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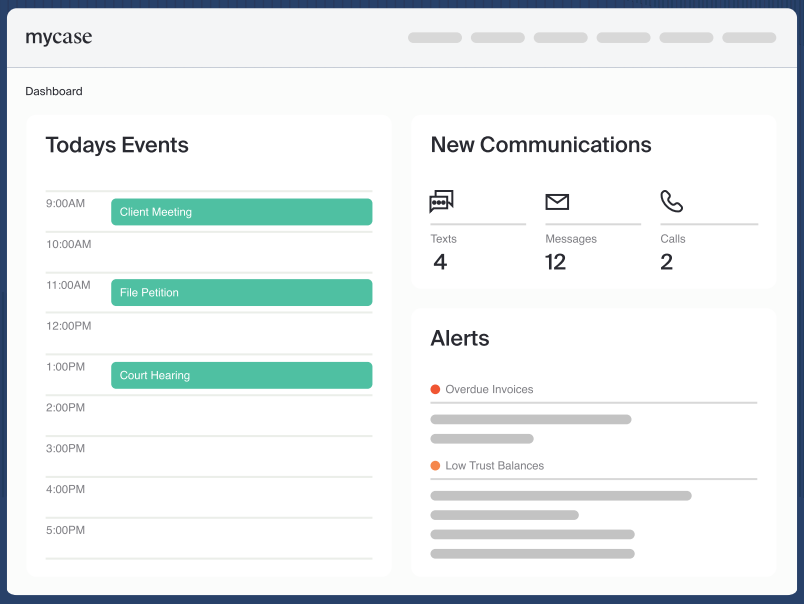

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SEPTEMBER 2023 | VOL. 102 | NO. 08

ON THE COVER: The federal government opened its immigration station on Ellis Island in New York Harbor on Jan. 1, 1892. Over the next 62 years, more than 12 million immigrants would arrive in the United States via Ellis Island.

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MARCH 1, 2024 (IF NECESSARY)
APRIL 19, 2024
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JULY 26, 2024

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SEPTEMBER 21, 2023
APRIL 20, 2024
SEPTEMBER 2024

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MEMBER SUSPENSIONS
FOR NONPAYMENT OF DUES

The list of active attorneys who are suspended for nonpayment of their State Bar of Michigan 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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MICHIGAN LAND TITLE STANDARDS

6TH EDITION
8TH SUPPLEMENT (2021)

The Eighth Supplement (2021) to the 6th Edition of the Michigan Land Title Standards prepared and published by the Land Title Standards Committee of the Real Property Law Section is now available for purchase.

Still need the 6th edition of the Michigan Land Title Standards and the previous supplements? They are also available for purchase.

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

IN BRIEF

MICHIGAN STATE BAR FOUNDATION NAMES 2023 AWARD WINNERS

The Michigan State Bar Foundation has announced its 2023 award recipients. Edward Pappas, chairman emeritus and consulting member at Dickinson Wright, is receiving the Founders Award, which recognizes a lawyer who exemplifies professional excellence and outstanding commitment to serving the community. Karen Tjapkes, director of litigation at Legal Aid of Western Michigan, is receiving the Access to Justice Award, which honors an individual who significantly advances access to justice for low-income individuals in Michigan.

"The Michigan State Bar Foundation is pleased to recognize the contributions of Edward Pappas and Karen Tjapkes," MSBF President Craig Lubben said, "Their leadership and commitment to access to justice are inspirational."

The awards will be presented during the MSBF Fellows Reception on Sept. 13 in Grand Rapids.

EDWARD PAPPAS

Pappas has provided significant leadership on important legal issues including professionalism, civility, and access to justice. He was State Bar of Michigan president in 2008-2009 and served as MSBF president from 2018-2022. In 2015, received the Robert P. Hudson Award, the State Bar of Michigan's highest honor. Pappas is a secretary for the MSBF Fellows Program, serves on the steering and fundraising committees for the foundation's Access to Justice Campaign, chairs the SBM Alternative Dispute Resolution Section, and is leading efforts to encourage mediators to volunteer with community dispute resolution centers and legal aid programs. He sits on the Western Michigan University Thomas M. Cooley Law School Board of Directors and is a fellow of the American Bar Association and the Oakland County Bar Foundation.

KAREN TJAPKES

Tjapkes has been an attorney with Legal Aid of Western Michigan for 23 years. As director of litigation, she oversees the program's advocacy and service delivery, establishes litigation goals and strategies, manages staff training and professional development, and assists with grant management. She represents low-income and elderly clients in housing law, foreclosure, consumer law, bankruptcy, and public benefits matters. Tjapkes co-chairs the Michigan Supreme Court Justice for All Commission Summary Proceedings Improvement Workgroup, sits on the steering council of the Grand Rapids Area Coalition to End Homelessness, and is an SBM Consumer Law Section council member. She has also served as an expert advisor with the Center for Survivor Agency and Justice on consumer rights for domestic violence survivors.

The Michigan State Bar Foundation is a 501(c)(3) organization that provides leadership and grants to improve access for all in the justice system, including support for civil legal aid for low-income households. For more information, visit www.msbf.org.

INSURANCE AND INDEMNITY LAW SECTION

The Insurance and Indemnity Law Section will host a conversation with state legislative and regulatory leaders on Thursday, Oct. 19, from 4:30-6 p.m. at the State Bar of Michigan headquarters in downtown Lansing. Hear from Sen. Mary Cavanagh (chair of the Senate Insurance and Financial Services Committee), Rep. Brenda Carter, (chair of the House Insurance and Financial Services Committee), and Department of Insurance and Financial Services Director Anita Fox on passed and pending legislation and a look ahead to the future of insurance in Michigan.

NEWS & MOVES

ARRIVALS AND PROMOTIONS

ELIZABETH ABDNOUR has joined Abdnour Weiker as partner and recently opened the firm's Lansing office.

AMY L. DIVINEY has joined Plunkett Cooney's Bloomfield Hills office as a senior attorney.

LANA M. ESCAMILLA and **STACI L. SALISBURY** have joined Lewis Reed & Allen as shareholders.

BRIAN PATRICK MORLEY has joined Butzel as a shareholder.

HARAN C. RASHES has joined Vivacity Infrastructure Group as vice president and general counsel.

DAVID B. ROTH with Harvey Kruse has been promoted to shareholder.

AWARDS AND HONORS

D. SCOTT BRINKMANN with Butzel was recognized as a 2023 Go-To Lawyer in commercial real estate law by Michigan Lawyers Weekly.

DANIELLE CHIDIAC and **CLAIRE D. VERGARA MACATULA** with Plunkett Cooney were recognized on the Lawyers of Color magazine Diversity, Equity, and Inclusion Hot List for 2023.

A portrait of former Michigan Supreme Court Justice **MAURA D. CORRIGAN** was unveiled for the first time to the public at the Hall of Justice in Lansing on June 14.

HOWARD GOLDMAN with Plunkett Cooney was recognized as a 2023 Go-To Lawyer in commercial real estate law by Michigan Lawyers Weekly.

STEVEN M. GURSTEN received the American Association for Justice Trucking Litigation Group Lifetime Achievement Award at its annual convention in Philadelphia on July 17.

MARY MASSARON with Plunkett Cooney was recognized in the 2023 class of Influential Women of Law by Michigan Lawyers Weekly.

ZARGHOONA SAKHI and **FRANCES SILNEY-BAH** were among three law school students honored as winners of the Plunkett Cooney Diversity, Equity, and Inclusion essay program. Sakhi completed her first year at Western Michigan University Thomas M. Cooley Law School and will spend her 2L year at the University of Aberdeen School of Law in Scotland. Silney-Bah is a 3L at Cooley. For their efforts, each student received a $2,500 scholarship.

MICHAEL B. STEWART with Fishman Stewart has been included in the 2023 edition of the IAM Patent 1000: The World's Leading Patent Professionals.

MITCHELL ZAJAC with Butzel was named to the Class of 2023 Rising Stars by 760 WJR and the Detroit Economic Club. The list is comprised of 10 local leaders under the age of 40 who are making an impact in their industries and communities.

LEADERSHIP

JAMES G. CAVANAGH, senior counsel with Warner Norcross and Judd, has been appointed to the Lansing Board of Ethics by Mayor Andy Schor.

JARED HAUTAMAKI was nominated to the Sault Ste. Marie Tribe of Chippewa Indians Appellate Court as a reserve judge.

MARK LEZOTTE with Butzel was appointed chair of board of directors for SourceAmerica, an organization that connects people with disabilities with employment opportunities.

NAME CHANGE

Kitch Drutchas Wagner Valitutti & Sherbrook has become **KITCH ATTORNEYS & COUNSELORS**.

Have a milestone to announce? Please send your information to News & Moves at newsandmoves@michbar.org.

IN MEMORIAM

PETER BILAKOS, P10798, of Ann Arbor, died July 1, 2023. He was born in 1932 and was admitted to the Bar in 1963.

H. DALE CUBITT, P12374, of Bad Axe, died June 7, 2023. He was born in 1938, graduated from University of Michigan Law School, and was admitted to the Bar in 1963.

RICHARD J. DELAMIELLEURE, P12641, of Ann Arbor, died Dec. 13, 2022. He was born in 1939, graduated from University of Michigan Law School, and was admitted to the Bar in 1965.

J. RICHARD EMENS, P13176, of Columbus, Ohio, died June 28, 2023. He was born in 1934, graduated from University of Michigan Law School, and was admitted to the Bar in 1959.

TODD M. HALBERT, P33488, of Southfield, died March 30, 2023. He was born in 1955, graduated from University of Michigan Law School, and was admitted to the Bar in 1981.

MICHAEL A. HETTINGER, P51282, of Portage, died July 28, 2023. He was born in 1961 and was admitted to the Bar in 1994.

THOMAS J. JEWETT, P31617, of Lansing, died Dec. 26, 2022. He was born in 1944, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1980.

STAN C. KAZUL, P15775, of Mill Valley, California, died Jan. 13, 2023. He was born in 1934, graduated from University of Detroit School of Law, and was admitted to the Bar in 1967.

RICHARD L. LANG, P16397, of Northport, died June 24, 2023. He was born in 1936 and was admitted to the Bar in 1962.

THOMAS LAZAR, P22878, of West Bloomfield, died Sept. 9, 2022. He was born in 1947, graduated from Wayne State University Law School, and was admitted to the Bar in 1973.

GARY L. NICHOLSON, P18288, of Pentwater, died Jan. 6, 2023. He was born in 1947 and was admitted to the Bar in 1972.

PEGGY G. PITT, P31407, of Royal Oak, died June 22, 2023. She was born in 1949, graduated from University of Detroit School of Law, and was admitted to the Bar in 1980.

DAVID P. PUTRYCUS, P55579, of Utica, died April 3, 2023. He was born in 1962, graduated from Detroit College of Law at Michigan State University, and was admitted to the Bar in 1996.

SCOTT R. REID, P40366, of Troy, died June 6, 2023. He was born in 1953, graduated from Detroit College of Law, and was admitted to the Bar in 1987.

KENDALL L. SAILLER, P50055, of Sterling Heights, died July 6, 2023. He was born in 1956, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1997.

BENJAMIN O. SCHWENDENER, Jr., P20150, of Okemos, died June 14, 2023. He was born in 1929 and was admitted to the Bar in 1953.

SAMUEL R. TERRY, P67616, of Fort Worth, Texas, died July 17, 2023. He was born in 1972, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 2004.

ANTONIO DOUGLAS TUDDLES, P64158, of Detroit, died July 3, 2023. He was born in 1960, graduated from University of Detroit Mercy School of Law, and was admitted to the Bar in 2002.

HOLLIS G. TURNHAM, P29483, of Lansing, died Aug. 5, 2023. She was born in 1951 and was admitted to the Bar in 1978.

RANDALL S. WINSTON, P22451, of Glenview, Illinois, died July 2, 2023. He was born in 1942, graduated from Wayne State University Law School, and was admitted to the Bar in 1968.

JEFFREY M. YOUNG, P34093, of Farmington Hills, died Feb. 17, 2023. He was born in 1942, graduated from Detroit College of Law, and was admitted to the Bar in 1982.

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.

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Michigan attorneys are required to keep a physical address and email address on file with the State Bar of Michigan to receive official communications. You can update your contact information and communication preferences at any time in your member profile after logging in to the Member Area.

FROM THE PRESIDENT

JAMES W. HEATH

The privilege of service

"No organization of lawyers can long survive which has not for its primary object the protection of the public."

— Roberts P. Hudson
First president of the State Bar of Michigan

Looking out over the past year — in fact, my whole life — it is easy to see that I stand on the shoulders of so many who came before me. Their presence, the paths they blazed, and the doors they opened made it possible for me to serve as president of the State Bar of Michigan. For that, I am so thankful because this year and this role have proved to me beyond any doubt that it is a privilege to serve.

My tenure introduced me to many people whom I am honored to have met and took me to many parts of this state to attend a variety of events.

Some were big: The Young Lawyers National Trial Advocacy Competition in my hometown of Detroit was a remarkable display of talent, diversity, and the bright future our profession can expect. The Young Lawyers Section and its members put together some of my favorite and most well-run events that I had the privilege of attending this year. The future, my friends, is in good hands.

Some were small: Quite honestly, some of the smallest were the most impressive. At these events, I was awed by those who were willing to take up the mantle to do the hard and too-often thankless work to make our state's sections, committees, bar associations, and the legal profession as strong as they can be. These meetings were about the business of advancing the rule of law, serving the public, and creating a more just justice system. Attending these meetings took me to the north, south, east, and west, and they were a testament to the dedicated attorneys we have in our state. They filled me with gratitude and privilege to be among them.

Some were near: While not necessarily physically close to my home, I must also mention the Floyd Skinner Scholarship Reception in Grand Rapids, which is near and dear to my heart. This event left an indelible impression because I do not know if I ever have seen an event focused on diversity, equity, and inclusion in the legal profession that was so universally embraced by an entire community. Here, they not only promoted diversity, but actively recruited it and showered its scholarship winner with support, affection, and intentional inclusion.

Some were far: Two particular events, which are paramount moments of my presidency, come to mind here. They occurred at the very beginning and at the very end of my term and took me far off the beaten path and into rural western Michigan counties.

The first was in Allegan County, where we celebrated the 43rd Michigan Legal Milestone, which commemorated the passage of Public Act 109 of 1857. The law, introduced by state senator and former Allegan County prosecutor Gilbert Moyers, guaranteed — for the first time in Michigan — that attorneys who represent indigent clients would receive payment for their services.

As corporation counsel for Wayne County, it was a full circle moment for me. The 1849 murder case that inspired the law was tried in Wayne County, and here I stood 170 years later helping to recognize its significance. It hit home especially because I knew that even with the passage of the law, funding for indigent defense had moved at a glacial pace, except for the last five years.

Thanks to the groundbreaking work done by the State Bar, the Michigan Legislature, and the Michigan Indigent Defense Commission, we have seen real progress including more than $150 million

in state grants, training for indigent defense attorneys, assigned experts and investigators in 1,000 cases, and switching (at long last) to an hourly payment system in Wayne County.

The event showed me that even with great historic strides forward, the responsibility lies with each of us to continue the work of those who came before us.

That lesson culminated in what I consider the capstone of my presidency: the 44th Michigan Legal Milestone recognizing Percy J. Langster, who served as Lake County prosecutor from 1949-50. He was the first elected Black prosecutor in the United States and served with amazing grace at a time when one could argue that this country didn't deserve his unwavering willingness to serve.

He served at the height of Jim Crow in a community that was predominantly white, but also home to Idlewild — an historic Black resort community that would grow into a destination for the Black professional class and greatest artists of the day.

As a former prosecutor myself, I look at Percy Langster with the utmost respect as a leader who epitomizes the true meaning of justice. The irony is that he was tasked with the responsibility of upholding justice at a time when he himself was overtly denied justice for the sole reason that he was Black. It didn't matter the degrees he earned or even the title he held; he was subject to explicit racism every single day. His willingness to look beyond the unequal world in which he lived and rise above the unfair treatment he endured in order to best serve his community are admirable beyond what many of us today can imagine. By honoring Percy Langster, this giant of legal history now is receiving the recognition he deserves.

I look at so many others who came before me and recognize that each are their own moments of time that are part of a greater continuum. Today, I am proud of how inclusive our Bar is. I am proud of how seriously we take our responsibility to protect the public. I am proud that we continue to work unrelentingly to improve the rule of law by building a legal profession that mirrors the public we serve. The work is not complete, but it is another point in the arc of justice.

It has been a privilege to serve in this role. I owe a great deal of thanks to Wayne County Executive Warren C. Evans, himself an attorney and lifelong public servant, who allowed me this opportunity to give back to the legal profession and to the state of Michigan. It is often overlooked that I am believed to be only the second public servant to serve as SBM president. I follow in the footsteps of Nancy Diehl, the 70th president of the State Bar, who this year is being honored with the Roberts P. Hudson Award, our highest honor. I was a young prosecutor in Wayne County when Prosecutor Kym Worthy allowed Nancy to serve in that role. Nancy was and is an inspiration to me. I find it no small coincidence that we both came into these roles with the support of our colleagues in Wayne County. It is a testament to our community's generosity and commitment to the well-being of our entire state.

