However" should be given only if there is a dispute whether the defendant had a duty to retreat. *See People v. Richardson,* 490 Mich 115; 803 NW2d 302 (2011).

2. The court may read whatever alternatives may apply or adapt them to other circumstances according to the evidence presented at trial.

M Crim JI 7.19
Nondeadly Aggressor Assaulted with Deadly Force
[combined with M Crim JI 7.16 in May 2023]

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instructions, M Crim JI 37.1b (Offering Commission, Gift, or Gratuity to Agent or Employee) and M Crim JI 37.2b (Accepting Commission, Gift, or Gratuity by Agent or Employee), for violations of MCL 750.125(1) and (2), respectively. These instructions are effective May 1, 2023.

[NEW] M Crim JI 37.1b
Offering Commission, Gift, or Gratuity to Agent or Employee

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS (CONTINUED)

(1) The defendant is charged with the crime of offering or promising a commission, gift, or gratuity to an agent or employee to influence how the agent or employee performs the employer's business. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*identify agent or employee*] was the agent or employee of [*name principal or employer*].

(3) Second, that the defendant

[*Select (a) or (b)*]

(a) [gave/offered or promised] a [commission/gift/gratuity] to [*identify agent or employee*].

(b) offered to or promised that [he/she] would perform some act that would benefit [*identify agent or employee*] or another person.

(4) Third, that when the defendant [(gave/offered or promised) a (commission/gift/gratuity) to (*identify agent or employee*)/offered to or promised that (he/she) would perform some act or offer to perform some act that would benefit (*identify proposed donor*) or another person], the defendant did so with the intent to influence [*identify agent or employee*]'s actions regarding [*name principal or employer*]'s business.

[NEW] M Crim JI 37.2b
Accepting Commission, Gift, or Gratuity by Agent or Employee

(1) The defendant is charged with the crime of requesting or accepting a commission, gift, or gratuity as an agent or employee to perform [his/her] employer's business according to an agreement with some other person. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was the agent or employee of [*name principal or employer*].

(3) Second, that the defendant

[*Select (a), (b), or (c)*]

(a) [requested/accepted] a [commission/gift/gratuity] from [*identify proposed donor*] for [himself/herself] or another person.

(b) [requested/accepted] a promise of a [commission/gift/gratuity] from [*identify proposed donor*] for [himself/herself] or another person.

(c) [requested/accepted] that [*identify proposed donor*] would perform some act or offer to perform some act that would benefit [himself/herself] or another person.

(4) Third, that when the defendant [requested/accepted] [(the commission/the gift/the gratuity) from (*identify proposed donor*)/the promise of a (commission/gift/gratuity) from (*identify proposed donor*)/that (*identify proposed donor*) would perform some act or offer to perform some act that would benefit the defendant or another person], the defendant did so agreeing or understanding with [*identify proposed donor*] that [he/she] would [*describe conduct agreed on between the defendant and the donor*] regarding [*name principal or employer*]'s business.

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instruction, M Crim JI 40.5 (Public Intoxication), for the offense found in the disorderly persons statute at MCL 750.167(c). The instruction is effective May 1, 2023.

[NEW] M Crim JI 40.5
Public Intoxication

(1) The defendant is charged with the crime of being intoxicated in public and causing a disturbance or endangering persons or property. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was in a place open to the public, [*state location*].

(3) Second, that the defendant was intoxicated. A person is intoxicated when he or she is mentally or physically impaired as a result of consuming an intoxicating substance, such as an alcoholic beverage or other substances.[1]

(4) Third, that the defendant [directly endangered the safety of another person or property/disrupted the peace and quiet of other persons/interfered with the ability of other persons to perform actions or duties permitted by law].[2]

Use Notes

See People v. Mash, 45 Mich App 459; 206 NW2d 767 (1973), and *People v. Weinberg,* 6 Mich App 345; 149 NW2d 248 (1967), for *public disturbance* language.

1. The court may provide other examples where appropriate.

2. The court may read any of the alternatives that apply to the prosecutor's theory of the case that are supported by the evidence.

