MICHIGAN
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NOVEMBER 2023

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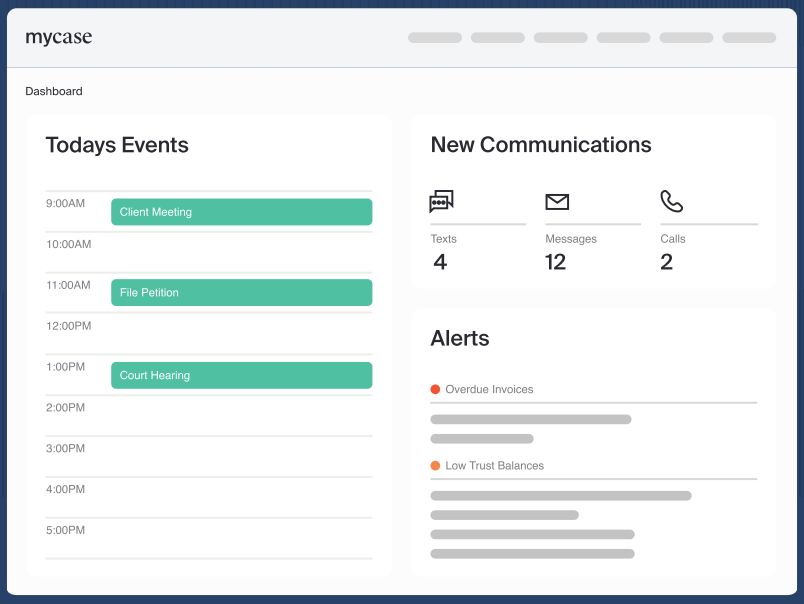

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OF INTEREST

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COLUMNS

NOTICES

CORRECTION

A photograph in the October 2023 Michigan Bar Journal misidentified former ICLE Legal Editor Kay Holsinger (center).

The Michigan Bar Journal regrets the error.

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RECENTLY RELEASED

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**:

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September 2024

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IN BRIEF

ANIMAL LAW SECTION

The Animal Law Section continues to focus on improving the legal protection of animals through advocacy, education, and legislation relating to animal cruelty and wildlife protection laws. Members of this section advocate for animal rights and welfare while working to ensure animals are treated ethically and legally. Congratulations to new section chairperson Erin Klug and chair-elect Rebecca Wrock, and a heartfelt thank you to Kate Brindle for two great years as chair.

ADR SECTION

We welcome 2023-24 section chair Jennifer Grieco. The ADR Annual Conference was held virtually on Sept. 29-30, and our annual ADR Awards Banquet was held on Oct. 24 at St. John's Resort in Plymouth. Award winners, annual conference presentations and materials, future events, past event materials, and the latest Michigan Dispute Resolution Journal can be found at connect.michbar.org/adr/home.

CANNABIS LAW SECTION

The Cannabis Law Section held its eighth annual conference from Sept. 28-30 at the Grand Hotel on Mackinac Island. Considered by many to be our best conference yet, the content and presenters were terrific, and the location and weather proved spectacular. The 78 attendees raved about the events, which were both educational and social. Barton Morris was elected section chair and Michelle Donovan was promoted to vice-chair. The full section council list is coming soon to SBM Connect.

ENVIRONMENTAL LAW SECTION

We welcome 2023-24 section chair Todd Schebor. Our annual meeting and program was held in Lansing on Oct. 4. The joint conference co-sponsored with the East and West Michigan chapters of the Air and Waste Management Association was held on Thursday, Nov. 2, at the Lansing Community College West Campus. Detailed event information and past event materials are available at connect.michbar.org/envlaw.

FAMILY LAW SECTION

The Family Law Section will next meet on Thursday, Dec. 14 at 5 p.m. at the Crowne Plaza Lansing West. All sections members are welcome to join us for dinner and discussion about current family law topics including legislation, court rules, and other matters which directly impact our practices.

LABOR AND EMPLOYMENT LAW SECTON

Labor and Employment Law Section networking events this year included "Golf with a Pro" at Wabeek Country Club in Bloomfield Township, where we sharpened our golf skills in a low-pressure environment. We have an exciting upcoming event at LaFontsee Art Galleries in Grand Rapids. Our virtual seminars covered legal issues such as Title IX and immigration law basics. Our upcoming annual mid-winter meeting at the Detroit Athletic Club in January is always a great opportunity to network and learn.

LGBTQ+ LAW SECTION

The LGBTQ+ Law Section will hold a virtual conference about ELCRA – 2023 Updates and Challenges on Friday, Nov. 17, from noon–1:30 pm. See the LGBTQ+ Law Section page on the SBM website for additional details and the Zoom link.

LITIGATION SECTION

The Litigation Section is pleased to announce its officers for 2023-24: Joel Bryant (chair), Anthony Kochis (chair-elect), Andrew Stevens (secretary), and Chris Chesney (treasurer). The section is also pleased to announce the election of at-large members Richard Szymanski, Ashley W. Wahl, and Christopher J. Zdarsky. The officers and council are looking forward to an excellent year.

PARALEGAL AND LEGAL ASSISTANT SECTION

The Paralegal and Legal Assistant Section met at Weber's Hotel and Restaurant in Ann Arbor on Sept. 30 for its annual meeting. Joseph McGill, State Bar of Michigan president-elect, addressed changes in the legal profession. The section council and committee met on Oct. 21 in Okemos to plan exciting events for members.

TAXATION SECTION

The Taxation Section elected new leaders at its annual meeting. Officers for the upcoming year are Brian Gallagher (chair), Rebecca Pugliesi (vice-chair), Ryan Peruski (treasurer), and Erick Hosner (secretary). The section also thanked outgoing chair Michael Monaghan for his exemplary leadership. The section council is already hard at work developing programming for the upcoming year including the Michigan Tax Conference, which will be held on May 23.

YOUNG LAWYERS SECTION

In October, the Young Lawyers Section hosted the National Trial Advocacy Competition in Detroit, welcoming 16 law schools from across the nation. It was a resounding success and a testament to our dedicated volunteers and judges. Gratitude to all involved. September saw the YLS transition to new leadership: Tanya Cripps-Serra (chair), Silvia Mansoor (chair-elect), Jake Eccleston (secretary), and Darnell Barton (treasurer). As we move forward, the section remains committed to excellence and professional growth.

NEWS & MOVES

ARRIVALS AND PROMOTIONS

MICHAEL J. BOVILL has joined the Grand Rapids office of Warner Norcross & Judd.

NADINE HESSI has joined the Bloomfield Hills office of Plunkett Cooney.

CHRISTOPHER D. MORRIS has joined Lewis Reed & Allen in Kalamazoo as a shareholder.

JOSEPH MORRISON JR. has joined Barnes & Thornburg as a partner in its Ann Arbor office.

ABRIL VALDES SIEWERT joined the State of Michigan Unemployment Insurance Appeals Commission as an administrative law examiner.

MICHAEL J. YASSAY has joined the Portage office of Kreis Enderle.

AWARDS AND HONORS

MICHAEL P. COONEY with Dykema in Detroit has become a fellow with the American College of Trial Lawyers.

JUSTIN A. GRIMSKE, executive partner with Secrest Wardle in Troy, was recognized among the 2023 Go-To Lawyers for negligence law by Michigan Lawyers Weekly.

MICHAEL D. WEAVER, a partner with Plunkett Cooney in Bloomfield Hills, was recognized among the 2023 Go-To Lawyers for negligence law by Michigan Lawyers Weekly.

NEW OFFICE

Michael Sherman has established **SHERMAN IMMIGRATION** in Royal Oak.

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

IN MEMORIAM

JOHN P. BARIL, P10432, of East Lansing, died Sept. 23, 2023. He was born in 1944, graduated from Wayne State University Law School, and was admitted to the Bar in 1968.

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

KARL ERIC HANNUM, P37652, of Troy, died Aug. 20, 2023. He was born in 1959, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1985.

HON. ROBERT HOLMES BELL, P10654, of East Grand Rapids, died June 8, 2023. He was born in 1944, graduated from Wayne State University Law School, and was admitted to the Bar in 1970.

JAMES S. MINER II, P17811, of Essexville, died Oct. 9, 2023. He was born in 1943, graduated from University of Michigan Law School, and was admitted to the Bar in 1967.

RAY A. PAIGE, P41848, of Detroit, died Aug. 17, 2023. He was born in 1956, graduated from Detroit College of Law, and was admitted to the Bar in 1988.

GLEN RUSSELL PETERSON, P85426, of Marenisco, died June 30, 2023. He was born in 1950 and was admitted to the Bar in 2021.

HARRIET B. ROTTER, P25319, of Franklin, died Dec. 23, 2022. She was born in 1939, graduated from University of Detroit School of Law, and was admitted to the Bar in 1975.

THOMAS G. SMITH, P20712, of Alpena, died July 22, 2023. He was born in 1932, graduated from Detroit College of Law, and was admitted to the Bar in 1962.

HON. EDWARD SOSNICK, P20796, of Bloomfield Hills, died Sept. 22, 2023. He was born in 1940, graduated from Wayne State University Law School, and was admitted to the Bar in 1968.

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

FROM THE PRESIDENT

DANIEL D. QUICK

To protect and serve

Our role as officers of the court is known to all of us. It coalesces our obligation to ethics and professionalism as much as to zealous advocacy. It is the font of our duty to serve our justice system be it through education, pro bono representation, or bar leadership. While some do not heed the call to service, many do in ways small and large. This unique role is what distinguishes us from so many other vocations. History gleams with the selfless acts of lawyers like Percy Langster, who was honored with the most recent Michigan Legal Milestone.

Lawyers are not the only ones called to service. Our churches, synagogues, and temples all implore their parishioners to reach beyond their own lives, their own self-interest, to contribute to our society, to our world. Our fraternal organizations, nonprofits, charities, community centers, and so many other institutions are in perpetual need of volunteers, talent, and money to further their missions, serving those who suffer in this world, serving ideals often neglected by our personal, economic, and work lives.

Those institutions exist under one umbrella: our democratic society. Without the freedom afforded to us by our Constitution and protected by our courts, none of this would exist. Other countries have riches. Not many have free speech, free press, vibrant dissent (on almost any topic), and protections for those without a voice. The structure and execution are hardly perfect; that's precisely why so many are called to a purpose. But without the superstructure mooring our government and society, the roof that perhaps too many of us take for granted will collapse and all that thrives underneath it would be jeopardized.

The passion of our citizenry and their ability to loudly proclaim their views is often wielded without much care. The issue is not whether it is well-intentioned, honestly believed, or what I (or any other Bar official) personally think about it. The Bar hews closely to its mandate to not get involved in partisan politics or policy debates. But firmly in its wheelhouse are issues reasonably related to improving the functioning of the court and the availability of legal services to society.[1] Emblazoned across every corner of our Bar are the words of Roberts P. Hudson, our first president: "No organization of lawyers can long survive which has not for its primary object the protection of the public." Nothing is more essential to protecting the public — and protecting the republic — than protecting the rule of law.

At its core, the rule of law provides that each of us is equal before the law. But it is built upon and closely tied to something deeper — faith in the courts as an institution. As our Supreme Court wrote when it tied the issues together, "The government derives its just powers from the consent of the governed. […] No [person] in this country is above the law."[2]

Faith in our courts is not about whether you won or lost a case. It is about whether at the end of the day, we trust our courts to resolve disputes rather than engage in vigilante justice. It is about whether we have faith placing our life, liberty, and money in the hands

of a judicial system. This trust must, of course, accept that people are fallible; that is why we have the right to a jury and appellate review. This trust must also recognize that sometimes there are bad laws and unjust decisions; even then, we must shore up and not destroy our institutions and work especially hard to bend the moral arc of our universe towards justice. *Brown vs. Board of Education* was decided by the same court that issued the *Dred Scott* decision. Injustice deserves — and indeed requires — rallies, marches, advocacy, and calls for change. What we cannot allow are attacks on the very fiber of our justice system.

Judges across the country are being threatened and attacked based upon their rulings. The U.S. Marshals Service reported an average of 847 threats or inappropriate miscommunications against federal judges per year in 2014-2015, a number that tripled by 2016-2017 and ballooned to approximately 4,400 threats per year between 2017-2021.[3] Here in Michigan, threats have been made against both federal[4] and state court judges.[5] As we approach election season, we might expect another spike of attacks and even outright intimidation.

The comment to ABA Model Rule 8.2 directly advocates that "[t]o maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized." The American Bar Association has responded,[6] as have many state bars. U.S. Supreme Court Chief Justice John Roberts has made a similar call to all lawyers, urging them to engage in civic outreach in order to increase the public's understanding of our government and courts.[7] State courts have launched task forces on countering disinformation, including attacks on judges.[8] Many have written on the threat and ways lawyers can professionally defend the rule of law.[9]

The State Bar of Michigan is committed to doing its part. In 2022, it posted a primer on the rule of law (which I authored) on its website, aimed at the public, the media, and attorneys.[10] We are looking at ways to increase our civics education offerings to students. We will use opportunities to remind Michiganders of the importance of the rule of law and corrosive, unnecessary damage caused by attacking judges personally. Each of you has a role to play as well. As private citizens who happen to be officers of the court, speak up. Write a letter to your local newspaper. Speak to your local community group or school about the rule of law. Instead of rolling your eyes at jury service, remember that it is one of the ways most people participate directly in our judicial system and studies show that citizens' perception of the overall fairness of our system increases once they serve.[11]

The aforementioned SBM online piece on the rule of law includes the observation that, "Democracy can be dismantled by words as well as actions."[12] Conversely, our words can shore up one of our most sacred institutions, affirm our citizenry's faith in the courts, and contribute to making the system better. Indeed, that is a worthy goal.

ENDNOTES

1. Administrative Order No. 2004-01, 470 Mich (2004).
2. *Mohrmann v Fry*, 266 Mich 422, 432, 254 NW 153 (1934).
3. CNN.com, *Judges Targeted Fast Facts*, <https://www.cnn.com/2013/11/04/us/judges-targeted-fast-facts/index.html>, (posted May 10, 2023) (all websites accessed October 16, 2023).
4. Williams, *Lansing man convicted of threatening federal judge, sheriff, court clerk*, Detroit News (July 21, 2023).
5. DeJanay Booth-Singleton, CBS Detroit, *Inmate pleads guilty to threatening Michigan county judge*, <https://www.cbsnews.com/detroit/news/inmate-pleads-guilty-to-threatening-michigan-judge/> (posted October 16, 2023).
6. American Bar Association, *Committee on the American Judicial System*, <https://www.americanbar.org/groups/litigation/initiatives/committee-on-american-judicial-system/>.
7. SupremeCourt.gov, *2019 Year-End Report on the Federal Judiciary*, <https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf>.
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Lawyer Referral Service helps people find attorneys and connects lawyers with clients

BY SCOTT ATKINSON

A lot of people need lawyers, but for many, finding the right one can be simultaneously confusing and overwhelming. Where to start? Where to look? What area of law am I really looking for anyway?

The State Bar of Michigan has been helping people answer those questions since 1971 with the Lawyer Referral Service, a program that helps people get the assistance they need and helps attorneys interested in adding new clients.

The process is simple: People looking for an attorney call (800) 968-0738 and pay $25 for a 25-minute consultation with a participating attorney to whom they are matched based on practice and geographic service area. Based on that consultation, the attorney and individual determine if they would like to continue working together on the case and negotiate the fees for additional service.

The problem: There are far more potential clients than panel attorneys can serve.

In the 2023 fiscal year, more than 2,600 clients who reached out to the Lawyer Referral Service could not be matched with an attorney.

The State Bar of Michigan is now actively recruiting attorneys statewide who are willing to participate in the program, which is a standout among other similar services. In 2022, the American

Bar Association awarded the State Bar of Michigan the Cindy A. Raisch Award in recognition of the services it offered in response to the pandemic.

"The State Bar Lawyer Referral Service is an invaluable tool for Michigan attorneys, particularly those who are still building or expanding their practice and actively seeking new clients," says SBM President Daniel D. Quick. "It's a fantastic way to pair prospective clients with the attorneys they need, and for attorneys to reach the people they're ready to serve."

The Lawyer Referral Service is an especially valuable program for newer attorneys who are still building their client base. While the Lawyer Referral Service is not a pro bono service, some attorneys choose to participate to help support access to justice for all Michigan residents.

Robert H. Roether, a personal injury and legal malpractice attorney in Saline, has been serving as a Lawyer Referral Service panel member for about 15 years.

"It's a great program, particularly for the public," he said. "It's pretty much the only place they can go to and speak to a lawyer and not get a hefty bill."

While not every referral leads to a case, he said, "I've had some over the years that were significant."

Alan D. Speck, a private practice attorney in Taylor, said the Lawyer Referral Service is usually a win-win for both client and attorney.

"The State Bar of Michigan Lawyer Referral Service provides a lot of flexibility. It allows me to open my practice to a wider geographic area," he said. "The callers I mostly get are appreciative of the consultation. They have a good expectation for services provided. The cost of each lead compared to the benefits are pretty low risk."

The Lawyer Referral Service is a one-stop shop for Michigan residents in need of an attorney. Call center personnel screen callers and help put them in touch with Legal Aid Services if they are not able to pay for an attorney. (The $25 fee is waived in some urgent housing, Social Security, workers' compensation, and personal injury cases.)

Screening callers also helps ensure prospective clients are matched with attorneys who can assist them, and makes sure potential clients are willing to hire an attorney. Panel members use an online system to track referrals, and they receive an email with the caller's name, the relevant practice area, and a brief summary of their case. The online system also provides information and tools to help attorneys manage their referrals.

Following the consultation, the attorney and the caller can choose to continue to work together on the case and, if they do, determine any additional fees.

While most people looking for help contact the State Bar of Michigan Lawyer Referral Service by telephone, requests also can be submitted online at michbar.org/lrs.

BECOMING A PANEL MEMBER

Becoming a panel member is easy and takes just three simple steps:

1. Sign up at michbar.org/lrs
2. Complete your profile by identifying your practice areas and judicial circuits.
3. Check online or your email for referrals.

Panel members must be active attorneys in good standing, engaged in the practice of law on a full- or part-time basis, and carry professional liability insurance in an amount not less than $100,000 per occurrence and $300,000 aggregate.

The base registration fee for panel members is $150 annually and includes four practice areas and two judicial circuit designations. Additional practice areas and judicial circuits can be purchased for $25 each (or expanded to include all Michigan judicial circuits for $300). In addition to the annual fee, panel attorneys remit 10% of fees over $250 on referred cases to the Lawyer Referral Service.