Finally, as I look back on this year, I am reminded once again by my beginnings as the son of James and Cleo Heath. My parents were born in rural Georgia, and like millions of other Black Americans, they were part of the Great Migration to the north. In search of a better life, they settled in Detroit. My father retired after 39 years of service to the Detroit Water & Sewerage Department. My mother spent more than 20 years as a special education teacher in the Detroit Public Schools. They lived their lives by example, showing me the value of giving back. They inspired my career. They inspired my public service. They inspired my volunteer service with the State Bar.

I will forever be thankful for this past year and all it has given me, including the friends I've made and the history we've remembered. It has been a privilege to serve. Thank you.

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Task force recommends steps to improve lawyer well-being

The Task Force on Well-Being in the Law released a comprehensive report with 21 detailed recommendations to address the high rates of depression, anxiety, and substance use in the legal profession. A collaboration between the Michigan Supreme Court and State Bar of Michigan, the task force emphasizes in the report that improving well-being is critical to professional performance, client service, and the public's trust in the legal system itself.

"Our profession must take concrete, substantial steps to address lawyer well-being because well-being is an essential component of competence," said Michigan Supreme Court Justice Megan K. Cavanagh, co-chair of the task force.

"This report helps to move our state forward and put Michigan at the forefront of lawyer well-being efforts nationwide. The task force's recommendations provide a framework that will improve service to clients and support for lawyers, judges, and law students," said task force co-chair Molly Ranns, director of the State Bar of Michigan's Lawyers and Judges Assistance Program.

Each recommendation is accompanied by strategies to alleviate mental health stressors, combat the stigma around seeking help, educate legal professionals about well-being, and enhance overall well-being within the legal community. To facilitate implementation of the recommendations, the task force called for the Michigan Su-

preme Court to name a permanent Commission on Well-Being in the Law focused on fostering a healthier legal culture.

The recommendations were targeted to key stakeholder groups in the profession.

For judicial officers, the task force recommends:

- communicating that well-being is a priority for the judiciary to reduce the stigma of mental health and substance use problems;
- developing policies focusing on prevention and early intervention to support judicial well-being;
- conducting judicial well-being surveys;
- providing well-being programming for judges and staff; and,
- monitoring struggling judges and establishing a partnership between the Judicial Tenure Commission and the Lawyers and Judges Assistance Program

For lawyers, the task force recommends:

- incorporating the Lawyers and Judges Assistance Program resources into the Attorney Grievance Commission intake screening process;
- providing ongoing training on lawyer well-being and mental health to the Attorney Discipline Board and Attorney Grievance Commission staff;
- including training on well-being in the State Bar of Michigan's "Tips and Tools for a Successful Practice" seminars;
- encouraging local and affinity bars and employers to create well-being committees;
- de-emphasizing alcohol at legal functions and social events;
- amending MRPC 1.1 (Competence) to include lawyer well-being as a function of competence;
- recognizing organizations and individuals who demonstrate their commitment to lawyer well-being;
- including a personal testimonial of recovery following the discipline section of the Michigan Bar Journal;
- offering wellness seminars on a regular basis to Michigan attorneys; and,
- creating and using a tool to measure the impact of lawyer well-being initiatives.

For law schools and students, the task force recommends:

- reassuring students that seeking mental health treatment will not create an obstacle to bar admission or their practice of law;
- encouraging and incentivizing law schools to follow American Bar Association standards on curriculum and student learning including use of structured assessments, providing reasonable notice to students when they may be asked to provide responses during lectures, and incorporating cross-cultural competencies;
- offering more robust, long-term, and sustainable mental health resources to students;
- delivering well-being messages to students throughout their studies; and,
- normalizing the ability to make mistakes as part of the learning process.

Formed in May 2022, the 28-member task force drew expertise from the judiciary, law schools, law students, practitioners and law firms, mental health professionals, and regulatory bodies.

The report underscores the essential nature of well-being in achieving professional competence, echoing the call to action set forth in the American Bar Association's national task force report "Practical Recommendations for Positive Change."

Since 2016, the issue of well-being has been increasingly highlighted within the legal profession. Disturbing studies revealed high rates of mental health and substance use concerns among attorneys, particularly in the first decade of practice. In response, the American Bar Association established a national task force in 2017 and released their report in 2018.

The ABA report highlighted three critical reasons to take action to promote the well-being of legal professionals:

- Well-being contributes to organizational success, meaning that both courts and law firms can run more efficiently and effectively.
- Well-being improves lawyer ethics and professionalism, allowing the profession to better serve the public and build trust in the judiciary.
- Well-being helps the profession to be healthier, happier people and better human beings both at work and at home.

Visit Michigan's Well-Being in the Law web page at www.courts.michigan.gov/administration/special-initiatives/well-being-in-the-law/ for more information about the task force and the report.

IMMIGRATION LAW

BY BRADLEY MAZE

Immigration is certainly a hot topic nationally, but there are also state and local impacts of which State Bar of Michigan lawyers should be aware.

In this, the SBM Immigration Law Section's first theme edition of the Michigan Bar Journal, we present four articles that will educate members and highlight the crossovers between immigration law and other aspects of law. The piece "Meet Me at the Crossroads" by Pamela S. Wall, Farah Hobballah, and Abril Valdes Siewert highlights instances where immigration and family law sometimes intersect. Two articles — "Banishment from the Kingdom" by Siewert and Mani Khavajian and "What a Difference a Day Makes" by Elinor R. Jordan — discuss the impact of criminal convictions and current criminal statutes on immigration charges of removability or inadmissibility. Finally, the article "Culture and Language Competency in the Legal World" by Jaimie Lerner sheds light on the disconnect in language, culture, and overall understanding in our legal system and the many immigrants who come into contact with it. These articles encourage lawyers to appreciate that noncitizens require a more conscious approach in representation — which includes the use of competent interpreters — and not assume that the simple or mundane aspects of their legal cases are easily comprehended.

The purpose of the Immigration Law Section is to foster awareness and appreciation of the areas of immigration and nationality law; study immigration and nationality law; promote recognition of immigration and nationality law as a specialized area of practice; educate of members of the Bar and the public on immigration and nationality law and policy; sponsor, prepare, and assist in the publication of legal writing in the field; and otherwise further the interests of the Bar and the legal profession on immigration and nationality law.

We welcome this opportunity to share our expertise with SBM members in the Bar Journal and are also eager to collaborate on intersectional activities and workshops. While we are a newer and smaller section of about 400 attorneys, we encourage all SBM members to drop into one of our monthly meetings and, if interested, formally join our section.

We look forward to collaborating with you and hope you enjoy our

Bradley Maze is the chair of the State Bar of Michigan Immigration Law Section and practices immigration law for Palmer Rey, a full-service immigration law firm in Southfield, where he specializes in removal litigation and appellate work.

Avoiding common mistakes where immigration and domestic cases intersect

BY PAMELA S. WALL, FARAH HOBBALLAH, AND ABRIL VALDES SIEWERT

Experienced family law practitioners know it is critical to protect their client's interests, but do they know how to consider and defend the additional interests that pertain to noncitizen clients? Ideally, a litigant's immigration status would not affect a case. In reality, there are special considerations when working with immigrants: they may have preconceived notions and incorrect assumptions from their country of origin, complex trepidations related to turning to the American court system for help, or specialized needs that must be considered to protect their immigration status.

PREPARING TO WORK WITH NONCITIZEN CLIENTS

Before consulting with a prospective noncitizen client, ask yourself: am I comfortable communicating with this client? While more than 50% of foreign-born United States residents are proficient in English,[1] do not assume based on someone's nation of origin or how long they have resided in the U.S. whether you can conduct your meeting solely in English; a noncitizen client who speaks strong English may still have difficulty grasping complex subjects in their second language. But don't fear working with a non-English speaker — using interpretation services, non-English speakers can understand and heed your advice with confidence. Consider first communicating with a prospective client in writing to assess their comfort with English.

In the event your client requires interpretation services, the court must provide interpreters so non-English speaking litigants can understand and contribute during court hearings.[2] Often, you can

also employ those very same interpreters and/or translators[3] for meetings and case preparation so your client can understand the case process from initial consultation to judgment. Whenever possible, hire a court-certified interpreter, who are required to pass exams that not only verify their ability to interpret from the target language to English and vice versa but also prove their knowledge of the court process and legal terminology, ensuring that they are able to interpret legal concepts effectively.[4] Qualified interpreters are the next best option; they are tested for language interpretation competency but not the court process knowledge or legal terminology.[5] These options can be costly, so virtual interpretation/translation services like Language Line[6] offer a more affordable route.

What is not a good option, however common it may be,[7] is using the client's child as an interpreter. This can harm the parent-child dynamic and create undue stress for the child.[8] If the client suggests an adult friend or family member who is willing to interpret, this can also be inadvisable as such interpretation disrupts the confidentiality of the communication and could make the client less willing to disclose uncomfortable but important facts.[9] A neutral, trained interpreter is best.

NONCITIZEN ACCESS IN FAMILY COURTS

Many noncitizens, particularly undocumented immigrants,[10] have the false belief that they cannot turn to the courts for recourse due to their immigration status, thinking the law will not protect them. If a prospective client has made it to your office, perhaps it is because they do not hold such a belief, but it can be beneficial, even stress-reducing, to assure a noncitizen client that regardless of their immigration status, the law applies to them as well.[11]

Some noncitizen litigants believe, incorrectly, that they cannot get divorced in the United States because they were married in another country. Generally, marriages performed abroad are considered valid in the U.S. if they were entered into in accordance with local law.[12] As with any divorce, at least one party needs to fulfill the jurisdictional and statutory requirements of the locality where they are filing.[13] As long as those requirements are met, a U.S. divorce is the proper legal remedy for valid marriages.[14] Whether the divorce judgment would be valid in their country of origin, however, is dependent on that foreign country's reciprocity schedule. Counsel should advise their client that the divorce is valid in the U.S. and that the client will need to consult an attorney in the locality where the marriage took place to properly determine reciprocity.

You may also find that noncitizens fear that leaving their marital homes will result in losing custody of their children or rights to personal property due to "abandonment." While this may be true in many parts of the world,[15] it is not the case in the U.S. and should be addressed at intake so clients are aware that separation from their spouse or partner is not an abdication of their rights.

CUSTODY, CHILD SUPPORT, AND NONCITIZENS

Many noncitizen clients — and some family law practitioners — believe undocumented immigrants cannot be awarded custody of their children due to their lack of status. There is no basis in law for this belief. A parent's immigration status does not preclude them from gaining or retaining custody. However, status can be weighed within the best interest factors[16] like any other fact surrounding the family. Thus, advocates must be prepared to address any concerns a judge may have about their client's status.

Similarly, many immigrant parents incorrectly believe that child or spousal support cannot be ordered if the payee and/or the payer is an undocumented immigrant. However, regardless of whether the parents have work authorization or a Social Security number (SSN), if child support is requested and the Michigan Child Support Formula recommends that it be paid, support may be ordered.[17]

There is a common misconception that undocumented immigrants do not pay taxes; this is untrue.[18] Though undocumented immigrants are not legally authorized to work in the United States and (usually) do not have SSNs, it does not mean they are not filing U.S. tax returns. A court may be hesitant to impute income[19] to a party not authorized to work in the U.S. and, therefore, does not have a reasonable likelihood of earning the potential wage. However, it is quite common for undocumented individuals to work, pay taxes, and file U.S. tax returns with an individual tax identification number (ITIN).[20] Practitioners may also encounter an undocumented client or opposing party's W2 containing a SSN that does not belong to the client or does not match their ITIN.[21] These documents can be utilized to prove an undocumented payer's actual income, resulting in an award of child support.[22]

Enforcement of such orders can, however, be complicated by the payer possessing no valid SSN or driver's license.[23] Additionally, under-the-table payments can complicate enforcement. But such facts thwart receipt of support for immigrant and citizen payees alike.[24] Even if securing payment is challenging, support that is ordered and unpaid remains owed to the payee and can result in the payer being charged with a felony[25] and denial or suspension of passports[26] or other legal documents.[27] However, unlike citizen parents, nonpayment of support by a noncitizen can result in the inability to adjust status or removal from the U.S. due to the reflection on one's moral character.[28] Payee clients may also be concerned that their payer can escape their support obligation by fleeing the country, but that is often not a valid concern as the payee can still enforce their support order[29] depending on the country in which the payer is located.[30]

SPOUSAL SUPPORT, AFFIDAVIT OF SUPPORT, AND NONCITIZENS

As discussed above, noncitizen clients can be awarded support in family court cases just as citizen clients can, but certain noncitizen

clients have an additional argument for an award of spousal support that citizens do not.

When a United States citizen or legal permanent resident wants their foreign-born spouse to come to the U.S., the resident spouse petitions the U.S. government for a visa.[31] Part of that application process requires the petitioning spouse prove sufficient income to support their emigrating spouse[32] and sign an affidavit of support (Form I-864), thereby becoming the sponsor financially responsible for the noncitizen spouse until they become a U.S. citizen or are credited with 40 quarters of work (usually 10 years.)[33] In 2011, the Michigan Court of Appeals determined that "divorce does not terminate your obligations under the Form I-864,"[34] meaning that family court can enforce your noncitizen client's rights under a signed affidavit of support[35] by ordering support to be paid by the opposing party until the noncitizen becomes a U.S. citizen, completes 40 quarters of work, or dies.

Courts award spousal support based on a multitude of factors including the length of the marriage, the abilities of the parties to work, the needs of the parties, etc.[36] Those factors can potentially result in a judge ordering an amount of support lower than the financial support due to a green card holder under the I-864, which requires that an individual's income be maintained at 125% of the poverty line.[37] Attorneys representing the beneficiary spouse should educate the court about the I-864 requirements to secure an appropriate spousal support award for their client.

ASSUAGING THE NONCITIZEN CLIENT'S FEARS

A common, and valid, concern noncitizen clients pertains to whether an impending divorce will jeopardize their immigration status. Commonly, when a foreign-born spouse is granted a visa based on the petition of their U.S. citizen or legal permanent resident spouse, they are afforded conditional resident status for two years.[38] Prior to expiration of conditional resident status, the parties will jointly file a new petition proving they are eligible for permanent residence without conditions. The new petition must demonstrate that they remain in a bona fide marriage.[39] If the new petition is granted, the conditions on permanent residence are removed and the immigrant spouse gains legal permanent residence valid for 10 years.

However, should the parties initiate a divorce or even separate prior to the two years, they can no longer file for joint removal of conditions.[40] Unless there are special circumstances present,[41] the immigrant spouse must independently file the petition to remove the conditions in what is widely known as a waiver of joint filing.[42] In this situation, the immigrant spouse carries the burden of proving that the marriage was entered into in good faith and not for the purposes of circumventing U.S. immigration laws.[43] This can be a difficult standard to meet. Thus, wherever a family law practitioner is uncertain about the immigration ramifications of a divorce, they should refer their noncitizen client to an immigration practitioner who can work in tandem with your office.

CONCLUSION

It is important that practitioners have cultural sensitivity and educate themselves on the inherent fears and unique challenges that noncitizens face in any interaction with U.S. court systems. This is where we use the counselor side of our attorney/counselor titles. Immigration law and the quest to attain and acquire legal U.S. status is an extremely challenging notion for many individuals. The State Bar of Michigan Immigration Law Section is here to help and available for any practitioner needing assistance.

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ENDNOTES

1. *English proficiency among U.S. immigrants, 1980-2017*, Pew Research Center (June 3, 2019) <https://www.pewresearch.org/hispanic/chart/immigrant-statistical-portrait-english-proficiency-among-u-s-immigrants/> [https://perma.cc/2ULU-XJSJ]. All websites cited in this article were accessed July 26, 2023.
2. MCR 1.111(B) ("If a person requests a foreign language interpreter and the court determines such services are necessary for the person to meaningfully participate in the case or court proceeding, or on the court's own determination that foreign language interpreter services are necessary for a person to meaningfully participate in the case or court proceeding, the court shall appoint a foreign language interpreter for that person if the person is a witness testifying in a civil or criminal case or court proceeding or is a party.").

