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- Is it time to modernize your condominium bylaws?
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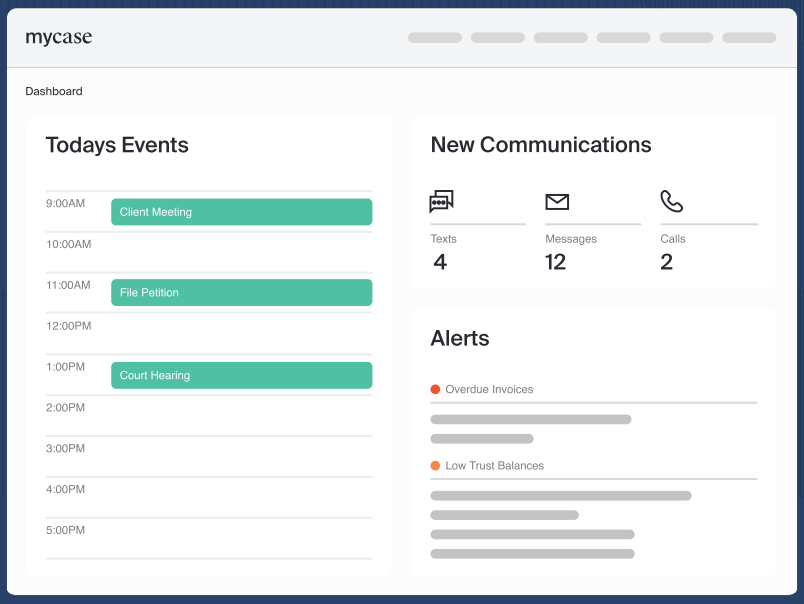

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RECENTLY RELEASED

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.

MONEY JUDGMENT INTEREST RATE

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

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

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

13% per year, compounded annually; or

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

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

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

DUTY TO REPORT AN ATTORNEY'S CRIMINAL CONVICTION

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

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

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

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

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

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755 W. Big Beaver Road, Suite 2100
Troy, MI 48084

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

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

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NEWS & MOVES

ARRIVALS AND PROMOTIONS

EVAN CHALL with Wright Beamer is the firm's newest partner.

KATHRYN EISENSTEIN with Mantese Honigman PC has been named partner.

JAKE W. HENDRICKS has joined Plunkett Cooney as an associate.

ROBERTS KENGIS has joined Lennon Miller as of counsel.

NATHAN LICHTMAN has joined Wright Beamer as an associate.

KIEL D. SMITH has been elevated to chief legal and administrative officer with automotive supplier Auria.

MARCUS SPROW with Foley & Lardner has been appointed managing partner of the Detroit office.

TIM ZELEK was appointed as counsel to the inspector general of the Marine Corps at the Pentagon in Arlington, Virginia.

AWARDS AND HONORS

Twenty-five **BUTZEL** attorneys have been recognized as Top Lawyers in metro Detroit 2024 by DBusiness magazine.

J. TERRANCE DILLON, **MICHAEL L. GUTIERREZ**, **DANIEL J. HATCH**, and **LEE T. SILVER** with Butzel have been recognized on the list of top lawyers in the November-December 2023 edition of Grand Rapids magazine.

HOWARD GOLDMAN, a partner with Plunkett Cooney, was recognized on Michigan Lawyers Weekly's inaugural Go-To Lawyers Power List for commercial real estate law.

MELISSA M. HORNE, counsel to Higgins, Cavanagh & Cooney in Providence, Rhode Island, was recognized as a lawyer of the year by RI Lawyers Weekly.

Butzel president and CEO **PAUL MERSINO** has been named to the Michigan Lawyers Weekly Leaders in the Law class of 2023.

PLUNKETT COONEY has been recognized by Best Companies Group as one of its 2023 Best Places to Work among Michigan law firms.

ELIZABETH ROGERS, a partner at Taft, has been recognized on Michigan Lawyers Weekly's Go-To Lawyers Power List for commercial real estate law.

Four **WARNER NORCROSS & JUDD** team members have been recognized on Michigan Lawyers Weekly's Unsung Heroes list for 2023.

LEADERSHIP

DREW S. NORTON with Drew S. Norton PC has successfully completed SCAO training in civil mediation and is now certified and available to perform civil mediations.

OTHER

BUTZEL attorney and former Michigan Supreme Court Justice **KURTIS T. WILDER** had his portrait dedication during a special session of the Michigan Supreme Court on Nov. 29.

PRESENTATIONS, PUBLICATIONS, AND EVENTS

The **INGHAM COUNTY BAR ASSOCIATION** hosts its Meet the Judges event on Thursday, Jan. 11.

MDTC hosts its The Defense Network event on Friday, Jan. 19, and its 8th Annual Legal Excellence Awards on Thursday, March 24.

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

IN MEMORIAM

CHARLES H. BLAIR, P10860, of Bloomfield Hills, died Nov. 4, 2023. He was born in 1935, graduated from Wayne State University Law School, and was admitted to the Bar in 1962.

DEAN D. BURNS, P11428, of Petoskey, died Dec. 1, 2023. He was born in 1940, graduated from University of Michigan Law School, and was admitted to the Bar in 1967.

MAUREEN H. BURKE, P32153, of Harbor Springs, died Oct. 12, 2023. She was born in 1950, graduated from University of Detroit School of Law, and was admitted to the Bar in 1980.

MARVIN W. CHERRIN, P11826, of Southfield, died Sept. 10, 2023. He was born in 1934, graduated from Wayne State University Law School, and was admitted to the Bar in 1961.

WILLIAM J. COLE, P12049, of Kentwood, died May 26, 2023. He was born in 1942, graduated from Wayne State University Law School, and was admitted to the Bar in 1970.

WILLIAM W. DERENGOSKI, P34242, of East Lansing, died Oct. 6, 2023. He was born in 1942, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1982.

WILLIAM M. DONOVAN, P12892, of Rochester, died Sept. 1, 2023. He was born in 1939, graduated from University of Detroit School of Law, and was admitted to the Bar in 1965.

STEVEN D. DUNNINGS, P36086, of Lansing, died Nov. 2, 2023. He was born in 1955 and was admitted to the Bar in 1984.

DAVID S. FEINBERG, P42854, of Lansing, died Nov. 28, 2023. He was born in 1960, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1989.

DENO P. FOTIEO, P28355, of Grand Rapids, died Dec. 10, 2023. He was born in 1952 and was admitted to the Bar in 1978.

JOHN J. FRAWLEY, P26370, of Haslett, died June 12, 2023. He was born in 1950, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1976.

VALORIE A. GILFEATHER, P27247, of Northport, died July 7, 2023. She was born in 1952, graduated from University of Michigan Law School, and was admitted to the Bar in 1977.

ROBERT GOREN, P14206, of Bingham Farms, died Nov. 27, 2023. He was born in 1931, graduated from Wayne State University Law School, and was admitted to the Bar in 1956.

DAVID L. KAMINSKI, P24720, of Northville, died Nov. 11, 2023. He was born in 1941, graduated from Detroit College of Law, and was admitted to the Bar in 1975.

DONALD A. KUEBLER, P16282, of Saginaw, died Sept. 15, 2023. He was born in 1938, graduated from Detroit College of Law, and was admitted to the Bar in 1966.

GARY D. KUIPER, P35894, of Grand Blanc, died Nov. 30, 2023. He was born in 1951, graduated from Detroit College of Law, and was admitted to the Bar in 1983.

DALE A. OSTERTAG, P38033, of Carlsbad, California, died Feb. 21, 2023. He was born in 1946, graduated from Detroit College of Law, and was admitted to the Bar in 1985.

KENDALL B. PERRY, P81592, of Mason, died Oct. 30, 2023. He was born in 1970, graduated from Western Michigan University Thomas Cooley Law School, and was admitted to the Bar in 2017.

CHRISTINE P. PIATKOWSKI, P56492, of Brighton, died Nov. 23, 2023. She was born in 1965, graduated from University of Detroit School of Law, and was admitted to the Bar in 1997.

MYRON F. POE, P18962, of Royal Oak, died Oct. 5, 2023. He was born in 1931, graduated from University of Detroit School of Law, and was admitted to the Bar in 1970.

ROBERT D. SAROW, P19904, of Bay City, died Oct. 28, 2023. He was born in 1942, graduated from University of Michigan Law School, and was admitted to the Bar in 1968.

HAROLD G. SCHUITMAKER, P20087, of Paw Paw, died Nov. 26, 2023. He was born in 1943, graduated from Wayne State University Law School, and was admitted to the Bar in 1970.

HON. H. DAVID SOET, P20769, of Grand Rapids, died Oct. 27, 2023. He was born in 1935, graduated from University of Michigan Law School, and was admitted to the Bar in 1961.