The Lawyer Referral Service program is actively recruiting attorneys in all practice areas statewide. However, some practice areas are particularly underserved, including family, real property, consumer, probate, and elder law.

Attorneys willing to provide reduced cost legal services to low- to moderate-income families can opt to participate in the Modest Means panel at no additional cost. (Attorneys do not remit any portion of their fees from Modest Means referrals.) Modest Means serves families who are at or below 250% of federal poverty guidelines. It is not a pro bono program. Attorneys also have the option of designating themselves as offering limited-scope services at no additional cost.

For additional information, please visit the State Bar of Michigan Lawyer Referral Service at michbar.org/lrs or contact Panel Coordinator Monique Smith at (517) 346-6323 or msmith@michbar.org.

Scott Atkinson is communications specialist for the State Bar of Michigan.

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Jury trials forbidden in most suits against the federal government: Why it matters

BY NEAL NUSHOLTZ

Except for lawsuits for tax refunds, jury trials are forbidden in lawsuits against the federal government.[1] In *Damsky v. Zavatt*,[2] the government sued in New York to foreclose its tax liens on property transferred from a delinquent taxpayer's wife to her husband and other third parties. The transferees sought a jury trial under the Seventh Amendment of the U.S. Constitution, which provides that where the value in controversy exceeds $20, the right to a jury trial in suits at common law "shall be preserved."

The *Damsky* court, relying on U.S. Supreme Court Justice Joseph Story's conclusion in *Parsons v. Bedford*[3] that the Constitution's framers did not intend to extend the right to a jury to equitable causes of action, held that foreclosures are an equitable remedy, and the transferees were not entitled to a jury trial on the foreclosures and the related issue of the wife's tax liability.[4] At the time of the American Revolution, there had been jury trials for tax debts in the Court of the Exchequer, so the husband was entitled to a jury trial on his separate tax liability.

JURY TRIALS DURING THE AMERICAN REVOLUTION

Prior to the American Revolution, colonial tax cases were bench trials in admiralty courts.[5] In England, however, jury trials in tax cases were held in regular courts. The difference angered the colonists, as is revealed by draft instructions written by John Adams to Boston's representatives in general court published in the New York Journal on June 29, 1769:

> In the 41 Sec. of the statute of the 4th of George III, we find that "all the forfeitures and penalties inflicted by this,

or any other act of Parliament, relating to the trade and revenues of the British colonies or plantations in America … may be prosecuted, sued for and recovered in any Court of Admiralty, in the said colonies."

[This] hardship is more severe as we see in the same page of the statute, and the section immediately preceding, "that all penalties and forfeitures which shall be incurred in Great Britain, shall be prosecuted, sued for, and recovered in any of his Majesty's Courts of Record in Westminster, or in the Court of Exchequer in Scotland" … a contrast which stares us, in the face! A partial distinction that is made between the subject in Great Britain, and the subject in America! The Parliament in one section, guarding the people of the realm, and securing to them, the benefit of a trial by jury and the law of the land, and by the next section depriving Americans of those important rights. Is not this distinction a brand of disgrace upon every American? A degradation below the rank of an Englishman? And, with respect to us, a repeal of the 29th Chapter of Magna Charta? "No freeman shall be taken or imprisoned or disseized of his freehold, or liberties, or outlawed or exiled, or any otherwise destroyed, nor will we pass upon him, nor condemn him, but lay lawful judgment of his peers, or the law of the land."

[T]he formidable powers of these courts, and their distressing course of proceedings, have been severely felt within the past year, many of their fellow citizens have been worn out with attendance upon them, in defense against information for extravagant and enormous penalties. And we have the highest reason to fear from past experience that if no relief is obtained for us, the properties and liberties … and the morals too, of this unhappy country, will be ruined, by these courts, and the persons employed to support them.[6]

THE LEGEND OF THE JURY TRIAL

As you'll soon see, jury trials got a foothold in England in the 12th century, supplanting the use of religious ordeals which relied on divine intervention as a mechanism for resolving disputes. It was the final chapter in the centuries of influence of religion as a source of legal authority.

Laws of the Creator

Ancient laws were deemed to have come from one of many gods. At the top of the obelisk of Hammurabi's Code (1810-1710 B.C.E.) is an engraving portraying Hammurabi being handed his laws from the sun god Shamash while seated on a throne. Laws sourced to a god carried the implication that violators would be punished by the god. Below is a table of ancient published laws and the gods to which they were attributed.[7]

Laws	Period (B.C.E.)	God Source
Ur-Nammu's Code (Sumeria)	2100-2050	Nanna
Hammurabi's Code (Babylon)	1810-1710	Shamash
Ten Commandments (Mt. Sinai)	1391-1271	YHWH

Attributing laws to a god effectively avoids the debate over whether a particular government action is proper. In 1873, the U.S. Supreme Court ruled that the Constitution did not prevent the State of Illinois from barring a married woman from practicing law.[8] Justice Joseph P. Bradley argued in his concurring opinion that "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things and cannot be based upon exceptional cases."[9] Years later, as an advocate before the Supreme Court, Ruth Bader Ginsburg argued in *Frontiero v. Richardson*[10] against a military rule that a husband could not qualify as a dependent of his wife, an Air Force officer. In Ginsburg's brief, she referenced the *Bradwell* statement about the law of the Creator, stating that "[t]he method of communication between the creator and the jurist is never disclosed."[11]

Draco's Jury Trials in Greece

Jury trials were first developed in Greece in 623 B.C.E. by Draco, an Athenian legislator. He used jury trials to stop the blood feuds between families who reciprocated by killing each other off one by one. He created a court system of jury trials for the categories of intentional killings, unintentional killings, justified killings, killings of slaves, and killings of foreigners.[12] Juries consisted of 51 men — 12 from each of Greece's four main tribes and three of the nine archon magistrates.[13] Conviction for intentional killing could lead to death or eternal exile and confiscation of property.[14]

Rome Went to Greece for its Laws

In the fifth century B.C.E., Rome sent 10 envoys – the Decemviri – to Athens to study its laws.[15] In 449 B.C.E, the Decemviri drew up and published in Rome a list of laws from Greece known as the Twelve Tables.[16] More than 300 years later, rules under the Lex Acilia Repetundarum were developed for trying certain crimes. The rules included securing a relatively small body of jurors to determine the guilt or innocence of a person charged with crimes of misconduct while holding provincial public office. Many provisions in the Lex Acilia Repetundarum were taken from Greek law, including having judges preside over the proceedings.[17]

Jury of Peers

The right to a jury of peers in the 1215 Magna Carta originally appeared in a 1037 edict of German Emperor Conrad II in the Consitutio de feudis[18] in an attempt to quell a war between Aribert, the archbishop of Milan, and the landed class called the vavasours.

Fighting had begun in 1035 when the land of one of the vavasours was confiscated.[19] Conrad arrived in 1037 and held a town meeting where the vavasours complained of many legal proceedings in which Aribert had offended them. Conrad ordered Aribert under house arrest, but one of his servants pretended to be Aribert asleep in his bed under the covers while Aribert fled on horseback.[20]

The Study of Law

In 530 B.C.E., Roman Emperor Justinian ordered creation of the Pandects, a digest of writings from jurists clearly setting forth statements of Roman law.[21] Seventeen jurists were selected to cull the most valuable passages from caselaw without repetition, inconsistencies, contradictions, or statements that were obsolete.[22]

Justinian aim was to remedy the diffusion, indefiniteness, and uncertainty created by judges who were interpreting the laws as they saw fit.[23] Justinian gave the Pandects the force of law and, to prevent the same diffusion and uncertainty from reoccurring, forbade everyone from writing commentaries about what had been set forth in the Pandects.[24] He also ordered the creation of a multivolume set of institutes for "youth desirous of studying the law."[25]

The Pandects' influence waned over time; once thought lost forever, they were accidentally rediscovered in Pisa in 1070 and provided the basis for the first law school at the University of Bologna in 1088.[26] Graduates appear to have traveled to England, bringing with them principles of Roman law, including using juries to resolve disputes.

Jury Trials in Medieval England

Around 1100, the feudal trial system in England consisted of rituals based on the intervention of God to resolve disputes. Trials started with parties at a community meeting where someone was accused of wrongdoing. After preliminary statements, the judge would decide not who was right but the ordeal that would be used to resolve the dispute and, where appropriate, who would carry the burden.[27]

Three options were available to resolve disputes:

- Compurgation, which consisted of a specified number of sworn statements in a specific form regarding the accusation and, later, the character of the party making the claim or denial, all subject to God's approval or punishment;
- Physical ordeal, a physical trial for serious crimes where a witness was put to his innocence by some miracle of God, like floating in a pool of water while tied up; and
- Battle, where God gave might to the right. Originally used for all disputes, it was later limited to serious crimes.[28]

English Kings and the Catholic Church

In 1100, England's government consisted of the king's council, from which the king issued laws. Initially, the council consisted of the king and his barons, subtenants who provided military support in the event of war. Henry I added legal scholars called curiales to his governing council.[29]

In 1164, the Constitutions of Clarendon provided for 12 men from the countryside to resolve disputes over property rights. In 1166, Henry II instructed judges to take jurisdiction over certain serious crimes by sworn inquest (the grand jury). He also offered sworn inquest as an alternative to battle (the trial jury).[30]

In 1107, Henry I and Pope Paschal II signed the Concordat of London.[31] The Concordat contained three provisions: bishops selected by a pope had to be approved by the crown and swear fealty to the king;[32] tax revenues of the bishoprics would be paid to the church; and revenues would not be paid to the church until a bishop was approved by the king.[33] In 1166, Henry II created the writ of utrum, which transferred jurisdiction over title to church land away from ecclesiastical courts to the king's secular courts.

In 1179, Henry II appointed 21 itinerant judges to run royal juries in four circuits throughout the country.[34] They handled jury trials requested by the writs de odia atia, a claim that an accusation made against a person was unwarranted and the result of malice. Trial by ordeal could be avoided by filing the writ and paying a fee to the king. A jury of recognitors would be empaneled to render a verdict on whether the accusation was justified. The process amounted to a jury trial on the underlying cause of action.[35]

By 1215, the year the Magna Carta was introduced, trial juries existed in most civil matters; some years later, the grand jury and trial jury system existed in all criminal cases under English common law.[36]

CONCLUSION

Preclusion of jury trials in tax cases at the time of the American Revolution — and today — indicates a concern about their results. In a statute of limitations case, the Supreme Court explained that the government can choose to protect its revenues by limiting access to the courts.

Government has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues. If there existed in the courts, state or national, any general power of impeding or controlling the collection of taxes or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary.[37]

The Supreme Court's statement implies that, on balance, collection of revenue is more important than court review of government action in the collection of revenue. Long term, that balance should be the other way around.

Neal Nusholtz, a shareholder at Kemp Klein in Troy, specializes in tax controversies including estate and income tax audits, IRS administrative appeals, and tax litigation in federal district courts, the U.S. Tax Court, and the 6th Circuit Court of Appeals. He is a graduate of Oberlin College and Thomas M. Cooley Law School. He is a contributor to the Journal of the American Revolution website.

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Tax considerations when selling a privately owned C corporation

BY EMILY MURPHY, REBECCA PUGLIESI, JOSH BEMIS, AND BELLA ROCCO

The dynamics of entity choice for privately held businesses have changed dramatically in the past several years. The maximum federal tax rate on C corporations permanently decreased from 35 percent to 21 percent in 2018, and general complexity with flow-through entities continues to increase.[1] Because of these changes, more privately held businesses are choosing C corporation structures, including those backed by private equity. As those companies pursue exit strategies, now is the time to revisit specific tax-planning strategies for selling C corporations.

EXCLUDING GAIN THROUGH SECTION 1202

The qualified small business stock exclusion under Section 1202 allows certain owners to permanently exclude gain on the sale or liquidation of C corporation stock from taxable income.[2] This benefit is significant because for qualified stock acquired after September 2010, a shareholder can exclude 100% of the gain up to the greater of $10 million or 10 times the shareholder's adjusted stock basis.[3] Additionally, gain on the sale of stock acquired between August 1993 and September 2010 is eligible for 50% or 75% gain exclusion depending on when the stock was acquired.[4]

Both the shareholder and the corporation must meet a number of requirements to take advantage of this tax benefit.[5] The main qualifications:

- The stock must be held by an individual, trust, or estate either directly or indirectly through a pass-through entity.[6]

- The stock must be held by the shareholder for at least five years.[7] Ownership of stock options and instruments convertible into stock do not begin the holding period until exercised.
- The stock must be acquired via original issuance (direct investment) in a C corporation (i.e., the stock cannot be purchased from another shareholder).[8]
- The corporation must be a domestic C corporation.[9]
- The corporation's gross assets must be less than $50 million at the time of investment and at all times prior to the investment. The valuation of the assets is typically based on tax basis, not fair market value or even book value.[10] As a result, many companies with very high values can still meet this requirement.
- The corporation must use at least 80% of the fair value of its assets in a qualified trade or business. A qualified trade or business includes all businesses except for professional services; banking and financing; farming; oil, gas, and mining; hospitality; real estate; and other passive businesses. There are additional limitations on the amount of working capital, investment assets, or investment real estate.[11]

With such significant potential tax benefits, taxpayers should not forget to consider Section 1202 when starting a new business, making new investments, restructuring, or selling a C corporation.

RECOGNIZING GAIN OUTSIDE THE CORPORATION: PERSONAL GOODWILL ALLOCATIONS

In the right fact pattern, selling personal goodwill in conjunction with selling the related business is a common strategy to avoid double taxation. Typically, a C corporation asset transaction is very costly from a federal tax perspective because of the two layers of tax. First, the gain is taxed at the corporate level at the federal corporate rate of 21%. Then, the net cash proceeds are distributed to the shareholders who are taxed at the dividend rate plus the net investment income tax in many cases (collectively 23.8%). Add in state and local taxes and the effective tax rate can exceed 50%!

If a portion of the sale price is determined to be attributable to personal goodwill, the seller can avoid a layer of tax. Personal goodwill is not a corporate asset because it is held personally by the shareholder; therefore, those proceeds are taxed only at the shareholder level. Further, such proceeds generally are not subject to net investment income tax.[12] A buyer is tax indifferent because they receive a stepped-up basis in the asset and are able to amortize the basis over 15 years regardless of whether the goodwill is purchased from the corporation or the shareholder.

This can be a win-win solution, but there are some common pitfalls. First, the parties must have proof that personal goodwill exists separate from corporate goodwill and is owned by the shareholder, not the corporation. Shareholders may fall into a trap if they have entered into an employment agreement or covenant not to compete with the corporation; courts view these agreements as a transfer of personal goodwill to the corporation.[13] Additionally, in order to complete the sale of personal goodwill, courts generally require shareholders to enter into an employment agreement or covenant not to compete.[14]

The value of personal goodwill may be based on factors including the personal characteristics of the business owner such as their reputation and relationships. Since that value may be difficult to separate from the sale of the business assets and corporate goodwill, engaging a third-party appraiser to determine the fair value of personal goodwill may be crucial.[15] That value should be agreed upon between buyer and seller and included in a written purchase agreement.

Finally, sellers should consider how personal goodwill impacts the economics of the deal when the target corporation has multiple shareholders. Since personal goodwill value is determined by personal attributes, it is likely that each owner will not receive the same consideration for their respective personal goodwill. In fact, shareholders who were more passive in nature or newer to the corporation may not have any personal goodwill at all. In this situation, selling personal goodwill as a separate asset effectively shifts the proceeds of the sale to one owner at the expense of the others.

MITIGATING THE IMPACT: PRESALE S ELECTION

If selling a C corporation seems to have more drawbacks than benefits, the owners might consider not selling a C corporation at all. If the shareholders and corporations otherwise qualify, the corporation could elect to be taxed as an S corporation.[16] The benefits of an S corporation election particularly stand out when considering an appropriate exit strategy, especially in a sale of assets.

Making an S election is a non-taxable event, but the change does create a built-in gains period of five years.[17] During that period, if the corporation recognizes gains on assets held at the time of election, it pays corporate tax on the built-in gain at the time of conversion. Therefore, an S election is often seen as a planning opportunity for business owners looking to sell several years into the future when the built-in gains tax is further limited or no longer applicable.

Despite the built-in gains period, there are still benefits to making a last-minute S election that may outweigh the drawbacks.

- In a C corporation, all shareholders pay the 3.8% net investment income tax on dividends and the gain on

sale of stock.[18] However, this tax is not imposed on S corporation shareholders that materially participate in the corporation.[19] Notably, active shareholders can avoid this tax whether engaging in a stock or asset sale.

- Many states, including Michigan, do not have a built-in gains tax. Therefore, while built-in gains in an asset sale will be taxed at corporate rates for federal purposes, the sellers may avoid state-level double taxation.
- In a C corporation sale, individuals would generally pay state income taxes on their gains. Because the federal deduction of state and local taxes is limited to $10,000,[20] these additional state taxes on exit often provide no federal deduction. However, in Michigan[21] and many other states, an S corporation may make an election to pay flow-through taxes at the entity level. The state taxes reduce ordinary flow-through income, generating a federal tax deduction at the entity level.

Corporations considering an S election strategy should weigh the benefits against additional costs, particularly gain on sale expected to be subject to ordinary individual tax rates. Strict timing requirements are also a pitfall to this opportunity. In order to elect S corporation status, IRS Form 2553 must be filed no later than two months and 15 days after the beginning of the tax year in which the election is to take effect (i.e., March 15 for calendar year taxpayers).[22] This leaves most corporations with a very short window to make and execute a decision if there is the possibility of a sale within the year. If this window is missed, business owners wanting to make the election prior to a sale may have to delay closing until the following year.

DON'T FORGET!

While a complete list of tax compliance nuances from selling a business is more than can be summarized in a few pages, there are other unique considerations for selling a C corporation that are worth mentioning. The following honorable mentions, although not necessarily favorable, should not be forgotten. Generally, the sooner these items can be identified, the more likely the proper steps can be taken to protect tax deductions or ultimate economic benefit.

Tax Attributes and Section 382

Buyers of C corporation stock inherit the acquired corporation's tax attributes such as net operating losses and credit carryforwards. Sellers can benefit from understanding the value of the tax attributes that the C corporation holds, allowing them to negotiate additional consideration for the value provided. However, buyers should be aware of Section 382, which can either delay the timing or eliminate the potential benefit from corporate tax attributes.