3. Though these words are often used interchangeably, per the American Translators Association, "interpreter" is the proper term for one who converts verbally spoken language into another verbally spoken language, while "translator" is one who similarly converts the written word, *Translator vs. Interpreter: What's the difference?* American Translators Association <https://www.atanet.org/client-assistance/translator-vs-interpreter/> [https://perma.cc/4S64-LYUQ].
4. *Certified Interpreters*, Michigan Courts <https://www.courts.michigan.gov/resources-for/judges-court-staff/interpreters/> [https://perma.cc/HN8J-2MRM].
5. *Id.*
6. Available at <https://www.languageline.com/> [https://perma.cc/JM33-PQ66].
7. Ellwood, *Frequently translating for non-English speaking parents can take a toll on mental health—but empathy may buffer this effect*, PsyPost (January 12, 2022) <https://www.psypost.org/2022/01/frequently-translating-for-non-english-speaking-parents-can-take-a-toll-on-mental-health-but-empathy-may-buffer-this-effect-62348> [https://perma.cc/Y46M-AC9M].
8. *The Dangers of Using Children as Their Parents' Interpreter*, Dynamic Language <https://www.dynamiclanguage.com/the-dangers-of-using-children-as-their-parents-interpreters/> [https://perma.cc/23A6-WQCB].
9. MRPC 1.6.
10. Picum, *Why Words Matter*, PICUM <https://picum.org/words-matter/#> [https://perma.cc/4D6M-XXAN] ("Calling a certain group of people 'illegal' denies them their humanity. There is no such thing as an 'illegal' person. 'Illegality' as a form of status has been deliberately assigned to undocumented migrants to justify a category of people who are undeserving of rights.").
11. US Const, Am XIV.
12. *Hutchins v Kimmell*, 31 Mich 126, 131 (1875) ("The general rule of law is, that a marriage valid where it is celebrated, is valid everywhere.").
13. MCL 552.9e.
14. *Marriage Abroad*, US Dep't of State, Bureau of Consular Affairs (November 22, 2022) <https://travel.state.gov/content/travel/en/international-travel/while-abroad/marriage-abroad.html> [https://perma.cc/ZC6C-FW2Y].
15. For example, in Mexico, the law is referred to as "abandon de hogar." See Reynoso, *Perspectives on Intersections of Race, Ethnicity, Gender, and other Grounds: Latinas at the Margins*, 7 Harv Latino L Rev 63, 70 (2004).
16. MCL 722.23.
17. MCL 552.605(2) ("[T]he court shall order child support in an amount determined by application of the child support formula.").
18. Hallman, *How Do Undocumented Immigrants Pay Federal Taxes? An Explainer*, Bipartisan Policy Center (March 28, 2018) <https://bipartisanpolicy.org/blog/how-do-undocumented-immigrants-pay-federal-taxes-an-explainer/> [https://perma.cc/8J25-G9DG] ("The IRS estimates that undocumented immigrants pay over $9 billion in withheld payroll taxes annually.").
19. 2021 MCSF 2.01(G) ("When a parent is voluntarily unemployed or underemployed, or has an unexercised ability to earn, income includes the potential income that parent could earn, subject to that parent's actual ability.").
20. ITINs allow undocumented individuals to file U.S. tax returns, but not receive a refund or ever collect Social Security, *How do Undocumented Immigrants Pay Federal Taxes?*
21. *Id.*
22. 2021 MCSF 2.01(C).
23. As of 2008, Michigan requires proof of legal status in order to obtain a driver's license, 2008 PA 7.
24. MCL 552.604.
25. MCL 750.165(1) ("If the court orders an individual to pay support for the ndividual's former or current spouse, or for a child of the individual, and the individual does not pay the support in the amount or at the time stated in the order, the individual is guilty of a felony punishable by imprisonment for not more than 4 years or by a fine of not more than $2,000.00, or both.").
26. *Child Support Payments*, US Dep't of State, Bureau of Consular Affairs (December 8, 2022) <https://travel.state.gov/content/travel/en/passports/legal-matters/child-support.html> [https://perma.cc/49MZ-HDVH].
27. *Enforce Support*, Mich Dep't of Health & Human Services <https://www.michigan.gov/mdhhs/adult-child-serv/child-sup/how-do-i/enforce-support#:~:text=Driver's%20licenses%2C%20recreational%20or%20sporting,than%20two%20months%20in%20payments>
28. 8 CFR 316.10(b)(3)(i).
29. Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (November 23, 2007).
30. *Status Table*, HCCH (May 25, 2023) <https://www.hcch.net/en/instruments/conventions/status-table/?cid=131> [https://perma.cc/4D2G-3E7N].
31. Form I-130, *Petition for Alien Relative*, available at <https://www.uscis.gov/i-130> [https://perma.cc/9QCC-L3QU].
32. Form I-864, *Affidavit of Support under Section 213A of the INA*, is a contract an individual signs agreeing to use their financial resources to support the intending immigrant named on the affidavit. The form is available at <https://www.uscis.gov/sites/default/files/document/forms/i-864.pdf> [https://perma.cc/Y7GZ-SAMX].
33. 8 USC 1183a.
34. *Greenleaf v Greenleaf*, unpublished per curiam opinion of the Court of Appeals, issued September 29, 2011 (Docket No 299131), p 2.
35. The I-864 is a contract between the Affidavit of Support sponsor and the United States government. The green card holder sponsored by the immigrant is a third-party beneficiary to the contract, and has the legal ability to enforce it, 8 USC 1183a(e)(1).
36. *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).
37. 8 USC 1183a(a)(1)(A).
38. 8 USC 1186a(a)(1). See also *Removing Conditions on Permanent Residence Based on Marriage*, US Citizenship and Immigration Services (January 23, 2023) <https://www.uscis.gov/green-card/after-we-grant-your-green-card/conditional-permanent-residence/removing-conditions-on-permanent-residence-based-on-marriage> [https://perma.cc/MX7V-D3DN].
39. *Removing Conditions on Permanent Residence Based on Marriage.*
40. *Id.* Divorce proceedings need not be final in order to disqualify a joint filing to remove conditions by both parties.
41. Victims of battery and/or extreme cruelty at the hands of their USC or LPR spouse can avoid the joint petition to adjust status by filing a Violence Against Women Act (VAWA) self-petition, 8 CFR 204.2.
42. 8 USC 1186a(c)(4).
43. 8 CFR 216.5.

Banishment from the kingdom: Criminal pleas, convictions, and immigration

BY ABRIL VALDES SIWERT AND MANI KNAVAJIAN

In its 2010 decision in *Padilla v. Kentucky*, the U.S. Supreme Court acknowledged both the severity of the immigration consequences of criminal convictions and the importance of ensuring that defendants are informed of those consequences before entering pleas.[1] The Supreme Court held that immigration penalties are so intimately tied to the criminal court process that defendants have a constitutional right to competent advice from their defense attorneys regarding the specific risk of deportation triggered by pleas and convictions.

The failure to properly advise non-U.S. citizen clients of immigration consequences may constitute ineffective assistance of counsel.[2] As a result, criminal defense practitioners must either develop a sufficient understanding of the immigration consequences of criminal convictions to properly advise their clients or consult with an immigration law practitioner who can analyze and advise on the potential consequences.

WHAT IS CRIMMIGRATION?

U.S. immigration laws have grown more complex and intertwined with criminal statutes over the past decades, especially since the 1996 immigration reforms.[3] This merger has given rise to what many have labelled "crimmigration."[4]

For non-U.S. citizens, criminal convictions for certain crimes (or, in some situations, simply admitting to specific conduct without even

being charged) can result in removal proceedings, mandatory detention during those proceedings, limitations on otherwise available immigration relief,[5] and a lifetime ban on returning to the United States.[6] Generally, the facts regarding what actually occurred are irrelevant. Instead, the immigration analysis focuses on the text of the statute underlying the conviction or charge — this type of analysis is referred to as the categorical approach.[7] These laws affect all noncitizens including lawful permanent residents (i.e., green card holders), asylees and refugees, people on temporary visas, and people without current status.

WHAT IS A CONVICTION FOR IMMIGRATION PURPOSES?

The Immigration and Nationality Act (INA) broadly defines a criminal conviction at 8 USC 1101(a)(48)(A) requiring a "formal judgment of guilt" whether by judge, jury, or plea (including nolo contendere[8]) plus some punishment, penalty, or "restraint on liberty." As a result, pleas taken under advisement when the defendant has to plead guilty or no contest or is found guilty by the court and the court imposes some form of punishment remain convictions under U.S. immigration law and are not feasible options for non-U.S. citizens.

As the INA broadly defines convictions, the following likely are considered convictions for immigration purposes in Michigan: deferrals under the Holmes Youthful Trainee Act[9] or domestic violence deferrals under MCL 769.4a, deferral to drug court for possession or use of controlled substances, or expungement under MCL 333.7411. However, juvenile delinquency offenses are not considered convictions for immigration purposes.[10]

CONSTITUTIONAL OBLIGATIONS IN LIGHT OF *PADILLA*

Since *Padilla* was published, criminal courts across Michigan have provided overly broad, nonspecific, boilerplate immigration warnings to defendants in hopes of upholding the ruling in *Padilla*. However, boilerplate immigration warnings provided by the court do not satisfy the safeguards announced by the U.S. Supreme Court in *Padilla*. This is because *Padilla* places the duty to warn about the risk of deportation on the criminal defense attorney and not on the court. Although constitutional warnings provided by the court can satisfy due process requirements, they cannot cure constitutional violations based on ineffective assistance of counsel.

Padilla requires criminal defense attorneys to give specific and accurate advice about the risk of deportation. It states:

> [I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. … Counsel who possess[es] the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.[11]

To uphold *Padilla*, criminal courts must require defense attorneys to provide accurate and client-specific advice about the potential risk of deportation to their non-U.S. citizen clients. Courts can also help by informing defense counsel of their duty under *Padilla* at the onset of criminal proceedings and notifying them of available resources relating to immigration consequences of criminal activity. In addition, courts can utilize a court-appointed immigration attorney or provide financial assistance to obtain an expert to provide advice about the risk of deportation and require that defense counsel provide a letter to their client detailing the specific immigration consequences prior to any plea being entered. These simple measures will ensure that criminal defense attorneys will be diligent in obtaining immigration consequences of a plea and provide accurate and specific advice about the risk of deportation to their clients.

ANALYZING IMMIGRATION CONSEQUENCES IN CRIMINAL PROCEEDINGS

Inquire about U.S. citizenship

To properly advise a noncitizen regarding a criminal plea or conviction, a criminal defense attorney must first inquire on their client's citizenship status. Many attorneys racially profile a light-skinned client or a fluent English speaker by wrongly assuming they are United States citizens based solely on those characteristics. If you determine your client is not a U.S. citizen, you must obtain your client's complete immigration and criminal history in every jurisdiction to properly analyze crimmigration consequences.

Is your client deportable or inadmissible?[12]

When analyzing whether a client is subject to grounds of inadmissibility and deportability, a criminal defense attorney must analyze the conviction to determine "the proper classification of the crime."[13] Making this classification is not an easy task, however, it is a significant part of a non-U.S. citizen's defense.[14] "Aggravated felonies"[15] and crimes involving moral turpitude[16] are the major categories of crimes in immigration law. To understand and advise a client on immigration consequences, the attorney must first categorize the crime charged and identify the possible adverse consequences, potential forms of relief, and possible solutions for the defendant.

An undocumented client does not eliminate your obligations under *Padilla*. Although this may seem counterintuitive, one might assume that if an individual is already removable for past crimes or lack of lawful status, the immigration consequences of a pending charge

are irrelevant to the individual's immigration case. However, whether a defendant is already removable does not mean that a defendant will suffer no harm from the failure to receive such advice. Because admissions of guilt or convictions may bear on an individual's eligibility for lawful status or relief from removal, an attorney's failure to advise a client about potential immigration consequences can prejudice a defendant regardless of their legal status or past criminal record.[17] A person who is removable may nonetheless be able to receive a new green card if he or she is not inadmissible due to a criminal conviction.[18] Counsel should therefore try to avoid inadmissibility in this situation.

What are your client's goals related to their immigration status?
Analyze the potential effects of pending charges on immigration status. Make sure to think about the specific threats of inadmissibility and deportability (e.g., mandatory detention and inability to travel) as well as denial of future benefits like becoming a U.S. citizen and obtaining other noncitizen status (e.g., visas).

Some questions an attorney should consider are: Does your client want to become a U.S. citizen or are they in process of doing so? Does the client care more about immigration consequences or avoiding jail time? Does your client have future travel plans that will trigger inadmissibility upon return?

What's the best plea/conviction for your client?
Consider all options available in your jurisdiction. For example:

- Can the case be resolved by reducing the charge to a civil infraction to avoid a conviction altogether?
- Can the charge be reduced to an offense that does not trigger deportation or inadmissibility?
- Can the defendant negotiate a sentence that would avoid deportation or preserve certain defenses against deportation (e.g., a sentence of less than one year on a theft offense or crime of violence or consecutive sentences of less than one year on multiple such offenses)?
- Are there multiple charges, only some of which would trigger deportation? If so, can a disposition be negotiated in which convictions and/or sentences of one year or more are only received on offenses that do not trigger deportation for such convictions and/or sentences?

CONCLUSION

Precise immigration consequences that may ensue from a given plea, admission of guilt, or conviction vary widely depending on the particular facts and circumstances of a defendant's case, his or her current immigration status, and past record. Criminal defense attorneys should strive to ensure that any advisal they provide is accurate. The authors urge criminal defense attorneys to reach out to an immigration practitioner or contact the State Bar of Michigan Immigration Section for further assistance when representing a non-U.S. citizen criminal defendant.[19]

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ENDNOTES

1. *Padilla v Kentucky*, 559 US 356; 130 S Ct 1473; 176 L Ed 2d 284 (2010). In this case, Petitioner Padilla, a lawful permanent resident of the United States for over 40 years, faced deportation after pleading guilty to drug-distribution charges in Kentucky. In postconviction proceedings, he claimed that his counsel not only failed to advise him of this consequence before he entered the plea, but also told him not to worry about deportation since he had lived in this country so long. Padilla alleged that he would have gone to trial had he not received this incorrect advice. The Court held: "Because the drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes, the importance of *accurate legal advice for noncitizens accused of crimes has never been more important.* Thus, as a matter of federal law, deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Id.* at 356, 364. Therefore, the Sixth Amendment requires defense counsel to provide affirmative, competent advice to noncitizen defendants regarding the risk of deportation triggered by a guilty plea and that absence of such advice is a basis for claim of ineffective assistance of counsel.
2. *Id.* at 374.
3. *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 8 USC 1101 *et seq.*
4. Professor Juliet Stumpf has been credited with coining the term "crimmigration system," which has been used subsequently by other scholars, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am U L Rev 367, 376 (2006). See also Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 Geo Immigr L J 665, 667 (2008).
5. *Procedures for Asylum and Bars to Asylum Eligibility,* 85 Fed Reg 67202 (October 21, 2020) (regulations that bar asylum for noncitizens with a wide range of convictions, including any felony and certain alcohol-related driving offenses).
6. E.g., 8 USC 1227(a)(2) (criminal grounds of deportation), 8 USC 1182 (criminal and related grounds of inadmissibility), 8 USC 1226(c) (criminal grounds for mandatory detention), and 8 USC 1101(f) (defining "good moral character," which is an eligibility requirement for naturalization, as an individual who has not been convicted of an aggravated felony or a crime resulting in incarceration of 180 days or more).
7. *Taylor v United States*, 495 US 575; 110 S Ct 2143 (1990) and *Descamps v United States*, 570 US 254; 133 S Ct 2276; 186 L Ed 2d 438 (2013).
8. *Molina v INS*, 981 F2d 14, 16, 18 (CA 1, 1992) (finding that a "'nolo plea plus probation'" under Rhode Island law amounts to a "'conviction'").
9. *Uritsky v Gonzales*, 399 F3d 728 (CA 6, 2005).
10. *In re Devison-Charles*, 22 I&N Dec 1362 (BIA 2000).
11. *Padilla*, 559 US at 373.
12. 8 USC 1182(a)(9). A noncitizen may be subject to an order of removal due to either grounds of inadmissibility or grounds of deportability. Proceedings in immigration court to remove a noncitizen from the United States are referred to as removal proceedings. A noncitizen who is removed by virtue of a criminal conviction will also

be excluded from admission to the United States for at least five years, and for life in the case of a noncitizen convicted of a so-called "aggravated felony."

13. Kramer, *Immigration Consequences of Criminal Activity: A Guide to Representing Foreign-Born Defendants*, American Immigration Lawyers Ass'n (2003), p 75.

14. *Id.*

15. An aggravated felony is an immigration term of art referring to certain types of crimes listed in 8 USC 1101(a)(43)(A) – (U). These offenses can be state law felonies or misdemeanors. Noncitizens convicted of aggravated felonies are deportable and are subject to mandatory detention during removal proceedings. In addition, they are ineligible for almost all forms of deportation relief (unless they fit within a very narrow exception, as an asylee or refugee who never applied for a green card). Furthermore, noncitizens deported as aggravated felons are inadmissible to the U.S. for life (though they can seek a waiver after being outside the United States for 20 consecutive years).

16. 8 USC 1182(a)(2)(A)(i) states in pertinent part that any alien is inadmissible to the United States who has been "convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of … a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime[.]" Note that a conviction is not required under this section of the statute. A voluntary and knowing admission to the essential elements of a crime involving moral turpitude alone may well suffice to render a person inadmissible to the United States.

17. *Immigration Consequences of Criminal Activity*.

18. *Id.*

19. For a further exploration of Michigan offenses and their attendant immigration consequences, please visit the ACLU of Michigan website and view *Immigration Consequences of Criminal Convictions, in Michigan: Report and Video Training* (March 3, 2020) <https://www.aclumich.org/en/ publications/immigration-consequences-criminal-convictions-michigan-reportand-video-training> [https://perma.cc/M4FX-9CPW]. This gives you access to a 90-minute training and 41-page report that contains substantial immigration consequence details about dozens of Michigan offenses. See also *Fair and Appropriate Policies and Practices for Noncitizen Defendants and Victims: A Guide for Prosecutors*, Michigan Immigrant Rights Center (December 2020), available at <https://michiganimmigrant.org/sites/default/files/mirc-guide-for-prosecutors-2021.pdf> [https://perma.cc/23MA-H3PJ]. Both websites were accessed July 26, 2023.