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

Count your blessings — then do something

I'll be honest with you. I've had every advantage. I was never hungry, unhoused, abused, or without love. I am male, white, and without a disability. My parents stressed education, could afford to live in a city with good public schools and send me to a SAT preparation course and college, and the government was there for law school tuition. I didn't have to balance work while trying to study or pass the bar. I was hired by an excellent firm and given every resource to try and succeed. I've had mentors, role models, and a lot of grace given to me every step of the way. And let's not forget family support, incredible friends and colleagues, and a tragedy-free life which has (among other things) allowed me to focus on my career and family. I do not suffer from mental disease, addiction, emotional issues, or major health obstacles. I face no discrimination of any sort anywhere I go. And I've had enough money to help smooth over the rougher edges of life, open doors, and help my children succeed.

Who amongst us would not be grateful for all of that? Surely those with far less are happy and successful, but one cannot simply ignore these tremendous advantages. 'Tis the season for gratitude, and yet I'm mindful that for those who have much, magnanimity is cheap.

But this is not about generosity. It's about recognition and action.

Counting one's own blessings forces two reckonings. First, one has to be honest with oneself. This isn't always easy. Ego often intervenes and tells you that what you have earned wasn't luck, or grace, or really had all that much to do with the help of others. It also requires awareness not only of oneself, but of the wider world. It's human nature to take things for granted — such as how much their skin color, upbringing, or peer groups (to name only a few factors) contributes to their success — because facing such truths feels like giving up agency in a precarious world and comes with the recognition that those who do not have these advantages — through no fault of their own — have a much harder journey.

This leads to the second reckoning of honestly taking stock of one's advantages: action. Here, I don't mean charity work, admirable though it is. I mean changing the system, or at least changing the outcome for someone in it. If we believe that all people are created equal and that all deserve a chance to prove themselves in this meritocracy, then we must necessarily believe that anything which tilts the table against some portion of the population is fundamentally unfair. Solving the world's ills is not the job of your bar association. But improving the functioning of the courts and taking action to increase the availability of legal services to society — that is our bread and butter.

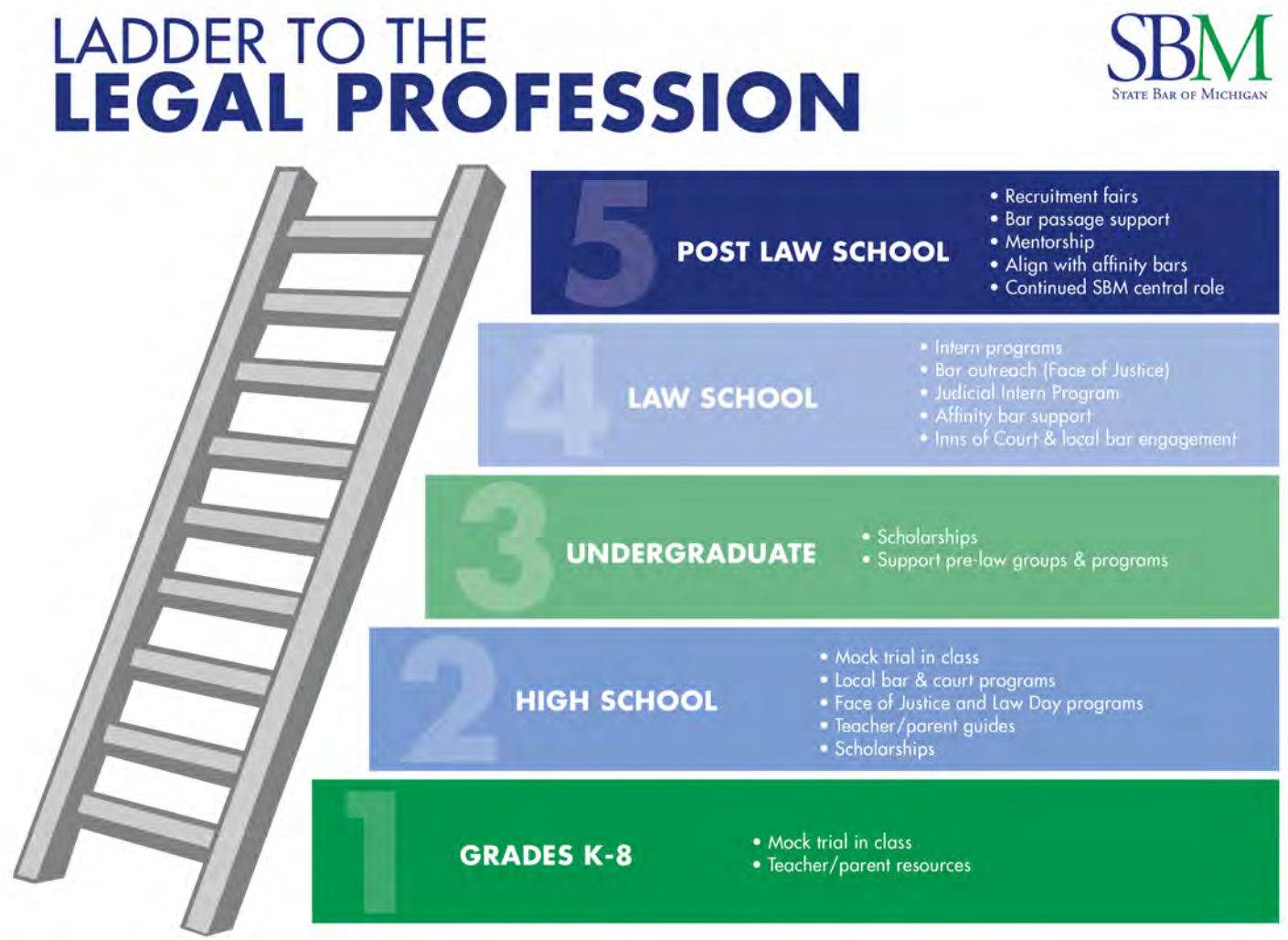
Of all places, everyone should have an equal shot at making it in the law. If justice is our name, then equal opportunity must be our game. But it doesn't work that way. Despite efforts to improve, diversity in the legal profession lags behind the overall U.S. population and other professions. For example, just 6% of lawyers are Hispanic and 5% of lawyers are Black, while representing 19% and 13% of the U.S. population, respectively.[1] Michigan has a similar disparity.[2] Much has been written as to why the improvement of legal services and the functioning of our courts turns upon the

very font of our legitimacy — the people, *all* people — both having access to and feeling welcome within the system. This includes, among a great many other things, inclusion as lawyers and judges within the justice system.[3]

One focus of the legal profession for many years has been pipeline programs. These programs recognize the truths noted above and attempt to create a supportive pathway for individuals historically disadvantaged, marginalized, and underrepresented to join the legal profession and succeed. The programs take many forms. The SBM itself hosts the Face of Justice program[4] as an important part of this tableau, and various bar associations, colleges, law schools, and courts sponsor similar efforts.[5]

For several years, I've been working with SBM Director of Diversity Greg Conyers, our executive director, and various other stakeholders to figure out what more we can do in this space. We convened a "summit" held in June 2023 and attended by more than 40 individuals representing interests from across the state. We heard about what works, what doesn't, and how the bar can help. We reconvened in November 2023 and in between, continued our collaboration, listening, and learning. The SBM's Diversity and Inclusion Advisory Committee has been actively involved, and my friend, partner, and fellow commissioner, Aaron Burrell, has agreed to take a leadership role.