When there is an ownership change in a C corporation of 50% or more within a three-year window, Section 382 and its sister statute, Section 383, provide annual limitations on the amount of tax attributes a corporation can use.[23] Limitations apply to net operating losses (NOLs), built-in losses, credits, and, since enactment of the Tax Cuts and Jobs Act Section 163(j), interest carryforwards.[24]

The annual limit on use of tax attributes is determined by multiplying the value of the C corporation by the long-term tax-exempt rate the month of the ownership change.[25] Therefore, if a C corporation had a value of $1 million when an ownership change occurred in July 2023, the annual limitation would be $30,100 ($1,000,000 x 3.01%). Additionally, if the selling C corporation has a net unrealized built-in gain in its assets at the time of ownership change (i.e., the fair market value of the assets is greater than the tax basis of the assets), Section 382 annual limitation is increased for any built-in gains realized in the five years following the change.[26] Conversely, if the C corporation has a net unrealized built-in loss in its assets, recognized losses are subject to Section 382.

Taxpayers with net unrealized built-in gains can often realize a significant benefit under Notice 2003-65 to release tax attributes from limitations on an accelerated basis, creating more value in NOLs and other attributes. Currently, however, there is a cloud over the future utilization of corporate tax attributes. In 2019, the IRS issued proposed regulations on calculating built-in gains and losses for purposes of Section 382.[27] The proposals require a methodology highly unfavorable to C corporations in a net unrealized built-in gain situation and would result in much more restrictive annual Section 382 limitations. While the proposed regulations have not been finalized, the IRS has indicated that the rules could be officially adopted at some point in the future.

Parachute Payments and Section 280G

It's common for a C corporation sale to trigger significant compensatory payments for key employees. Section 280G was enacted to penalize excessive payouts to executives by imposing a 20% excise tax to recipients of excess parachute payments. This tax is imposed in addition to ordinary taxes owed on an executive's compensation. Further, the C corporation cannot deduct any payouts classified as excessive.[28] Section 280G applies generally to all corporations — including C corporations and controlled foreign corporations — whether held by a flow-through entity or not. However, S corporations and even C corporations that would otherwise be eligible to make an S election are exempted from these rules.[29]

A parachute payment is any payment to a "disqualified individual" contingent on a change in ownership or control of the corporation or a substantial portion of its assets with an aggregate value that equals or exceeds three times the individual's average wages over

the last five years.[30] The 20% excise tax is only applied to the portion of the payment that exceeds the average payment threshold. Disqualified individuals generally include employees or independent contractors who are officers, shareholders, or highly compensated individuals of the corporation during the 12-month period preceding closing of the transaction.[31]

The excise tax imposed by Section 280G can be avoided by planning. First, the company may have a "cleansing vote" in which 75% of disinterested shareholders waive the right to payments and allow the disqualified individual to receive parachute payments excise tax-free.[32] However, before a vote can occur, the corporation needs to determine excess parachute amounts. Such calculations must be provided to shareholders so they can make an informed decision during the cleansing vote. Alternatively, the payment could be classified as reasonable compensation[33] by attaching it to a covenant not to compete. Under this approach, however, the payment will likely require an independent valuation to establish the value within the total amount paid that can be classified as reasonable compensation.

LOOKING AHEAD

In the new environment where the corporate tax rate on operations is significantly lower than flow-through entities, it is likely that privately held companies will continue to look to C corporation structures. Tried and true planning opportunities specific to C corporations can help sellers maximize after-tax return on investment.

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4. § 1202(a).
5. § 1202(c)-(j).
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7. *Id.*
8. § 1202(c)(1).
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10. § 1202(d)(1)(A).
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12. §§ 1411(c)(1)(A)(iii); 469(c)(1).
13. See e.g. *Martin Ice Cream Co. v Comm'r*, 110 T.C. 189 (1998); *Muskat v US*, 554 F3d 183 (CA 1 2009), and *H & M, Inc.*, T.C. Memo. 2012-290.
14. See e.g. *Norwalk v Comm'r*, T.C. Memo. 1998-279.
15. See Kennedy, T.C. Memo. 2010-206.
16. See generally §§ 1361; 1362.
17. § 1374(d)(7)(A).
18. § 1411(a)(1).
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20. IRS.gov, *Topic No. 503, Deductible Taxes* <https://www.irs.gov/taxtopics/tc503> (website accessed October 24, 2023).
21. MCL § 206.813.
22. § 1362(b).
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24. *Id.*; Treas. Reg. § 1.163(j)-3(b)(8).
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26. § 382(h).
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28. § 280G(a).
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Potential audits of the employee retention tax credit

BY ERIC W. GREGORY

The Employee Retention Tax Credit (ERTC) is a refundable tax credit of up to $26,000 per employee for businesses affected by the COVID-19 pandemic. It is a powerful tool for business owners, but the ERTC has become abused to the extent that the Internal Revenue Service has warned taxpayers to "think twice before filing a claim for the credits" due to misleading claims by tax promoters in exaggerating eligibility criteria.[1] It describes the practices of many tax promoters promising ERTC refunds as "deeply troubling and a major concern for the IRS."[2] Those tax promoters have created a network — described as a "vast sales army" by the Wall Street Journal — to cold call potential claimants and promote their consulting tax services.[3]

Employers who have already made ERTC claims should review eligibility and substantiation requirements to ensure the claim is valid. Employers still considering claims should know the IRS has placed a moratorium on processing new claims through at least the end of 2023 so it can implement more detailed compliance reviews.[4]

ERTC BASICS

As described in Internal Revenue Code §3134, the ERTC provides a credit for eligible employers who pay qualified wages to some or all employees between March 12, 2020, and Oct. 1, 2021, with "recovery startup businesses" eligible for a credit in the fourth quarter of 2021. The ERTC was first implemented by the federal CARES Act in March 2020 and has been subsequently amended by the Consolidated Appropriations Act of 2021, the American Rescue Plan Act, and the Infrastructure Investment and Jobs Act. The ERTC compensates businesses that kept employees during the COVID-19 pandemic despite being subject to reduced gross receipts or orders forcing it to shutdown.

An employer is eligible for a credit for a calendar quarter if it was carrying on a trade or business in that quarter and satisfies one of three conditions: there was a governmental order suspending the employer's trade or business, a "substantial decline" in the employer's gross receipts, or the employer qualifies as a recovery startup business.[5]

GOVERNMENTAL ORDER TEST

For calendar quarters in 2020 through the third quarter of 2021, employers are eligible for the ERTC due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) because of COVID-19.[6] Governmental orders include:

- An order from a city's mayor stating that all non-essential businesses must close for a certain period;
- A state emergency proclamation directing residents to shelter in place for a specific period other than those employed by an essential business who may travel to and work at their workplace;
- A local order imposing a curfew that impacts the operating hours of a trade or business for a specified period; and
- A local health department order mandating workplace closure for cleaning and disinfecting.[7]

Relying on this requires an employer to establish that it is subject to a governmental order in effect, the order must be applicable to the particular employer (it cannot be an order applicable to customers),[8] the order must be issued by a governmental entity with jurisdiction over the employer's operations,[9] and the order must also be mandatory — statements by government officials or mere declarations of emergency do not suffice.[10]

Additionally, the employer seeking the ERTC must demonstrate the applicable order has "more than a nominal impact" on its operations either due to suspending them or requiring modifications to them.[11] A suspension may either be a full suspension of operations or a partial suspension if, under the facts and circumstances, "more than a nominal portion" of the business is suspended by the order.[12]

For purposes of the ERTC, "more than a nominal portion" is determined if either the gross receipts from that portion of the business operations is at least 10% of the total gross receipts (calculated using gross receipts of the same calendar quarter in 2019) or the hours of service performed by employees in that portion of the business is at least 10% of the total number of hours of service performed by all employees in the employer's business (both determined using the number of hours of service performed by employees in the same calendar quarter in 2019).[13]

A business may also qualify for the ERTC if its operations are modified due to a governmental order with "more than a nominal effect."[14] A governmental order that resulted in a reduction of an employer's ability to provide goods or services in the normal course of business of not less than 10% is deemed to have more than a nominal effect on business operations.[15] Examples of these modifications include limiting occupancy to provide for social distancing, requiring services to be performed on an appointment basis (for businesses that previously offered walk-in service), or changing the format of service (for example, restrictions on buffet or self-serve restaurants, but not prepackaged or carry-out.)

The mere fact that employers must make modifications to business operations due to a governmental order does not result in a partial suspension unless the modification has more than a nominal effect on business operations. Whether a modification required by a governmental order has more than a nominal effect is based on facts and circumstances.

The IRS requires businesses to consider these factors in determining if an employer can continue to operate at a level comparable to its operations prior to the governmental order:

- Telework capabilities: The employer must consider whether it has adequate support for operations to continue via work from another location.
- Portability of work: The employer must consider the amount of portable work — work that can be performed from a remote location — within its trade or business operations.
- Need for presence in a physical workspace: The employer must evaluate the role its physical workspace plays in its trade or business. If the critical workspace to trade or business operations that tasks central to the operations cannot be performed remotely, this factor alone indicates that the employer is not able to continue comparable operations. Employers with workspace that is critical include laboratories or manufacturers with special equipment or materials that cannot be accessed or operated remotely.
- Transitioning to telework operations: If an employer can conduct comparable operations via telework but did not previously allow for or allowed for only minimal telework, some adjustment period is expected and, generally, operations are not considered partially suspended during that period. However, if an employer incurs a significant delay (beyond two weeks, for example) in moving operations to a comparable telework setting, the employer's trade or business operations may be deemed subject to partial suspension during that transition.[16]

In almost all cases, an employer that had to close its workplace but continued operations comparable to its operations prior to the closure, including by requiring its employees to telework, generally are not eligible for the ERTC under the governmental order test.[17]

GROSS RECEIPTS TEST

For the tax year 2020, employers are eligible for the ERTC in any quarter in which their gross receipts were less than 50% of those in the same quarter in 2019. Employers remain eligible for the ERTC until the quarter following the first quarter in which gross receipts are greater than 80% for the same quarter in 2019.[18]

For the tax year 2021, employers are eligible for the ERTC in any quarter in which gross receipts are less than 80% of those in the same quarter in 2019. Employers will remain eligible for each successive quarter in which gross receipts have declined 20% or more compared to the same quarter(s) in 2019 through the third quarter of 2021. In addition, in 2021, employers can look back to the immediately preceding quarter and if they meet the 20% decline in gross receipts in that previous quarter, they are automatically eligible for the current quarter.[19]

RECOVERY STARTUP BUSINESSES

For the third and fourth quarters of 2021, recovery startup businesses are also eligible to claim up to $50,000 per quarter providing it began carrying on a trade or business after Feb. 15, 2020, and its average annual gross receipts for the three-year tax period ending with the tax year that precedes the calendar quarter for which the ERTC is determined does not exceed $1 million as determined under rules similar to those under Code §448(c)(3).[20]

QUALIFIED WAGES

The definition of qualified wages depends on whether an employer is a large or small employer. In either case, "wages" refer to wages and compensation as defined in Code §§3121(a) and 3231(e). Credit can only be taken on wages not forgiven or expected to be forgiven under the Paycheck Protection Program.[21]

LARGE EMPLOYERS

The size of an employer for ERTC purposes is based on the average number of full-time employees (within the meaning of the shared responsibility health coverage rules for large employers under the Affordable Care Act as described in Code §4980H) in 2019. For purposes of the 2020 ERTC, a large employer has more than 100 full-time employees. For the 2021 ERTC, it is more than 500 full-time employees.

For eligible large employers, qualified wages only include those paid by the eligible employer with respect to when an employee was not providing services due to suspension of the employer's trade or business under the governmental order test or where the employer has experienced a decline in gross receipts under the gross receipts test.[22]

SMALL EMPLOYERS

For the 2020 ERTC, a small employer has 100 or fewer full-time employees. For the 2021 ERTC, it is 500 or fewer full-time employees. Eligible small employers can treat all wages (other than those for which the employer claims a credit for qualified sick leave or family leave wages) as qualified wages during any period in the calendar quarter when eligible under either the governmental order or gross receipts tests.

IMPROPER POSITIONS ADVOCATED BY PROMOTERS

Promoters have been filing claims based on unjustified positions that generally do not merit claiming the ERTC.[23] Speaking at the IRS nationwide tax forum in July, Commissioner Danny Werfel warned that "[t]he further we get from the pandemic, we believe the percentage of legitimate claims coming in is declining, [but] we continue to see more and more questionable claims coming in following the onslaught of misleading marketing from promoters pushing businesses to apply."[24]

This is especially true for governmental order claims since they are more subjective than gross receipts claims. Examples of unjustified claims from promoters include:

- Suggested guidance and recommendations from federal bodies such as the Centers for Disease Control and Prevention that do not qualify as suspension orders and are not mandatory.
- Claims based on cost increases to successfully maintain pre-pandemic levels of operations, which is not a factor in IRS guidance.
- Claims based on shutdown orders not applicable to the employer such as shutdown orders applicable to the employer's customers.[25] This sometimes includes the employer's inability to visit customers in person. Again, if an employer could plausibly continue to serve customers via telephone, e-mail, or teleconference, it likely is not able to claim the ERTC.[26]
- Claims based upon an employer's voluntary shutdown. Many critical or essential business operations were exempted from most state and local governmental orders, but some employers chose to close offices or branches during the height of the pandemic. IRS guidance makes clear that unless businesses were ordered to do so, closing or diminishing an operation alone will not justify a claim.[27]
- Claims based on modifications to operations that do not rise to the level of a partial suspension because they did not have a "more than nominal effect" on the business and did not result in a reduction in an employer's ability to provide goods or services in the normal course of business by 10% or more.
- Claims based upon supply chain issues. The IRS in July stated that "[a] supply chain issue, by itself, does not qualify you for the [ERTC]."[28] The IRS provided a narrow exception if an employer's supplier was fully or partially suspended — applied only when the employer absolutely could not operate

without the supplier's product and the supplier was fully or partially suspended themselves.[29]

In addition to having the supplier's governmental order, an employer would need to show that the order caused the supplier to suspend operations, the employer could not obtain the supplier's goods or materials elsewhere at *any* cost, and it caused a full or partial suspension of business operations.

SUBSTANTIATION REQUIREMENTS

Many promoters have filed claims that do not comply with IRS substantiation requirements provided in Notice 2021-20 and in its FAQs. These include:

- Copies of specific governmental orders relied upon for the claim.
- Documentation of the decline in gross receipts.
- Documentation demonstrating the qualified wages and amounts including any qualified health plan expenses.
- Whether any employees who received wages under the claim are related to owners of the employer.
- The relationship of the employer to other businesses or entities and how required aggregation affects the claim.[30]
- Any completed 7200 forms submitted to the IRS.
- Any completed federal employment and income tax returns to claim the ERTC.

The IRS warns specifically to not "accept a generic document about a government order from a third party. If they say you qualify for [the ERTC] based on a government order, ask for a copy of the government order [and] review it carefully to make sure it applied to your business or organization."[31] Many promoters, in the author's experience, have produced short documents no longer than a couple pages with simple conclusory statements claiming the company experienced a "more than nominal effect" or had been suspended for "more than a nominal portion" without any documentation or analysis as to why. Lastly, many promoters fail to limit ERTC claims to the specific periods in which the orders applied and instead claim the entire quarter or the entire year in which it applied.

The IRS has made the above a part of its standard information document requests for ERTC audits.

POTENTIAL PENALTIES

Interest and penalties can be assessed on an erroneously claimed ERTC. IRS code provides for different penalty provisions, a full discussion of which is beyond the scope of this article. Potential penalties include, but are not limited to, penalties for inaccuracy, erroneous claims for refunds, fraud, or evasion of employment taxes.[32] Taxpayers bear the burden of substantiating reasonable cause to avoid penalties and must exercise ordinary business care and prudence in reporting proper tax liability. All tax returns are signed under penalties of perjury.

Taxpayers may demonstrate reasonable cause and absence of willful neglect to avoid penalties. Factors that may be considered in making this determination include whether the taxpayer made attempts to report proper tax liability, the complexity of the issue, and the taxpayer's overall patterns and compliance history.[33]

STATUTE OF LIMITATIONS

A three-year statute of limitations applies to ERTC claims under IRS Code §6051 and FICA taxes assessable on Form 941 where the ERTC is claimed. A special five-year statute of limitations applies to ERTC claims for the third quarter of 2021.[34] The IRS could bring a suit related to an ERTC claim pursuant to tax court deficiency procedures under Code §6212. Additionally, the IRS could also file suit for an erroneous refund claim under Code §7405. Generally, a deficiency proceeding must be initiated within the three-year statute of limitations under Code §6501, but an IRS claim for an erroneous refund may be brought within two years of the date of the refund or even five years of the date of the refund if there is fraud or a mistake of fact in making the refund claim.[35]

Simply because the IRS pays an employer's claim for an ERTC does not mean the IRS agrees that the employer is entitled to the credit. The credit is not claimed on an application reviewed and approved by the IRS; it is claimed by amending Form 941 indicating the employer is claiming it. Only when the relevant statute of limitations has expired *and* the IRS ability to bring a civil suit becomes time-barred can employers feel comfortable knowing claims will not be challenged by the government.

AGGRESSIVE MARKETING WARNING SIGNS

The IRS has identified the following warning signs to look for in connection with aggressive ERTC marketing:[36]

- Unsolicited calls or advertisements mentioning an easy application process. In reality, there is no application process. An employer claims the credit but bears the burden of proof that it was justified upon an IRS audit.
- Statements that the promoter can determine ERTC eligibility within minutes. Generally, an actual interview should take place to understand how the business operated before and during the pandemic.
- Claims from the promoter that the employer qualifies for a credit before discussing the specific situation. The ERTC is complex and requires careful review.
- Lack of written information that offers a comprehensive explanation to an IRS examiner regarding which provisions in a governmental order applied to the operations and how the provisions caused the business to be suspended.

- Wildly aggressive suggestions urging employers to submit claims; this author has seen claims such as there is "nothing to lose" and employers must act "before funds run out." Improperly claiming and receiving the credit may amount to tax fraud with substantial penalties and interest due. Additionally, there is no "set amount of funds" for ERTC claims. Employers have until April 15, 2024, to file a 941-X return to claim the ERTC for any quarter in 2020 and until April 15, 2025, to file a claim for any quarter in 2021.
- Contingent fees based on the amount of a refund the number of employees covered, which are forbidden by §10.27 of Circular 230 governing practice before the IRS.