Michigan lawmakers can keep families together by shortening sentences by one day

BY ELINOR R. JORDAN

When a person has made a big mistake, they may be relieved to hear that the conduct they engaged in is not being considered for felony charges. Imagine a 19-year-old accused of shoplifting an iPhone — she might be presented a possible plea of misdemeanor larceny and the chance to put it behind her if she accepts a $2,000 fine and serves one day in jail.

For noncitizens, however, such mistakes cannot be put in the rear-view mirror so easily. For these residents, some of Michigan's one-year misdemeanors can carry a life sentence of deportation.

Attorneys and members of the public alike are often surprised to learn that a green card holder who is a parent and breadwinner could be deported if they commit a misdemeanor. This is because under federal law, a single conviction for certain crimes can make a noncitizen deportable if the offense carries a possible sentence of one year or more.[1] Michigan has several one-year misdemeanors that could be deportable offenses;[2] the state legislature could end this hardship for families of lawfully present immigrants by reducing the possible sentence of misdemeanors by a single day from 365 to 364 days.

CRIMES COULD LEAD TO DEPORTATION

Among other grounds, a noncitizen's criminal activity triggers deportation under federal law if the noncitizen is convicted of a "crime involving moral turpitude" generally within five years of en-

tering the United States.[3] A crime involving moral turpitude has been vaguely defined as a "reprehensible act" with a mens rea of at least recklessness[4] and may include most crimes involving theft or fraud[5] as well as certain assaultive crimes.[6]

Some of the most common ways that a lawful permanent resident can land themselves in danger of removal have to do with impulsive behavior such as shoplifting or low-level embezzlement. Critically, a "conviction" for immigration purposes includes circumstances where a noncitizen enters "a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and … the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed."[7] This means that a noncitizen who accepts a plea involving probation, fines, or any punishment for a crime is considered to have been convicted. This includes instances where diversionary programs are used to avoid convictions under state law.[8]

Anecdotally, few people who plead to or are convicted of so-called one-year misdemeanors in Michigan seem to receive or serve a full year sentence.[9] Nevertheless, the fact that Michigan law allows for a 365-day sentence makes these crimes potentially deportable offenses.

Michigan has several misdemeanors that are punishable by "imprisonment for not more than 1 year."[10] These include activities such as larceny of property worth $200-$1,000 or larceny of an item worth less than $200 where the person has stolen before.[11] These appear to be two of the most common one-year misdemeanors that give rise to deportability. Similarly, a single theft or embezzlement of $200-$1,000 that occurred using the internet or repeated low-level internet offenses also result in a one-year misdemeanor.[12] However, conduct such as littering where garbage hits a moving vehicle,[13] driving a motorcycle more than once without a license,[14] hunting a moose without a license,[15] or refusing to provide a DNA sample when required[16] are also one-year misdemeanors.

It is worth noting that undocumented Michiganders who come to the attention of law enforcement may face removal regardless of the severity of any offense they did or didn't commit. A person is subject to removal from the United States regardless of their ties simply because they lack a visa or other permission to be present, with few potential defenses.[17] The people who would benefit from this proposed change in Michigan law are those who have already obtained authorization to be in the country. For example, a change to Michigan's one-year misdemeanor laws could impact a teen who was adopted by U.S. citizens, someone who came to the United States to marry a U.S. citizen, or an entrepreneur who brought a business to the U.S.

IN PERSPECTIVE

ELINOR R. JORDAN

Furthermore, many more serious or violent crimes would still trigger deportation after this change. People who commit crimes involving domestic violence, stalking, child abuse or neglect, or violations of protection orders may still be deportable because of a separate ground of deportability for crimes involving domestic violence.[18] This means that individuals who commit misdemeanors involving this type of conduct would still be subject to potential deportation for those crimes regardless of any change in sentencing laws.

MICHIGAN SHOULD AMEND ITS STATUTES

Many states have corrected the wording of their misdemeanor sentences to end this injustice. States like Utah,[19] Colorado,[20] Nevada,[21] Washington,[22] Rhode Island,[23] New York,[24] and California[25] have already passed changes akin to what this article proposes. Many of these states were able to enact simple legislation to alter their statutes by replacing phrases such as "one year" or "twelve months" with "364 days."

A similar change to Michigan law may be slightly different given that the punishments for misdemeanors are found throughout the Michigan Code. This could allow Michigan lawmakers to take a surgical approach and determine which misdemeanors they most want to make ineligible for deportation. Alternatively, Michigan lawmakers could pass legislation that changes all one-year misdemeanors to 364-day misdemeanors by enacting a separate statute that alters all misdemeanors currently punishable by one year.

Reducing the number of deportable misdemeanors would have benefits far beyond each individual case. Many community members are hesitant to report crimes that may lead to their neighbors being removed from the country. And if a noncitizen faces a charge such as this, their defense attorney would presumably engage in plea negotiation with the goal of mitigating the threat of deportation. Plea negotiation would be much simpler if the threat of deportation could be taken off the table without lessening the noncitizen's criminal accountability.

Immigration attorneys regularly talk to noncitizens in the crosshairs of a one-year misdemeanor and the deportability consequences it carries. Figures are difficult to come by, but my research suggests that 907 individuals whose most serious crime was a misdemeanor were deported from Michigan between 2015 and 2020.[26] For each family torn apart when someone is deported, the negative impacts on the noncitizen's children and community far outweigh the societal cost of these misdemeanors. The Michigan Legislature could easily enact a solution to keep more parents, workers, and productive community members in our state.

Elinor Jordan is a supervising attorney for training and impact at Michigan Immigrant Rights Center focusing on unaccompanied immigrant children. She helped found the Survivor Law Clinic at the Michigan Coalition to End Domestic and Sexual Violence and began her legal career as a clerk for Hon. David W. McKeague of the U.S. Court of Appeals for the Sixth Circuit.

The author dedicates this article to the memory of Eva Alvarez, an incomparable voice for immigrant justice in Michigan and beyond. A cornerstone of MIRC's state policy work, Eva was tragically killed in a car accident on Feb. 25, 2023. We are grateful to have known her and carry forward her legacy.

ENDNOTES

1. E.g., 8 USC 1227(a)(2)(A)(i)(II) (making deportable any noncitizen who commits a crime involving moral turpitude "for which a sentence of one year or longer may be imposed").
2. E.g., MCL 750.356(4), 752.797(3)(a), and 324.40118(5).
3. 8 USC 1227(a)(2)(A)(i) (adding a carve out for an alien admitted within 10 years of an offense in the case of an alien provided lawful permanent resident status under section 1255(j) [8 USC 1255(j)]).
4. *In re Silva-Trevino*, 24 I&N Dec 687, 706 (AG 2008).
5. *Jordan v DeGeorge*, 341 US 223, 228; 71 S Ct 703; 95 L Ed 886 (1951) (explaining that crimes involving fraud have "universally" been held to involve moral turpitude); *In re Guillermo Diaz-Lizarraga*, 26 I&N Dec 847 (BIA 2016) (explaining that a theft offense is a CIMT if it involves a taking or exercise of control over another's property without consent and with an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded and holding that and Arizona shoplifting statute was a CIMT); and *In re Silva-Trevino*, 24 I&N Dec at 706.
6. *In re Solon*, 24 I&N Dec 239 (BIA 2007).
7. 8 USC 1101(a)(48)(A)(i)-(ii).
8. E.g., *Uritsky v Gonzales*, 399 F3d 728 (CA 6, 2005) (holding that an alternative sentence as a youthful trainee under Michigan's Holmes Youthful Trainee Act, MCL 762.11, is considered a conviction for immigration purposes).
9. Where a noncitizen is sentenced to a full year of imprisonment for a one-year misdemeanor, the crime may also be considered an aggravated felony, which would make the noncitizen potentially deportable under a separate grounds of deportability. A detailed analysis of the aggravated felony grounds of deportability is outside the scope of this article. 8 USC 1227(a)(2)(A)(ii) (making deportable any noncitizen "who is convicted of an aggravated felony at any time after admission") and 8 USC 1101(a)(43)(F)(G) (including theft offenses and crimes of violence subject to a term of imprisonment of at least one year in the definition of "aggravated felony").
10. E.g., MCL 750.356(4); MCL 752.797(3)(a); and MCL 324.40118(5).
11. MCL 750.356(4).
12. MCL 752.797(1)(b).
13. MCL 324.8903.
14. MCL 257.312a.
15. MCL 324.40118(5) (notably this offense may be considered a strict liability offense that may not be considered a crime involving moral turpitude).
16. MCL 28.173a.
17. 8 USC 1182(a)(6)(A)(i).
18. 8 USC 1227(a)(2)(E).
19. Utah HB 244 (2019).
20. Colo HB 19-1148 (2019).
21. Nev SB 169 (2013).
22. Wash SB 5168 (2011-12).
23. RI S2367 (2022).
24. NY SB 1505C (2020).
25. Cal SB 1310 (2014).
26. *Latest Data: Immigration and Customs Enforcement Removals*, Transactional Records Access Clearinghouse <https://trac.syr.edu/phptools/immigration/remove/> [https://perma.cc/A6B4-TTGG] (accessing subset ICE removals for Michigan, seriousness level of most serious criminal conviction, and 907 people deported on "misdemeanors, including petty and other minor violations of the law" between 2015 and 2020). Please note that this figure likely includes some individuals who were subject to deportation regardless of any changes in misdemeanor laws proposed here, such as individuals with misdemeanor domestic violence convictions. Website accessed July 26, 2023.

Harry Potter and the Castle of Poudlard: Cultural and language competency in the legal world

BY JAIMIE LERNER

When reading Harry Potter in French, American audiences may be surprised to learn that the magic castle of Hogwarts has been translated to "Poudlard"—or lice bacon.[1] Readers in Hebrew will find that Christmas melodies about hippogriffs have been altered to the tune of a Chanukah song.[2] Brazilian Portuguese Potter fans, on the other hand, know the house of Hufflepuff as "Lufa-lufa."[3]

Available in more 60 languages worldwide, Harry Potter translators have reckoned not only with literal translations, but also cultural interpretations.[4] This is because international readers need language to create the same connotations and societal resonance as the original words do in English. Language and culture are intertwined in a way that cannot be divided — not even for the phenomenon that is Harry Potter. Yet the legal world's understanding of the significant impact of language and culture in cases is grievously lacking.

Today in the United States, nearly 68 million people speak a language other than English at home.[5] These are your current and future clients, each with their own linguistic and cultural differences. For a successful client-centered relationship,[6] it is essential to understand how this diversity impacts people in the American legal system and the protections available to them.[7]

THE NEED FOR CULTURAL BROKERS

Our role as advocates is building a bridge between clients and the American legal system — creating a path to recognize linguis-

tic and cultural diversity. Because of this, we need to change the dialogue from using competent translators to instead being guided by "cultural brokers."[8] Interpreters, attorneys, and judges need to be trained to identify when word-for-word translation by itself is not enough to convey accurate meaning.

You say Ingles, I say English

Interpretation[9] itself is rife with cultural components and layers of complications. Think of a child's game of telephone, where a sentence is passed down from player to player until the result is a muddled — and often hilarious — departure from the original phrase. Skilled interpreters strive to avoid these deviations in meaning, but cultural components can cause roadblocks.

Take the idiom "she has her head in the clouds," meaning she is daydreaming or distracted. Idioms change based on language and culture; in French, the way to describe the same idea is "*elle est dans la lune*" or "she is in the moon." When working with an interpreter, try to avoid idioms, colloquialisms, and overly complicated sentences with jargon. Use simple, clear language and break up conversation into about two sentences at a time.

Another consideration is whether interpretation should be word-for-word or based on the meaning of a phrase. Of course, precise translations are impossible. A common question in court proceedings is "Do you have any siblings?" But in Spanish, the word "siblings" (*"hermanos"*) is the same as the word for "brothers" while the word "sisters" ("*hermanas*") has a different translation. An attorney attuned to this linguistic difference will ask "Do you have any brothers or sisters?" to preempt confusion.

But a different scenario often plays out. A judge asks if a person has any siblings and the witness understands the question as, "Do you have any brothers?" She answers honestly — no. Then she later testifies that a gang threatened her sister, and the judge becomes suspicious; he now believes the witness is lying to him. Of course, there is nothing on the record to prove otherwise — "[c]ourt stenographers write down only what's translated by the interpreter. If that person mistranslates or if portions of the call get dropped, what's said in the original language isn't legally part of the record."[10]

That is why interpretation misunderstandings need to be caught and objected to in real time: there is no way to verify them later. Having an individual fluent in both English and a client's native language in court can alert you of interpretation errors during testimony.

Nonverbal Communication Confusion

Nonverbal communication requires yet another layer of translation that is essential to any effective relationship. Consider the role of body language, facial expressions, and eye contact. Imagine

speaking with a client; her voice is soft, and she avoids looking at you. Does she appear dishonest? Untrustworthy? Withdrawn? How we interpret nonverbal communication is rooted in our own cultural bias.[11]

In the United States, this behavior — especially direct eye contact — affects whether we perceive a person as honest or dishonest.[12] Yet, some East Asian cultures perceive a person to be "angrier, unapproachable, and unpleasant when making eye contact."[13] These contradictory cultural norms can cause clients to experience significant bias in the American legal system. In other words, we have a breakdown in cultural communication.[14] With this in mind, advocates can put information regarding non-linguistic cues in the record, preempting potential credibility issues.

Time is a Construct

Physicists say time is an illusion. Entrepreneurs say time is money. Immigration attorneys should say that time is a social construct.

Time-related cultural bias must be acknowledged for effective advocacy. American culture is predominantly monochronic — time is viewed as rigid, fixed, and chronological.[15] In contrast, for many cultures, time is polychronic — fluid and less tangible.[16] Latin American society, for instance, is primarily polychronic, and clients from this region likely emphasize how events affect relationships while placing less value on specific dates or rigid timelines.[17] A person's "time culture" influences not only their emphasis of events, but also memory, as "the flow of time is viewed as a sort of circle, with the past, present, and future all interrelated."[18]

The predicament is that the American legal system places fundamental significance on the timeline and procedural history of a case. Failure to remember dates or the order of events is considered a credibility issue. And yet it is often a cultural dispute. By demanding American time norms — our cultural biases — we create tension with people from polychronic societies.[19] This can cause friction in an attorney-client relationship and be the basis for a harsh jury verdict. That said, by submitting evidence on polychronic regions or objecting to time-based cross-examination questions based on cultural bias, we can combat these issues.

While we ostensibly celebrate cultural diversity in the United States, the American legal system falls short. We find "cultural collisions in the courtroom" that undermine proceedings "to such an extent that factual conclusions may rest upon nothing more substantial than the quicksand of cultural bias."[20] To fix this, we need more than interpreters; we need cultural brokers to bridge this gap and prevent bias. But when these brokers do not exist, we can still protect clients with constitutional safeguards and case law.

LACK OF CULTURAL BIAS TRAINING AND FAILURE TO IMPLEMENT LEGAL PROTECTIONS

Legal protections for linguistic differences in the courtroom implicate fundamental rights of due process and a fair hearing under the Fifth and 14th Amendments of the U.S. Constitution.[21] However, protections for cultural disparities are still in their infancy. Most circuits have recognized — often in the immigration context — that there is a cultural bias at play in proceedings. These decisions reference issues in evaluating witness demeanor, credibility, and assumptions about how societies operate.[22] But these are only a small subset. Courts often skirt around cultural issues or fail to address them altogether. The question becomes not what laws protect clients, but how to implement them?

The U.S. Sixth Circuit Court of Appeals has primarily focused on credibility, recognizing the need to "be sensitive to misunderstandings caused by language barriers, the use of translators, and cultural differences."[23] But there is little to no guidance on what this means in practice. How should adjudicators recognize and rectify their own cultural bias in a case? Judges are not given extensive cultural or language training.[24] Indeed, a judicial lack of "cultural competence" is a "disturbing feature" of many cases.[25] Rather, recognition of these issues is primarily left up to the advocacy skills of individual attorneys. And yet only about 37 percent of people appearing before an immigration court have legal representation.[26]

WHEN CULTURAL BIAS AFFECTS LANGUAGE ACCESS

Consider the case of a Cameroonian man thrown into the American judicial system that failed to understand that his native language — pidgin English — was distinct from standard English "with its own grammatical and linguistic structure."[27] An immigration judge denied his case and never assigned an interpreter.[28] The circuit court later held that his due process rights were violated; these rights are "meaningless in cases where the judge and … applicant cannot understand each other."[29]

This case handled a clear language issue. But on a deeper level, the circuit court was forced to confront bias and the role of language. The immigration judge, due to his own biases, failed to recognize pidgin English was a different language — "I know pidgin English … Why did you have to practice English."[30]

Despite the glaring judicial bias in this case, the word "bias" does not appear once in the appellate decision. This case was remanded, but fixing these issues at their foundation requires more than appellate success. It requires a fundamental shift in legal training to recognize and remedy bias.