Over time, I've decided that a ladder is a better metaphor than a pipeline for what the SBM can do. In a perfect world, a cohesive system would accompany a student from elementary school through law school graduation and beyond, aware of each person's unique journey, and offering a host of support services. But that is not realistic. Instead, we have a number of programs offered by multiple groups and entities with little, if any, longitudinality (that is, staying connected over time) or data collection as to what really works. A ladder is a better metaphor because at each rung there are offerings. One might capture some of the current pipeline programs as follows:

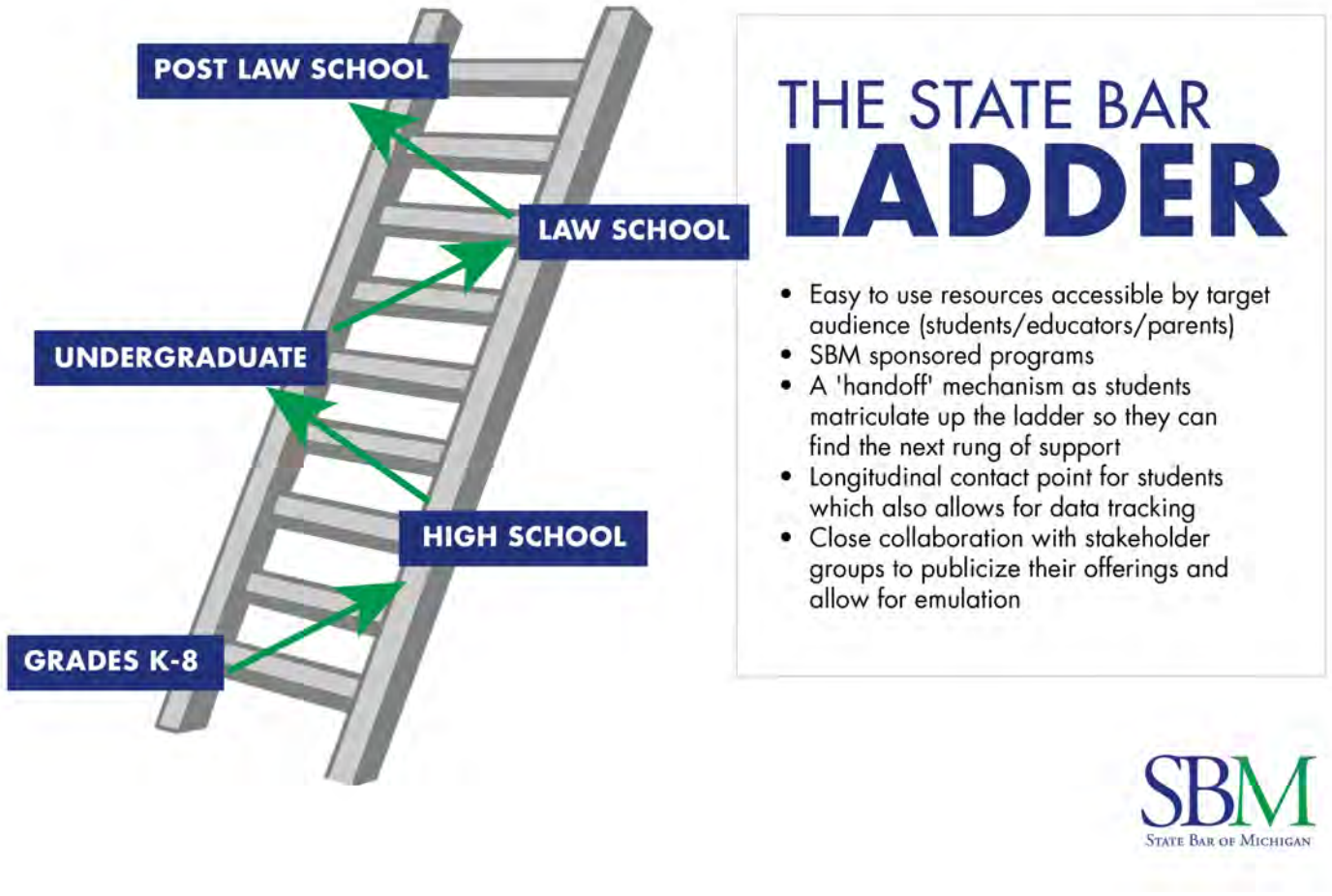


What a ladder also has are legs, which connect the rungs and give the apparatus structure and cohesion. The ladder metaphor is more apt because it highlights where the SBM can really shine: by connecting all the work of others while providing the climber an easy way to find the next rung and keep ascending. The Bar can be a convener amongst various groups as a centralized way to share and colloborate and the sponsor of signature programs which supplement the rich offerings provided by others. My vision for the SBM ladder is represented below.

As we move through 2024, and for many years into the future, we will stay focused on these issues. Someday, someone will look back — maybe in this space — and reflect upon the advantages they had to get to where they are in life. Hopefully, the SBM will be amongst the advantages that person had to ascend to their success. For that opportunity, I am truly grateful.

ENDNOTES

1. American Bar Association, *Statement of ABA President Mary Smith RE: Diversity programs at law firms* <https://www.americanbar.org/news/abanews/aba-news-archives/2023/08/statement-of-aba-president-re-diversity-programs-law-firms/> (posted August 25, 2023) (accessed December 14, 2023).
2. State Bar of Michigan, *Diversity & Inclusion* <https://www.michbar.org/diversity/home> [scroll to SBM Demographic Data at bottom of page].
3. Emblematic of the widespread recognition of need for action is the Michigan Supreme Court's establishment of the Commission on Diversity, Equity, and Inclusion in the Michigan Judiciary. See Administrative Order No. 2022-1, ___ Mich ___ (2022) <https://www.courts.michigan.gov/48d342/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/adopted-orders/2021-38_2022-01-05_formattedorder_ao2022-1dei.pdf>).
4. State Bar of Michigan, *Face of Justice* <https://www.michbar.org/diversity/face-of-justice>).
5. State Bar of Michigan, *Diversity & Inclusion Pipeline Programs Guide* <https://www.michbar.org/file/diversity/pdfs/pipelineguide.pdf>) (accessed December 14, 2023). Lately, even private corporations are helping, such as the Ford Motor Co. establishment of the Ford Law Career Academy. <https://media.ford.com/content/fordmedia/fna/us/en/news/2020/11/23/ford-law-career-academy.html>).



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Professionalism: Inspiring respect, building trust

BY HON. ELIZABETH T. CLEMENT

When the COVID-19 pandemic began and Michigan courts pivoted quickly to online proceedings, hundreds of thousands of interested parties were able to watch livestreamed court hearings. Since April 2020, litigants have participated in more than 11 million hours of hearings and local trial court YouTube channels have grown to include more than 350,000 subscribers. The public is interested in the work of our justice system, and judges and lawyers owe them our best effort to achieve and maintain the highest standards of professionalism and civility.

For the most part, when Michiganders tune in to watch trial court proceedings, they see just that — a justice system in which all are treated with dignity and respect. However, we all are aware of instances when civility is sacrificed — sometimes for sake of argument, sometimes because of frustration or anger, and sometimes for other reasons. No excuse is acceptable for bad behavior, especially when we are talking about judges and lawyers. We know better and we must act like it.

The lack of professionalism is not a new phenomenon; livestreaming just made it more visible to the public. The State Bar of Michigan has long been concerned about the problem, leading to its hosting of a summit on professionalism and civility in October 2018. Based on the work of the summit, former SBM President Ed Pappas chaired a workgroup that developed professionalism principles endorsed by the SBM Representative Assembly in 2020. In December of that year, the Michigan Supreme Court formally adopted the 12 Principles of Professionalism and Civility in Administrative Order 2020-23.

The principles embody civility, cooperation, respect, fairness, open-mindedness, honesty, integrity, courtesy, and responsibility, holding attorneys accountable and demanding that we in the legal profession hold one another accountable. The principles and the associated guidance in the administrative order provide a detailed set of rules for lawyers and judges. Judges, for example, are advised to be punctual and patient and maintain control in the courtroom so proceedings are civil and fair-minded.

In 2022, the State Bar of Michigan transitioned the workgroup into the Special Committee on Professionalism and Civility to continue this mission. Under the leadership of chair Michael Lieb, the committee maintains materials intended to support lawyers and judges as they implement the professionalism principles on a day-to-day basis. The committee also operates a speakers' bureau whose members are ready, willing, and able to attend professional events to help lead the charge on upholding and increasing civility within the legal profession. I encourage law schools, firms, courts, sections, local and special purpose bar associations, and others to take advantage of this new resource. More information is available at michbar.org/professionalism.

WHY PROFESSIONALISM MATTERS

Our justice system relies on a basic understanding that all people will be treated equally under the law. As protectors of the rule of law and champions of justice, we have a duty to uphold respect for the laws of the land and all parties operating within our courts.

Whatever our role or specialty in the legal community, whatever our personal politics or ambitions, we owe it to both our colleagues and the public who depend on our legal system to show that even in the fiercest legal battles, professionalism and civility are absolutely necessary.

We also should recognize that our duty stretches beyond our professional lives. Professionalism encompasses our actions from the law school classroom to the courtroom, including emails and phone calls with clients and other attorneys and our behavior at public meetings and in the halls of justice. As members of the legal profession, we represent our profession wherever we go.

As noted in the commentary on the administrative order adopting the principles:

> Underscoring and reemphasizing as these principles do, such virtues as respect, cooperation, courtesy, fairness, honesty, good faith, and integrity in our everyday dealings, is hardly to define our professional obligations in a novel or remarkable manner, but it is necessary nonetheless that we occasionally remind ourselves of these fundamental obligations as we each engage in a profession in which these virtues are so ordinarily and regularly implicated.