MORATORIUM ON NEW CLAIMS

In September, the IRS announced an immediate moratorium on processing new ERTC claims through the end of 2023, reflecting the IRS's increased concern regarding "honest small business owners being scammed by unscrupulous actors."[37] The IRS also announced that it is developing initiatives to help businesses victimized by aggressive promoters including repayment programs for those who received improper ERTC payments and a special withdrawal option for businesses that filed an ERTC claim that has not been processed.[38] The IRS is also "continuing to assess options on how to deal with businesses that [paid an ERTC tax promoter] contingency fee … out of its [ERTC] payment."[39]

CONCLUSION

Employers who have claimed the ERTC but have concerns about the justification of their claim should consult a tax professional to examine its sufficiency. To the extent that employers take advantage of the ERTC settlement program, they may be able to avoid interest and penalties as well as the expense of an audit. Alternatively, a thorough review could reveal that the claim is justified based on the facts and analysis and will provide an enhancement to the taxpayer's demonstration of ordinary business care and prudence in making an appropriate claim.

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31. Internal Revenue Service, *Frequently asked questions about the Employee Retention Credit, Q and A 2* <https://www.irs.gov/coronavirus/frequently-asked-questions-about-the-employee-retention-credit#scams>.
32. *See* Code §§ 6662(a) (inaccuracy), 6676(a) (erroneous claim for refund), 6663(a) (fraud), and 6672(a) (evasion of employment taxes).
33. Code §6724(a).
34. Code §3134(l).
35. Code §6532(b)
36. Internal Revenue Service, *IRS Commissioner signals new phase of Employee Retention Credit work; with backlog eliminated, additional procedures will be put in place to deal with growing fraud risk* <https://www.irs.gov/newsroom/irs-commissioner-signals-new-phase-of-employee-retention-credit-work-with-backlog-eliminated-additional-procedures-will-be-put-in-place-to-deal-with-growing-fraud-risk#:~:text=The%20Employee%20Retention%20Credit%2C%20also,marketing%20has%20overshadowed%20the%20program> (posted July 26, 2023).
37. IR-2023, 169.
38. *Id.*
39. IR-2023, 169.

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How an F reorganization can benefit the sale of an S corporation

BY WILLIAM E. SIGLER

Although the Tax Cuts and Jobs Act of 2017 reduced the C corporation tax rate to 21%,[1] S corporations remain one of the more popular vehicles for conducting business. In fact, it is not uncommon even for limited liability companies to make S corporation elections. When it comes time to sell an S corporation, conventional wisdom says that the buyer will want to purchase the business's assets. But that is not always the case.

There can be reasons the buyer would prefer to purchase the equity of the business but have the transaction treated as an asset purchase for tax purposes. In those circumstances, the buyer will generally need to choose between a Section 338(h)(10) election,[2] a Section 336(e) election,[3] or an F reorganization.[4] Among the alternatives, an F reorganization can offer important advantages.

SETTING THE SCENE

Even though sellers of S corporations do not have to worry about two levels of taxes, they generally prefer to dispose of their businesses as a whole — along with the liabilities — by selling stock and paying tax on the proceeds at capital gains rates. Assuming no issues surface during the due diligence process, the buyer may also prefer to buy stock.

From the buyer's perspective, purchasing stock can have several important advantages. It avoids complications involved with transferring trade names, contracts, licenses, and permits and allows for continuation of the seller's employer identification number. In addition, it can facilitate transactions where the buyer wants the seller to have skin in the game in the form of equity after the sale closes.

The principal problem buyers face in a stock sale is the inability to obtain a fair market value tax basis for the assets inside the corporation for depreciation purposes.

One solution is for the buyer to make a Section 338(h)(10) election. This allows a buyer of stock in an S corporation (or a C corporation that is part of a consolidated group) to treat the transaction as an acquisition of 100% of the assets of the seller for tax purposes. A Section 336(e) election is similar to a 338(h)(10) election. However, to make a 338(h)(10) election, the buyer must be a corporation. Therefore, individuals, partnerships, and other non-corporate entities that otherwise cannot benefit from a 338(h)(10) election may be able to qualify for a 336(e) election, but there are important limitations with respect to these elections.

In a 338(h)(10) election, the buyer must acquire at least 80% of the total combined voting power of all classes of the seller's stock entitled to vote and at least 80% of the total value of the stock.[5] A similar requirement must be satisfied for a 336(e) election.[6] These requirements can be a problem if the buyer wants the seller to roll over more than 20% of their proceeds into the purchasing entity after the acquisition is completed, particularly if the Internal Revenue Service on audit may disagree with the valuation of the stock and argue that the requirements for the 338(h)(10) or 336(e) elections were not met.

Another concern for the buyer is the validity of the seller's S corporation election. To make a 338(h)(10) election, the seller must be a corporation that is a subsidiary in a consolidated group, a corporation that is a subsidiary eligible to file a consolidated return but chooses not to, or an S corporation[7]. To make a 336(e) election, the seller must be a domestic corporation that makes a "qualified stock disposition" of stock of another corporation.[8] If a transaction qualifies under both code sections, then 338(h)(10) takes precedence.[9] Thus, if 338(h)(10) is controlling but the seller's S corporation status has knowingly or unknowingly terminated, the 338(h)(10) election will be ineffective and the buyer will not obtain a fair market value basis in the seller's assets.

F REORGANIZATION TO THE RESCUE

An F reorganization can be used to mitigate the risk of the seller having lost its S corporation election. There is no minimum amount of the seller's stock that must be acquired in the transaction and no limitation on the amount of the proceeds received by the seller that can be reinvested in the purchasing entity.

Section 368(a)(1)(F) describes an F reorganization as a "mere change in identity, form, or place of organization of one corporation, however effected." Historically, F reorganizations have been used to effectuate the following:

- A change in a corporation's name;
- A change in the form of a corporation, such as from a business trust taxable as a corporation to a state law corporation; or
- A change in a corporation's state of incorporation, accomplished by having the corporation merge into a new corporation organized in the desired state of incorporation.

Six requirements must be met to qualify as an F reorganization. These requirements are:

1. The buyer's stock must be distributed in exchange for the seller's stock.[10] The goal of this requirement is making sure that both the buyer and seller have essentially the same stockholders. An exception exists for a de minimis amount of stock issued by the buyer other than in respect of the stock of the seller to facilitate the organization of the buyer or maintain its legal existence.

2. The same persons must own all the stock of the buyer and seller in identical proportions.[11] This requirement is not violated if the stock is of different classes or otherwise has different terms as long as it is of equivalent value, nor is this requirement violated if cash or other property is distributed from either corporation.

3. The buyer may not hold any property or have any tax attributes prior to the F reorganization.[12] This requirement is not violated if the buyer holds a de minimis amount of assets to facilitate its organization or maintain its legal existence, has tax attributes related to holding those assets, or holds proceeds of loans taken in connection with the F reorganization.

4. The seller must completely liquidate as part of the transaction.[13] A dissolution of the seller's legal existence for state law purposes is not absolutely required for an F reorganization.[14] The seller may even retain a de minimis amount of assets for purposes of preserving its legal existence.

5. Immediately after F reorganization, no corporation other than the buyer may hold any property previously held by the seller if the other corporation would, as a result, succeed to any tax attributes of the seller under Section 381(c).[15]

6. Immediately after F reorganization, the buyer may not hold property acquired from a corporation other than the seller if, as a result, the buyer would inherit tax attributes of the other corporation under 381(c).[16]

The fifth and sixth requirements were added to the final regulations in 2015 to further ensure that the buyer would be equivalent to the seller consistent with the definition of an F reorganiza-

tion as a mere change in identity, form, or place of organization of one corporation.[17]

PUTTING THE PLAN INTO ACTION

The steps of an F reorganization of an S corporation — and the timing of those steps — are based on Situation 1 in Rev. Rul. 2008-18.[18] A common plans is as follows:

1. Create a new corporation on day one.[19]
2. Contribute stock in the seller to the new corporation on day two.
3. Make a Qualified Subchapter S Subsidiary (QSub) election on behalf of the seller by filing Form 8869 on day two.
4. Convert the seller to an LLC on day three.[20]
5. Sell the LLC to the buyer on day four.

F reorganization does not require that the seller have a valid S corporation election because the seller is selling a single-member LLC membership interest. There will be a step up in basis because for federal income tax purposes, the buyer is treated as purchasing the assets of the single-member LLC. Also, there are no limits on the amount of equity in the LLC that can be contributed via a partial rollover into the buyer's acquisition structure with the remaining LLC equity being acquired by the buyer.

One pitfall to monitor concerns the QSub election. At the time the election is made, the seller must be a corporation.[21] Therefore, the QSub election should be made at least one day before the state law conversion to an LLC. Otherwise, it may void the F reorganization.

There exists some controversy over whether a QSub election should be necessary in the first place. It isn't referenced among the six requirements listed in the U.S. Department of Treasury regulations.[22] Moreover, when a QSub election is made, the subsidiary corporation is deemed to have liquidated into the parent corporation.[23] Likewise, when a corporation is converted into a single-member LLC, the corporation is deemed to have liquidated.[24] Thus, the result is the same regardless of whether the QSub election is made.

The American Institute of Certified Public Accountants (AICPA) recently made this argument in a letter to the IRS. The AICPA also recommended that the IRS issue guidance confirming that a QSub election is not necessary and that when a subsidiary corporation is converted into an LLC as part of a reorganization occurring within a single day, the reorganization will be treated as an F reorganization and the subsidiary corporation will not be treated as a C corporation at any time during the reorganization.[25]

CONCLUSION

For buyers, an F reorganization of an S corporation can minimize the complications involved with transferring trade names, contracts, licenses, and permits commonly required with asset sales; permit the continuation of the seller's employer identification number; and obtain a step up in the tax basis of the seller's assets without concern about the validity of the seller's S corporation election.

The seller, on the other hand, can defer gain recognition on the rollover equity and any deferred payments. The seller may not receive 100% capital gains treatment, but will dispose of the business as a whole including liabilities and, to the extent that the purchase price is not adjusted to reflect the seller's taxes, the difference may be mitigated by other factors such as the availability of capital gains treatment on appreciated intangible assets.

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ENDNOTES

1. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, §13001, 26 USC 11 (2017).
2. I.R.C. §338(h)(10).
3. I.R.C. §336(e).
4. I.R.C. §368(a)(1)(F).
5. I.R.C. §338(d)(3).
6. Treas. Reg. §1.336-1(b)(6)(i).
7. Treas. Reg. §1.338(h)(10)-1(c)(1).
8. Treas. Reg. §1.336-1(b)(1).
9. Treas. Reg. §1.336-1(b)(6)(ii)(A) (Overlap with qualified stock purchase—(A).In general. Except as provided in paragraph (b)(6)(ii)(B) of this section, *a transaction satisfying the definition of a qualified stock disposition under paragraph (b)(6)(i) of this section, which also qualifies as a qualified stock purchase (as defined in section 338(d)(3)), will not be treated as a qualified stock disposition*.) (emphasis added).
10. Treas. Reg. §1.368-2(m)(1)(i).
11. Treas. Reg. §1.368-2(m)(1)(ii).
12. Treas. Reg. §1.368-2(m)(1)(iii).
13. Treas. Reg. §1.368-2(m)(1)(iv).
14. In PLR 200835002, the IRS held that the seller would be considered an ongoing corporation prior to its merger into the buyer in an F reorganization even though the seller had been dissolved for state law purposes as a result of its failure to continue filing its state-law business registration.
15. Treas. Reg. §1.368-2(m)(1)(v).
16. Treas. Reg. §1.368-2(m)(1)(vi).
17. I.R.C. §368(a)(1)(F).
18. Rev. Rul. 2008-18, 2008-1 C. B. 674; *See also*, PLRs 200542013, 200701017, and 200725012.
19. The buyer should be treated as an S corporation because of the S corporation election continuity rules in Rev. Rul. 64-250.
20. *See* MCL 450.4709 and Michigan Department of Licensing and Regulatory Affairs form CSCL/CD-554, "Certificate of Conversion".
21. IRC 1361(b)(3)(B).
22. Treas. Reg. §1.368-2(m)(1).
23. Treas. Reg. §1.1361-4(a)(2).
24. Treas. Reg. §301.7701-3(g)(1)(iii).
25. Blake Vickers, TaxNotes.com, *AICPA Seeks More Guidance on Structuring F Reorganizations,*<https://www.taxnotes.com/research/federal/other-documents/irs-tax-correspondence/aicpa-seeks-more-guidance-on-structuring-f-reorganizations/7h8g6> (posted August 29, 2023) (website accessed October 18, 2023).

INNOVATIVE PHILANTHROPIC SOLUTIONS FOR CLIENTS

Attorney Amy Hartmann on who she turns to for charitable giving expertise

At our law firm, we often work with individuals who have opportunities to make a significant impact on their communities through philanthropy. Whether it is clients selling their businesses, retirees with substantial assets, or families who have accumulated wealth over the years, many of our clients are eager to incorporate charitable giving into their tax and estate planning.

The Community Foundation for Southeast Michigan has been our trusted partner when creating philanthropic plans for our clients. Their willingness to collaborate and provide invaluable assistance in these matters is energizing and rewarding as it strengthens our relationship with our clients and our communities.

We have even had the privilege of hosting the Community Foundation Donor Services team at our offices, allowing us to present the latest in charitable giving opportunities to our clients alongside their other professional advisors to provide comprehensive wealth planning.

This collaborative approach between advisors and the Community Foundation ensures that the philanthropic goals of our clients align seamlessly with the community's needs.

The innovative solutions by the Community Foundation staff and partners provide endless opportunities for the future of charitable giving in southeastern Michigan.

I am proud to play a small part in the activities of the Community Foundation and encourage you to partner with them and create lasting legacy for your clients.

- Attorney Amy Hartmann, longtime member of the Legal Financial Network of the Community Foundation for Southeast Michigan

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The private benefit doctrine and tax-exempt entities

BY ALAN MAY AND NEAL NUSHOLTZ

Charitable organizations are exempt from income tax under Internal Revenue Code (IRC) §501(c)(3) if they are both organized and operated exclusively for one or more of the public purposes specified in that code section. An organization failing to meet either an organizational test in its formation documents or an operational test in actual practice is not exempt.[1] The instructions for the application for recognition of exemption under Section 501(c)(3) state the rule about exempt purpose specifically as an exclusion of private benefit:

> "A Section 501(c)(3) organization must not further non-exempt purposes (such as purposes that benefit private interests) more than insubstantially").[2]

NIL COLLECTIVES

It's November, and many readers are immersed in college football. Harken back to Sept. 5, 1908, when a new phrase was added to the nomenclature of college football: the forward pass. St. Louis University's Bradbury Robinson, in a game against Carroll (Iowa) College, threw the pigskin downfield for a 20-yard gain, widely acknowledged as the first forward pass in history.[3] Thereafter, it was part of the game.

Recently, a couple new terms have become familiar in college athletics: name, image, and likeness (NIL) and collectives. In 2021, the National Collegiate Athletic Association adopted a policy allowing student-athletes to be paid for their name, image, and likeness without affecting their athletic eligibility.[4] Collectives formed to develop, fund, and otherwise facilitate NIL deals for student-athletes. Generally, these collectives operated independently of the affiliated university. Some have applied for and obtained their own tax ex-

emptions under §501(c)(3), while others operate under the sponsorship of existing 501(c)(3) organizations that support the affiliated university or its athletic programs.

Donations funding NIL payments are not deductible from one's federal income taxes; private benefits were cited as a reason to disqualify college donations as charitable deductions in Internal Revenue Service Advice Memorandum 2023-004, which addressed charitable deductions for donations to NIL collectives. Some nonprofit collectives have informed donors that 80-100% of contributions will be paid out as compensation to student-athletes for their NIL rights.[5] Collectives have paid student-athletes to promote it or a partner charity by posting videos on social media, autographing memorabilia, leading sports camps, and attending fundraisers.

The memorandum also stated that tax exemption requires organizations to engage primarily in activities that further an exempt purpose. Generally, an occasional benefit to a private interest incidental to an organization pursuing an exempt purpose will not be deemed to have impermissibly served private interests. The memorandum also held that when an organization's activities result in a direct benefit to designated or identifiable individuals, the private benefit is not incidental to exempt purposes.

Occasionally, the IRS has recognized organizations whose activities benefitted student-athletes as charitable entities, but those rulings were based on a determination that the activities advanced education, an exempt purpose under §501(c)(3).[6] The activities of NIL collectives do not appear to further educational purposes.

The memorandum stated that the potential public benefit of access to student-athletes and the increased recruitment of student-athletes from compensated activities does not make the private benefit "qualitatively incidental." The memorandum concluded that "a single nonexempt purpose, if substantial in nature, precludes exemption and, consequently, many organizations that develop paid NIL opportunities for student athletes are not tax exempt."

Now, let's explore the use of tax-exempt campaign funds for criminal defense of a politician. This article does not comment on the propriety of paying criminal defense fees as it affects the payor, but the tax effect to the payee. Sometimes, payment of a politician's legal fees must be declared as income to the politician.