Everyone has their own cultural biases, and even experienced judges "are not immune" from allowing it to affect their conclusions.[31] The way to improve justice is requiring training on cultural and language differences for all individuals involved in the American legal system. Only by continuing to raise awareness of cultural bias can we begin to alter the dialogue and move closer to legal parity for people with different language and cultural backgrounds.

* * *

When "Harry Potter and the Philosopher's Stone" was published in the United States, the title was changed to "Harry Potter and the Sorcerer's Stone." Why? Because it was thought American audiences would not be familiar with the term "philosopher's stone" — a famous mythological object. Instead, the title was changed to "sorcerer's stone," a term that sounds magical.[32] The change is fitting. A substantial aspect of any communication is education, culture, and a sense of place. When we lose sight of these, so much is lost in translation.

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ENDNOTES

1. Rowling, *Harry Potter Et le Prince de Sang-Mele* (Gallimard Jeunesse, 2007).
2. Burack, *In the Hebrew Translation of Harry Potter, Sirius Black Sings Hanukkah Songs*, Heylama (October 19, 2018), available at <https://www.heyalma.com/in-the-hebrew-translation-of-harry-potter-sirius-black-sings-hanukkah-songs/>.
3. Okrent, *8 Languages with Different Names for the Hogwarts Houses*, Mental Floss (April 6, 2016), available at <https://www.mentalfloss.com/article/78202/8-languages-different-names-harry-potters-hogwarts-houses>.
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6. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L Rev 999 (2007).
7. Racial bias plays a large role in cultural bias in the American legal system and is deserving of space and recognition, but it is not the focus of this article.
8. Author Anne Fadiman describes advice she received while researching her book: "someone who merely converted Hmong words into English, however accurately, would be of no help to me whatsoever. 'I don't call my staff interpreters,'. . . 'I call them cultural brokers." Fadiman, *The Spirit Catches You and You Fall Down: A Hmong Child, Her American Doctors, and the Collison of Two Cultures* (Farrar, Straus and Giroux, 2012), p 95; see also Chin, *Multiple Cultures, One Criminal Justice System: The Need for a "Cultural Ombudsman" in the Courtroom*, 53 Drake L Rev 651, 657 (2005).
Levin, *The Lying Chicken and the Gaze Avoidant Egg: Eye Contact, Deception, and Causal Order*, 71 S Commc'n J 401, 401 (2006).
9. An interpreter works in spoken or signed language—such as interpreting in a courtroom setting. While a translator works in written language—such as translating documents.
10. Jaafari, *Immigration Courts Getting Lost in Translation*, Marshall Project (March 20, 2019), <https://www.themarshallproject.org/2019/03/20/immigration-courts-getting-lost-in-translation>; see also Santaniello, *If an Interpreter Mistranslates in a Courtroom and There is No Recording, Does Anyone Care?: The Case for Protecting LEP Defendants' Constitutional Rights*, 14 Nw J L & Soc Pol'y 91 (2018).
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19. Schroeder, *The Vulnerability of Asylum Adjudications to Subconscious Cultural Biases: Demanding American Narrative Norms*, 97 BU L Rev 315 (2017).
20. *Multiple Cultures*, 53 Drake L Rev at 657, quoting *Dia v Ashcroft*, 353 F3d 228, 275 n2 (CA3, 2003).
21. *Marino v Ragen*, 332 US 561 (1947); *Gonzales v Zurbrick*, 45 F2d 934, 937 (CA 6, 1930); *In re Tomas*, 19 I&N Dec 464 (1987).
22. *Perez-Alvarez v INS*, 857 F2d 23 (CA 1, 1988); *Abulashvili v Att'y Gen*, 663 F3d 197, 206 (CA 3, 2011); *Ndudzi v Garland*, 41 F4th 686, 693 n2 (CA 5, 2022); *Marouf v Lynch*, 811 F3d 174 (CA 6, 2016); *Djouma v Gonzales*, 429 F3d 685, 687-88 (CA 7, 2005); *Jinfeng Tian v Barr*, 932 F3d 664 (CA 8, 2019); *Chouchkov v INS*, 220 F3d 1077, 1083 n15 (CA 9, 2000); *Solomon v Gonzales*, 454 F3d 1160 (CA 10, 2006), superseded by statute.
23. *Marouf*, 811 F3d at 180-81, quoting *Reyes-Cardona v Holder*, 565 F Appx 366, 367 (CA 6, 2014)).
24. Vaala, *Bias on the Bench: Raising the Bar for U.S. Immigration Judges to Ensure Equality for Asylum Seekers*, 49 Wm & Mary L Rev 1011 (2007); *Executive Office for Immigration Review Immigration Judge Training*, US Dep't of Justice (2022), available at <https://www.justice.gov/eoir/page/file/1513996/download>.
25. *Kadia v Gonzales*, 501 F3d 817, 819 (CA 7, 2007), quoting *Iao v Gonzales*, 400 F3d 530, 534 (CA 7, 2005) and *Djouma*, 429 F3d at 687-88.
26. Eagly & Shafer, *Access to Counsel in Immigration Court*, Am Immigr Council (2016), available at <https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf>.
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29. *Id.*, quoting *Marincas v Lewis*, 92 F3d 195, 204 (CA 3, 1996).
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STATE BAR OF MICHIGAN

Celebrating lawyers who make a difference

2023 A LAWYER HELPS PRO BONO HONOR ROLL

The State Bar of Michigan is pleased to publish the 2023 A Lawyer Helps Pro Bono Honor Roll. The honor roll recognizes individual attorneys, law firms, and corporations that support access-to-justice efforts by providing pro bono legal services to low-income individuals and families throughout Michigan.

Law firms and corporations that submitted an honor roll application and achieved a per-attorney average of 30, 50, or 100+ hours pro bono legal services in 2022, as well as firms and corporations that provided at least 100 cumulative hours of pro bono legal services in 2022, were eligible for recognition on the 2023 honor roll.

Individual attorneys who submitted an honor roll application and provided 30, 50, or 100+ hours of qualifying pro bono legal services in 2022 were also eligible for recognition on the 2023 honor roll.

For the 2023 honor roll, more than 40,000 pro bono service hours provided by more than 1,000 Michigan-licensed attorneys in the 2022 calendar year were submitted to the State Bar. While most eligible attorneys wanted to be publicly recognized for their qualifying pro bono service, many attorneys did not wish to be included on the published version of the honor roll and submitted their 2022 pro bono service hours for reporting purposes only.

The individual and firm applications for the 2024 Pro Bono honor roll recognizing eligible pro bono service hours provided in the 2023 calendar year will be available in January 2024. Please visit www.alawyerhelps.org for more information about the honor roll and to find pro bono opportunities in your area.

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Sabrina Balgamwalla
Callie Barr
Stephanie Blumenau
Barbara Bowman
Charles E. Burpee
Michael S. Callahan
Megan E. Callahan-Krol
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Kelechi Akinbosede
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Geaneen Arends
Lauren E. Babbage
Justin Bagdady
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Samantha Van Sumeren
Wei Wang
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Laura A. Weingartner
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Amanda Zack
Glen Zatz
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Jacqueline August
Justin Azar
Elizabeth B. Baker
Alan Baldridge
Laura C. Baucus
Jennifer Z. Belveal
Jaron Bentley
Migladys Bermudez
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Lori A. Buiteweg
Alexander Burridge
Shane P. Callaghan
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Thomas D. Colis
Jason P. Colvin
Jason Conti
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Joseph Cunningham
Eric J. Dalek
Nardeen Dalli
Gregory D. DeGrazia
Amy DeNise
Jane Derse Quasarano
Katrina P. Desmond
Alexandra Dieck
Zhiguo Du
Lani M. Duffy

FIRMS & CORPORATIONS

RECOGNITION BASED ON FIRM'S PER-ATTORNEY AVERAGE HOURS

TIER 1
(50–99 Hours)
Jones Day

TIER 2
(30–49 Hours)
Miller Johnson
Gruel Mills Nims and Pylman
Bodman
Foley & Lardner
Miller Canfield

RECOGNITION BASED ON FIRM'S TOTAL HOURS

TIER 1
(4,000–5,999 Hours)
Bodman
Miller Canfield

TIER 2
(2,000–3,999 Hours)
Dykema
Jones Day
Miller Johnson

TIER 3
(100–1,999 Hours)
Chartier & Nyamfukudza
Foley & Lardner
Gruel Mills Nims and Pylman
Kitchen Sharkey
Honigman
Nichols, Sacks, Slank, Sendelbach, Buiteweg & Solomon
The Probate Pro
Rhoades McKee
Varnum
Warner Norcross + Judd
Young Basile

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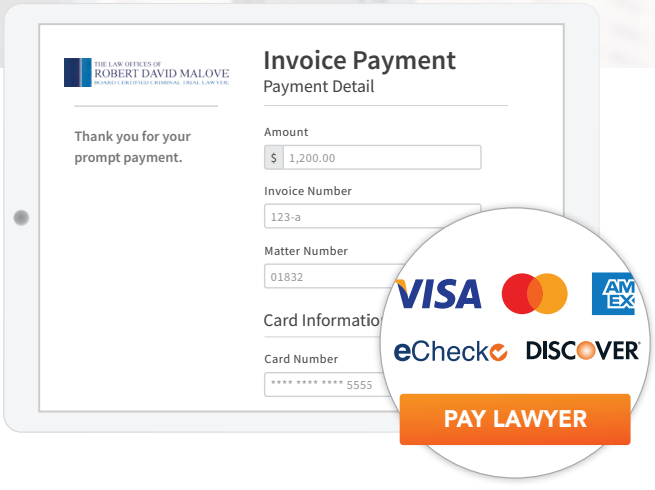

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PLAIN LANGUAGE

Minimize prepositional phrases. Question every *of*. (Part 1)

BY JOSEPH KIMBLE

In the June column, I took aim at multiword prepositions like *prior to* and *with regard to* — two, three, even four words that function as a preposition but can almost always be replaced by a one-word preposition. I said that they "are among the most noxious and pervasive small-scale faults in legal writing."

Now we go after their sibling, unnecessary prepositional phrases, which may be somewhat less noxious but are even more pervasive. They are, in my view, the prime cause of sentence-level verbosity in legal writing. And the prime offender is *of*-phrases — hence my advice to question every *of*. Naturally, not all prepositional phrases can be eliminated — perhaps most of them can't be — but tight prose minimizes them.

Below are three specific techniques. (Some of the sentences, taken from federal decisions, have been modified without showing ellipses or brackets.) There are more ways than these three, but those others merit their own discussion. So up next will be a column on eliminating zombie nouns and using the active voice.

Of course, any technique can be overdone; writers must always consider sound and rhythm and idiom.

USE A POSSESSIVE FORM

- "Plaintiffs contend that the Court improperly ruled ~~in favor of the City~~ in the City's favor based on the Court's interpretation of the ZO because the City did not raise this issue in its motion for summary judgment." [Note that the edit could have been "for the City," converting a multiword preposition to a one-word preposition.]
- "~~Statements by the parties~~ The parties' statements do not control the Court's analysis of the ZO."
- "Judge Price emphasized the ~~improper purpose of the lawsuit~~ lawsuit's improper purpose, which was 'to spread the narrative that our election processes are rigged and our democratic institutions cannot be trusted.'" [The edit also puts *which* next to what it modifies.]
- "Defendant emphasizes that, in the five years she has been incarcerated, she has obtained her GED; graduated from a 9-month, 12-step, drug-abuse program; and gone on to become one of the ~~leaders of the program~~ program's leaders."
- "As a whole, the Court finds ~~the testimony of James~~ James's testimony more believable than ~~that of Berry~~ Berry's."

CHANGE THE PREPOSITIONAL PHRASE TO AN ADJECTIVE

- "It is recommended that plaintiff's complaint be dismissed for failure to comply with ~~an order of the Court~~ a Court order pursuant to [under] Fed. R. Civ. P. 41(b)." [Better: "be dismissed under Fed. R. Civ. P. 41(b) for failure to comply with a Court order."]
- "Defendant Wheeler filed objections to the report and recommendation that the ~~claim of due process~~ due-process claim be denied."
- "No statute, regulation, or ~~rule of common law~~ common-law rule imposes a duty upon [on] a carrier to know the identity of its passengers." [Changing to "its passengers' identities" — back-to-back possessive forms — might be a little clumsy.]
- "The defendant appealed, arguing that his ~~conviction of~~

"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.

~~robbery~~ robbery conviction, for which he was not indicted, was unconstitutional."

- "However, [But] there was no transfer of ~~title of the Subaru~~ the Subaru title or any other written documentation regarding [on] the sale of the vehicle [the vehicle's sale]."

CUT THE PREPOSITIONAL PHRASE ENTIRELY

- "The Court of Appeals mandated that the sentencing court be satisfied ~~of the existence~~ of a legitimate basis for the arrest." [Or "that the arrest had a legitimate basis."]
- "The Court finds *Martinez* to be persuasive in ~~the context of~~ the present case [this case]. All the plaintiffs ~~in this case~~ were either [either were] targeted with impact munitions or chemical agents or were arrested under a challenged curfew order."
- "In interpreting ~~the terms of~~ a trust, a settlor's intent is determined by considering the language used in the trust, reading all the [its] provisions ~~of the trust~~ together."
- "The circumstances surrounding the two disclosures differ significantly ~~in nature~~."
- "The Court directed Defendants to produce these documents by July 1, 2022. To the extent [that] Defendants have not yet fully complied ~~with their duty to produce documents~~, Plaintiff's motion is premature."

This article originally appeared in Judicature, *Vol. 107, No. 1 (2023).*

Joseph Kimble taught legal writing for 30 years at WMU-Cooley Law School. His third and latest book is *Seeing Through Legalese: More Essays on Plain Language*. He is a senior editor of *The Scribes Journal of Legal Writing*, editor of the Redlines column in *Judicature*, a past president of the international organization Clarity, and a drafting consultant on all federal court rules. He led the work of redrafting the Federal Rules of Civil Procedure and Federal Rules of Evidence. Most recently, he won a 2023 Roberts P. Hudson Award from the State Bar of Michigan

BEST PRACTICES

Old websites seldom die: using the Wayback Machine in litigation

BY NATHAN G. PEPLINSKI

"Once something is on the internet, it will never go away."

While this adage can be true, finding an actual record of an inactive web page or website can be frustrating. In litigation, ascertaining precisely what content was posted and when it appeared can be crucial.

Often, litigants who control a website scrub information detrimental to their case. Also, website marketing is a dynamic, ever-changing practice involving constant text and keyword modification to improve traffic. Even in the absence of malice, something seen on a website one day may disappear the next, which can aggravate counsel or opposing parties who did not secure proof of the content when it was live.

The Wayback Machine can be a window to the past, at least figuratively.

WHAT IS THE WAYBACK MACHINE?

The Internet Archive is a 501(c)(3) non-profit entity founded to gather knowledge in a digital format and make it available to everyone in the world in perpetuity.[1] In 1996, the organization began inventorying the web — at least commercially — using the Wayback Machine, a tool developed to collect books, television, movies, radio materials, concerts, and websites.[2]

The system seeks to preserve our culture's digital artifacts and heritage for researchers, historians, and scholars by indexing web page data using a program or automated script.[3] Its web-crawling is the same method search engines like Google employ to deliver results.[4] The Internet Archive uses the data it collects to create a three-dimensional index for browsing web materials over recorded periods.[5]

By simply entering a website's URL, the Wayback Machine lets you view that site's past iterations, assuming it was archived. You select the version by choosing a date from a timeline of yearly calendars.

WAYBACK MACHINE LIMITATIONS

The Wayback Machine only gathers publicly available information and does not index or archive information on password-protected websites, pages on secured servers, or online message boards.[6] A site owner can also request that it disregard their website by establishing robot exclusions.[7] Despite these restrictions, the amount of information the Wayback Machine continues to collect is astounding; the Internet Archive indicates it has archived over 806 billion web pages as of April 2023.[8]

Depending on the target website and search parameters, Wayback Machine users may see grayed-out graphics or no images due to difficulties capturing JavaScript elements or an inability to incorporate graphic material into the archive.[9] But even when the complete page is not recorded, the system may still archive relevant information, especially written text.

Another concern is external hyperlinks that take you to a different website. Clicking a link on an archived page will likely take you to another point in time on that site. Though the Wayback Machine tries to deliver third-party pages contemporaneous with the target website, the date of the linked material will have likely changed. The Wayback Machine displays the web page's date at the top of the browser.[10]

Users can request the Wayback Machine to capture a single web page via its "Save Page Now" feature. The archive will maintain the record for as long as the website does not block crawlers even if the site owner changes or deletes the page later. These requests are anonymous; the system does not keep the requestor's IP address.[11]

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

USE OF THE WAYBACK MACHINE IN LITIGATION

Because historical information is often vital to prosecuting or defending a lawsuit, data it can be determinative to counsel, judges, and juries. Although the Wayback Machine was not created for this use, the Internet Archive configured its system to make its contents more useful in legal matters. The first step for any lawyer attempting to use the Wayback Machine in litigation should be to avoid involving Internet Archive staff.