The committee has adopted a new jury instruction, M Crim JI 41.2 (Using a Device to Eavesdrop on a Private Conversation) for the crime found at MCL 750.539c. The instruction is effective May 1, 2023.

[NEW] M Crim JI 41.2
Using a Device to Eavesdrop on a Private Conversation

(1) The defendant is charged with the crime of using a device to eavesdrop on a private conversation. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*identify complainants*] were having a private conversation where the defendant was not a participant.

(3) Second, that the defendant intentionally [used a device/knowingly aided another person in using a device/knowingly employed or procured another person to use a device] to overhear, record, amplify, or transmit any part of the private conversation between [*identify complainants*].

(4) Third, that the defendant did not have the consent of all persons who were part of the private conversation to overhear, record, amplify, or transmit the conversation.

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FROM THE MICHIGAN SUPREME COURT

ADM File No. 2019-33
Proposed Rescission of Administrative Order No. 2021-7 and Proposed Adoption of the Michigan Continuing Judicial Education Rules

To read ADM File No. 2019-33 dated March 15, 2023, visit courts.michigan.gov/494784/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/proposed-orders/2019-33_2023-03-15_formor_propmcjerules.pdf

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

To read ADM File No. 2022-32 dated March 22, 2023, visit courts.michigan.gov/495454/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/adopted-orders/2022-32_2023-03-22_formor_amdmcr7.200.pdf

ADM File No. 2021-10
Proposed Amendments of the Michigan Rules of Evidence

To read ADM File No. 2021-10 dated March 22, 2023, visit courts.michigan.gov/49581e/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/proposed-orders/2021-10_2023-03-22_formor_propmre.pdf

ADM File No. 2023-01
Assignment of Business Court Judge in the 7th Circuit Court (Genesee County)

On order of the Court, effective immediately, Hon. B. Chris Christenson is assigned to serve as a business court judge in the 7th Circuit Court for a term expiring April 1, 2025.

ADM File No. 2023-01
Supreme Court Appointment to the Committee on Model Civil Jury Instructions

On order of the Court, pursuant to Administrative Order No. 2001-6 and effective immediately, Debra Freid is appointed to the Committee on Model Civil Jury Instructions for a partial term ending Dec. 31, 2024.

ADM File No. 2023-01
Supreme Court Appointments to the Court Reporting and Recording Board of Review

On order of the Court, pursuant to MCR 8.108(G)(2)(a) and effective April 1, 2023:

- Hon. Timothy J. Kelly, district court judge, is reappointed to a second four-year term that will expire on March 31, 2027;
- Hon. Jennifer S. Callaghan, probate court judge, is reappointed to a second four-year term that will expire on March 31, 2027;
- Jessica Jaynes, certified court reporter, is reappointed to a first four-year term that will expire on March 31, 2027; and
- Kris Fuller, certified court recorder, is reappointed to a second four-year term that will expire on March 31, 2027.

ADM File No. 2013-17
Proposed Amendment of Rule 3.206 of the Michigan Court Rules

On order of the Court, the proposed amendment of Rule 3.206 of the Michigan Court Rules having been published for comment at 495 Mich 1227 (2014), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendment. This administrative file is closed without further action.

ADM File No. 2021-40
Amendment of Rule 5 of the Rules for the Board of Law Examiners

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 5 of the Rules for the Board of Law Examiners is adopted, effective May 1, 2023.

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

Rule 5 Admission Without Examination

(A) Definitions. For purposes of this rule, the following definitions apply.

(a) "Full-time" is 21 or more hours per week.

(b) "Instructor" includes a clinical instructor. A clinical instructor is someone whose responsibilities include teaching and supervising law students in a clinic organized by an accredited law school.

(A)-(F) [Relettered (B)-(G) but otherwise unchanged.]

Staff Comment (ADM File No. 2021-40): The amendment of Rule 5 adds a new subrule (A) that defines the terms "full-time" and "instructor" to clarify that clinical instructors may be admitted to the bar without examination.