Take this reminder seriously. Professionalism and civility in the practice of law builds public confidence in the justice system. A lack of professionalism puts clients at risk, interferes with the justice system's ability to function fairly and efficiently, and often brings attorneys and courts into disrepute. This discussion is about more than any one of us or any one moment. Our commitment to professionalism is about maintaining — at all times — our greater responsibility to our clients, our community, and our democratic society. All lawyers and judges should conduct themselves in a manner that promotes a positive image of the legal system, fosters its reputation, and preserves public trust.

Professionalism does not come at the sacrifice of success. The most successful lawyers and most highly regarded judges are also known as highly courteous and professional. Professional and civil conduct naturally inspires the respect of others, which in turn builds a reputation for trustworthiness — the most critical attribute for success.

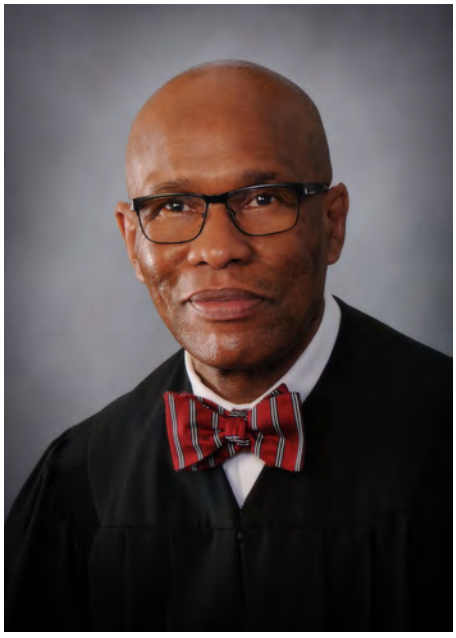
Please consider taking advantage of the new resources available through the work of the Special Committee on Professionalism and Civility and take time to reflect on your own work and the impact of your own actions. As a new year begins, remember that each of us has the capacity to improve, grow, and be an example for others.

Hon. Elizabeth T. Clement is chief justice of the Michigan Supreme Court.

SPOTLIGHT

Hon. Terry L. Clark leads Judicial Ethics Committee

BY SCOTT ATKINSON



Hon. Terry L. Clark is at the heart of anything and everything that needs to be done on behalf of the State Bar of Michigan Judicial Ethics Committee.

A member of the committee since 2014, the Saginaw district judge has served as chair since 2015. The jurisdiction of the Judicial Ethics Committee, as granted by the SBM Board of Commissioners, includes recommending amendments to the Michigan Code of Judicial Conduct and providing guidance on standards of professional conduct by judges and judicial candidates.

All members of the Judicial Ethics Committee are volunteers, but Clark remains unique in his enthusiastic commitment to the committee. He readily takes on virtually every volunteering opportunity with the committee, serving on subcommittees, drafting ethics opinions, and speaking to various groups.

Heading into his 34th year on the bench, Clark also serves on the Criminal Jury Instructions Committee, and from 1989-1990 was chair of the State Bar of Michigan Representative Assembly.

"For me, the reason I got involved and stayed involved is because I've always believed in volunteer service for the State Bar," Clark said. "I've always believed that it's important for us to give part of ourselves to the Bar so that we can be ambassadors for the State Bar of Michigan."

Quick to give other members credit for the work the committee has accomplished over the years, Clark said being a volunteer allows him to better see and understand the important work being done and services that are available to Michigan attorneys — including the State Bar of Michigan's Ethics Helpline, which Michigan attorneys (including judicial officers) can call anonymously for guidance when difficult situations arise.

"I'm really proud of the tremendous work the hotline does," he said.

He said he's also proud of how the committee has tackled tough, new ethical issues in recent years, particularly regarding technology. The committee has looked closely at issues involving social media and, most recently, artificial intelligence to ensure Michigan judges get the guidance they need.

"Everyone's talking about it," he said about artificial intelligence. "What happens when I get a lawyer or someone in my courtroom where that's raised?"

The Judicial Ethics Committee released JI-155 in October 2023 that determined judicial officers must maintain competence with advancing technology, including artificial intelligence. Members of the committee work hard to ensure it offers timely, relevant guidance for Michigan judges, Clark said.

Asked if there is one thing he wishes more people knew about the committee, Clark said simply: "That we're here. We're here to serve. We're here to help."

Scott Atkinson is communications specialist at the State Bar of Michigan

"Spotlight" features a Michigan attorney who provides important volunteer service to the State Bar of Michigan and highlights the variety of work being done to support Michigan attorneys and the administration of justice.

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FY 2023 SBM ANNUAL FINANCIAL REPORT

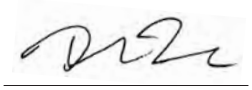
FULL REPORT AVAILABLE AT MICHBAR.ORG/GENERALINFO

December 8, 2023

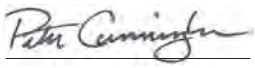
Honorable Elizabeth T. Clement
Chief Justice
Supreme Court of Michigan
Hall of Justice
925 W. Ottawa Street
Lansing, MI 48915

Pursuant to Rule 7 of the Rules Concerning the State Bar of Michigan, please accept the State Bar of Michigan's FY 2023 Annual Financial Report, which covers the fiscal year that ended on September 30, 2023. The Annual Financial Report contains audited financial statements and other information required by accounting standards as well as information that highlights the operations and effectiveness of the State Bar of Michigan as a public body corporate operating pursuant to statute and rules set forth by the Michigan Supreme Court.

The State Bar of Michigan's management is responsible for the information provided in this FY 2023 Annual Financial Report. The basic financial statements and related notes are audited by the independent accounting firm of Andrews Hooper Pavlik PLC in accordance with auditing standards generally accepted in the United States of America. Their opinion is provided as part of this report. Questions or comments about this report should be directed to the executive director of the State Bar of Michigan.



Daniel D. Quick
President



Peter Cunningham
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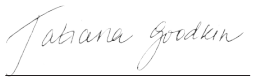

Tatiana Goodkin
Chief Financial Officer

The State Bar of Michigan works to promote the professionalism of lawyers; advocates for an open, fair, and accessible justice system; and provides services to members that enable them to best serve their clients.

OVERVIEW OF THE STATE BAR OF MICHIGAN

The State Bar of Michigan was established in 1935 by public act and is regulated by the Michigan Supreme Court. The State Bar of Michigan exists to aid in promoting improvements in the administration of justice and advancements in jurisprudence, improving relations between the legal profession and the public, and promoting the interests of the legal profession in Michigan. By law, all persons licensed to practice law in Michigan constitute the State Bar of Michigan's membership. The State Bar of Michigan is a public body corporate, funded by licensing fees and revenue generated by bar activities. It receives no appropriations from the state of Michigan.

GOVERNANCE

By integrating the Bar into the regulatory structure of the legal profession, the state of Michigan adopted a modified form of the self-governance of the legal profession common to England and Commonwealth countries. Pursuant to Rule 5 of the Rules Concerning the State Bar of Michigan (State Bar Rules), the State Bar is governed by a Board of Commissioners. The president, president-elect, vice president, secretary, and treasurer are the officers of the State Bar, elected by the Board of Commissioners.

State Bar Rule 6 provides for a 150-member Representative Assembly as the final policymaking body of the State Bar. Its elected officers are the chair, vice chair, and clerk.

STRUCTURE

The State Bar of Michigan helps lawyers, as officers of the court, fulfill their ethical obligations to improve the quality of legal services and assist in the regulation of the legal profession. The State Bar of Michigan accomplishes a substantial portion of this work through its volunteers, led by the leadership of the Board of Commissioners and Representative Assembly.

There are also 22 standing committees of the State Bar, created to advance the work of the State Bar as defined by court rule. Over 455 attorneys served on State Bar of Michigan committees, task forces, and work groups in FY 2023. The State Bar's 43 sections focus largely on excellence in specific practice areas, and each operates with its own bylaws approved by the Board of Commissioners. The work of the Young Lawyers Section and the Judicial Section is funded by the State Bar of Michigan, and the other 41 sections are funded through membership dues.

To carry out its mission, the State Bar of Michigan employs a paid staff that operates under the supervision of the executive director, who is appointed by the Board of Commissioners. The State Bar of Michigan employed 72 full-time equivalent employees (FTEs) at the end of FY 2023.

FINANCIAL & MEMBERSHIP SUMMARY

FINANCIAL SUMMARY

As of September 30, 2023, the State Bar of Michigan's net position in the Administrative Fund totaled $12,751,125 — an increase of $2,938,002, or 29.9%, in FY 2023. Excluding the net restricted assets associated with the retiree healthcare trust, the Administrative Fund totaled $9,660,537 — an increase of $2,221,483, or 29.9%, in FY 2023. The Administrative Fund increase was driven by the $80 license fee increase for active attorneys effective FY 2023. The Client Protection Fund's net position totaled $2,521,993 — an increase of $400,202, or 18.9%. The sections' net position, calculated separately as it consists of voluntary section dues and other section funds, totaled $2,883,841 — a decrease of $192,287, or 6.3%, in FY 2023. The State Bar operates with no outstanding debt.