Authenticating the Record

As with any form of evidence, authenticating archived Wayback Machine pages is essential. The proffering attorney must authenticate that record to show it is what it purports to be. But as a nonprofit organization, the Internet Archive has limited resources and people maintaining the archive would rather devote their efforts to indexing information for posterity than being brought into your dispute. The organization clarifies that attorneys must first address any authentication issues themselves.[12]

The most streamlined means for authenticating an archived web page is simply asking the opposing party to stipulate that the captured information is a correct and accurate record. Given that a neutral, unbiased source maintains the information, there should be a good basis for counsel to admit that the web page stated what it stated at that time and move on to its impact on the litigation.

Even in the absence of malice, something seen on a website one day may disappear the next, which can aggravate counsel or opposing parties who did not secure proof of the content when it was live.

A request for admission is another way to enter the information into evidence, which Michigan's state and federal courts allow.[13] "[R]equests for admission are used to establish admission of facts about which there is no real dispute."[14] The Internet Archive's purpose, operation, and inherent neutrality are tough to discredit; providing the opposing party with the Wayback Machine record attached to a request to confirm the system correctly recorded what was previously in existence should elicit an admission.

Another means of authentication is deposing the party maintaining the relevant website's content, especially when the opposing party's website is at issue. You may not know the person with knowledge of the website's content, but you can likely overcome that by taking what is often called a corporate representative deposition.[15]

Judicial Notice

Having the court take notice of material obtained from the Wayback Machine is another path to admitting evidence. "Judicial notice is based upon very obvious reasons of convenience and expediency; and the wisdom of dispensing with proof of matters within the common knowledge of everyone has never been questioned."[16]

Michigan Rule of Evidence 201(b) states:

> "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

The state rule is consistent with its federal counterpart, FRE 201.[17] Since web crawling takes a snapshot of a web page's contents at a distinct moment, recording that content should meet the rules' requirements. The crawler has no decision-making power and cannot alter the impressions it captures; indeed, doing so would defeat the Wayback Machine's very purpose as a tool to record the history of the web.

The U.S. District Court for the Eastern District of Michigan concluded as much in a dispute over the parties' web presences and respective uses of a certain phrase and the judge even used the Wayback Machine to obtain relevant information, ruling that "[t]he Court takes judicial notice of the parties' historical internet presence as represented by the Internet Archive."[18]

Numerous other courts have reached similar conclusions regarding the Wayback Machine as the proper vehicle for judicial notice of a web page's contents.[19] Patent examiners have also used it in similar situations.[20]

But judicial notice of Wayback Machine records is not universally accepted.[21] Some courts that have addressed challenges to Wayback Machine materials require further authentication of the evidence before admission.[22] Other courts require an "affidavit of a

person with personal knowledge who can attest that the third-party crawler operates to create an unaltered copy of a website as it appears on a given day."[23]

Conversely, the U.S. District Court for the Northern District of Illinois noted that authentication is a low bar requiring only a prima facie showing of genuineness; whether the opposing party has presented evidence of bias or a lack of unreliability in material obtained from the Wayback Machine is a question for the jury.[24] This added authentication requirement seems to defeat much of the purpose of judicial admission and ostensibly creates two unnecessary hurdles.

First, as a practical consideration, because a lawyer cannot be a witness in the case, they would have to find a testifying witness to personally repeat the steps of accessing the Wayback Machine, conducting the search, and printing the relevant material.

Second, the Internet Archive is a non-profit organization with limited resources; it neither charges fees for access or retrieval nor permits advertising, opting to fund its operation primarily through donations.[25] Compelling Internet Archive personnel to help a party satisfy an affidavit requirement places an unwanted burden on them. While they will authenticate records if needed, it may take additional time to complete that task.[26] One exception to its fee-free structure is a processing charge for each authentication request for each website URL. The Internet Archive's standard affidavit language, including its statement regarding crawler software, can be reviewed on its website.[27]

Hearsay Challenges and Exceptions

Some lawyers seeking to block admission of Wayback Machine records have raised hearsay objections. Hearsay can be a complicated issue; exceptions to the general exclusionary rule depend on the purpose for which the evidence is introduced and in what manner, case by case. Even a single document or record can reflect multiple levels of hearsay.

Hearsay is generally defined as an out-of-court statement made for the truth of the matter asserted.[28] Arguably, a web page's record of existence at a specific time fails to meet this definition; some courts have stated that such a record is not a statement at all because it is an image generated by a machine.[29] At least one court has also noted that the Internet Archive's maintained records falls under the business record hearsay exception.[30] If the party maintaining the website is a party to the case, it is also possible that the statement recorded on the website would amount to a statement against that party's interest or an admission by a party opponent.[31]

Counsel on both sides should carefully explore hearsay objections and exceptions before trying to introduce or block the gathered Wayback Machine information at trial. Yet even when a found piece of evidence may not seem admissible, that does not mean it is useless. If the end goal of litigation is seeking the truth and delivering justice, knowledge of previously existing information can be valuable when advising your client or confronting the other side. Therefore, a thorough investigation and extensive discovery are always necessary to conclusively advocate a matter and the Wayback Machine can be a worthwhile tool in that endeavor.

CONCLUSION

The Wayback Machine is a digital looking glass that enables attorneys searching for earlier versions of websites and web pages to magically peer into the past. Although the records it produces have limitations and you cannot count on the system to capture every line of code, the Wayback Machine may provide the evidence you need to support your client's claims or defenses.

Like every other tool, however, users must wield it carefully. Counsel should develop a sound strategy to ensure the admissibility of a Wayback Machine-indexed web page so the jury or judge can properly consider it. That requires an in-depth understanding of evidentiary rules related to authentication, hearsay, and admitting a Wayback Machine record during a deposition or by a request for admission.

But even when the opportunity to admit such evidence may be difficult or doubtful, the Wayback Machine can still be an effective way to travel back in time to retrieve a defunct or materially altered web page and prove its existence. As expressly stated in the comments to Michigan Rule of Professional Responsibility 1.1:

> "To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education, including the knowledge and skills regarding existing and developing technology that are reasonably necessary to provide competent representation for the client in a particular matter."

Familiarizing oneself with innovations like the Wayback Machine isn't just advisable — it is arguably part of the lawyer's ethical duty to maintain competence.

Nathan Peplinski, a partner at Harvey Kruse in Troy, has practiced at every level of the court system from local district courts to several arguments before the Michigan Supreme Court to briefing the United States Supreme Court. He started his legal career in the Michigan Court of Appeals Prehearing Division and served several terms as senior clerk to Michigan Supreme Court Justice Marilyn Kelly.

ENDNOTES

1. *Archive.org Information,* Internet Archive <https://help.archive.org/help/archive-org-information/> [https://perma.cc/PP4Y-Y826]. All websites cited in this article were accessed July 26, 2023.
2. *Introductory Tour of Archive.Org and its Collections,* Internet Archive <https://help.archive.org/help/introductory-tour-of-archive-org-and-its-collections/> [https://perma.cc/B4YS-YV45].
3. *Wayback Machine General Information,* Internet Archive <https://help.archive.org/help/wayback-machine-general-information/> [https://perma.cc/H52H-6HFR].
4. Dilmegani, *Web Crawler: What It Is, How It Works & Applications in 2023,* AI Multiple (June 6, 2023) <https://research.aimultiple.com/web-crawler/> [https://perma.cc/NFF5-UC2Y].
5. *Wayback Machine General Information.*
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7. Robot Exclusion Protocol allows a website to exclude automated clients, such as a web crawler, from accessing the site, in part or completely, *Formalizing the Robots Exclusion Protocol Specification,* Google Search Central Blog (July 1, 2019) <https://developers.google.com/search/blog/2019/07/rep-id> [https://perma.cc/BNY3-7ZFE].
8. *Wayback Machine,* Internet Archive <https://archive.org/web/> [https://perma.cc/HM68-QEBM].
9. *Using the Wayback Machine,* Internet Archive <https://help.archive.org/help/using-the-wayback-machine/> [https://perma.cc/KBS9-Q5F5].
10. *E.g.,* Harvey Kruse, P.C. <https://www.harveykruse.com/attorney-profiles/> [https://perma.cc/BV69-53J4].
11. *Save Pages in the Wayback Machine,* Internet Archive <https://help.archive.org/help/save-pages-in-the-wayback-machine/> [https://perma.cc/7X9L-Y7PN].
12. *Information Requests,* Internet Archive <https://archive.org/legal> [https://perma.cc/9539-44DV].
13. MCR 2.312 and FRCP 36. The Michigan court rule regarding requests for admission is modeled after the federal rule.
14. *Lawrence v Burdi,* 314 Mich App 203, 213; 886 NW2d 748 (2016).
15. MCR 2.306(B)(1)(b) allows a deposition notice to list "a general description sufficient to identify the person or the particular class or group to which the person belongs" when noticing a deposition.
16. *Winekoff v Pospisil,* 384 Mich 260, 268; 181 NW2d 897 (1970).
17. MRE 201, Notes.
18. *Pond Guy, Inc v Aquascape Designs, Inc,* unpublished order of the United States District Court for the Eastern District of Michigan, issued June 24, 2014 (Docket No 13-13229).
19. See *Perera v AG United States,* 536 F App'x 240, 242 n 3 (CA 3, 2013); *UL LLC v Space Chariot, Inc,* 250 F Supp 3d 596, 604 n 2 (CD Cal, 2017); *In re Packaged Seafood Prod Antitrust Litigation,* 338 F Supp 3d 1118, 1132 n 8 (SD Cal, 2018); *Safeway Transit Ltd Liability Co v Discount Party Bus, Inc,* 334 F Supp 3d 995, 1000 n 4 (D Minn, 2018); *East Coast Test Prep LLC v Allnursescom, Inc,* 307 F Supp 3d 952, 967 (D Minn, 2018); *FTC v Omics Group,* 374 F Supp 3d 994, 1004 n 6 (D Nev, 2019); *In re Facebook, Inc Securities Litigation,* 405 F Supp 3d 809, 829 (ND Cal, 2019); *Pohl v MH Sub I, LLC,* 332 FRD 713, 716 (ND Fla, 2019); *MD v Abbot,* 509 F Supp 3d 683, 713 n 19 (SD Tex, 2020); *Southern Environmental Law Ctr v Council on Environmental Quality,* 446 F Supp 3d 107, 113 n 6 (WD Va, 2020); *DotStrategy, Co v Twitter Inc,* 476 F Supp 3d 978, 980 n 1 (ND Cal, 2020); *Cooper v Simpson Strong-Tie Co,* 460 F Supp 3d 894, 905 (ND Cal, 2020); *Sturgis Motorcycle Rally, Inc v Rushmore Photo & Gifts, Inc,* 529 F Supp 3d 940, 960 (D SD, 2021); *Brown v Google LLC,* 525 F Supp 3d 1049, 1061 (ND Cal, 2021); *Yoon v Lululemon United States,* 549 F Supp 3d 1073, 1079 (CD Cal, 2021).
20. *Valve Corp v Ironburg Inventions Ltd,* 8 F 4th 1364, 1374 (CA Fed, 2021).
21. *Weinhoffer v David Shoring, Inc,* 23 F 4th 579, 584 (CA 5, 2022) and *Ward v American Airlines,* 498 F Supp 3d 909, 915 n 1 (ND Tex, 2020).
22. *Pohl v MH Sub I, LLC,* 332 FRD 713, 716, 717 (ND Fla, 2019).
23. *Id.,* at 718.
24. *Telewizja Polska USA, Inc v Echostar Satellite Corp,* unpublished memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division, issued October 15, 2004 (Case No 02 C 3293).
27. *A Message from Internet Archive Founder, Brewster Kahle,* Internet Archive <https://archive.org/donate?origin=iawww-TopNavDonateButton> [https://perma.cc/225L-WMCU].
26. *Information Requests,* Internet Archive <https://archive.org/legal> [https://perma.cc/QV7K-A6VM].
27. *Standard Affidavit,* Internet Archive <https://archive.org/legal/affidavit.php> [https://perma.cc/CX4V-UR4C].
28. FRE 801(c) and MRE 801(c).
29. *McGucken v Triton Electric Vehicle Ltd liability Co,* unpublished order of the United States District Court for the Central District of California, issued March 21, 2022 (Case No CV 21-3624-DMG (GJSx)); *Hansen Cold Storage Construction v Cold Systems,* unpublished order of the United States District Court for the Central District of California, issued February 11, 2022 (Case No 2:19-cv-07617-SB-MAA); *Abu-Lughod v Calis,* unpublished order of the United States District Court for the Central District of California, issued October 9, 2014 (Docket No CV 13-2792 DMG (RXx)); and Telewizja Polska USA, Inc v Echostar Satellite Corp.
30. *Abu-Lughod v Calis.*
31. MRE 804(b)(3), FRE 804(b)(3), MRE 801(d)(2), and FRE 801(2)(D).

ETHICAL PERSPECTIVE

Addressing the unauthorized practice of law in the courtroom

BY KATHERINE S. GARDNER

Most attorneys and judges have stories about a "courtroom surprise" — an issue that came up unexpectedly or an argument that was not anticipated. Attorneys are trained to think on their feet and handle these surprises when they arise. Judges are adept at handling unanticipated complications.

Unfortunately, one of these surprises could involve the unauthorized practice of law (UPL) by a non-attorney. This could include the drafting of pleadings by an individual who is not licensed to practice law or non-lawyers attempting to join hearings and present arguments on behalf of parties. Attorneys and judges are often at a loss about how to handle UPL in these situations. Luckily, there are ethics opinions, rules, and court decisions which provide a roadmap for just these occasions.

Michigan's UPL statute prohibits unlicensed individuals from practicing law.[1] However, the UPL statute does not define the practice of law and the Michigan courts have held that questions involving the practice of law must be decided by the courts on a case-by-case basis.[2] "[A] person engages in the practice of law when he counsels or assists another in matters that require the use of legal discretion and profound legal knowledge."[3]

If an attorney suspects that UPL is occurring, the attorney has an ethical obligation to report the suspected UPL conduct.[4] If the suspected conduct is occurring in the courtroom or involves pleadings filed in court or an administrative matter, the attorney should bring the suspected UPL activity to the attention of the judge and report it to the State Bar of Michigan UPL Department. Circumstances which may trigger an attorney's reporting obligation can include receiving pleadings which designate a non-attorney as a party representative, being contacted by a non-attorney attempting to negotiate on behalf of a party, or even becoming aware that a non-attorney has provided legal advice to a party.

If suspected UPL occurs in the courtroom, Ethics Opinion JI-26 provides a clear road map for judges. First, a judge should require that court personnel regularly check pleadings for signature and licensure to ensure that the person signing is a member of the State Bar. If the person signing the pleading cannot be identified as a member of the Bar, the pleading should be rejected unless the party is appearing pro se.[5]

If UPL concerns are raised by an attorney during a hearing or a judge becomes aware during the course of a proceeding that a representative of a party is not licensed to practice law, the judge must stop the proceeding and should place as much information as possible on the record and forward a transcript to the State Bar of Michigan UPL Department. This should include the names and addresses of all persons having relevant information about the incident. Copies of all relevant pleadings, documents, and correspondence relating to the matters should also be provided.[6]

In addition to stopping the proceedings and reporting the UPL to the State Bar, the judge also has other options to address UPL. In *Mitan v. Farmington Square Condo*minium *Association*,[7] the Michigan Court of Appeals cited approvingly the language of the Massachusetts Supreme Court:

> [W]here a court learns that a person is engaged in the unauthorized practice of law, the court is obligated to take corrective action, regardless of whether the adverse party requests such action. A court has no discretion to tolerate the unauthorized practice of law, and may not allow a person to engage in the unauthorized practice of law simply because the adverse party does not object. A judge does have the discretion, however, to determine the appropriate remedy.[8]

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

In the *Mitan* case, which involved a non-attorney personal representative attempting to litigate claims on behalf of an estate, the Court of Appeals vacated a judgment and remanded the case with instructions to provide the estate a period of time, set at the court's discretion, to file a response to a counterclaim. In addition, the court was to direct the estate's personal representative to employ the services of a licensed attorney in defense of the counterclaim. If the personal representative attempted to file pleadings on behalf of the estate or proceed without counsel, the trial court was directed to reject any pleadings or motions so filed.[9]

As demonstrated by *Mitan*, the court has discretion with regard to addressing UPL. Some remedies that may be employed can include entering a contempt order to show cause and, if it is determined that UPL has occurred, sanctioning the individual appropriately.[10] A judge may dismiss the action or strike the pleadings.[11] If it is believed that a licensed attorney has assisted or permitted UPL to occur, the judge may refer the attorney to the appropriate disciplinary agency.[12]

The purpose of the UPL statute is to protect the public. Unlicensed individuals who attempt to provide legal services can cause significant harm and impair legal rights. Working together, lawyers and judges can help prevent and curtail UPL. For more information regarding UPL or to file a UPL complaint, visit michbar.org/professional/upl.

Katherine S. Gardner is the unauthorized practice of law counsel at the State Bar of Michigan.