IRC §527 POLITICAL ORGANIZATIONS

IRC §527 governs the tax requirements of political organizations. Political organizations cannot be subject to the same stringent private benefit rules applied to 501(c)(3) entities because, after all, campaign organizations are formed for the private benefit of the candidate. Generally, amounts expended by a political organization for exempt functions are not income to the individual or individuals on whose behalf the expenditures are made.[7] The exempt functions of a political organization are defined as all activities directly related to and supporting the process of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to public office or office in a political organization.[8]

Whether an expenditure is an exempt function depends upon facts and circumstances. Typically, when an organization supports an individual's campaign for public office, its activities and expenditures in furtherance of that individual's election or appointment are for an exempt function of the organization. Political contributions are not taxable to the candidates on whose behalf they are collected provided they are used for campaign expenses or similar purposes.[9] Political funds used by the candidate for personal purposes are includible in the candidate's gross income for that year.[10] "Personal use" refers to any use of funds in a campaign account of a present or former candidate to fulfill commitments, obligations, or expenses of any person if the expense would exist irrespective of the candidate's campaign or duties as a federal officeholder.[11]

The IRS presumes that in the absence of evidence to the contrary, contributions to a candidate are political funds not intended for the candidate's unrestricted personal use.[12] Expenditures of political funds by a candidate for anything other than campaign or similar purposes will be considered a diversion of such funds, requiring them to be included in his or her income.[13]

INDIRECT EXPENSES AND ATTORNEY FEES FOR CRIMINAL DEFENSE

Generally, where an organization supports an individual's campaign for public office, its activities and expenditures in furtherance of election or appointment to that office are for exempt functions. Exempt functions include indirect expenses — expenditures not directly related to influencing or attempting to influence the selection process but necessary to support directly related activities.[14] Functions supporting directly related activities are those which must be engaged in to allow the political organization to influence or attempt to influence the selection process (i.e., overhead and record keeping.) Similarly, expenses incurred while soliciting contributions are necessary to support the organization's activities.[15]

Hypothetically Speaking

Suppose a candidate commits one or more political crimes after ballots have been counted and, after being indicted, uses campaign funds to pay criminal defense attorney fees. Those fees can be income to the candidate in the year they are paid if they are deemed to be for his or her personal expense. Expenditures which are illegal or for a judicially determined illegal activity are not considered expenditures in furtherance of an exempt function even though they are made in connection with the selection process.[16]

Under IRC 527, expenditures for illegal activity are added to the taxable income of a political organization. Reimbursements for criminal defense to participants in criminal activities are not taxable if they are not an incentive to engage in criminal activity:

> "Expenditures by a political organization that are illegal or for an activity that is judicially determined to be illegal are treated as amounts not segregated for use only for the exempt function and shall be included in the political organization's taxable income. … [V]oluntary reimbursement to the participants in the illegal activity for similar expenses incurred by them are not taxable to the organization if the organization can demonstrate that such payments do not constitute a part of the inducement to engage in the illegal activity."[17]

What follows is a discussion of relevant factors involved in determining if payment of a candidate's criminal defense fees by a political organization would be income to the candidate. The factors are whether the fees are a debt that would exist irrespective of the campaign; whether the candidate was a candidate at the time of the crime; and whether the crime benefitted the campaign.

Issue I: Whether criminal defense fees would exist irrespective of the campaign.

A test for taxability of campaign payment of a candidate's expenses is whether the expense would exist irrespective of whether there had been a political campaign. In *Federal Election Commission v. Craig for U.S. Senate*,[18] candidate Larry Craig had pled guilty to disorderly conduct in an airport bathroom. He subsequently used campaign funds to pay an attorney more than $197,000 to reverse his guilty plea. The Federal Election Commission sued Craig to surrender that money and pay a civil penalty of $45,000. The court said:

> "If campaign funds are used for a financial obligation that is caused by campaign activity or the activities of an officeholder, that use is not personal use. However, if the obligation would exist even in the absence of the candidacy or even if the officeholder were not in office, then the use of funds for that obligation generally would be personal use."[19]

The court analogized Craig's charge to driving under the influence of alcohol, and the FEC had already held that attorney fees for driving while intoxicated are personal and not a campaign expense.

Issue II: Whether the politician was a candidate at the time of the crime.

If the crimes at issue were committed after ballots were counted, was the candidate even a candidate at the time of the crime? One case held that the candidacy terminates upon counting of the ballots, but the campaign continues during the period of a contest under state laws:

> "When a candidate who has been defeated in a general election contests the certification of his or her opponent, we believe the individual is still a 'candidate' until a termination report is filed."[20]

Issue III: Whether the crime benefited the campaign.

Another question that might be raised is whether crimes actually benefit a political campaign. That issue came up in an income tax case where a corporation deducted criminal defense fees it had paid on behalf of its sole shareholder, who had made tax concealed protection payments of more than $1.7 million in cash to the Gambino crime family. The company was disallowed the deduction because it could not show that it benefited from the crime.[21]

CONCLUSION

To date, no politician has attempted to justify criminal defense costs as a campaign expense by arguing that committing a crime was necessary to carry out an exempt function of the campaign. If that argument is raised in a tax court petition, it could result in caselaw that provides comprehensive legal guidance on the relevant issues.

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Neal Nusholtz, a shareholder at Kemp Klein in Troy, specializes in tax controversies including estate and income tax audits, IRS administrative appeals, and tax litigation in federal district courts, the U.S. Tax Court, and the 6th Circuit Court of Appeals. He is a graduate of Oberlin College and Thomas M. Cooley Law School. He is a contributor to the Journal of the American Revolution website.

ENDNOTES

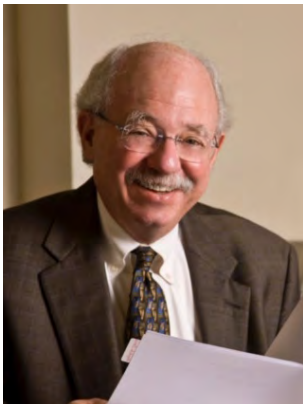
1. 26 CFR ("Treas. Reg.") 1.502(c)(3)-1(c)(1)(a).
2. Form 1023 (Application for Recognition of Exemption Under Section 501(c).
3. Morrison, *The Early History of Football's Forward Pass*, Smithsonian Magazine <https://www.smithsonianmag.com/history/the-early-history-of-footballs-forward-pass-78015237/> (posted December 28, 2010) (accessed October 20, 2023).
4. IRS Advice Memorandum 2023-004.
5. *Id.*
6. See, e.g., Rev. Rul. 55-587, 1955-2 C.B. 261 (high school athletic association promoted educational purposes); Rev. Rul. 67-291, 1967-2 C.B. 184 (organization subsidizing training table for university athletic teams furthered university educational program). See Rev. Rul. 56-13, 1956-1 C.B. 198 (organization formed to persuade students of outstanding athletic ability to attend a particular university is not an educational organization).
7. Treas. Reg. § 1.527-5(a).
8. Treas. Reg. §1.527-2(c)(1).
9. Rev. Rul. 71-449, 1971-2 C.B. 77 (1977).
10. Field Service Advice 0887.
11. Federal Election Commission Notice 1995-5.

12. Revenue Procedure 68-19, 1968-1 CB 810, January 1, 1968.
13. GCM 33622 (I.R.S. Sept. 15, 1967).
14. Revenue Procedure 68-19, 1968-1 CB 810, January 1, 1968.
15. Treas. Reg. §1.527-2(c)(2).
16. Treas. Reg. §1.527-2(c)(4).
17. Treas. Reg. 1.527-5(a)(2).
18. *Fed Election Comm v Craig for U.S. Senate*, 816 F3d 829 (D.C. Cir. 2016).
19. *Id.* at p. 835.
20. *Legislative Coordinating Council v Stanley*, 264 Kan 690, 700; 957 P2d 379, 389 (1998).
21. *Cap. Video Corp. v. Comm'r*, 83 T.C.M. (CCH) 1229 (T.C.), aff'd, 311 F.3d 458 (1st Cir. 2002).

The State Bar of Michigan Alternative Dispute Resolution Section Announces 2023 Award Winners

The Alternative Dispute Resolution Section of the State Bar of Michigan is proud to announce that the following individuals are the recipients of the ADR Section's major awards in 2023. The award recipients were honored at an awards ceremony on Tuesday, October 24 at Saint John's Resort in Plymouth.

For more information about the section and the annual conference, visit sbmadrconference.com.



Sheldon J. Stark

is the recipient of the Distinguished Service Award. Shel has made significant contributions to the field of alternative dispute resolution. He was Chair of the ADR Section from 2016-2017, Chair or Co-Chair of the ADR Section's Skills Action Team for many years, created and Chaired the ADR Section's Diversity and Inclusion Action Team Book Club for several years. Shel has been a long-term contributor to all the activities of the Section over many years, including creating and presenting at many Section events, seminars, Lunch and Learns, and many articles for The Michigan Dispute Resolution Journal.

Nakisha Chaney

is the recipient of the Hero of ADR Award. Nakisha has held various roles with the ADR Section, including Chair of the 2022 Annual Conference, Co-Chair of the Skills Action Team, presenter at the Young Lawyers Section Annual Meeting, and moderator of a presentation at the ADR Section Annual Conference.

Zenell Brown

is the recipient of the Diversity and Inclusion Award. Zenell Brown has focused on DEI initiatives and activities that have enriched the members of the SBM's ADR Section and Michigan's legal community. She is frequently asked to speak and facilitate DEI workgroups and conferences. She is the author of "Coffee and Conversations: Inclusion and Belonging."

Jennifer M. Grieco and Zena Zumeta

are recipients of the George N. Bashara Jr. Award. This award recognizes Jennifer for her distinguished service this year as Chair-Elect of the ADR Section, Chair of the 2023 Annual ADR Conference, Chair of the newly developed Social Media Action Team, and Chair of the Awards Committee. This award recognizes Zena for her distinguished service over the last two years as Co-Chair of the Skills Action Team.

Anne Bachle Fifer

is the recipient of the Nanci S. Klein Award. Anne's commitment to community mediation predates Michigan's 33-year-old Community Dispute Resolution Program ("CDRP"). This award recognizes Anne for her pivotal role in creating a solid local and statewide foundation for community mediation, and for nurturing that work through years of leadership in both administering programs as staff and as a volunteer, and providing training for many hundreds of people, including lawyers, who have gone on to serve as volunteer mediators and board members at CDRP centers.

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PLAIN LANGUAGE

A pox on *pursuant to*

BY IAN LEWENSTEIN

In June 2004, this column emphatically declared a pox on *prior to*.[1] Almost 20 years later, it's long past time to extend the pox to the ubiquitous *pursuant to*.[2]

References

Michèle M. Asprey, *Plain Language for Lawyers* (Leichhardt, NSW: The Federation Press, 4th ed, 2013), p 183: *Pursuant to* "is an expression we are so used to that we barely notice we are using it. Yet to most non-lawyers it is one of the hallmarks of legalese. Ordinary people say *under* if they mean to refer loosely to something . . . . Or, if they are being more specific, they say *according to*. . . . There is no reason why lawyers cannot do the same."

Australian Government, *Style Manual*, https://www.stylemanual.gov.au/writing-and-designing-content/clear-language-and-writing-style/plain-language-and-word-choice: recommends using *under*.

Peter Butt, *The Lawyer's Style Guide* (Oxford, UK: Hart Publishing, 2021), p 658: "Usually, *pursuant to* is a habitual legalism, meaning simply *under* or *by* . . . ." (The author goes on to discuss the term's potential ambiguity.)

Peter Butt, *Modern Legal Drafting* (Port Melbourne, Victoria: Cambridge University Press, 3d ed, 2013), p 242: recommends using *under*.

Bryan A. Garner, *The Elements of Legal Style* (New York: Oxford University Press, 2d ed, 2002), p 136: "Write *under*, *in accordance with*, *as required by*, *in response to*, or *in carrying out*. These are ordinary English words and phrases; *pursuant to* is pure legalese."

Bryan A. Garner, *Garner's Modern English Usage* (New York: Oxford University Press, 5th ed, 2022), p 905: "*Pursuant to* (= in accordance with; under; in carrying out) is rarely — if ever — useful. Lawyers are the main users of the phrase, and they have used it only since about 1800 — often imprecisely."

Bryan A. Garner, *The Redbook, A Manual on Legal Style* (St. Paul: West Academic, 5th ed, 2023), pp 255, 609: "This is one of the worst instances of legalese because it's the most common."

"[*P*]*ursuant to* can always be replaced with a preposition (*under*) or a more precise phrase (*in accordance with* — concededly longer, but universally intelligible in a way that *pursuant to* is not)."

Joseph Kimble, *Seeing Through Legalese* (Durham: Carolina Academic Press, 2017), p 5: *pursuant to* is "hardcore legalese."

Uniform Laws Commission, *Drafting Rules and Style Manual* (2023), p 64: recommends using *under*.

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

ENDNOTES

1. Kimble, *A Pox on* Prior To, 83 Mich B J 48 (June 2004).
2. This pox should extend to Minnesota, where the noxious phrase appears in 4,190 documents (not per instance) in *Minnesota Statutes* and in 1,301 documents in *Minnesota Rules*. Online search conducted May 15, 2023. <https://www.revisor.mn.gov/search/?stat=1&laws=1&rule=1>.

"Plain Language," edited by Joseph Kimble, has been a regular feature of the *Michigan Bar Journal* for nearly 40 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.

BEST PRACTICES

Evidentiary foundations

BY JAMES A. JOHNSON

Evidence is the means to ascertain the truth in a lawsuit at trial. To get to the truth, information and documents must be offered and admitted into evidence. The proponent of an item of evidence must lay a foundation or predicate before formally offering the item into evidence. Foundations lurk everywhere, waiting to trip you up.

Experienced trial lawyers will tell you that witness qualification heads the list. There is a basic requirement that any fact witness must be shown to have firsthand knowledge about the matter to which he or she is about to testify.[1] It is important to lay this foundation of personal knowledge at the beginning of any witness testimony. In fact, Michigan Rule of Evidence (MRE) 602, which is nearly identical to Federal Rule of Evidence (FRE) 602, states that a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.[2] This rule is subject to the provisions of MRE 703 — akin to FRE 703 — relating to opinion testimony of expert witnesses.

AUTHENTICATION

To authenticate an item of evidence, the proponent must present proof that the item is what he or she claims that it is.[3] By way of example, MRE 901, almost identical to FRE 901, requires the proponent to present sufficient evidence to support a rational jury finding that a signature on a letter[4] is genuine or that a photograph[5] is an accurate depiction. You do not need the photographer to lay the foundation for introducing a photograph; any witness who has personal knowledge of the photo is sufficient.[6] Similarly, the predicate or foundation to authenticate a signature on a letter is established by any witness who is sufficiently familiar with the author's handwriting.[7] This rule permits nonexpert opinion as to the genuineness of handwriting based upon familiarity not acquired for purposes of litigation.

RELEVANCY

With authentication comes the necessity to show that the evidence is relevant — i.e., it has some rational tendency to prove a fact in issue.[8] MRE 401, which defines relevant evidence, and FRE 401 are nearly identical. If a document's terms are in issue, the proponent will have to comply with the best evidence rule which generally requires that original documents be provided as evidence.[9] The rule only applies to proving the contents of a document. Secondary evidence, such as a duplicate original, is admissible if the original is properly accounted for with an adequate excuse for non-production of the original.[10] Importantly, and pursuant to MRE 1004 regarding admissibility of other evidence of contents, which is nearly identical to FRE 1004, originals are not required if they are lost, destroyed, otherwise unobtainable, in the possession of the opponent, or if the evidence is not closely related to a controlling issue.

HEARSAY

Hearsay is an assertive statement other than one made by the declarant while testifying, offered to prove the truth of the matter asserted.[11] The rule against admitting hearsay protects confrontation and the fundamental right to cross-examination.[12] The test for determining hearsay is determined by who you want to cross-examine. If cross-examination of the witness on the stand is an adequate test of the reliability of the evidence, the out-of-court statement is not hearsay. However, if testing the offered evidence would additionally require cross-examination of the person who originally made the statement, it is hearsay.[13] We are interested in the declarant's credibility only when the out-of-court statement is being used to prove the truth of the assertion.

However, even if a statement falls within the definition of hearsay, that statement may be admissible. There are numerous exceptions to the hearsay rule set out in MRE 803, 803A, 804, and 805 and

"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.

FRE 803, 804, 805, 806, and 807. The exceptions are based mostly on a showing that the statement is trustworthy. For example, the foundation for the excited utterance exception is a showing that at the time of the statement, the declarant was in a state of excitement caused by a startling event.[14]

One of the most common exceptions to the hearsay rule used at trial is the business records exception.[15] This exception is referenced in subsection (6) of MRE 803 regarding hearsay exceptions and availability of declarant immaterial – which is similar to FRE 803 – and specifically admits evidence of certain acts, events, conditions, opinions, and diagnoses. The following are suggested procedural steps to lay the foundation:

1. Put the custodian of the records or employee who is familiar with the recordkeeping on the stand.
2. Have the business record marked for identification and show it to opposing counsel.
3. Have the witness identify the record of which he has custody.
4. Have the witness explain his duties.
5. Establish the witness's general familiarity with the business routines.
6. Establish that it is the business custom to make records at the event or shortly afterwards.
7. Establish that the record was made in the ordinary course of business and that the record relates to that business.
8. Have the witness tell who provided the information on the record and that it was his duty to gather the information and pass it on to the witness or the person who made the record.

Though FRE 803(6)(7) puts the burden of proof of lack of trustworthiness on the party opposing admission,[16] business entries have a circumstantial guarantee of trustworthiness because the entry is routine. The witness need not be the custodian of the records so long as he or she can testify to the habitual method with which the business prepares and maintains its records, nor does the witness need personal knowledge of the entry's preparation so long as he or she can show that the record or report was made in the regular course of business. Some jurisdictions have dispensed with live witnesses and admit business records by affidavit.[17] As of Sept. 1, 2001, Michigan permits properly authenticated records to be introduced into evidence without requiring a records custodian to establish authenticity.[18]

Keep in mind that under MRE 104 (preliminary questions) and the substantially similar FRE 104, the trial judge has the discretion to evaluate the trustworthiness of the source of information to determine whether the record is admissible. Also, the court is not bound by the rules of evidence except with respect to privileges[19].

If the aforementioned steps fail, you may be able to argue that the record passes the test of admissibility as an additional exception under MRE 803(24)[20] or, if in federal court, under FRE 807 (residual exception).[21] However, MRE 803(24) requires advance notice of intent to offer the statement. Another possibility, again if in federal court, is to argue for admissibility under FRE 805 (hearsay within hearsay.)

ELECTRONIC EVIDENCE

With respect to authenticating electronic information, courts have uniformly held that existing rules of evidence are generally adequate. The authentication threshold of MRE and FRE 901(a) is met by evidence sufficient to support a finding that the matter in question is what its proponent claims. According to MRE 901(a)'s liberal admissibility standard, mobile phone text messages can be authenticated and admitted through direct or circumstantial witness testimony. If something more is required, MRE 901(b)(4) is not very demanding.[22]

Electronic evidence is affected by the Uniform Electronic Transactions Act, which has been adopted in all 50 states.[23] The UETA, which establishes that "an electronic record of a transaction is the equivalent of a paper record, and that an electronic signature will be given the same legal effect, whatever that might be, as a manual signature,"[24] applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored.

CONCLUSION

Trial lawyers are storytellers of the highest calling. Exhibits and testimony are the tools that make the story believable and compelling. The foundation of a good story is preparation to make the jury act in your favor. Everywhere you look in the law of evidence, there is something you must introduce first to prove what you are really after. Every exhibit must meet three basic requirements before it can be admitted into evidence — the witness must be competent to testify about it, the testimony and exhibit must be relevant, and the exhibit must be authenticated or fit within some exception.