APPROVED FY 2024 BUDGET

The State Bar Board of Commissioners approved a FY 2024 Administrative Fund budget in July 2023 totaling $12,224,735, resulting in a projected surplus of $893,220. The budget is aligned with the State Bar's strategic plan. A summary of the FY 2024 approved budget is in the December 2023 Michigan Bar Journal and can also be found on the State Bar's website at michbar.org/generalinfo.

MEMBERSHIP AND AFFILIATE STATISTICS

In FY 2023, the total number of State Bar of Michigan attorney members increased by 51, or 0.1%, over FY 2022. The number of active attorneys decreased by 410, or 1.0%. More than one-third of that decline is attributable to 140 fewer new attorneys in FY 2023. Below are the statistics for each type of member as well as affiliate members for the year that ended September 30, 2023:

ATTORNEY MEMBERS

Active members	41,985
Inactive members	1,106
Emeritus members	3,733
Total attorney members	**46,824**

AFFILLIATE MEMBERS

Legal administrators	2
Legal assistants	194
Total affilliate members	**196**

NOTE: These figures reflect members and affiliates in good standing and do not include those disciplined, disbarred, resigned, deceased, or suspended for nonpayment of license fees.

REAL PROPERTY LAW

BY DAWN M. PATTERSON

It is the privilege of the State Bar of Michigan Real Property Law Section to be invited to participate in this edition of the Michigan Bar Journal. Our section welcomes all members of the Bar who are interested in real property matters to join and be active.

RPLS members meet, collaborate, and network at various engaging events throughout the year. It is the section's mission to provide education and information about current real property issues through meetings, seminars, its website at connect.michbar.org/realproperty, pro bono service programs, and publication of the Michigan Real Property Review.

The real estate market has been a bit of a roller coaster in recent years. However, some common concerns for both general and real estate practitioners remain constant regardless of market conditions. The many timeless issues include our selected topics, which address advising clients on handling real estate transfers without the involvement of probate court, advising on condominium bylaws, and understanding the options of title policy products when representing a buyer.

RPLS extends its gratitude to its members that have authored the three featured articles:

- The first article, Ladybird Deeds: Key Features and Uses by Emily Sullivan and Gregg Nathanson, discusses this efficient estate planning device and its key features.
- The second article, Outdated to Upgraded: Is it time to Modernize your Condominium Bylaws? by Kevin Hirzel, provides insight into critical issues that may be overlooked by condominium associations and offers suggestions for amending outdated condominium documentation.
- The third article, the American Land Title Association Homeowner's Policy of Title Insurance: The Highest Level of Protection by Stacey Barbe, addresses the benefits of an enhanced owner's policy of title insurance.

If you have any questions regarding the Real Property Law Section or would like to become involved in the section, please do not hesitate to contact me or any member of the council. The list of section officers and council members may be found by clicking on the "About" tab at connect.michbar.org/realproperty.

Real Property Law Section Chair **Dawn M. Patterson** is a national underwriting attorney with the shared commercial underwriting team at First American Title Insurance Company. Based out of metropolitan Detroit, she has worked as an underwriting counsel for more than 20 years. Patterson is a former chair of the Michigan Land Title Association Education Committee and the Oakland County Bar Association Real Estate Committee, and former board member of the Incorporated Society of Irish American Lawyers.

Ladybird deeds: Key features and uses

BY EMILY M. SULLIVAN AND GREGG A. NATHANSON

A ladybird deed creates a unique combination of present and future interests that allows the grantor to retain control over real property during the grantor's lifetime while facilitating an automatic non-probate transfer to one or more designated beneficiaries upon the grantor's death. Michigan cases have unambiguously affirmed the ladybird deed's validity as "a means to forgo the probate process"[1] while reserving to the grantor "the rights to sell, commit waste, and almost everything else."[2]

This article explores the key features of a ladybird deed including the powers reserved by the grantor and effectiveness of the conveyance to one or more designated beneficiaries only upon the death of the grantor. Recent case law and considerations for practitioners to effectively utilize ladybird deeds in their estate planning practices are also discussed.

DEFINING CHARACTERISTICS OF A LADYBIRD DEED

The life estate reserved by the grantor in a ladybird deed is enhanced by an unrestricted power to convey the real property during the grantor's lifetime.[3] This power gives the grantor complete discretion to occupy, use, encumber, or sell the property without notice to or consent by the remainder beneficiary.[4]

Standard 9.3 of the Michigan Land Title Standards refers to the grantor's interest under a ladybird deed as a "life estate with power to convey."[5] It characterizes the lifetime power to convey the property as a power of appointment under Michigan's Power of Appointment Act.[6] Put simply, a power of appointment gives the donee the power to dispose of the property. In a ladybird deed, typically the grantor is both the donor and the donee of the power of appointment. Thus, Standard 9.3 provides:

> The holder of a life estate, coupled with an absolute power to dispose of the fee estate by *inter vivos* conveyance can convey a fee simple estate during the lifetime of the holder. If the power is not exercised, the gift over becomes effective.[7]

For advocates of plain language drafting, the examples provided in Standard 9.3 illustrate how a ladybird-type conveyance may be drafted using less obtuse language. For example, a conveyance to the grantor "for her lifetime, to do with as she pleases, but on her death, if not previously disposed of, Blackacre shall be divided between Gerald Rapp and Ivor Sorenson" is a valid gift to the two named beneficiaries.[8] The use of straightforward language can avoid ambiguity.

In practice, drafting attorneys often cite Standard 9.3 in ladybird deeds. For example, assuming a husband and wife hold fee simple title, the following language conveys a life estate to the husband and wife coupled with an unrestricted power for both or the survivor to convey the property and title to the couple's living trust on the second death:

> Grantors, husband and wife, whose address is _____ convey and warrant to Grantee, themselves, husband and wife as tenants by the entireties, the property described below … for their lifetimes, a life estate, coupled with an unrestricted irrevocable power to convey the property during their lifetimes or the survivor's lifetime, pursuant to Michigan Land Title Standard 9.3 in effect today or any successor to such Land Title Standard. This life estate granted to and retained by [Grantors] is measured by their respective lives, and terminates upon the death of the last to die of [Grantors]. This power to convey creates a general *inter vivos* power of appointment, which includes the power to sell, transfer, gift, mortgage, lease, encumber or otherwise convey or dispose of all or any portion of the Property in any manner which [Grantors], or the survivor of them, deems fit, in their sole discretion, without the consent of anyone else during their lifetimes and to retain the proceeds therefrom. If the Property has not been conveyed during the lifetimes of [Grantors], or the survivor of them has not previously conveyed the Property prior to the survivor's death, then, upon the death of the last to die of [Grantors], the Property shall automatically be conveyed to the then acting Trustee of the [Grantor's Revocable Living Trust], [dated], as it may be now or hereafter amended, whose address is
>
> _____.

GRANTOR'S UNRESTRICTED POWER TO CONVEY: LESSONS FROM *CONSERVATORSHIP OF GREER*

In an unpublished opinion, the Michigan Court of Appeals recently affirmed the grantor's unfettered discretion to deal with property subject to a ladybird deed during the grantor's lifetime.[9] *In re Conservatorship of Greer* involved a series of ladybird deeds that conveyed a married couple's home upon their deaths.[10] The first ladybird deed provided that if the property was not conveyed before their deaths, title would transfer to the couple's longtime caregiver.[11] The husband died and a conservator was appointed for the wife.[12] The conservator executed a second ladybird deed transferring the house on the wife's death to the couple's living trust instead of the caregiver.[13]

The caregiver challenged the conservator's authority to convey the property by the subsequent ladybird deed, arguing the conservator lacked authority to dispose of the protected individual's real property.[14] The conservator sought summary disposition on the grounds that the grantor retained the unrestricted power to transfer the property in the first ladybird deed.[15] Because the caregiver's interest could be destroyed by a lifetime conveyance, the conservator argued, the caregiver lacked standing to challenging the conveyance.[16]

The probate court granted summary disposition in favor of the conservator.[17] In affirming the trial court, the Court of Appeals held that the powers reserved by the grantor in the first ladybird deed allowed the grantor to deal with the property as if the grantor had remained the sole owner.[18] This included the power to change the identity of the reminder beneficiary without the remainder beneficiary's approval.[19]

Moreover, execution of the second ladybird deed was not a disposition of the protected individual's real property that required the probate court's approval.[20] The second deed did not change the grantor's interest in the property. Under both deeds, the grantor retained a life estate coupled with an unrestricted power to convey the property during the grantor's lifetime.[21] The second ladybird deed merely changed the identity of the remainder beneficiary. Therefore, the conservator's execution of the second ladybird deed was not a disposition of the protected individual's real property and did not require the probate court's approval.[22]

Greer critically restricts the ability of a ladybird deed's remainder interest holder to challenge the grantor's lifetime actions concerning the property. In the court's view, a ladybird deed does not give the remainder beneficiary an enforceable interest in the property until the grantor's death. Rather, the remainder beneficiary "has no interest in the property until after the death of the grantor."[23] Therefore, the grantor's actions are not subject to challenge by the remainder beneficiary.