ENDNOTES

1. MCL 600.916.
2. *State Bar v Cramer*, 399 Mich 116, 134; 249 NW2d 1 (1976).
3. *Dressel v Ameribank*, 468 Mich 557, 566; 664 NW2d 151 (2003).
4. MRPC 5.5 and Ethics Opinion C-239 (September 3, 1986)
5. Ethics Opinion JI-26 (June 29, 1990), p 2.
6. *Id.* at 4.
7. *Mitan v Farmington Square Condo*minium *Ass'n*, unpublished per curiam opinion of the Court of Appeals, issued February 25, 2021 (Docket No 350053).
8. *Id.* at 7, citing *Rental Prop Mgmt Servs v Hatcher*, 479 Mass 542, 551; 97 NE3d 319 (2018).
9. *Id.*
10. MCR 2.116(F) and MCR 3.606(A).
11. *Mitan v Farmington Square Condo*minium *Ass'n* at 8.
12. Code of Judicial Conduct, Canon 3B(3) and MRPC 8.3. See also Ethics Opinion JI-26 at 4.

PRACTICING WELLNESS

Stop carrying everyone's orange juice: the curse of competence

BY THOMAS GRDEN

Raising toddlers isn't so different than working in the mental health industry: it's a responsibility that yields small victories interspersed with a myriad of defeats. Some of the victories are genuine, like potty training, and some are pyrrhic, like finding a show or movie that your kids will sit still and watch. One piece of advice that you won't find in any parenting book (not that I've read any parenting books): there's no shame in turning on a movie to buy yourself some quiet time. You do what you can to survive and reuse what works. If that means watching Disney's "Encanto" for the umpteenth time, so be it.

For those who haven't seen "Encanto," the need-to-know is this: a family struck by tragedy was blessed with superpowers. It breaks from the Disney mold by eschewing a traditional villain in favor of exploring complex familial relationships and it's rife with lessons for people of all ages. During my eleventy-first viewing of this film, I noticed an interesting choice made by the animators (keeping in mind that every choice made in an animated film is intentional): Luisa, a brawny female character endowed with super strength, lifts a large table into place so the family can eat breakfast outside. The next time we see her, she's taking her seat at the table and *she's carrying five glasses of orange juice.*

As an aside, if ever there were a perfect cinematic metaphor for "overworked lawyer," it would be Luisa. Her musical number following the breakfast scene lays bare the toxic work culture practice of treating employees like expendable commodities rather than human beings. The orange juice she carried was for the rest of the family, and the scene is a subtle nod to her countless obligations. And yet, much to my wife's chagrin, every time I watch it, I can't help but say aloud, "Why does the character with super strength have to carry all the orange juice?"

At first glance, it doesn't seem so farfetched — Luisa is capable, available, and willing, so what's the problem? To highlight how ludicrous the situation really is, let's envision a scenario where Los Angeles Lakers superstar LeBron James is asked by the team's owner to perform in the halftime show. He's certainly capable. It's halftime, so we know he's available, and there's no way to know if he's willing without asking. It would definitely boost profits, and if there's one thing we know about billionaires, it's that all of them have a Scrooge McDuck-like vault of money that they're itching to fill. Why, then, do I get the feeling that no one has ever asked LeBron James to put on a show for the fans during intermission?

This phenomenon is known as the curse of competence — the tendency of those responsible for consistently assigning tasks to the most capable people. The curse of competence compels employers to encumber their best employees with the most difficult work, the most time-consuming work, and/or work that falls outside of their main responsibilities. The cliché example would be asking a lawyer to fix the fax machine, but a more common trap seems to befall those with a talent for public speaking: "Hey we loved your presentation so much today that we'd like you to speak about (something tangentially related) … are you available to come out in (a laughably short timeframe)?"

Does that sound familiar?

If you're a legal stakeholder, hopefully by now you're picturing the cursed employee in your organization. The practice may initially make them feel trusted, respected, and valued, but that elation usually dissipates when the reality of the assignment emerges. This can quickly lead to dissatisfaction, burnout, and turnover.

"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

Here are a few potential ways to address the curse in your workplace using former Detroit Tigers pitcher and future Hall of Famer Justin Verlander as an example:

- **Be mindful of — and resist — the temptation to over-rely on your ace.** If you ask him to pitch too often, fatigue and injury will ensure he isn't your ace for long.
- **Be mindful of the scope of their responsibilities.** Don't ask him to play left field.
- **Familiarize yourself with employee strengths and interests.** His fastball is dominant, but he likes throwing the curveball. Work both into the game plan.
- **Pay up.** Money goes a long way towards happiness.[1]
- **Don't ignore the problem.** Doing so could leave you watching the time and money you invested into professional development winning a championship in Houston.

Lest I be accused of only arming the stakeholder bourgeoisie, here are some actionable steps for the legal proletariat who are cursed with competence:

- **Re-examine your value.** While it's true that overreliance is a sincere form of flattery, it's also true that compliments don't pay the bills.
- **Separate your sense of self-worth from what you're worth to your employer.** The era of tying self-worth to hours worked is coming to an end (just one more thing to blame on millennials.)
- **Mind the cost.** You might be capable and available, but before you decide if you're willing, consider the toll on time and energy.

The curse of competence manifests itself when employees don't feel empowered to occasionally turn down an assignment. I'm not advocating a "not my job" mentality, but rather encouraging people to *actually* decline those opportunities that you regularly accept and grumble about later. If you catch yourself grousing internally after being roped in to *yet* another critically important committee meeting, come join the SBM Lawyers & Judges Assistance Program Virtual Support Group,[2] where you can do your griping out loud. It's completely confidential, runs on Wednesday evenings from 6-7 p.m., and is facilitated by yours truly. For more information, email contactLJAP@michbar.org.

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

ENDNOTES

1. Killingsworth, *Experienced well-being rises with income, even above $75,000 per year,* PNAS (January 18, 2021) <https://www.pnas.org/doi/10.1073/pnas.2016976118> [https://perma.cc/C8Z9-A3T6] (website accessed June 20, 2023).
2. For more information or to register, visit <https://www.michbar.org/generalinfo/ljap/supportgroups> [https://perma.cc/C57Y-E5J7] (website accessed June 20, 2023).

LAW PRACTICE SOLUTIONS

How to value a law practice post-2020 and succession planning options for lawyers to consider

BY JEREMY E. POOCK

As thousands of baby-boomer attorneys (hereafter referred to as senior attorneys) consider retiring over the next 5-20 years, they often ask (a) What is my law practice worth? and (b) What succession planning options do I have for my law practice?

POST-2020 LAW PRACTICE VALUATION

Since 2020, law firm valuation consists of the cumulative value derived from the following five components. Each component is referred to individually as a value chip; collectively, they're known as the five components of value.

1) The firm's client list;
2) Sources who refer clients to the firm;
3) Goodwill that the firm's senior attorneys have earned over the course of decades of practice locally, regionally, and even nationally or internationally;
4) Subject matter knowledge that the firm's senior attorneys have gained in their given practice areas; and
5) The firm's digital value.

PRIMARY SUCCESSION PLANNING OPTIONS FOR LAW FIRMS

Senior attorneys and the firms they lead have the three primary options when considering succession planning for their law practices: joining a growing law firm; structuring an internal succession plan; or maintaining the status quo.

Preferred option: join a growing law firm

Joining a growing law firm is the preferred succession planning option for senior attorneys because growing firms want and need what senior attorneys have:

- Instant growth that a senior attorney's client list can deliver;
- Associated lawyers and support staff who are typically well-trained and reliable;
- The cumulative experience of senior attorneys and their lawyer and non-lawyer staff in shared practice areas; and
- A wealth of potential value stemming from opportunities to repurpose the senior attorney's knowledge into print, video, and

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.

audio content (e.g., podcasts, blogs, e-newsletters, LinkedIn posts, YouTube videos, and more) and expanding marketing to the senior attorney's client list.

Potential option: structure an internal succession plan

Many senior attorneys would prefer structuring an internal succession plan with a long-time associate or partner or recruiting someone to take over their practice. However, most internal candidates do not want to assume the role for the following reasons:

- They joined the senior attorney's firm as a key employee and prefer working for someone else rather than becoming a small business owner;
- They have no interest (and often minimal know-how) to operate a business that needs to make payroll twice per month and pay rent every month;
- They cannot afford to purchase the practice due to personal expenses (e.g., mortgages, car payments, college tuition) and planning for their own retirement; and
- Most internal successors assume that their boss will never retire.

Risky option: maintaining the status quo

Senior attorneys maintaining a status quo approach to managing their firms risk long-term loss of value for two reasons. First, senior attorneys who do not make meaningful investments in digital marketing for their firms are unlikely to add new clients at a pace similar to yesteryear; today's consumers increasingly ask Google to recommend the best attorney for their legal needs. By contrast, today's senior attorneys developed their books of business in the word-of-mouth era when potential clients learned about lawyers from friends, family members, co-workers, and other professionals.

Also, by maintaining the status quo for too long, senior attorneys risk a random event that can instantly and negatively impact the value of their practices — an unexpected physical or mental health occurrence, the untimely departure of a key lawyer or support staff employee, or a senior attorney's premature death.

Other succession options

Senior attorneys may consider selling their law firms in accordance with Michigan Rules of Professional Conduct 1.17. MRPC 1.17(a) states that "[a] lawyer or a law firm may sell or purchase a private law practice, including good will, pursuant to this rule."

MRPC 1.17 includes several challenges, most notably the client notice requirement set forth in MRPC 1.17(c) requiring would-be sellers to provide actual notice to "each of the seller's clients" at least 91 days before the date of a sale about the following:

- The fact of a proposed sale;
- The identity of the proposed purchaser;
- The terms of any proposed change to fee agreement terms with the applicable client, if permissible, per MRPC 1.17;
- Notice of the client's right to retain alternate counsel or take possession of the client's file; and
- Notice of a presumption that client files will transfer to the purchaser if the applicable client does not retain alternate counsel or "otherwise object within 90 days of receipt of the notice."[1]

As thousands of baby-boomer attorneys consider retiring over the next 5-20 years, they often ask, "What is my law practice worth?" and "What succession planning options do I have for my law practice?"

In addition, MRPC 1.17(d) states, in part, that "[i]f a client cannot be given actual notice as required in paragraph (c), the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a judge of the judicial circuit in which the seller maintains the practice."[2]

In the author's experience, senior attorneys often opt not to pursue a sale per rules such as MRPC 1.17 because of the potential "lose-lose-lose" consequences presented by sending a pre-sale notice — namely, the potential loss of clients after they receive the notice; the potential loss of the purchaser should too many clients depart after receiving the notice; and the potential loss in value to the purchaser due to the firm having fewer clients.

Additional succession planning options for senior attorneys include winding up the affairs of a practice per MRPC 1.16[3] or transferring files to one or more colleagues, including doing so on a case-by-case basis per MRPC 1.5(e). In the event of an unexpected death or a physical or mental health incapacity of a lawyer, a sale or transfer of the practice can be facilitated by the lawyer's fiduciary with the involvement of an interim administrator.[4]

NEXT MONTH

In the October issue, we'll continue the discussion of sale or transfer of law practice ownership by looking at typical payment terms, logistics, succession planning and rules of professional conduct, and current trends in succession planning.

Jeremy E. Poock is the founder of Senior Attorney Match, which designs and implements law firm sales for attorneys who have practiced 30 or more years. Prior to founding Senior Attorney Match in 2013, he practiced as a business law attorney in Massachusetts for 13 years.

ENDNOTES

1. MRPC 1.17(c).
2. MRPC 1.17(d).
3. MRPC 1.16 includes the following: "(d) Upon termination of representation, a lawyer shall take reasonable steps to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law."
4. MRPC 1.17 and MCR 9.301, which defines terms such as "Affected Attorney" (includes an attorney who becomes temporarily or permanently disabled or incapacitated and deceased attorneys) and "Interim Administrator," which "means a general term for an active Michigan attorney in good standing who serves on behalf of a Private Practice Attorney who becomes an Affected Attorney." See also MCR 9.307(E), which includes the following among the duties and powers of an Interim Administrator: "To the extent possible, the Interim Administrator may assist and cooperate with the Affected Attorney and/or the Affected Attorney's fiduciary in the continuance, transition, sale, or winding up of the Law Firm."

ORDERS OF DISCIPLINE & DISABILITY

DISBARMENT

Amanda Ann Carmen Andrews, P75823, Port Clinton, Ohio, by the Attorney Discipline Board Tri-County Hearing Panel #9. Disbarment, effective June 15, 2023.[1]

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

Based on her convictions, the panel found that the respondent committed professional misconduct when she engaged in conduct that violated a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615 in violation of MCR 9.104(5).

The panel ordered that the respondent be disbarred from the practice of law in Michigan. Total costs were assessed in the amount of $3,736.66.

1. The respondent has been continuously suspended from the practice of law in Michigan since Sept. 6, 2022. Please see Notice of Automatic Interim Suspension issued Oct. 28, 2022.

REINSTATEMENT

On April 5, 2023, Ingham County Hearing Panel #2 entered an Order of Suspension with Conditions (By Consent) suspending the respondent from the practice of law in Michigan for 90 days effective May 1, 2023. On July 25, 2023, the respondent filed an affidavit pursuant to MCR 9.123(A) attesting that he has fully complied with all requirements of the panel's order and will continue to comply with the order until and unless reinstated. The board was advised that the grievance administrator has no objection to the affidavit, and the board being otherwise advised;

NOW THEREFORE,

IT IS ORDERED that the respondent, **Frederick J. Blackmond,** is **REINSTATED** to the practice of law in Michigan effective Aug. 2, 2023.

DISBARMENT (BY CONSENT)

Scott A. Chappelle, P43635, East Lansing, by the Attorney Discipline Board Ingham

County Hearing Panel #3. Disbarment, effective July 22, 2023.[1]

The respondent was convicted on April 25, 2022, by guilty plea, of the felony offense of Tax Evasion in violation of 26 U.S.C. § 7201, in a matter titled *United States of America v. Scott Allan Chappelle,* United States District Court Western District of Michigan, Case No. 1:20 CR 0079 JMB. In accordance with MCR 9.120(B)(1), the respondent's license to practice law in Michigan was automatically suspended effective April 25, 2022, the date the court accepted the respondent's guilty plea.

Based on his conviction, admissions, and the stipulation of the parties, the panel found that the respondent committed professional misconduct when he 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 panel ordered that the respondent be disbarred from the practice of law in Michigan. Total costs were assessed in the amount of $1,186.56.

1. The respondent has been continuously suspended from the practice of law in Michigan since April 25, 2022. Please see Notice of Automatic Interim Suspension issued July 15, 2022.

REPRIMAND

Leila L. Hale, P79801, Henderson, Nevada, by the Attorney Discipline Board. Reprimand, effective June 23, 2023.

The grievance administrator filed a Notice of Filing of Reciprocal Discipline pursuant to MCR 9.120(C) that attached a certified copy of an order publicly reprimanding the respondent entered by the Nevada Supreme Court on Feb. 17, 2023, in a matter titled *In the Matter of Discipline of Leila L. Hale, Bar No. 7368,* Nevada Supreme Court No. 84918.

An order regarding imposition of reciprocal discipline was issued by the board on April 3, 2023, ordering the parties to inform the board in writing within 21 days from service of the order of any objection to the imposition of comparable discipline in Michigan based on the grounds set forth in MCR 9.120(C)(1), and whether a hearing was requested. The 21-day period set forth in the board's April 3, 2023, order expired without objection or request for hearing by either party.

On May 25, 2023, the Attorney Discipline Board ordered that the respondent be reprimanded. Costs were assessed in the amount of $1,509.

REINSTATEMENT

On May 17, 2023, Tri-County Hearing Panel #1 entered an Order of Suspension (By Consent) suspending the respondent from the practice of law in Michigan for 45 days effective May 27, 2023. On July 12, 2023, the respondent filed an affidavit pursuant to MCR 9.123(A) attesting that he has fully complied with all requirements of the panel's order and will continue to comply with the order until and unless reinstated. The board was advised that the grievance administrator has no objection to the affidavit and the board being otherwise advised;

NOW THEREFORE,

IT IS ORDERED that the respondent, **Zachary Hallman**, is **REINSTATED** to the practice of law in Michigan effective July 18, 2023.

REPRIMAND WITH CONDITIONS (BY CONSENT)

John Lawrence McDonough, P68576, Three Rivers, by the Attorney Discipline Board Kalamazoo County Hearing Panel #2. Reprimand, effective June 29, 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 admission that he was convicted by guilty plea of impaired driving, a misdemeanor, in violation of MCL 257.625(3)(a), in *People v. John Lawrence McDonough,* 8th District Court (Kalamazoo), Case No. 08-774-SD.

Based on the respondent's conviction, admission, and the parties' stipulation, the panel found that the respondent committed professional misconduct when he 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 and subject to conditions relevant to the established

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

misconduct. Costs were assessed in the amount of $938.51.

SUSPENSION (BY CONSENT)

Thomas C. Miller, P17786, Southfield, by the Attorney Discipline Board Tri-County Hearing Panel #60. Suspension, 180 days, effective Nov. 1, 2023.[1]

The respondent and the grievance administrator filed a Stipulation for Consent Order of 180-Day Suspension in accordance with MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by the hearing panel. Based upon the respondent's admissions to all the allegations set forth in the formal complaint, the panel found that he committed professional misconduct during his representation of a client in a medical malpractice case. Specifically, the respondent prepared and filed an action but failed to advise his client regarding numerous defense motions filed and failed to respond to these motions, which were ultimately granted and the case was dismissed. When the client contacted the respondent regarding the status of her case, the respondent misrepresented that there was no activity and failed to tell her the case had been dismissed.