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

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

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 3.977, 3.993, 7.311, and 7.316 of the Michigan Court Rules are adopted, effective May 1, 2023.

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

Rule 3.977 Termination of Parental Rights

(A)-(J) [Unchanged.]

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

Rule 3.993 Appeals

(A)-(B) [Unchanged.]

(C) Procedure; Ineffective Assistance of Appellate Counsel; Delayed Appeals.

(1) [Unchanged.]

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

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

(D)-(E) [Unchanged.]

Rule 7.311 Motions in Supreme Court

(A)-(G) [Unchanged.]

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

Rule 7.316 Miscellaneous Relief

(A)-(C) [Unchanged.]

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

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

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

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

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

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

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

ADM File No. 2002-37
Retention of the Amendment of Rule 1.109 of the Michigan Court Rules

On order of the Court, notice and opportunity for comment having been provided, the Sept. 14, 2022, amendment of Rule 1.109 of the Michigan Court Rules is retained.

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

ADM File No. 2021-49
Amendment of Rule 2.002 of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 2.002 of the Michigan Court Rules is adopted, effective May 1, 2023.

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

Rule 2.002 Waiver of Fees for Indigent Persons

(A) Applicability and Scope.

(1)-(2) [Unchanged.]

(3) Waiver of filing fees for prisoners who are under the jurisdiction of the Michigan Department of Corrections is governed by MCL 600.2963 and as provided in this rule.

(3)-(5) [Renumbered (4)-(6) but otherwise unchanged.]

(B) Request for Waiver of Fees. A request to waive fees must accompany the documents the individual is filing with the court. If the request is being made by a prisoner under the jurisdiction of the Michigan Department of Corrections, the prisoner must also file a certified copy of their institutional account showing the current balance and a 12-month history of any deposits and withdrawals. The request must be on a form approved by the State Court Administrative Office entitled "Fee Waiver Request." Except as provided in subrule (K), no additional documentation may be required. The information contained on the form shall be nonpublic. The request must be verified in accordance with MCR 1.109(D)(3)(b) and may be signed either

(1)-(2) [Unchanged.]

(C)-(F) [Unchanged.]

(G) Order Regarding a Request to Waive Fees. A judge shall enter an order either granting or denying a request made under (E) or (F) within three business days and such order shall be nonpublic. If required financial information is not provided in the waiver request, the judge may deny the waiver. An order denying shall indicate the reason for denial. The order granting a request must include a statement that the person for whom fees are waived is required to notify the court when the reason for waiver no longer exists.

(1) The clerk of the court shall send a copy of the order to the individual. Except as otherwise provided in this subrule, iIf the court denied the request, the clerk shall also send a notice that to preserve the filing date the individual must pay the fees within 14 days from the date the clerk sends notice of the order or the filing will be rejected. If the individual is a prisoner under the jurisdiction of the Michigan Department of Corrections, the clerk's notice shall indicate that the prisoner must pay the full or partial payment ordered by the court within 21 days after the date of the order, or the filing will be rejected.

(2) De Novo Review of Fee Waiver Denials.

(a) Request for De Novo Review. Except as otherwise provided in this subrule, iIf the court denies a request for fee waiver, the individual may file a request for de novo review within 14 days of the notice denying the waiver. A prisoner under the jurisdiction of the Michigan Department of Corrections may file the de novo review request within 21 days of the notice denying the waiver. There is no motion fee for the request. A request for de novo review automatically stays the case or preserves the filing date until the review is decided. A de novo review must be held within 14 days of receiving the request.

(b)-(c) [Unchanged.]

(H)-(L) [Unchanged.]

Staff Comment (ADM File No. 2021-49): The amendments of MCR 2.002(B) and (G) provide procedural direction to courts regarding prisoner requests for fee waivers in civil actions.

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

ADM File No. 2021-32
Amendment of Rule 6.112 of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 6.112 of the Michigan Court Rules is adopted, effective May 1, 2023.

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

Rule 6.112 The Information or Indictment

(A)-(E) [Unchanged.]