Subsequent conveyances exercising the power of appointment reserved by the grantor in a ladybird deed have been challenged on the grounds that the power was improperly exercised.[24] At common law, a power of appointment could not be properly exercised without an express statement referring to the power.[25] The Powers of Appointment Act provides two circumstances in which a power of appointment may be exercised by a later conveyance without a specific reference to the power of appointment.[26] First, a specific reference to the power of appointment is not required if the interest conveyed could only be transferred by exercise of the power of ap-

pointment.[27] Second, an explicit reference to the power of appointment is not required if the intent to exercise the power was apparent from the circumstances surrounding the instrument's drafting and execution.[28] Even if not required, drafters of conveyances following a ladybird deed can further solidify the grantor's authority and reduce the potential for disputes by clearly stating that the grantor is exercising the power to convey reserved in the prior ladybird deed. For example:

> This deed is being given pursuant to a Power to Convey reserved in [warranty/quit claim] deed recorded on _____ in liber ____ page _____, _____ county records.

TAX BENEFITS OF DELAYING TRANSFER OF TITLE TO THE REMAINDER BENEFICIARY

A ladybird deed provides several tax benefits. If the property is the grantor's principal residence, the grantor may retain the principal residence exemption. Because the conveyance to the remainder beneficiary is not effective until the grantor's death, it is not a transfer of ownership for the purposes of uncapping the property's taxable value.[29] It is important to file a property transfer affidavit at the time of recording and claim an exemption from uncapping. Under the current form of property transfer affidavit, check the exemption for "transfer of that portion of a property subject to a life lease or life estate (until the life lease or life estate expires)." Also, the property's taxable value will not uncap on the grantor's death if residential property is transferred to certain family members.[30]

The remainder beneficiary will receive a step up in basis that will reduce the taxable gain realized on a subsequent sale.[31] "Step up in basis" refers to the adjustment in the cost basis of an inherited asset to its fair market value on the date of the decedent's death.[32] Since the grantor is both the donor and the donee of the power of appointment contained in the ladybird deed, the property will be included in the grantor's estate for tax purposes.[33] The beneficiary acquires the property from the decedent "by reason of death," thereby satisfying the second requirement to receive a step up in basis.[34] Therefore, little or no taxable gain should result from a sale of the property promptly after death of the grantor.

USES OF LADYBIRD DEEDS IN ESTATE PLANNING

One of the primary advantages of a ladybird deed is its simplicity. If a client owns a home and no other significant assets, a ladybird deed is all that is required to transfer title upon the client's death. Another attractive quality of a ladybird deed is the ability to bypass probate. A ladybird deed is a nonprobate transfer under MCL 700.6101.[35] If the grantor does not convey the property during his or her lifetime, title to the property subject to a ladybird deed will immediately pass to the designated beneficiary upon the grantor's death without the need for probate.

A ladybird deed can preserve a client's eligibility for Medicaid benefits. Medicaid imposes strict asset limits on long-term care benefits. An applicant who attempts to fall within the asset limits by disposing of property for less than fair market value in the five years preceding the application will be subject to a penalty period during which Medicaid will not cover the cost of long-term care.[36] Because the grantor retains unrestricted rights to the property, a conveyance by ladybird deed is not a disposition for purposes of Medicaid. Property transferred by ladybird deed is also not included within the grantor's estate and, as a result, not vulnerable to recovery under current Medicaid rules.[37]

A ladybird deed allows the grantor to retain more control over the property as opposed to a deed where third parties are added to the title as joint tenants. If the grantor is a joint tenant, the property cannot be sold or mortgaged without the consent of all joint tenants.[38] Moreover, the grantor may be liable to the other joint tenant(s) for waste or the reasonable rental value of the property.[39] Because both the grantor and joint tenant have a present ownership interest, the property will be vulnerable to both parties' creditors. A ladybird deed assists the grantor in avoiding these traps and liabilities.

Many practitioners recommend promptly recording the ladybird deed to provide notice of the grantor's intent and satisfy the delivery and acceptance requirements for valid conveyance of real property. However, at least one court has held that a lengthy delay between execution and recording of a deed does not affect the validity of the conveyance.[40] In that case, the grantors executed a deed to themselves as trustees of their living trust.[41] The grantors instructed their attorney to record the deed only if the grantors died simultaneously.[42] The court held the grantors did not place a condition upon the delivery of the deed, but rather delivered the deed to themselves as trustees of their living trust.[43] A deed takes effect upon delivery, not at the time of recording.[44] Therefore, the conveyance to the couple's trust was valid despite the long delay between the deed's execution and its recording.[45]

LIMITATIONS OF LADYBIRD DEEDS

Ladybird deeds, like all estate planning devices, are not without pitfalls. The immediate transfer of title to the beneficiary upon the grantor's death can result in unintended consequences. In a recent Minnesota case, the grantor died; a few days later, the house burned down.[46] The remainder beneficiary was not an insured under the homeowner's policy.[47] The court held that there was no insurance coverage since the remainder beneficiary became the owner immediately upon the grantor's death.[48] To avoid this outcome, clients should add the remainder beneficiary as an additional insured to their homeowner's policy.[49]

Whether preparing a ladybird deed or transferring title to a client's living trust, it is important to use the correct legal description. Refer to the client's owner's policy of title insurance or the last recorded deed. If neither is available, obtain a current title commitment. Re-

lying solely on an assessor's or tax-legal description may lead to problems if the tax-legal description differs from the legal description in the last recorded deed.

The remainder beneficiary of a ladybird deed still receives an interest in real property, even if that interest is contingent and not presently enforceable against the grantor. All real property interests held by a judgment debtor (including future interests) are subject to claims by the creditor.[50] Therefore, the remainder beneficiary's interest will be subject to execution, levy, and sale. As a practical matter, the remainder beneficiary's interest is unlikely to attract the interest of creditors. The value of the interest would be difficult to determine, and the grantor could divest the remainder beneficiary's interest and defeat their creditor claims by a subsequent conveyance.

For many homeowners, the simplicity of a ladybird deed is an appealing alternative to a more expensive will or trust. It may also tempt homeowners to draft the deed themselves. Self-drafting increases the likelihood of mistakes that will cause the conveyance to be invalid or fail to capture the grantor's full intent. For example, an unartfully drafted ladybird deed may create a life estate and a remainder interest without reserving the grantor's power of appointment. Additionally, an inexperienced drafter may fail to appreciate the potentially significant impact of making individual remainder beneficiaries joint tenants versus tenants in common.

CONCLUSION

A thoughtfully drafted ladybird deed can be a powerful estate planning device. The grantor can retain control over the real property during the grantor's lifetime. Recent case law has curtailed the remainder beneficiary's ability to challenge the grantor's lifetime actions. Upon the grantor's death, the property will automatically transfer to the designated remainder beneficiary without the need for probate. For these reasons, ladybird deeds are an attractive estate planning tool and often used in conjunction with wills, trusts, and other estate planning devices.

Emily M. Sullivan is an attorney at Couzens, Lansky, Fealk, Ellis, Roeder & Lazar in Farmington Hills with a focus on commercial real estate and corporate transactions. Her experience includes purchases, sales, leases, and financing of commercial real property and business formation, acquisitions, and dispositions, and corporate governance.

Gregg A. Nathanson is a partner at Couzens, Lansky, Fealk, Ellis, Roeder & Lazar in Farmington Hills. A frequent author and speaker, he has served in leadership capacities for the State Bar of Michigan Real Property Law Section, the Michigan Land Title Association, and Commercial Board of Realtors, where he chairs the education committee.