Based upon respondent's admissions as set forth in the parties' stipulation, the panel found that the respondent neglected a legal matter entrusted to him in violation of MRPC 1.1(c); failed to seek lawful objectives of his client in violation of MRPC 1.2(a); failed to act with reasonable diligence and promptness in violation of MRPC 1.3; failed to keep his client reasonably informed about the status of her matter and failed to comply properly with reasonable requests for information in violation of MRPC 1.4(a); failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation in violation of MRPC 1.4(b); engaged in conduct involving deceit 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 is prejudicial to the administration of justice in violation of 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); engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3); and engaged in conduct in violation of the Rules of Professional Conduct in violation of MRPC 8.4(a) and MCR 9.104(4).

In accordance with the parties' stipulation, the panel ordered that the respondent's license to practice law be suspended for a period of 180 days effective Nov. 1, 2023. Total costs were assessed in the amount of $1,288.28.

1. The parties agreed that the order of suspension be effective Nov. 1, 2023, in order to accommodate respondent's clients and allow them to obtain substitute counsel as needed. The hearing panel found that this constituted good cause for the delayed effective date.

THREE-YEAR SUSPENSION

Scott Alan Mund, P56731, Muskegon, by the Attorney Discipline Board Muskegon County Hearing Panel #1. Suspension, three years, effective July 6, 2023.[1]

The respondent and the grievance administrator filed a First Amended Stipulation for Consent Order of Suspension which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The amended stipulation contained the respondent's admission that he was convicted by no contest plea of one count of the felony offense of Gross Indecency in violation of MCL/PACC 750.338B in the matter titled *People v. Scott Alan Mund,* Muskegon County Circuit Court Case No. 2021-004920-FH. In accordance with MCR 9.120(B)(1), the respondent's license to practice law in Michigan was automatically suspended effective June 7, 2022, the date the court accepted the respondent's no contest plea.

Based on the respondent's admissions and the parties' amended stipulation, the panel found that the respondent engaged in conduct involving a violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness in violation of MRPC 8.4(b) and 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 amended stipulation of the parties, the hearing panel ordered that the respondent's license to practice law in Michigan be suspended for three years effective July 6, 2023. Total costs were assessed in the amount of $943.08.

1. The respondent has been continuously suspended from the practice of law in Michigan since June 7, 2022. Please see Notice of Automatic Interim Suspension issued Sept. 6, 2022.

REPRIMAND (BY CONSENT)

John J. Puzzuoli, P43803, Warren, by the Attorney Discipline Board Tri-County Hearing Panel #103. Reprimand, effective July 5, 2023.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Reprimand pursuant to MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contained the respondent's admission that he was convicted by guilty plea of operating a motor vehicle while impaired, a misdemeanor, in violation of MCL/PACC 257.6253-A in *People v. John Joseph Puzzuoli,* 86th District Court, Case No. 22-1910-SD-2.

Based on the respondent's conviction, admission, and the parties' stipulation, the panel found that the respondent committed professional misconduct when he engaged

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

in conduct involving 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) and that he 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 $759.48.

REINSTATEMENT (WITH CONDITIONS)

Jason P. Ronning, P64779, Hudsonville, by the Attorney Discipline Board. Reinstated, effective July 18, 2023.

The petitioner's license to practice law in Michigan has been continuously suspended since Dec. 28, 2017. *Grievance Administrator v. Jason P. Ronning,* 17-130-MZ (Ref. 17-27-JC; 17-28-GA) (120-day suspension, effective Dec. 28, 2017). Thereafter, three other separate, unrelated disciplinary matters were filed against the petitioner that ultimately led to the suspension of his license to practice law requiring reinstatement under MCR 9.123(B) and 9.124. *Grievance Administrator v. Jason P. Ronning,* 18-12-GA (180-day suspension, effective June 1, 2018); *Grievance Administrator v. Jason P. Ronning,* 19-26-GA (30-month suspension, effective Aug. 15, 2019); and *Grievance Administrator v. Jason P. Ronning,* 20-29-GA (one-year suspension, effective Oct. 9, 2020).

On May 31, 2022, the petitioner filed a petition for reinstatement pursuant to MCR 9.123 and MCR 9.124 which was assigned to Muskegon County Hearing Panel #2. After a hearing on the petition, the panel concluded that the petitioner satisfactorily established his eligibility for reinstatement and on March 21, 2023, issued an Order of Eligibility for Reinstatement with Conditions that indicated that an order of reinstatement would be issued upon receipt of written verification that the petitioner paid his applicable membership dues to the State Bar of Michigan in accordance with Rules 2 and 3 of the Supreme Court Rules Governing the State Bar and that the respondent had been recertified by the Board of Law Examiners.

On July 17, 2023, the board received from the petitioner written verification that the State Board of Law Examiners determined that he was entitled to recertification as a member of the State Bar of Michigan and that the petitioner paid his applicable membership dues. The board issued an Order of Reinstatement with Conditions reinstating the petitioner to the practice of law in Michigan effective July 18, 2023.

THREE-YEAR SUSPENSION WITH CONDITION (BY CONSENT)

James C. Scarletta, P68858, St. Clair Shores, by the Attorney Discipline Board Tri-County Hearing Panel #7. Suspension, three years, effective March 3, 2022.[1]

The respondent and the grievance administrator filed an Amended Stipulation for Consent Order of Discipline which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The amended stipulation contained the respondent's admission that he was convicted by no contest plea of Home Invasion — 2nd Degree in violation MCL/PACC 750.110A3, a felony, in the matter titled *People of the State of Michigan v. James Christopher Scarletta,* Washtenaw County Circuit Court Case No. 20-000654-FH. In accordance with MCR 9.120(B)(1), the respondent's license to practice law in Michigan was automatically suspended effective Jan. 27, 2022, the date the court accepted the respondent's no contest plea.

Based on the respondent's admissions and the parties' amended 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's license to practice law in Michigan be suspended for three years effective March 3, 2022, as agreed to by the parties and that he be subject to a condition relevant to the established misconduct. Total costs were assessed in the amount of $1,459.90.

1 The respondent has been continuously suspended from the practice of law in Michigan since Jan. 27, 2022. Please see Notice of Automatic Interim Suspension issued March 11, 2022.

REPRIMAND (BY CONSENT)

Eldon J. Vincent, P65432, Marshall, by the Attorney Discipline Board Ingham County Hearing Panel #1. Reprimand, effective June 17, 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. The parties' stipulation contained the respondent's admission that he committed professional misconduct when he purchased stock ownership in a business entity formed by a client, offered to prepare the purchase documents, and did not advise his client in writing that he could obtain outside counsel to review the transaction.

Based on the respondent's admissions and the stipulation of the parties, the panel found that the respondent engaged in a conflict of interest by entering into a business transaction with a client or knowingly acquiring an ownership adverse to a client unless the terms are fair and reasonable to the client, the client is given reasonable opportunity to seek the advice of independent counsel, and the client consents in writing in violation of MRPC 1.8(a)(1); 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 to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); 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. Costs were assessed in the amount of $759.48.

REPRIMAND WITH CONDITIONS (BY CONSENT)

Stephen K. Woods, P54528, Cassopolis, by the Attorney Discipline Board Berrien County Hearing Panel #1. Reprimand, effective June 17, 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 admission that he was convicted by guilty plea on Nov. 16, 2022, of Operating While Intoxicated, 2nd offense, a misdemeanor, in violation of MCL/PACC code 257.6251-A, in *People v. Stephen K.* Woods, 4th Judicial District, 22-0975-FD.

Based on the respondent's conviction, admission, and the parties' stipulation, the panel found that the respondent committed professional misconduct when he 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 with conditions relevant to the established misconduct. Costs were assessed in the amount of $775.24.

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

The Committee on Model Criminal Jury Instructions has adopted the following amended model criminal jury instruction, M Crim JI 4.11a (Evidence of Other Acts of Domestic Violence) to add Sexual Assault and otherwise reform the instruction. This amended instruction is effective July 2023.

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

(1) You have heard evidence that the defendant [*describe the alleged conduct by the defendant*]. [He/she] is not on trial for [that act/those acts].

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

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

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

Use Note

MCL 768.27b permits evidence of other acts of domestic assault or sexual assault. *See People v. Mack*, 493 Mich 1; 825 NW2d 541 (2012), citing *People v. Watkins*, 491 Mich 450; 818 NW2d 296 (2012). "Domestic violence" for purposes of this instruction is defined in MCL 768.27b(6)(a) and (b). "Sexual assault crimes" are those offenses under the Sex Offenders Registration Act found at MCL 28.722(r), (t), and (v).

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instruction, M Crim JI 7.26 (Parental Kidnapping — Defense of Protecting Child; Burden of Proof). The instruction is based on MCL 750.350a and is effective July 2023.

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

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

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

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

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

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

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

7) You should consider these elements separately. If you find that the defendant has proved all three of these elements by a preponderance of the evidence, you must find [him/her] not guilty of parental kidnapping. If the defendant has failed to prove any of these elements, the defense fails.

Use Note

Parental discipline is a defense to child abuse under MCL 750.136b, but it is not addressed in MCL 750.350a. The committee takes no position on its application to this instruction.

1. The terms "physical harm", "mental harm", "abuse", and "neglect" are not defined in MCL 750.350a. The Committee on Model Criminal Jury Instructions does not recommend importing defini-

tions from other statutory provisions if the jury questions the meaning of the terms but suggests the use of dictionary meanings.

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instruction, M Crim JI 13.19b (Prohibited Use of Emergency 9-1-1 Service), to address a crime found in MCL 484.1605. The instruction is effective July 2023.

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

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

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

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

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

Use Note

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

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instruction, M Crim JI 33.2 (Animal Cruelty or Abandonment), to address a crime found in MCL 750.50. The instruction is effective July 2023.

[NEW] M Crim JI 33.2
Animal Cruelty or Abandonment

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

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

(3) Second, that the defendant

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

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

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

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

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

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

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

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

(4) Third,[8]

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

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

(b) the offense involved four to nine animals.

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

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

Use Notes

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

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

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

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

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

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

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

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

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instructions, M Crim JI 33.4 (First-Degree Killing or Torturing an Animal), M Crim JI 33.4a (Second-Degree Killing or Torturing an Animal), M Crim JI 33.4b (Third-Degree Killing or Torturing an Animal) and M Crim JI 33.4c (Just Cause Defense to Killing or Torturing an Animal) for the crimes found at MCL 750.50b(2). The instructions are effective July 2023.

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

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

(2) First, that the defendant intentionally

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

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

[or]

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

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

A "companion animal" is a vertebrate commonly considered to be a pet or considered by [*identify complainant*] to be a pet.[1]

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

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

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

[or]

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

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

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

Use Notes

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

2. This is a specific intent crime.

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

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

(2) First, that the defendant

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

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

[or]

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

[or]

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

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

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

[or]

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

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

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

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

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

A "companion animal" is a vertebrate commonly considered to be a pet or considered by [*identify complainant*] to be a pet.[3]

Use Notes

1. This is a specific intent crime.

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

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

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

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

(2) That the defendant

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

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

[or]

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

[or]

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

[or]

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS (CONTINUED)

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

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

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

[or]

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

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

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

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

Use Notes

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

2. This is a specific intent crime.

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

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

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

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

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

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

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

Use Note

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

PUBLIC POLICY REPORT

AT THE CAPITOL

HB 4563 (Hoadley) **Property tax: tax tribunal; Civil rights: open meetings; Communications: technology;** Property tax: tax tribunal; electronic hearings of the tax tribunal; provide for. Amends sec. 3a of 1976 PA 267 (MCL 15.263a).

POSITION: Support.

HB 4564 (Outman) **Property tax: tax tribunal; Property tax: assessments; Communications: technology;** Property tax: tax tribunal; methods for tax tribunal to hold hearings; expand to include electronically. Amends secs. 26 & 34 of 1973 PA 186 (MCL 205.726 & 205.734).

POSITION: Support.

HB 4657 (Pohutsky) **Courts: state court administration; Criminal procedure: pretrial procedure;** Courts: state court administration; state pretrial services division; create. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding secs. 11 & 11a to ch. V.

POSITION: Support with additional comments recommending that the legislation include a definition of qualitative and quantitative evidence-based practices to ensure that such practices reflect the communities served; that specific consideration should be given to tribal sovereignty; and that data on violations of pretrial release orders be included in the data collection.

HB 4850 (Glanville) **Courts: juries; Military affairs: other;** Courts: juries; exemption from jury service for certain military personnel; allow. Amends sec. 1307a of 1961 PA 236 (MCL 600.1307a).

POSITION: Support.

IN THE HALL OF JUSTICE

Proposed Amendment of Rule 2.311 of the Michigan Court Rules (ADM File No. 2022-14) – Physical and Mental Examination of Persons (See *Michigan Bar Journal* June 2023, p 59).

STATUS: Comment period expired Aug. 1, 2023; Public hearing to be scheduled.

POSITION: Support.

Proposed Amendments of Rules 2.511 and 6.412 of the Michigan Court Rules (ADM File No. 2022-11) – Impaneling the Jury; Selection of the Jury (See *Michigan Bar Journal* June 2023, p 58).

STATUS: Comment period expires Aug. 1, 2023; Public hearing to be scheduled.

POSITION: Support with an amendment removing the proposed Rule 2.511(C)(2) and Rule 6.412(C)(2)(b).

Proposed Amendment of Rule 3.613 of the Michigan Court Rules (ADM File No. 2023-05) – Change of Name (See *Michigan Bar Journal* _____ 2023, p ____).

STATUS: Comment period expired Sept. 1; Public hearing to be scheduled.

POSITION: Support.

Proposed Amendment of Rule 6.425 of the Michigan Court Rules (ADM File No. 2022-26) – Sentencing; Appointment of Appellate Counsel (See *Michigan Bar Journal* June 2023, p 59).

STATUS: Comment period expired Aug. 1, 2023; Public hearing to be scheduled.

POSITION: Support.

Amendment of Rule 7.202 of the Michigan Court Rules (ADM File No. 2023-08) – Definitions (See *Michigan Bar Journal* June 2023, p 60).

STATUS: Comment Period Expires Aug. 1, 2023; Public hearing to be scheduled.

POSITION: Support.

FROM THE MICHIGAN SUPREME COURT

ADM File No. 2022-34
Proposed Amendments of Rules 3.993 and 6.428 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering amendments of Rules 3.993 and 6.428 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 3.993 Appeals

(A)-(E) [Unchanged.]

(C) If a party was denied the right to appellate review or the appointment of appellate counsel due to errors by the party's prior attorney or the court, or other factors outside the party's control, the trial court must issue an order restarting the time in which to file an appeal or request counsel, except that the court must not issue any order which would extend the time for appealing an order terminating parental rights beyond 63 days from entry of the order terminating rights. A party filing an appeal after receiving an order issued under this subrule should provide the Court of Appeals with a copy of the order when filing the appeal.

Rule 6.428 Restoration of Appellate Rights

If the defendant, whether convicted by plea or at trial, was denied the right to appellate review or the appointment of appellate counsel due to errors by the defendant's prior attorney or the court, or other factors outside the defendant's control, the trial court shall issue an order restarting the time in which to file an appeal or request counsel. A party filing an appeal after receiving an order issued under this subrule should provide the Court of Appeals with a copy of the order when filing the appeal.

Staff Comment (ADM File No. 2022-34): The proposed amendment of MCR 3.993 would provide for the restoration of appellate rights in juvenile cases, similarly to that of criminal cases under MCR 6.428, and the proposed amendments would further ask parties to provide the Court of Appeals with a copy of the order when filing the appeal.

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 Oct. 1, 2023, by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2022-34. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2022-34
Amendments of Rules 3.913, 3.943, 3.977, and 3.993 and Addition of Rule 3.937 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 3.913, 3.943, 3.977, and 3.993 and addition of Rule 3.937 of the Michigan Court Rules are adopted, effective Sept. 1, 2023.

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

Rule 3.913 Referees

(A)-(B) [Unchanged.]

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

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

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

[NEW] Rule 3.937 Advice of Appellate Rights

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

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

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

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

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

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

Rule 3.943 Dispositional Hearing

(A)-(E) [Unchanged.]

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

Rule 3.977 Termination of Parental Rights

(A)-(I) [Unchanged.]

(J) Respondent's Rights Following Termination.

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

(a)-(b) [Unchanged.]

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

(d)-(e) [Unchanged.]

(2) [Unchanged.]

(K) [Unchanged.]

Rule 3.993 Appeals

(A)-(C) [Unchanged.]

(E) Request and Appointment of Counsel.

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

(2)-(3) [Unchanged.]

(F) [Unchanged.]

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

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

ADM File No. 2023-01 Appointment of Chief Judge of the 59th District Court

On order of the Court, effective immediately, Hon. Nicholas Christensen is appointed as chief judge of the 59th District Court for the remainder of a term ending Dec. 31, 2023.

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LAWYERS & JUDGES ASSISTANCE
MEETING DIRECTORY

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

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

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.

ALCOHOLICS ANONYMOUS & OTHER SUPPORT GROUPS

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

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

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

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

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

Lansing
SUNDAY 7 PM*
Virtual 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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