James A. Johnson, a former chief of a civil division, is an accomplished trial lawyer who currently concentrates on serious personal injury, insurance coverage, entertainment and sports law, and criminal defense. He is an active member of the Michigan, Massachusetts, Texas, and Federal Court bars, and can be reached at www.JamesAJohnsonEsq.com.

ENDNOTES

1. MRE 602.
2. MRE 602; FRE 602.
3. MRE 901; FRE 901.
4. *People v Taylor*, 159 Mich App 468; 406 NW 2d 859 (1987); *People v Howard*, 226 Mich App 528; 575 NW 2d 859 (1987); *Champion* v *Champion*, 368 Mich 84, 88; 117 NW 2d 107 (1962).
5. *People v Mills*, 450 Mich 61; 537 NW 2d 909, mod, 450 Mich 1212; 539 NW 2d 504 (1995); *People v Herndon*, 246 Mich App 371; 633 NW 2d 376 (2001).
6. *Werthman v GMC*, 187 Mich. App 238, 466 NW 2d 305.
7. MRE 901(b)(2); FRE 901(b)(2).
8. MRE 401; FRE 401.
9. *Steinberg v Ford Motor Co*, 72 Mich App 520; 250 NW 2d 115 (1997).
10. MRE 1001-1004; FRE 1001-1004.
11. MRE 801(c).
12. *Crawford v Washington*, 541 US 36 (2004); *People v Walker*, 273 Mich App 56; 728 NW 2d 902 (2006).
13. MRE 801(c).
14. *Berryman v Kmart Corp.*, 193 Mich App 88; 483 NW 2d 642 (1992). *People v Smith*, 456 Mich 543; 581 NW 2d 654 (1998); *People v Straight*, 430 Mich 418; 424 NW 2d 257 (1988).
15. MRE 803(6); FRE 803(6); *Price v Long Realty, Inc*, 199 Mich App 461; 502 NW 2d 337 (1993); *Solomon v Schuell*, 435 Mich 104; 457 NW 2d 669 (1990).
16. FRE 803(6)(7).
17. NC R Evid 803(6).
18. MRE 902(11).
19. MRE 104.
20. MRE 803(24).
21. FRE 807.
22. *Champion*, 368 Mich at 88.
23. MCL 450.831 et seq.
24. Uniform Law Commission, *Electronic Transactions Act*, <https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034#:~:text=The%20Uniform%20Electronic%20Transactions%20Act,removing%20barriers%20to%20electronic%20commerce>. Website accessed October 16, 2023.

ETHICAL PERSPECTIVE

IOLTA vs non-IOLTA: Where to hold client funds

BY ALECIA CHANDLER

Being a lawyer is not merely a vocation. It is a public trust, and each of us has an obligation to give back to our communities.

— Former U.S. Attorney General Janet Reno[1]

Lawyers play a variety of roles — advisor, negotiator, litigator, lobbyist — but one of the most important is that of a fiduciary. Lawyers are fiduciaries to our clients, creating a duty of "good faith, trust, [and] confidence"[2] through our representation. Additionally, when handling funds, a fiduciary must exercise a "high standard of care in managing another's money."[3]

This includes, but is not limited to, attorney fees and costs paid in advance and settlement proceeds. The Michigan Rules of Professional Conduct (MRPC) expand the typical fiduciary role by requiring lawyers to maintain funds and property belonging to clients or third parties separate from their own in either an Interest on Lawyer Trust Account (IOLTA) or non-IOLTA.[4] Prior to acceptance of and at reasonable intervals after receipt of funds to be held, the lawyer shall review the IOLTA to determine if changes have occurred that require the funds to be deposited into a non-IOLTA.[5]

Before determining which account the monies or property should be deposited in, it is important to know the difference between the two accounts. IOLTAs refer to pooled interest- or dividend-bearing accounts at eligible institutions that cannot earn income for the client or third person in excess of the costs incurred to secure such income. A non-IOLTA refers to interest- or dividend-bearing accounts in banks, savings and loan associations, and credit unions that contain larger or longer-term funds that can net income for the client.

To make this determination, lawyers must first do the dreaded math calculations. I say "dreaded" because many of us went to law school because math was not our forte but, nonetheless, we must do it to make reasonable determinations as a fiduciary. When completing the calculations, the interest rate obviously comes into play.

Interest rate returns on financial accounts have increased significantly, and that leaves lawyers who regularly handle large-dollar settlements to ask if retaining those funds in an IOLTA is appropriate. As lawyers, we have both an ethical and a fiduciary duty[6] when funds are held on behalf of a client or third party. Therefore, it is essential to be aware of the interest rate returns and how it affects a client's funds.

Under MRPC 1.15(d), lawyers must hold client and third-party funds in an IOLTA or non-IOLTA. MRPC 1.15(e) provides the factors to be considered when determining which account should be used to maintain the funds. Specifically, it requires consideration of the following:

- The amount of interest or dividends the funds would earn while considering the amount of the funds to be deposited, the expected duration, and the rates of interest or yield at the financial institution;
- Costs of establishing the account including financial institution charges, service fees, attorney fees involved in setting up the account, preparation of tax documents, and any other costs;

"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.

- Capability of the financial institution or firm to calculate appropriate interest; and
- Other relevant factors.

To make this determination, we must return to the dreaded math problem. Here is a sample calculation to assess which account the settlement funds should be deposited in:

$3 Million Settlement
(Principal Amount x Interest Rate) / Number of time periods
$3,000,000 x .045 (4.5%) = $135,000 (annual interest)
$135,000 / 12 months = $11,250 per month interest

$50,000 Settlement
(Principal Amount x Interest Rate) / Number of time periods
$50,000 x .045 (4.5%) = $2,250 (annual interest)
$2,250 / 12 months = $187.50 per month interest

As you can see from the calculations, if a lawyer is holding a large settlement for even a short period of time, the funds may earn substantial interest. Therefore, the lawyer must evaluate whether a non-IOLTA would be more advantageous for their client.[7] In the $3 million settlement calculation example above, even if the lawyer is only holding the funds for two weeks while the payment clears the bank, a non-IOLTA would be appropriate as the client would receive around $6,000 in interest.

This is particularly important for firms that hold settlement funds while negotiating liens associated with representation. For example, personal injury lawyers may receive a $3 million settlement, but must negotiate the associated medical liens.[8] The lawyer must remit the undisputed portion to the client when the payment clears and remove the calculable, undisputed portion of their attorney fees, but hold the remainder until the medical liens are resolved. By placing settlement funds in a non-IOLTA, the additional interest may help the client receive more money than if they were placed in an IOLTA where interest is not earned.

It is worth reminding lawyers that non-IOLTAs must be held at an approved financial institution[9] authorized to do business in Michigan and insured by the federal government or "an open-ended investment company registered with the Securities and Exchange Commission."[10] Also, the funds must be available to be withdrawn upon request; investment vehicles like certificates of deposit, which may only be withdrawn on a term basis, cannot be used. However, many mutual funds now make funds available for withdrawal within 24 hours. Before using mutual funds, it is absolutely critical that lawyers determine whether the funds are available upon request.

Non-IOLTAs may be an account established on a per-client basis or a pooled account. However, pooled accounts must ensure that the client funds are accounted for, and interest is calculated per client. Lawyers may not receive any interest or dividends from IOLTA or non-IOLTAs.[11]

IOLTAs are a useful and necessary tool to keep client funds and property separate from a law firm's operating expenses while benefiting the community. However, non-IOLTAs are a similarly useful and necessary tool to not only keep client funds and property separate but also to benefit the client, which is the lawyer's first and most paramount duty.

For more information, visit the Trust Accounts page on the State Bar of Michigan website at michbar.org/opinions/taon.

Alecia Chandler is professional responsibility programs director for the State Bar of Michigan.

ENDNOTES

1. U.S. Department of Justice, *Remarks of Attorney General Janet Reno Access to Justice Forum: Ensuring the American Ideal,* <https://www.justice.gov/archive/ag/speeches/1996/03-19-1996c.pdf> (all websites accessed October 16, 2023).
2. *Black's Law Dictionary* (7th ed).
3. *Id.*
4. MRPC 1.15(d).
5. MRPC 1.15(j).
6. MRPC 1.15 Comment.
7. It should be noted that MRPC 1.15(j) provides that a good faith decision to hold funds in an IOLTA is not reviewable by disciplinary authorities. However, the decision must be made in good faith. Moreover, the Michigan Rules of Professional Conduct do not have any impact on civil claims for breach of fiduciary duty.
8. Ethics Opinion RI-373. This and other ethics opinions can be found at Ethics Opinion Search, SBM [https://perma.cc/E8LX-GL8W].
9. State Bar of Michigan, *Approved Financial Institutions,* <https://www.michbar.org/file/opinions/taon_list.pdf>.
10. MRPC 1.15(a)(2).
11. MRPC 1.15(h).

LAW PRACTICE SOLUTIONS

Navigating Rule 21: Professional liability insurance for interim administrators

BY ALEC FRUIN

Effective Sept. 1, 2023, the Michigan Supreme Court introduced a regulatory update known as Rule 21 regarding interim administrator planning for attorneys in private practice. The rule is designed to protect the interests of an attorney's clients through the appointment of interim administrators, who play a crucial role in managing and overseeing business operations during a transitional phase within the firm. Rule 21 mandates that interim administrators obtain professional liability insurance to provide coverage for duties performed while acting for the affected attorney.

UNDERSTANDING RULE 21 AND ITS IMPLICATIONS

Interim administrators are appointed to temporarily protect an affected attorney's clients and interests. An "affected attorney" refers to an attorney who is temporarily or permanently unable to practice law due to the circumstances described in MCR 9.301(A). Rule 21 mandates that interim administrators must obtain and retain professional liability insurance to protect themselves from the potential consequences of any alleged errors, omissions, or professional negligence while performing the duties of an interim administrator.

COVERAGE SOLUTIONS FOR INTERIM ADMINISTRATORS

As it pertains to interim administrators, lawyers' professional liability insurance — commonly known as errors and omissions (E&O) insurance — is intended to provide coverage against claims arising from the performance of their duties. While each professional liability policy varies based on the language set forth by the insurance company, there are commonalities where coverage for interim administrators may be afforded. The following are scenarios where interim administrators would look for coverage to respond:

1. The interim administrator is a current attorney of the affected attorney's firm. In this scenario, coverage is likely to respond for the interim administrator under the definition of an insured as an employee of the firm, which would be the named insured on the policy.

2. The interim administrator is not a current attorney of the affected attorney's firm. This scenario applies to solo practitioners with no other attorney at the firm. The interim administrator appointed to manage the firm's transition is likely to be provided coverage under the definition of an insured on the affected attorney's policy. Thus, the interim administrator would essentially be acting as an employee of the firm and look to be afforded coverage to the extent that the affected attorney was provided under the policy.

3. The affected attorney does not have professional liability insurance. If the interim administrator has a professional liability insurance policy, coverage may extend for their duties performed on behalf of the affected attorney's firm per the definition of professional (legal) services.

4. Neither the affected attorney nor the interim administrator has professional liability insurance. In this scenario, there are two types of professional liability policies that may afford coverage solutions: E&O and miscellaneous professional liability insurance. As referenced previously, E&O insurance may look to extend coverage to the interim administrator in addition to the policy's intent to cover legal services provided. A miscellaneous professional liability policy in the name of the interim administrator may provide coverage for the duties provided; however, this policy would not cover any legal services being provided.

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.

PROFESSIONAL LIABILITY IN THE EVENT OF A CLAIM

Interim administrators may be vulnerable to claims alleging negligence or inadequate performance which could result in financial loss to the organization. The insurance policy is intended to respond with coverage for legal costs to defend a claim regardless of the validity or grounds. However, indemnity (damages and settlements) payments will not be afforded for intentional acts as outlined in the exclusions section of the policy. Additionally, in the event of a covered claim, the policy would provide compensation for indemnity. Decisions regarding the status of a covered claim are made on a claim-by-claim basis by the insurance company.

CONFIRM COVERAGE WITH YOUR INSURANCE AGENT

It's advisable to reach out to your current professional liability insurance agent and ensure that your insurance company provides coverage for the duties as an interim administrator. During this process, make sure that your agent possesses comprehensive knowledge and expertise in the realm of lawyers' professional liability, including a deep understanding of the different potential risks involved.

CONCLUSION

Michigan's Rule 21 has ushered in a new era of accountability for interim administrators, emphasizing the need for professional liability insurance to provide comprehensive protection against potential risks. This insurance coverage is intended to not only shield individuals serving as interim administrators, but also provide peace of mind and ensure the confidence and security needed to perform their roles effectively and lead a seamless transition.

Disclaimer: This publication is not intended to confirm coverage for any claim that arises or to commit to coverage on behalf of any insurance company, but simply highlight potential coverage solutions for interim administrators.

Alec Fruin is a retail insurance broker at Marquette-based Acrisure LLC (doing business as VAST.) He specializes in lawyers professional liability and providing tailored solutions to firms throughout Michigan.

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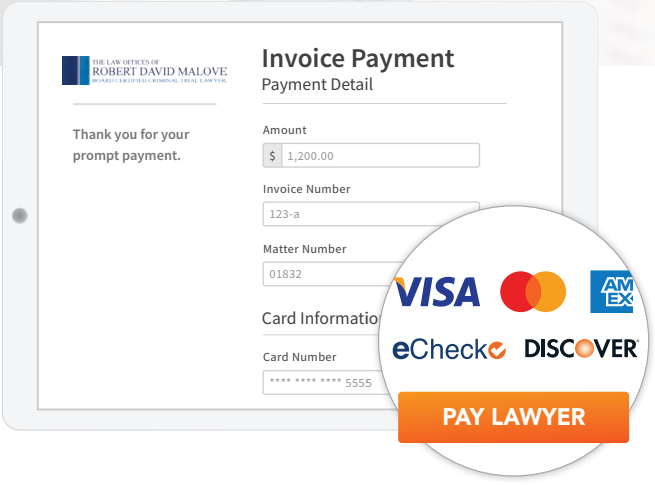

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Keeping up with tax guidance: Newsletters and alerts

BY JANE MELAND

Administrative guidance plays a significant role in understanding and interpreting the tax laws in the United States. While statutory law reigns supreme in the hierarchy of tax authorities, the importance of tax guidance cannot be overstated. It serves to fill the gaps inherent in statutory tax law, thereby providing crucial details of how tax laws should be applied and implemented — information essential for tax planning and compliance purposes.

One of the challenges associated with tax guidance is keeping abreast of the constantly changing collection of guidance documents issued at the state and federal levels.[1] With new guidance issued frequently, one of the most useful tools for monitoring updates is newsletters and alerts.

CURRENT AWARENESS SOURCES

There are a multitude of tax-focused newsletters and alerts that vary in scope and content. Some provide broad nationwide coverage of tax topics while others focus on specific jurisdictions or tax practice areas. Some provide detailed commentary and analysis of tax issues while others merely report tax law developments. With so many options, evaluating newsletters to find the best fit for your informational needs is important.

When assessing tax-related newsletters, cost, content, and frequency are the three most important factors to consider. Most newsletters are delivered electronically by subscribing via either a free resource such as the Internal Revenue Service (IRS) website or a subscription-based service such as Bloomberg Law. Obviously, subscription services come with a high price tag, but they tend to offer more analytical content, advanced search features, and various frequency settings.

In this article, I'll cover newsletters and alerts focused exclusively on tax guidance available through free government websites, Bloomberg Law, and Lexis Tax, although several research services also provide newsletters.[2]

FEDERAL SOURCES

The IRS offers a wide range of free e-news subscriptions on a variety of tax topics.[3] One such newsletter is IRS Guidewire, which provides email notifications of newly issued tax guidance such as regulations, notices, revenue rulings, procedures, and announcements. The email notifications are triggered as guidance documents are issued, so the frequency of notifications can vary; in a given week, subscribers might receive multiple notifications or none at all.

IRS Guidewire has several advantages when compared to other newsletters. Most importantly, it is free and timely. Additionally, the notification emails are formatted for easy reading and quick access to full-text guidance documents. One potential downside of this service is that it does not provide commentary or analysis, but if staying updated is the goal, this service is more than adequate.

Bloomberg Law publishes several tax-related newsletters and although it does not currently publish a dedicated tax guidance newsletter, it offers two useful alternatives: the Daily Tax Report and the Federal Tax Developments Tracker.

The Daily Tax Report is Bloomberg's flagship newsletter for all things tax. It covers federal, state, and international tax news. It also includes a special section on tax developments where newly issued tax guidance and recently decided cases are reported. The tax developments section is set apart from the rest of the newsletter content, making it easy to quickly peruse recently issued guidance documents.

The Federal Tax Developments Tracker is a database within Bloomberg that serves as a running ticker.

The Federal Tax Developments Tracker does not have its own newsletter, but subscribers may set up email alerts to receive notifications. One of the advantages of alerts is that they are highly customizable, allowing users to apply search terms, filter for specific types of guidance documents, put limits on categories of taxpayers (individual, corporate, nonprofit, etc.), and select from a range of frequency settings.

Like Bloomberg, Lexis Tax[4] does not publish a dedicated guidance newsletter. Instead, Lexis Tax subscribers can set up email alerts within its IRS Rulings and Releases database that includes comprehensive coverage of IRS guidance documents. Consistent with other services, Lexis Tax allows subscribers to apply search terms, frequency settings, and filters, but its filters are not quite as robust as Bloomberg's Federal Tax Developments Tracker.

One of the challenges associated with tax guidance is keeping abreast of the constantly changing collection of guidance documents issued at the state and federal levels.

MICHIGAN SOURCES

The best option for tracking Michigan-specific guidance documents is the Michigan Department of Treasury website, which offers a free email subscription to its Michigan Tax Updates Newsletter.[5] This newsletter is tailored to tax professionals and provides updates on a host of guidance documents including revenue administrative bulletins, audit manuals, technical advice letters, legal rulings, and more. Subscribers can choose to receive updates immediately, daily, or weekly.

Bloomberg provides state equivalents to the two services described in the federal sources section above. These are Daily Tax Report: State and the State Tax Development Tracker. Both sources provide nationwide coverage of state tax developments including guidance issued by the Michigan Department of Treasury, but limiting results to Michigan-specific developments requires some extra effort. These newsletters may be useful to practitioners who provide multi-jurisdictional tax advice but for those whose practice is Michigan-focused, the free newsletter from the Michigan Department of Treasury seems to be the better and more affordable option.