ENDNOTES

1. *In re Conservatorship of Greer*, unpublished per curiam opinion of the Court of Appeals, issued January 19, 2023 (Docket No. 359531); *In re Estate of Rasmer*, 501 Mich 18, 44 n 18; 903 NW2d 800 (2017).
2. *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684, 687 n 2; 880 NW2d 269 (2015).
3. *Id.* at n. 2.
4. Black's Law Dictionary (10th ed), p 503 (defining a ladybird deed as "[a] deed that allows a property owner to transfer ownership of the property to another while retaining the right to hold and occupy the property and use it as if the transferor were still the sole owner").
5. Michigan Land Title Standards (6th ed), Standard 9.3.
6. MCL 556.112.
7. Michigan Land Title Standards (6th ed), Standard 9.3.
8. *Id.*
9. *In re Conservatorship of Greer*, unpub op at 5.
10. *Id.* at 2.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 3.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 5.
21. *Id.*
22. *Id.*
23. *Id.* at n. 5.
24. *In re Tobias Estate*, unpublished per curiam opinion of the Court of Appeals, issued May 10, 2012 (Docket No. 304852).
25. *Hund v Holmes*, 395 Mich 188, 193-194; 235 NW2d 331 (1975).
26. MCL 556.114.
27. *Id.*
28. *Id.*
29. Michigan State Tax Commission, *Transfer of Ownership Guidelines* (Oct 30, 2017) p.20, available at <https://www.michigan.gov/-/media/Project/Websites/treasury/MISC_9/TransferOwnershipGuidelines.pdf> (all websites accessed December 19, 2023).
30. MCL 211.27a(u).
31. 26 USC 1014(a)(1).
32. *Id.*
33. 26 USC 1014(b)(10).
34. *Id.*
35. MCL 700.6101.
36. Michigan Department of Health and Human Services, *Bridges Eligibility Manual BEM 405* (January 1, 2023), p.1 available at <https://dhhs.michigan.gov/olmweb/ex/BP/Public/BEM/405.pdf>.
37. MCL 400.112h.
38. *Smith v Smith*, 290 Mich 143, 155; 287 NW 411 (1939).
39. *Tomchak v Handricks,* 370 Mich 143, 146; 121 NW2d 409 (1963).
40. *Chakmak v Koss*, unpublished per curiam opinion of the Court of Appeals, issued January 12, 2023 (Docket No. 359169).
41. *Id.* at 1.
42. *Id.*
43. *Id. at 4.*
44. *Id.* at 3.
45. *Id.* at 2.
46. *Strope-Robinson v State Farm Fire & Cas Co*, No 20-1147 (8th Cir Feb 5, 2021).
47. *Id.*
48. *Id.*
49. *Id.*
50. MCL 600.6018.

Outdated to upgraded: Time to modernize your condominium bylaws?

BY KEVIN HIRZEL

In Michigan, a condominium is created when a developer records the master deed and condominium bylaws with the register of deeds where the condominium is located.[1] However, as with many things in life, original condominium documents are not meant to last indefinitely.

If you bought a new car, would you fill it with gas and expect it to run forever? Of course not. You would change the oil, rotate the tires, and perform regular maintenance to protect your investment. Similarly, condominium documents require tune-ups due to changes in the law, technology, or society after the developer transitions control of the condominium to the co-owners.[2] Unfortunately, the first time many condominium associations realize their original documents need to be modernized is after a problem arises. Like proactive maintenance on a car, condominium associations should review their documents and update them periodically to avoid a major breakdown.[3] This article explores some critical issues often overlooked by condominium associations and provides suggestions for amending outdated documents.

ANIMALS

Many older condominium bylaws restrict the type or number of pets co-owners can keep in their units.[4] Condominium bylaws that restrict pets can lead to confusion and potential litigation as disagreements arise as to which animals are pets. In other states, courts have determined that chickens[5] and goats[6] may constitute household pets in certain circumstances — even when most co-owners do not consider them to be. Accordingly, while older bylaws contain restrictions on "pets," modern bylaws will contain restrictions on "animals."

Modern bylaws will also specifically identify the types of animals permitted within the condominium and, in some instances, require a co-owner obtain written permission from the association to keep certain types of animals. Finally, even after upgrading bylaws, con-

dominium associations should be aware that the Fair Housing Act[7] may require a reasonable accommodation for assistance or emotional support animals depending on the circumstances.[8] While requests for reasonable accommodations are highly fact-specific, practitioners should be aware that not every request must be accommodated. The Fair Housing Act only requires a reasonable accommodation, not an absolute accommodation.[9]

E-BIKES

Approximately 3.7 million e-bikes were sold in 2019 and by the end of 2023, there will be an estimated 300 million e-bikes in use.[10] Many older condominium bylaws do not contemplate e-bikes, so condominium associations should assess whether their infrastructure can handle charging lithium-ion batteries, as this could potentially overload the electrical system in the condominium — New York City reported 174 battery fires in 2022[11] and fire departments in Michigan have reported an increase in e-bike fires as well.[12]

Due to potential safety concerns and liability risks, some associations are considering banning e-bikes.[13] However, if an association permits e-bikes, upgraded bylaws should consider imposing certain restrictions, such as the following:

- Requiring all batteries and charging equipment be listed by a nationally recognized testing lab.
- Requiring co-owners to follow manufacturer safety instructions.
- Requiring batteries and chargers only be used for devices for which they were designed, and no other devices.
- Requiring e-bikes and batteries be stored in certain locations and not near exit doors.

ELECTRIC VEHICLES

Many condominium bylaws were drafted before electric vehicles became ubiquitous; the sale of electric vehicles has tripled in the last three years.[14] While some states have laws prohibiting condominium associations from banning electric vehicles, Michigan does not currently have such a law.[15] Outdated bylaws do not contemplate installation of electric vehicle charging stations in an attached condominium, nor do they consider co-owners needing to connect to the general common element electrical system.[16]

Generally speaking, a co-owner may not modify the common elements without written approval from the association.[17] The Michigan Court of Appeals has held that a co-owner cannot modify common elements by installing a new electrical box connected to the common element electrical system without permission from the condominium association.[18] Given the lack of statutory framework regarding electrical vehicles in Michigan, associations have been updating bylaws to account for installation of electric vehicle charging stations. Examples of issues that updated bylaws address include:

- Are level 1, level 2, and level 3 chargers permitted? In most cases, condominium electrical systems will only be able to handle level 1 or level 2 charging.
- If the charging station is located outside of a unit, is the association or the co-owner responsible for paying for the electricity? Also, how will electricity use be metered?
- Who is responsible for maintenance and repair of the charging station?
- Who is responsible for damage caused by the charging station?

INSURANCE

Directors and Officers Insurance/Crime Insurance

The Michigan Condominium Act requires all condominium associations to carry insurance.[19] However, associations are only required to carry liability insurance for fire and extended coverage, vandalism and malicious mischief, and workers' compensation if required by law.[20] Accordingly, outdated bylaws may not require directors and officers insurance or crime insurance.

Directors and officers insurance is important not only for individual directors, but for a condominium association as well because the association is typically a named insured under the policy. Associations must indemnify directors and officers in certain circumstances and having insurance to provide a defense and cover potential liability is important.[21] Similarly, articles of incorporation for condominium associations may also require that the association assume the liability of volunteer directors and officers in certain circumstances under the Michigan Nonprofit Corporation Act.[22] While directors and officers insurance is not mandated by the Michigan Condominium Act, modern bylaws require condominium associations carry this type of insurance to reduce potential liability.

In addition to directors and officers insurance, upgraded condominium bylaws also require crime insurance to cover things like theft by board members, forgery, theft of personal property, or wire fraud. For example, if a board member embezzled funds, the policy would reimburse the association for its loss. If the association does not have crime insurance, it may lead to large additional assessments against members and interfere with association operations. Similarly, Fannie Mae and Freddie Mac also require condominium associations with more than $5,000 in funds and more than 20 units to have crime and fidelity insurance to satisfy their underwriting guidelines.[23] Accordingly, crime insurance is not only important for liability protection, but also for enhancing property values.

Liability/Property Insurance

Many older condominium bylaws require the association and individual co-owners to pay for overlapping insurance coverage without considering the practical realities of the modern insurance market. Older bylaws tend to require associations obtain all-in property insurance policies covering common elements and fixtures within a unit

that are not personal property such as appliances, cabinets, floor coverings, and wall coverings.[24] An all-in policy also typically covers upgrades made to units, whereas a single entity or walls-in policy covers the same thing as an all-in policy except for upgrades.[25]

If condominium bylaws also require co-owners to obtain an HO-6 insurance policy for their unit, it will typically create a situation where there is overlapping coverage between the association and co-owner. In the absence of a primary insurance carrier provision, older bylaws can create disputes between insurance adjusters when determining responsibility for a loss, slowing down repairs and increasing overall insurance expenses.

In contrast, modern condominium bylaws commonly require a bare-walls insurance policy.[26] A bare-walls policy typically covers only the drywall and provides no coverage for the unit's interior. If there is a flood or fire, a bare-walls policy does not pay for fixtures or upgrades.[27] Rather, these items are covered under the unit owner's HO-6 policy often mandatory in modern bylaws. Modern bylaws tend to set up responsibilities in this manner to reduce insurance costs and create clear lines between the association's insurance carrier and the co-owner's insurance carrier.