(F) Notice of Intent to Seek Enhanced Sentence. A notice of intent to seek an enhanced sentence pursuant to MCL 769.13 must list the prior convictions that may be relied upon for purposes of sentence enhancement. The notice must contain, if applicable, any mandatory minimum sentence required by law as a result of the sentence enhancement. The notice must be filed within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived or eliminated as allowed under MCR 6.113(E), within 21 days after the filing of the information charging the underlying offense.

(G)-(H) [Unchanged.]

Staff Comment (ADM File No. 2021-32): The amendment of MCR 6.112(F) requires that the notice of intent to seek an enhanced sentence contain any mandatory minimum sentence required by law as a result of the enhancement.

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

ADM File No. 2020-29
Amendment of Rule 410 of the Michigan Rules of Evidence

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 410 of the Michigan Rules of Evidence is adopted, effective May 1, 2023.

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

Rule 410 Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) A plea of guilty which was later withdrawn or vacated;

(2) [Unchanged.]

(3) Any statement made in the course of any proceedings under MCR 6.302 or MCR 6.310 or comparable state or federal procedure regarding either of the foregoing pleas; or

(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn or vacated.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Staff Comment (ADM File No. 2020-29): The amendment in this file adds vacated pleas to the list of guilty pleas that may not be used against defendant. In addition, the amendment adds a reference to MCR 6.310 in subsection (3), which makes inadmissible statements made during a proceeding on defendant's motion to withdraw his or her plea and statements made during the prosecution's motion to vacate a plea for failure to comply with the terms of a plea agreement.

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

ADM File No. 2020-31
Proposed Amendment of Rule 1.8 of the Michigan Rules of Professional Conduct

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

(a)-(d) [Unchanged.]

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that

(1)-(2) [Unchanged.]

(3) provided that the lawyer represents the indigent client pro bono, pro bono through a nonprofit legal services or public

interest organization, or pro bono through a law school clinical or pro bono program, a lawyer representing an indigent client may pay for or provide the following types of assistance to the client to facilitate the client's access to the justice system in the matter: transportation to and from court proceedings; lodging if it is less costly than providing transportation for multiple days; meals during long court proceedings; or clothing for court appearances. The legal services must be delivered at no fee to the indigent client, and the lawyer:

(i) may not promise, assure or imply the availability of such assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide such assistance to prospective clients.

Funds raised for any legal services or public interest organization for purposes of providing legal services will not be considered useable for providing assistance to indigent clients, and assistance referenced in this subsection may not include loans or any other form of support that causes the client to be financially beholden to the provider of the assistance.

Assistance provided under (3) may be provided even if the indigent client's representation is eligible for a fee under a fee-shifting statute.

(f)-(j) [Unchanged.]

Comment:

[Unchanged except for the following proposed additional language]

Humanitarian Exception.

Paragraph (e)(3) serves as a humanitarian exception. The lawyer can assist the client with needs that frustrate the client's access to the justice system in the specific matter for which the representation was undertaken, while still preserving the nature of the attorney-client relationship. For purposes of this rule, indigent is defined as people who are unable, without substantial financial hardship to themselves and their dependents, to obtain competent, qualified legal representation on their own.

Staff Comment (ADM File No. 2020-31): The proposed amendment of MRPC 1.8 would allow attorneys to provide certain assistance to indigent clients they are serving on a pro bono basis. 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 July 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. 2020-31. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2023-06 Amendments of Rules 6.001 and 8.119, and Addition of Rule 6.451 of the Michigan Court Rules

On order of the Court, the following amendments of Rules 6.001 and 8.119 and addition of Rule 6.451 of the Michigan Court Rules are adopted, effective April 11, 2023. Concurrently, individuals are invited to comment on the form or the merits of the amendments and addition during the usual comment period. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Immediate adoption of this proposal does not necessarily mean that the Court will retain the amendments in their present form following the public comment period.

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

Rule 6.001 Scope; Applicability of Civil Rules; Superseded Rules and Statutes

(A) [Unchanged.]