CONCLUSION

Newsletters and alerts are important tools for keeping pace with the ever-evolving landscape of tax guidance at the state and federal levels. With a diverse array of options available ranging from complimentary newsletters provided by entities like the IRS and the Michigan Department of Treasury to highly adaptable alerts offered by Bloomberg and Lexis, there is a suitable resource to meet the needs of most tax practitioners.

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

ENDNOTE

1. For a general overview of guidance documents issued at the federal level see, Internal Revenue Service, *IRS Guidance,* available at <https://www.irs.gov/newsroom/irs-guidance>; and for general overview of Michigan specific guidance documents *see,* Mich. Dept. Treasury, Revenue Administrative Bulletin 2016-20, Issuance of Bulletins, Letter Rulings and Other Guidance for Taxpayers, available at <https://www.michigan.gov/taxes/-/media/Project/Websites/treasury/RAB/2016/2016_RAB_201620__Issuance_of_Bulletins_Letter_Rulings_and_Other_Guidance.pdf?rev=9c80670861b24eacb226da858ce0a1a4&hash=DACBA68B7EBD94E5535D9FDFA21C08AE> (websites in this article were accessed September 6, 2023).
2. *E.g.,* Checkpoint Edge, VitalLaw Tax Research, and Tax Notes.
3. A list of all IRS e-News subscriptions may be found at https://www.irs.gov/newsroom/e-news-subscriptions.
4. Lexis Tax is a special tax focused research tool within Lexis +. More information about Lexis Tax may be found at: https://www.lexisnexis.com/en-us/products/lexis-tax.page.
5. Mich. Dept. Treasury, *Reports & Legal Resources,* available at <https://www.michigan.gov/treasury/reference>.
6. *Id.*

PRACTICING WELLNESS

The many benefits of the SBM Lawyers and Judges Assistance Program

BY MOLLY RANNS

As director of the State Bar of Michigan Lawyers and Judges Assistance Program (LJAP), I often wrestle over how to answer one frequently asked question: "So, what do you do for a living?" In fact, directors from lawyer assistance programs all over the country grapple with the complexities of this answer.

Simply put: We save lives. But there's a more elaborate response. The services LJAP (and programs like it) provides are abundant, personalized, comprehensive, and confidential.[1]

In the world of lawyer assistance programs (more commonly referred to as LAPs), it's been said that if you've seen one LAP, you've seen all LAPs. In other words, lawyer assistance programs are like snowflakes, similar to one another but unique in what each provides. LAPs across the country exist to help lawyers, judges, and law students not only with substance use and mental health concerns, but also offer a hand to those looking to maximize their overall well-being and thrive both personally and professionally.

We know from research that legal professionals face a unique set of stressors and, therefore, need specialized programs to address the strenuous nature of the practice of law. For example, the American Bar Association Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation in 2016 published a study of nearly 13,000 practicing attorneys and found that statistically significant elevated rates of depression, anxiety, stress, and substance use existed within the legal culture.[2] What's more, the Survey of Law Student Well-Being, also released in 2016, found similar statistics among law students.[3] Lawyer assistance programs are positioned to play an essential role in lawyer well-being and address these pressing concerns.

The SBM Lawyers and Judges Assistance Program serves law students, bar applicants, lawyers, judges, family members, colleagues, and other concerned parties.[4] We offer free telephone consultations for legal professionals and their family members, perform our own clinical assessments either on site or via a HIPAA-compliant telehealth platform, and provide short-term counseling for law students. LJAP also offers professional monitoring services, referrals to properly trained and credentialed providers who are effective in their jobs, free virtual support groups for law students and lawyers, and regular wellness seminars with nationally renowned keynote speakers at no cost to attendees. LJAP is here to provide professional training and educational outreach to your law school, firm, local or affinity bar, court, employer, or legal-related organization on topics pertaining to well-being for law students, lawyers, and judges. The assistance LJAP provides is both preventative and curative — in other words, we work to both thwart the difficulties so many legal professionals face and promote recovery from impairment.

Michigan Court Rule 9.114(c) states that if an attorney's alleged misconduct is significantly related to mental health or substance use, discipline can consist of contractual probation in lieu of sanctions while noting that contractual probation does not constitute discipline and shall be kept confidential.[5] The Lawyers and Judges Assistance Program works in this fashion, supporting recovery and helping strug-

"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

gling attorneys get well. While this has been — and will continue to be — a core mission of LJAP, attorneys and others do not need to encounter a problem before contacting our confidential program and utilizing the many services we have to offer.

We have come to understand that wellness is not simply the absence of illness, but rather a continuous process of seeking to thrive in all of life's dimensions[6] while recognizing the importance of being able to cope with day-to-day stressors in a positive manner and flourish as individuals. Managing one's mental and emotional health is integral to competence[7] and LJAP is here to support wellness in the legal community.

The support and services LJAP provides are many. If you are struggling, or perhaps just looking to maximize your overall well-being, call our confidential help line at (800) 996-5522 or email us at contactLJAP@michbar.org today.

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

ENDNOTES

1. State Bar of Michigan Lawyer & Judges Assistance Program <https://www.michbar.org/generalinfo/ljap/home> (all websites in this article were accessed on October 1, 2023).
2. National Task Force on Lawyer Well-Being, The Path to Lawyer Well-Being: Practical Recommendations for Positive Change <https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/lawyer_well_being_report_final.pdf>.
3. *Id.*
4. State Bar of Michigan Lawyer & Judges Assistance Program <https://www.michbar.org/generalinfo/ljap/home>.
5. MCR 9.114.
6. National Task Force on Lawyer Well-Being, The Path to Lawyer Well-Being: Practical Recommendations for Positive Change <https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/lawyer_well_being_report_final.pdf>.
7. *Id.*

ORDERS OF DISCIPLINE & DISABILITY

SUSPENSION AND RESTITUTION

Raymond G. Mullins, P23101, Ypsilanti, by the Attorney Discipline Board Washtenaw County Hearing Panel #5. Suspension, 180 days, effective Oct. 13, 2023.

After proceedings conducted pursuant to MCR 9.115, the panel found, by default, that the respondent committed professional misconduct during his representation of a client in an employment discrimination matter by failing to file a response to a motion to dismiss although he was given a number of opportunities to do so, resulting in the dismissal of his client's matter. The panel further found that in response to a request for investigation filed against him by his client, the respondent falsely responded that he had filed a response to the motion, that the court considered the motion, and granted the defendant's request to dismiss the action.

Based on the respondent's default, the hearing panel found that the respondent neglected a legal matter in violation of MRPC 1.1(c); failed to seek the lawful objectives of the 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 a client reasonably informed about the status of a matter and failed to comply promptly with reasonable requests for information in violation of MRPC 1.4(a); failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions in violation of MRPC 1.4(b); failed to refund an unearned fee in violation of MRPC 1.16(d); knowingly made a false statement of material fact in connection with a disciplinary matter in violation of MRPC 8.1(a)(1) and MCR 9.104(6); engaged in conduct in violation of the Rules of Professional Conduct in violation of MRPC 8.4(a); engaged in conduct involving dishonesty in violation of MRPC 8.4(b); engaged in conduct that was prejudicial to the proper administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); and engaged in conduct that was contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3).

The panel ordered that the respondent's license to practice law be suspended for 180 days, effective Oct. 13, 2023, and that the respondent pay restitution totaling $5,000. Costs were assessed in the amount of $1,887.13.

REPRIMAND WITH CONDITIONS (BY CONSENT)

Bart P. O'Neill, P63950, Harper Woods, by the Attorney Discipline Board Tri-County Hearing Panel #13. Reprimand, effective Sept. 9, 2023.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Reprimand with Conditions pursuant to MCR 9.115(F)(5) that was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contained the respondent's admissions that he was convicted by guilty plea on June 16, 2022, of Operating While Intoxicated, 2nd Offense, a misdemeanor, in violation of MCL/PACC code 257.625(1) in *People of the State of Michigan v. Bart Paul O'Neill,* 16th Circuit Court, Case No. 22-0030-FH, and that his conduct in that regard constitutes professional misconduct.[1]

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 MRPC 8.4(b) and MCR 9.104(5).

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ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be reprimanded with conditions relevant to the established misconduct. Total costs were assessed in the amount of $875.

1. The judgment of sentence indicates that the respondent was convicted under MCL 257.6256B; however, that subsection relates to a conviction of someone under the age of 21. The respondent is over 21 years of age. The correct subsection for Operating While Intoxicated, 2nd Offense, is MCL 257.625(1).

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FROM THE MICHIGAN SUPREME COURT

ADM File No. 2020-21
Amendments of the Michigan Rules of Evidence

ADM File No. 2022-03
Amendment of Rule 1.109 of the Michigan Court Rules

ADM File No. 2022-19
Proposed Amendments of Rules 1.15 and 1.15A and Proposed Additions of Rules 1.15B and 1.15C of the Michigan Rules of Professional Conduct

ADM File No. 2023-24
Proposed Amendment of Rule 3.701 and Proposed Additions of Rules 3.715, 3.716, 3.717, 3.718, 3.719, 3.720, 3.721, and 3.722 of the Michigan Court Rules

To read these ADM files, visit www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/administrative-orders/.

ADM File No. 2021-20
Amendment of Rule 6.001 and Addition of Rule 6.009 of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 6.001 and addition of Rule 6.009 of the Michigan Court Rules is adopted, effective Jan. 1, 2024.

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

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

(A) [Unchanged.]

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006(A) and (C)-(E), 6.009, 6.101-6.103, 6.104(A), 6.105-6.106, 6.125, 6.202, 6.425(D)(3), 6.427, 6.430, 6.435, 6.440, 6.441, 6.445, 6.450, 6.451, and the rules in subchapter 6.600 govern matters of procedure in criminal cases cognizable in the district courts.

(C) Juvenile Cases. MCR 6.009 and tThe rules in subchapter 6.900 govern matters of procedure in the district courts and in circuit courts and courts of equivalent criminal jurisdiction in cases involving juveniles against whom the prosecutor has authorized the filing of a criminal complaint as provided in MCL 764.1f.

(D)-(E) [Unchanged.]

[NEW] Rule 6.009 Use of Restraints on a Defendant

(A) Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, cloth and leather restraints, and other similar items, may not be used on a defendant during a court proceeding that is or could have been before a jury unless the court finds, using record evidence, that the use of restraints is necessary due to one of the following factors:

(1) Instruments of restraint are necessary to prevent physical harm to the defendant or another person.

(2) The defendant has a history of disruptive courtroom behavior that has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior.

(3) There is a founded belief that the defendant presents a substantial risk of flight from the courtroom.

(B) The court's determination that restraints are necessary must be made outside the presence of the jury. If restraints are ordered, the court shall state on the record or in writing its findings of fact in support of the order.

(C) Any restraints used on a defendant in the courtroom must allow the defendant limited movement of the hands to read and handle documents and writings necessary to the hearing. Under no circumstances should a defendant be restrained using fixed restraints to a wall, floor, or furniture.

(D) If the court determines restraints are needed, the court must order restraints that reflect the least restrictive means necessary to maintain the security of the courtroom. A court should consider the visibility of a given restraint and the degree to which it affects an

individual's range of movement. A court may consider, but is not limited to considering, participation by video or other electronic means; the presence of court personnel, law enforcement officers, or bailiffs; or unobtrusive stun devices.

Staff Comment (ADM 2021-20): The addition of MCR 6.009 establishes a procedure regarding the use of restraints on a criminal defendant in court proceedings that are or could be before a jury, and the amendment of MCR 6.001 makes the new rule applicable to felony, misdemeanor, and automatic waiver cases.

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

CAVANAGH, J. (*concurring*). I concur with this Court's order amending MCR 6.001 and adopting MCR 6.009. Under the new rule trial courts may order a defendant restrained any time they have record evidence to conclude it is necessary. The only circumstances under which restraining a defendant is prohibited are if a trial court has not considered whether restraining a defendant is necessary or if the trial court has done so and concluded that restraint is unnecessary. Further, the inquiry is required only in proceedings that are before a jury or could have been before a jury. This measure is prudent, narrow, and respectful of the presumption of innocence as well as the formal dignity of the courtroom.

We need not limit our court rules to require only constitutional minimums, but clearly, the constitutional minimum is a relevant consideration. In *Deck v. Missouri,* 544 US 622, 629 (2005), the United States Supreme Court discussed physical restraints that are visible to a jury because that was the factual circumstance with which the Court was presented. The Court, however, was very clear that there was a "consensus disapproving routine shackling dating back to the 19th century ... ." *Id.* at 629. Going back to Blackstone and before, courts have observed concerns with restraints beyond just their visibility:

> Blackstone wrote that "it is laid down in our antient [sic] books, that, though under an indictment of the highest nature," a defendant "must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape." 4 W. Blackstone, Commentaries on the Laws of England 317 (1769) (footnote omitted); see also 3 E. Coke, Institutes of the Laws of England *34 ("If felons come in judgement to answer, ... they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will"). [*Id.* at 626.]

And clearly *Deck*'s holding is not limited to the presumption of innocence, because the ultimate question the Court was contemplating was the use of restraints in the sentencing phase of a death-penalty case. *Deck* noted that the presumption of innocence was only one of three "fundamental legal principles" that required the prohibition of routine restraint. *Id.* at 630. The Court also noted that restraints interfere with the right to counsel and that "judges must seek to maintain a judicial process that is a dignified process." *Id.* at 631. On that point, the Court said:

> The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment. And it reflects a seriousness of purpose that helps to explain the judicial system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve. The routine use of shackles in the presence of juries would undermine these symbolic yet concrete objectives. As this Court has said, the use of shackles at trial "affront[s]" the "dignity and decorum of judicial proceedings that the judge is seeking to uphold." [*Id.* (citation omitted).]

Concerns about dignity in court proceedings certainly apply to bench trials as well as jury trials.

The counterbalance to these important legal principles is the vital practical consideration of safety. Sometimes restraints are required. MCR 6.009 allows a trial court to order restraints any time the court finds they are necessary because of one of the factors set forth in MCR 6.009(A)(1) through (3). Among these factors is if "[i]nstruments of restraint are necessary to prevent physical harm to the defendant or another person." MCR 6.009(A)(1). This broadly worded consideration would seem to allow a trial court to consider any fact specific to the defendant that gives rise to the necessity of restraints.

Of note, requiring consideration of the necessity of restraints in hearings that could not be held before a jury was not discussed in this public-comment process. That requirement might pose greater logistical challenges. To the extent Justice VIVIANO points out that particular defendants might be restrained for some hearings and not others, I trust our trial courts to navigate those decisions as they see fit.

VIVIANO, J. (*dissenting*). The majority adopts a new rule that greatly limits the circumstances in which a criminal defendant can be restrained when appearing in court. It prohibits the use of restraints on a criminal defendant in any "proceeding that is or could have been before a jury" unless the court makes certain findings. Consequently, the rule applies to proceedings that take place in front of a judge without a jury. The new rule is neither constitutionally required nor practically wise. I fear it will needlessly endanger the safety of judges, court staff, attorneys, and members of the public in courtrooms across the state. I therefore dissent.

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

As Justice ZAHRA explained when this rule was published for comment, the federal Constitution limits the use of restraints only when those restraints are visible to a *jury.* The United States Supreme Court's decision in *Deck v. Missouri,* 544 US 622, 629 (2005), held that the Constitution "prohibit[s] the use of physical restraints *visible to the jury* absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." (Emphasis added.) This reflects our caselaw. Prior to *Deck,* we held there was no prejudicial error when the jury does not observe the restraints on a defendant. See *People v. Dunn,* 446 Mich 409, 425 (1994) ("The record does not show, however, that any member of the jury saw or could see the leg irons, and, therefore, the record does not provide a basis for a finding that the use of leg irons deprived Dunn of a fair trial."). More recently, we have declined to apply *Deck*'s rule in situations in which the restraints were shielded from the jury's view and there was no evidence that any juror saw the restraints. *People v. Arthur,* 495 Mich 861, 862 (2013).

Today, however, the majority effectively extends the rule from *Deck* to certain proceedings before a judge. Nothing in the Constitution or relevant caselaw requires this result. Indeed, in describing the history of the rule, *Deck* explained that it "was meant to protect defendants appearing at trial before a jury." *Deck,* 544 US at 626. Accordingly, the rule was inapplicable during arraignments "or like proceedings before the judge." *Id.*[1] There is simply no basis in *Deck* or historical practice for limiting the use of restraints in nonjury proceedings.[2]

Not only is the rule constitutionally and historically ungrounded, it is also confusing and imprudent. As Justice ZAHRA observed, "the published rule would extend *Deck* even to bench trials held before the very judge who would have earlier made the decision on whether to shackle the defendant." Proposed Amendment of MCR 6.001 and Proposed Addition of MCR 6.009, 509 Mich 1214, 1216-1217 (2022) (ZAHRA, J., *dissenting*). More befuddling still, the rule applies only to certain proceedings in front of the judge — those that could have been held in front of a jury. As such, even if restraints during a bench trial are prohibited under the new rule, the judge could nevertheless order shackles on the defendant during all other proceedings that occur during the trial that would not take place in front of a jury. Thus, for example, if a motion is made during the bench trial, the judge could order the defendant restrained during the argument and decision on the motion.

It strains credulity to believe that the rule has any beneficial effect in these circumstances. It is not clear to me how the same judge who decides whether to shackle the defendant in the first place and sees the defendant in shackles during nonjury proceedings will somehow be biased by knowing that defendant is restrained during the bench trial — as noted, the majority's enactment today applies not only to *visible* restraints but more broadly to all restraints. So even if the judge cannot see the restraints, the rule still applies. What purpose could this rule possibly serve?

The rule adopted by the majority treats our trial judges as if they are incapable of using common sense. There is, of course, no basis for the idea that trial judges are unable to set aside the fact that a defendant is restrained in order to make proper and unbiased rulings during the proceedings.[3] Indeed, it is not clear that today's rule provides a solution to any problem whatsoever. No research or even anecdotes have been put forward in support of the notion that using restraints in bench trials or similar proceedings before a judge has resulted in harm to defendants. Certainly, nothing has been offered that would justify changing the default rule from allowing restraints in these circumstances to prohibiting them unless an exception exists.

The real result of the majority's rule, then, will not be to protect defendants. Rather, the rule's true effect will be to endanger the safety of court proceedings by limiting the discretion of trial judges, who certainly understand the security needs of their courtrooms far better than the members of this Court do. The rule significantly constricts the factors that a court can consider when determining whether to order restraints. As I noted when the majority imposed a similar rule with regard to juvenile defendants, today's rule removes from the table various factors that have always been considered in this setting. See Adoption of MCR 3.906, 508 Mich cxxvii, cxxxi-cxxxii (VIVIANO, J., *dissenting*). The rule today allows for restraints only if they are necessary to prevent physical harm, if the defendant has a history of "disruptive courtroom behavior" that poses "a substantial risk" of physical harm, or if there is "a founded belief that the defendant presents a substantial risk of flight … ."