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006(A) and (C)-(E), 6.101, 6.103, 6.104(A), 6.105-6.106, 6.125, 6.202, 6.425(D)(3), 6.427, 6.430, 6.435, 6.440, 6.441, 6.445, 6.450, 6.451, and the rules in subchapter 6.600 govern matters of procedure in criminal cases cognizable in the district courts.

(C)-(E) [Unchanged.]

Rule 8.119 Court Records and Reports; Duties of Clerks

(A)-(G) [Unchanged.]

(H) Access to Records. Except as otherwise provided in subrule (F), only case records as defined in subrule (D) are public records, subject to access in accordance with these rules.

(1)-(8) [Unchanged.]

(9) Set Aside Convictions. Information on set aside convictions is nonpublic and access is limited to a court of competent jurisdiction, an agency of the judicial branch of state government, the department of corrections, a law enforcement agency, a prosecuting attorney, the attorney general, and the governor upon request and only for the purposes identified in MCL 780.623. Access may also be provided to the individual whose conviction was set aside, that individual's attorney, and the victim(s) as defined in MCL 780.623. The court must redact all information related to the set aside conviction or convictions before making the case record available to the public in any format.

(I)-(L) [Unchanged.]

[NEW] Rule 6.451 Reinstatement of Convictions Set Aside Without Application

A conviction that was automatically set aside by operation of law under MCL 780.621g must be reinstated by the court as provided in MCL 780.621h. The court must:

(A) provide notice and an opportunity to be heard before reinstating a conviction for failure to make a good faith effort to pay restitution under MCL 780.621h(3),

(B) order the reinstatement on a form approved by the State Court Administrative Office,

(C) serve any order entered under this rule on the prosecuting authority and the individual whose conviction was automatically set aside.

An order for reinstatement of a conviction that was improperly or erroneously set aside as provided in MCL 780.621h(2) must advise the individual whose conviction is being reinstated that he or she may object to the reinstatement by requesting a hearing. The request must be filed with the court on a form approved by the State Court Administrative Office.

Staff Comment (ADM File No. 2023-06): The amendment of MCR 8.119 requires courts to restrict access to case records involving set aside convictions similar to how MCL 780.623 restricts access to records maintained by the Michigan State Police. The amendment further requires the court to redact information regarding any conviction that has been set aside before that record is made available. The addition of MCR 6.451 requires the court to provide notice and an opportunity to be heard before reinstating a conviction for failure to make a good faith effort to pay restitution under MCL 780.621h(3) and to order the reinstatement on an SCAO-approved form. The amendment of MCR 6.001 clarifies that MCR 6.451 applies to cases cognizable in the district courts.

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 July 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. 2023-06. Your comments and the comments of others will be posted under the chapter affected by this proposal.

VIVIANO, J. (*concurring*).

I concur with the adoption of these revisions and giving them effect prior to the close of public comments and consideration at a public hearing. I write to express my concerns about certain aspects of the revisions that this Court must consider when this matter returns to us to decide whether to retain the amendments we have adopted today. First, we must consider what obligations the new expungement statutory amendments impose on courts. MCL 780.623 does not directly address court records at all. Rather, it pertains to records that the Department of State Police must retain.[1] MCL 780.623(5) makes it a crime for a person other than the defendant whose conviction was set aside or the victim to divulge, use, or publish information concerning a set-aside conviction. But it is not clear to me that this provision applies to court clerks.[2] Second, if MCL 780.623(5) does pertain to court records and court staff, the constitutionality of the statute must be considered. Is the issue of nonpublic court records one of substantive law, such that it is within the province of the Legislature, or one of practice and procedure, such that it falls within our constitutional authority to determine such rules? See generally *McDougall v. Schanz*, 461 Mich 15, 26-36 (1999). Third, we should consider what constitutional authority, if any, we have to broadly restrict a class of court records. See *In re Leopold*, 448 US App DC 77, 79 (2020) ("The public's right of access to judicial records is a fundamental element of the rule of law."). These are important and difficult questions that should have been fully addressed prior to any changes to the court rules taking effect.[3] It is incumbent on this Court to ensure they are adequately addressed when this matter returns to us at the close of the public comment period and after public hearing.

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

1. As a matter of practice, courts have treated records relating to set-aside convictions as nonpublic. The State Court Administrative Office has published guidelines for courts addressing nonpublic and limited-access court records, indicating that the existence of records governed by MCL 780.621 and MCL 780.623 cannot be acknowledged. SCAO, Nonpublic and Limited-Access Court Records (Revised Jan 2023) <https://www.courts.michigan.gov/siteassets/court-administration/standardsguidelines/casefile/cf_chart.pdf> (accessed March 24, 2023) [https://perma.cc/G62C-Z4B8].

2. MCL 780.623(5) broadly prohibits any person, other than the defendant and victim from divulging, using, or publishing information concerning a set-aside conviction and makes it a misdemeanor to do so. I also question whether such a broad prohibition, which appears to criminalize any reference to an expunged conviction unless it is made by the defendant or the victim, runs afoul of the First Amendment. See Volokh, The Volokh Conspiracy, Mass. Trial Court Rejects Right to Be Forgotten <https://reason.com/volokh/2021/04/13/mass-trial-court-rejects-right-to-be-forgotten/> (posted April 13, 2021) (accessed March 24, 2023) [https://perma.cc/GF5P-LAG4].

3. I am once again dismayed by the timing of the proposed amendments. The legislation prompting them, 2020 PA 193, was signed into law in October 2020, over two years ago, but the proposed amendments were not provided to us until a few weeks ago. This is not the first time we have been asked to impose significant changes to how our courts operate with little advance notice to judges and court staff and no opportunity for public comment prior to at least some of the changes becoming effective. The delay in this matter is especially concerning given the estimate that 1,250,000 convictions will be automatically set aside on April 11, 2023. These changes will have a very significant and immediate effect on how our courts manage their files and provide public access. The public, judges, court staff, defense attorneys, prosecutors, and victim advocate groups need guidance but should have been given an opportunity to provide public comment prior to these changes taking effect.

ADM File No. 2023-06
Proposed Amendments of Rules 6.110 and 8.119 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering amendments of Rules 6.110 and 8.119 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 also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

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

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

Rule 6.110 The Preliminary Examination

(A)-(F) [Unchanged.]

(G) Return of Examination. Immediately on concluding the examination, the court must certify and transmit to the court before which the defendant is bound to appear the prosecutor's authorization for a warrant application, the complaint, a copy of the register of actions, the examination return, ~~and~~ any recognizances received, and any motions, responses, or orders entered in the case.

(H)-(I) [Unchanged.]

Rule 8.119 Court Records and Reports; Duties of Clerks

(A)-(G) [Unchanged.]

(H) Access to Records. Except as otherwise provided in subrule (F), only case records as defined in subrule (D) are public records, subject to access in accordance with these rules.

(1)-(9) [Unchanged.]

(10) Circuit Court Bindover. All case records maintained by the district court become nonpublic immediately after the entry of an order binding the defendant over to the circuit court. The circuit court case record remains accessible as provided by this rule.

(I)-(L) [Unchanged.]

Staff Comment (ADM File No. 2023-06): The proposed amendment of MCR 8.119 would require all case records maintained by the district court to become nonpublic immediately after bindover to the circuit court. This proposal would also amend MCR 6.110(G) to expand the types of documents that must be transmitted to the circuit court to ensure appropriate public access in the circuit court. The proposal would consolidate public access in the circuit court case file and would also uniformly ensure that information regarding set aside criminal offenses in the circuit court cannot be separately accessed in the district court case file.

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 July 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. 2023-06. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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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.

PLEASE DO NOT HESITATE TO CONTACT LJAP DIRECTLY WITH QUESTIONS PERTAINING TO VIRTUAL 12-STEP MEETINGS. FOR MEETING LOGIN INFORMATION, CONTACT LJAP VOLUNTEERS ARVIN P. AT 248.310.6360 OR MIKE M. AT 517.242.4792.

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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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