This severely limits a court's discretion. A significant majority of states, historically and into the modern era, has "permitted courts to consider a range of information outside the trial, including past escape, prior convictions, the nature of the crime for which the defendant was on trial, conduct prior to trial while in prison, any prior disposition toward violence, and physical attributes of the defendant, such as his size, physical strength, and age." *Deck,* 544 US at 647-648 (THOMAS, J., *dissenting*). *Deck* allowed courts to continue relying on all these factors and rejected the rule "that courts may consider only a defendant's conduct at the trial itself or other information demonstrating that it is a relative certainty that the defendant will engage in disruptive or threatening conduct at his trial." *Id.* at 648 (THOMAS, J., *dissenting*); see also *id.* at 630 (opinion of the Court) (noting that judges can "take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial"). As I said with

regard to the use of restraints on juveniles, "I can think of no justification for limiting trial courts from full consideration of all factors bearing on the safety and security of court proceedings." Adoption of MCR 3.906, 508 Mich at cxxxii (VIVIANO, J., *dissenting*). I fear that the majority has enacted such a limitation today, in a much larger class of cases and with potentially tragic results.

I would have no objection to a rule that conforms to the constitutional requirements laid out in *Deck*, which our trial courts must abide by in any event. Today's rule needlessly goes much further and dangerously limits the ability of our trial judges to ensure that court proceedings are conducted safely and securely. I therefore dissent.

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

1. Although *Deck* involved the penalty phase, the penalty was decided by a jury in *Deck* and the holding was expressly limited to such jury determinations. *Id.* at 632-633.

2. Justice CAVANAGH notes that concerns other than the visibility of restraints help explain the historical ban on restraints. This may be true, but it ignores the ban's historical limitation to jury proceedings, where the visibility of restraints was thought to potentially harm perceptions of the defendant. While Blackstone's and Lord Coke's brief commentaries on the topic suggested a broader ban on restraints, courts quickly thereafter took the position that "their power to order the removal of shackles [w]as limited to trial" and did not extend to pretrial proceedings like arraignments. Lehr, *Brought to the Bar: The Constitutionality of Indiscriminate Shackling in Non-Jury Criminal Proceedings*, 48 N Ky L Rev 1, 6-7 (2021); see also *id.* at 7 (noting that early decisions in this country "[w]ithout exception" followed the English rule limiting the presumptive ban on shackles to trial). Part of the rationale was, as "[e]arly English jurists . . . recognized," that "restraints had the potential to skew perceptions of the criminal defendant" and "harm the public's perception of the defendant and the court." *Id.* at 4-5; see also *id.* at 8 (noting early caselaw from this country expressing the "concern[] for the effects visible restraints might have on a jury's perception of the defendant"). Thus, historically, the visibility of the restraints was a key to the development of the rule, and the presumption against restraints applied only in the jury-trial setting. *Id.* at 9 (noting in light of this history that the common-law rule has been consistent and that the Supreme Court has recognized it as a constitutional rule governing *jury* proceedings); *id.* at 37 (noting the longstanding view that nonjury proceedings are fundamentally different from jury proceedings and that restrictions on restraints should not apply).

3. On the contrary, "[o]ur judicial system operates under a fundamental presumption that trial judges are impartial, even when presented with inadmissible or prejudicial information." *Cameron v Rewerts*, 841 F Appx 864, 866 (CA 6, 2021), citing, *inter alia, Harris v Rivera*, 454 US 339, 346 (1981) ("In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions."); see also *People v Wofford*, 196 Mich App 275, 282 (1992) ("Unlike a jury, a judge is presumed to possess an understanding of the law, which allows him to understand the difference between admissible and inadmissible evidence or statements of counsel."); cf. *Mahlen Land Corp v Kurtz*, 355 Mich 340, 351 (1959) (noting that, when reviewing a trial judge's actions, the judge "stands in our eyes garbed with every presumption of fairness, and integrity, and heavy indeed is the burden assumed in this Court by the litigant who would impeach the presumption so amply justified through the years").

ADM File No. 2022-11
Amendments of Rules 2.511 and 6.412 of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 2.511 and 6.412 of the Michigan Court Rules are adopted, effective Jan. 1, 2024.

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

Rule 2.511 Impaneling the Jury

(A)-(B) [Unchanged.]

(C) Examination of Jurors~~; Discharge of Unqualified Juror~~. The court may ~~conduct the~~ examin~~eation of~~ prospective jurors or ~~may~~ permit the attorneys for the parties to do so. If the court examines the prospective jurors, it must permit the attorneys for the parties to

(1) ask further questions that the court considers proper, or

(2) submit further questions that the court may ask if it considers them proper.

(D) Discharge of Unqualified Juror. When the court finds that a person in attendance at court as a juror is not qualified to serve as a juror, the court shall discharge him or her from further attendance and service as a juror.

(D)-(H) [Relettered (E)-(I) but otherwise unchanged.]

Rule 6.412 Selection of the Jury

(A)-(B) [Unchanged.]

(C) Voir Dire of Prospective Jurors.

(1) [Unchanged.]

(2) Conduct of the Examination. The court may ~~conduct the~~ examin~~eation of~~ prospective jurors or permit the attorneys for the parties~~lawyers~~ to do so. If the court ~~conducts the~~ examin~~esation~~ the prospective jurors, it must~~may~~ permit the attorneys for the parties~~lawyers~~ to ~~supplement the examination by direct questioning or by submitting questions for the court to ask.~~

(a) ask further questions that the court considers proper, or

(b) submit further questions that the court may ask if it considers them proper.

On its own initiative or on the motion of a party, the court may provide for a prospective juror or jurors to be questioned out of the presence of the other jurors.

(D)-(F) [Unchanged.]

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

Staff Comment (ADM File No. 2022-11): The amendments of MCR 2.511(C) and 6.412(C) align with Fed Crim P 24 and Fed Civ R 47 and require the court to allow the attorneys or parties to conduct voir dire in civil and criminal proceedings if the court examines the prospective jurors. The requirement is subject to the court's determination that the parties' or attorneys' questions are proper.

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

ADM File No. 2022-24
Proposed Amendments of Rules 6.907, 6.909, and 6.933 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering amendments of Rules 6.907, 6.909, and 6.933 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 6.907 Arraignment on Complaint and Warrant

(A) [Unchanged.]

(B) Temporary Detention Pending Arraignment. If the prosecuting attorney has authorized the filing of a complaint and warrant charging a specified juvenile violation instead of approving the filing of a petition in the family division of the circuit court, a juvenile may, following apprehension, be detained pending arraignment:

(1)-(3) [Unchanged.]

If no juvenile facility is reasonably available and if it is apparent that the juvenile may not otherwise be safely detained, the magistrate may, without a hearing, authorize that the juvenile be lodged pending arraignment in a facility used to incarcerate adults. The juvenile must be kept separate from adult prisoners as required by law. Best efforts must be made to avoid placing youthful inmates in isolation to comply with this provision.

(C) [Unchanged.]

Rule 6.909 Releasing or Detaining Juveniles Before Trial or Sentencing

(A) [Unchanged.]

(B) Place of Confinement.

(1)-(3) [Unchanged.]

(4) Separate Custody of Juvenile. The juvenile in custody or detention must be maintained separately from the adult prisoners or adult accused as required by MCL 764.27a. Best efforts must be made to avoid placing youthful inmates in isolation to comply with this provision.

(C) [Unchanged.]

Rule 6.933 Juvenile Probation Revocation

(A)-(F) [Unchanged.]

(G) Disposition in General.

(1) [Unchanged.]

(2) Other Violations. If the court finds that the juvenile has violated juvenile probation, other than as provided in subrule (G)(1), the court may order the juvenile committed to the Department of Corrections as provided in subrule (G)(1), or may order the juvenile continued on juvenile probation and under state wardship, and may order any of the following:

(a)-(h) [Unchanged.]

If the court determines to place the juvenile in jail for up to 30 days, and the juvenile is under 18 years of age, the juvenile must be placed separately from adult prisoners as required by law. Best efforts must be made to avoid placing youthful inmates in isolation to comply with this provision.

(3) [Unchanged.]

(H)-(J) [Unchanged.]

Staff Comment (ADM File No. 2022-24): As a condition for the State's receipt of federal funds under the Prison Rape Elimination

Act, 34 USC 30301 *et seq.*, the conditions of confinement for juveniles must comply with federal regulations promulgated under that act, including the requirement that best efforts be made to avoid placing incarcerated youthful inmates in isolation. See 28 CFR 115.14. The proposed amendments clarify that youthful inmates should not be placed in isolation in order to keep them separate from adults.

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 Jan. 1, 2024 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. 2022-24. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ZAHRA, J. and VIVIANO, J., would have declined to publish the proposal for comment.

ADM File No. 2022-33
Proposed Amendment of Rule 4.303 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 4.303 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for 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 4.303 Notice

(A)-(C) [Unchanged.]

(D) Dismissal for Lack of Progress. On motion of a party or on its own initiative, the court may order that an action in which no progress has been made within 91 days be dismissed for lack of progress. A dismissal under this subrule is without prejudice, unless the court orders otherwise.

Staff Comment (ADM File No. 2022-33): The proposed amendment of MCR 4.303 would allow courts to dismiss small claims cases for lack of progress. 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 Jan. 1, 2024, 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. 2022-33. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2023-01
Supreme Court Appointment to the Attorney Discipline Board

On order of the Court pursuant to MCR 9.110, Kamilia K. Landrum (layperson member) is appointed to the Attorney Discipline Board for a term commencing on Oct. 1, 2023, and ending on Sept. 30, 2026.

ADM File No. 2023-01
Supreme Court Appointments to the Attorney Grievance Commission

On order of the Court, pursuant to MCR 9.108, Kathryn R. Swedlow (attorney member), Alexander Pahany (attorney member), and James Moritz (layperson member) are appointed to the Attorney Grievance Commission for terms commencing on Oct. 1, 2023, and ending on Sept. 30, 2026.

Latoya M. Willis is appointed as chairperson and J. Paul Janes is reappointed as vice-chairperson of the commission for terms commencing on Oct. 1, 2023, and ending Sept. 30, 2024.

ADM File No. 2023-20
Adoption of Administrative Order No. 2023-1 Creation of the Commission on Well-Being in the Law

Administrative Order No. 2023-1 — Commission on Well-Being in the Law

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

In 2017, the National Task Force on Lawyer Well-Being released its report, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change.* The report highlights the significant struggles faced by legal professionals and law students, including high rates of depression, anxiety, and substance use issues. In May 2022, the Michigan Supreme Court and the State Bar of Michigan launched The Task Force on Well-Being in the Law (Task Force) to answer the National Task Force's call to action to address the well-being of legal professionals and law students. On Aug. 18, 2023, the Task Force presented a report to the Supreme Court that included a recommendation that the Court create an ongoing interdisciplinary commission to build on the work that has been done to date. The Court recognizes the importance of ensuring Michigan's legal professionals and law students have the resources and information available to help ensure their well- being. Therefore, on order of the Court, the Commission on Well-Being in the Law is created, effective immediately.

I. Purpose

The purpose of the Commission on Well-Being in the Law is to build upon the good work already accomplished by the Task Force and continue the forward momentum to change the climate of the legal culture by promoting well-being within the legal profession. The Commission will foster an environment that encourages members of the legal profession, law students, and court staff to strive for greater mental, physical, and emotional health.

II. Duties

The Commission will address the recommendations outlined in the report from the Task Force on Well-Being in the Law, and continue to work with stakeholders to identify and implement additional strategies to reduce the stresses to mental health in the legal profession; eliminate the stigma associated with help-seeking behaviors; educate judges and court staff, lawyers, and law students on well-being issues; and take incremental steps to enhance well-being within the profession.

III. Commission Leadership

A. Executive Team — The leadership, direction, and administrative support for the Commission's activities is provided collaboratively by the State Court Administrative Office, Supreme Court staff, and the State Bar of Michigan. The chair and vice-chair, the State Court Administrator (or designee), the Executive Director of the State Bar of Michigan (or designee), and the Director of the State Bar of Michigan Lawyers and Judges Assistance Program constitute the Executive Team. Duties of the Executive Team include:

1. Preparing meeting agendas;

2. Providing data required for Commission deliberations;

3. Identifying and pursuing third party funding sources for Commission initiatives; and

4. Preparing an annual report for the Supreme Court.

B. Chair and Vice-Chair — A chair and vice-chair are appointed for two-year terms and may be reappointed.

1. Initial appointments — Individuals selected for chair/vice-chair positions when the Commission is first constituted shall serve their initial two-year term regardless of their continued membership in the groups outlined in Section IV.A.

2. After the initial selection, individuals selected for the chair/vice-chair positions shall be chosen from the membership of the Commission. The Executive Team will provide recommendations for the Court's consideration.

3. Duties of the chair include:

a. Presiding at all meetings of the Commission;

b. Approving a draft agenda for Commission meetings; and

c. Serving as the official spokesperson of the Commission.

4. The vice-chair will perform the duties of the chair in the chair's absence.

IV. Commission Membership

A. Membership shall be comprised of 34 members from the following individuals and groups:

1. A sitting justice of the Michigan Supreme Court.

2. The State Court Administrator or designee.

3. The Executive Director of the State Bar of Michigan or designee.

4. The Director of the State Bar of Michigan Lawyers and Judges Assistance Program.

5. Subject to appointment as provided in Section IV.B, one individual representing each of the following, as recommended by the following:

a. the Michigan Indigent Defense Commission;

b. the Prosecuting Attorneys Association of Michigan;

c. the Board of Commissioners of the State Bar of Michigan;

d. the Michigan Tribal State-Federal Judicial Forum;

e. Michigan State University College of Law;

f. University of Michigan Law School;

g. Western Michigan University Cooley Law School;

h. University of Detroit Mercy School of Law;

i. Wayne State University Law School;

j. the Michigan Attorney Discipline Board;

k. the Michigan Attorney Grievance Commission;

l. the Michigan Judicial Tenure Commission.

6. Subject to appointment as provided in Section IV.B, the following individuals:

a. a judge of the Michigan Court of Appeals;

b. a member of the Michigan Judges Association (Circuit Court Judge);

c. a member of the Michigan District Court Judges Association;

d. a member of the Michigan Probate Judges Association;

e. a member of the Association of Black Judges of Michigan

f. a member of the Referees Association of Michigan;

g. a member of the Michigan Association of District Court Magistrates;

h. a member of the Michigan Court Administration Association;

i. a member of the Michigan Association of Circuit Court Administrators;

j. a member of the Michigan Probate and Juvenile Registers Association;

k. two law students currently attending an ABA-accredited law school within Michigan;

l. two mental health professionals licensed in Michigan;

m. four attorneys licensed and practicing in Michigan, with one from each of the following representative groups:

i. has been licensed for less than 5 years;

ii. working in a solo practice;

iii. working at a mid-size law firm, as defined by the Executive Team;

iv. an attorney working at a large law firm, as defined by the Executive Team.

B. Appointments. With the exception of the members who will serve by virtue of their status (See Section IV.A.1 to IV.A.4), the Supreme Court shall appoint all members of the Commission. The Executive Team will provide recommendations for the Court's consideration.

C. Terms — With the exception of members who will serve by virtue of their status (See Section IV.A.1 to IV.A.4), members of the Commission will be appointed for three-year terms and will be limited to serving two full terms. Initial terms will commence as ordered by the Court and may be less than three years to ensure that the terms are staggered, with initial terms of one-year, two-years, and three- years. All members appointed or reappointed following these initial terms will be appointed for three-year terms. After initial appointment, all terms commence January 1st and end on December 31 of each calendar year. A law student member who graduates during their term may serve until the completion of their term but may not be reappointed to represent that stakeholder group.

The following individuals comprise the initial Executive Team of the Commission on Well-Being in the Law:

Supreme Court Justice Megan K. Cavanagh

State Court Administrator Tom Boyd (or designee)

SBM Executive Director Peter Cunningham (or designee)

Director of the SBM Lawyer and Judges Assistance Program Molly Ranns.

Justice Megan K. Cavanagh and Molly Ranns are appointed as the initial chair and vice-chair, respectively.

D. Vacancy — The Executive Team may declare a vacancy exists if a member resigns from his or her position from the

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

Commission, moves outside of Michigan, is no longer licensed as required for membership, or does not attend two consecutive meetings without being excused by the chair or vice-chair. If the vacancy is from a group identified in Section IV.A.5, that group shall provide the Executive Team a recommendation for appointment of another person to fill the vacancy. The Executive team shall transmit the recommendation of the group to the Court. In the event of other vacancies on the Commission, the Executive Team will recommend to the Court appointment of a replacement member who will serve the remainder of the term of the former incumbent. After serving the remainder of the term, the new member may be reappointed for no more than two full terms.

V. Meetings, Committees, and Workgroups

A. The Commission will establish operating procedures for conducting meetings. The procedures will be available to the public.

B. The Commission may establish Work Groups or Subcommittees as needed to facilitate or accomplish the work of the Commission.

C. The Executive Team may invite individuals whose particular experience and perspective is needed or helpful to assist with the Commission's work, including participation in Work Groups or Subcommittees.

VI. Staffing and Administration

The State Court Administrative Office and Supreme Court staff will provide administrative support to the Commission.

VII. Compensation

Members of the Commission will serve without compensation.

VIII. Reporting Requirement

A. The Commission will file an annual report with the Michigan Supreme Court about the Commission's activities and progress during the previous year. The annual report will be available to the public on the Court's website.

B. The Commission may make additional information, data, presentations, and publications available to the public and may solicit public comment concerning the Commission's work.

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Career Center. The State Bar of Michigan has partnered with an industry leader in job board development to create a unique SBM employment marketplace with features different from generalist job boards in including a highly targeted focus on employment opportunities in a certain sector, location, or demographic; anonymous resume posting and job application enabling job candidates to stay connected to the employment market while maintaining full control over their confidential information; An advanced "job alert" system that notifies candidates of new opportunities matching their preselected criteria; and access to industry-specific jobs and top-quality candidates. Employer access to a large number of job seekers. The career center is free for job seekers. Employers pay a fee to post jobs. For more information visit the Career Center at jobs.michbar.org.

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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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