MARIJUANA

Michigan decriminalized the recreational use of marijuana in 2018,[28] but marijuana remains illegal under federal law.[29] Other than having a restriction on engaging in illegal activity within the condominium, most older bylaws do not contain provisions directly addressing the use of marijuana in the unit. Upgraded bylaws will have specific provisions addressing marijuana use. While marijuana may be decriminalized in Michigan, many associations have banned it due to potential liability and insurance coverage issues.

Many mainstream insurance policies contain language excluding coverage for damage resulting from growing or using marijuana. This means that unless a condominium association finds a specialty insurance carrier, damage resulting from a marijuana-related incident may not be covered. For example, a California court determined that an insurance carrier did not have a duty to provide coverage when a property owner altered the electrical system in their building to grow marijuana.[30] Various other federal courts have held that because growing or using marijuana is illegal under federal law, the illegal or criminal acts exclusion in an insurance policy precludes coverage.[31]

Similarly, in another case, coverage was denied when a court determined the insured did not notify the insurance carrier that marijuana was being grown on the premises — the policy contained a duty to notify the carrier of a change in the occupancy or use of the premises.[32] Accordingly, while condominium associations may be able to rely on a general prohibition regarding illegal activity within a condominium, most co-owners do not understand the potential risks marijuana use within a condominium poses or that marijuana is still illegal under federal law.

RESERVE STUDIES

When creating a budget, condominium associations are required to maintain a reserve fund of at least 10% of the association's current annual budget on a noncumulative basis.[33] In many cases, the 10% statutory minimum is inadequate to pay for repair and replacement of common elements, which is why condominium bylaws must provide a warning that the minimum may be inadequate; associations should carefully analyze its individual needs.[34]

Accordingly, while most condominium bylaws only require compliance with the minimum reserve fund requirements, associations should consider mandating a higher reserve fund based on a reserve study. If warranted by a reserve study, requiring a reserve fund that exceeds 10% also helps the association maintain its status as warrantable under Fannie Mae and Freddie Mac mortgage underwriting guidelines; mortgage underwriters will now request to review or update a reserve study within the last three years as part of the underwriting process.[35] Given that some states now require reserve studies[36] and such legislation could come to Michigan, associations should consider being proactive about mandating them.

CONCLUSION

Condominium associations are encouraged to consult an attorney and review their documents periodically to ensure they meet the co-owners' needs. The law is often slow to adapt to societal changes, so proactively amending documents can help associations provide value to co-owners by avoiding costly litigation, creating harmony within the community, and enhancing property values. While amending outdated documents is typically not top of mind for associations, it is important to do so before problems arise.

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ENDNOTES

1. See MCL 559.108 ("'Master deed' means the condominium document recording the condominium project to which are attached as exhibits and incorporated by reference the bylaws for the project and the condominium subdivision plan for the project."); MCL 559.103(9) ("'Condominium bylaws' or 'bylaws' means the required set of bylaws for the condominium project attached to the master deed.") (MCL 559.173(1) ("A master deed and an amendment to the master deed shall be recorded.")
2. MCL 559.152.
3. In most cases, MCL 559.190 permits 2/3 of the co-owners to vote to amend the condominium documents. MCL 559.190a outlines the circumstances in which mortgagee approval may be required to amend the condominium documents.
4. MCL 559.156(a) states that the condominium bylaws may contain provisions "[a]s are deemed appropriate for the administration of the condominium project not inconsistent with this act or any other applicable laws." While not binding precedent, an unpublished opinion of the Michigan Court of Appeals held that condominium rules, as opposed to condominium bylaws, that arbitrarily imposed a weight and height restriction on dogs were unreasonable and unenforceable. See *Bear Creek Village Condominium Association v Clark*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 1989 (Docket No. 104101).
5. *Eldorado Community Improvement Ass'n, Inc v Billings*, 2016-NMCA-057, ¶ 1; 374 P3d 737.
6. *Steiner v Windrow Estates Home Owners Ass'n, Inc,* 213 NC App 454; 713 SE2d 518 (2011).
7. 42 USC 3601 *et seq*.
8. The Department of Housing and Urban Development ("HUD") issued guidance as to what factors a condominium association should consider when evaluating a request for an emotional support animal. FHEO-2020-01, <https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf> (all websites accessed December 12, 2023).
9. See, e.g., *Fox Bay Civic Ass'n, Inc v Creswell*, unpublished opinion of the Court of Appeals, issued May 30, 2019 (Docket No. 343384) (holding that fenced in dog run was not a reasonable accommodation when a property owner could install an electric fence that did not violate the restrictive covenants).
10. Stephanie Cole, The Roundup.org, *51 Official E-Bike Statistics and Facts*, <https://theroundup.org/ebike-statistics/>.
11. Laura Otto, HOA Resources, E-Bike Concerns Rise in HOA and Condo Communities, <https://hoaresources.caionline.org/e-bike-concerns-rise-in-hoa-and-condo-communities/>.
12. Howard, *Mackinac Island Residents, historic businesses warned of e-bike battery fires,* Detroit Free Press (May 2, 2023) <https://www.freep.com/story/news/local/michigan/2023/05/02/mackinac-island-fire-e-bike-battery-fires/70170466007/>.
13. *Cohen*, E-Bikes Are Convenient. They Can Also Cause Fatal Fires, New York Times, (March 6, 2023) <https://www.nytimes.com/2023/03/06/realestate/e-bikes-fires-danger.html>.
14. IEA, *Electric Vehicles* <https://www.iea.org/energy-system/transport/electric-vehicles>.
15. *See* Cal Civ Code 4745; Colo Rev Stat Ann 38-33.3-106.8; Haw Rev Stat Ann 196-7.5; 20 ILCS 627; Or Rev Stat Ann 100.627.
16. Enrico Tomasso, Motor Mouth, *The Complicated Case of Charging an Electric Vehicle in a Condo* <https://www.motormoutharabia.com/uncategorized/fargo-woman-takes-condo-association-to-court-over-power-bill-for-electric-vehicle-inspires-new-law/26625/> (posted September 5, 2023).
17. MCL 559.147(1) states: Subject to the prohibitions and restrictions in the condominium documents, a co-owner may make improvements or alterations within a condominium unit that do not impair the structural integrity of a structure or otherwise lessen the support of a portion of the condominium project. Except as provided in section 47a, a co-owner shall not do anything which would change the exterior appearance of a condominium unit or of any other portion of the condominium project except to the extent and subject to the conditions as the condominium documents may specify.
18. *Hunters Pointe Condo Ass'n v Csicsil*, unpublished opinion of the Court of Appeals, issued November 30, 2001 (Docket No. 221603), p *3 ("Further, the tub is wired to an electrical box that had to be installed on the deck to bring power through the exterior wall of defendants' condominium unit. Because the hot tub is situated on the deck year-round and a separate box with a dedicated 220-volt circuit had to be installed to power the hot tub, under the condominium association documents, installation of the hot tub constitutes a change in a common element[.]"
19. MCL 559.156.
20. Mich Admin Code, R 559.508.
21. MCL 559.154(6) states: The bylaws shall provide an indemnification clause for the board of directors of the association of co-owners. The indemnification clause shall require that 10 days' notice, before payment under the clause, be given to the co-owners. The indemnification clause shall exclude indemnification for willful and wanton misconduct and for gross negligence.
22. MCL 450.2209(e) permits the articles of incorporation of a Michigan Nonprofit Corporation, such as a condominium association, to contain a provision that allows for the association to assume liability for all acts or omissions of volunteer directors, volunteer officers, and other volunteers if all the following conditions are met: (i) The volunteer was acting or reasonably believed he or she was acting within the scope of his or her authority. (ii) The volunteer was acting in good faith. (iii) The volunteer's conduct did not amount to gross negligence or willful and wanton misconduct. (iv) The volunteer's conduct was not an intentional tort. (v) The volunteer's conduct was not a tort arising out of the ownership, maintenance, or use of a motor vehicle for which tort liability may be imposed under section 3135 of the insurance code of 1956, 1956 PA 218, MCL 500.3135.
23. Fannie Mae Selling Guide, <https://selling-guide.fanniemae.com/Selling-Guide/Origination-thru-Closing/Subpart-B7-Insurance/Chapter-B7-4-Liability-and-Fidelity-Crime-Insurance/1032999851/B7-4-02-Fidelity-Crime-Insurance-Requirements-for-Project-Developments-09-04-2018.htm>; Freddie Mac Selling Guide; <https://guide.freddiemac.com/app/guide/section/4703.5>.
24. Hirzel, *Hirzel's Handbook: How to Operate a Michigan Condo or HOA* (Second Edition) (2023), p. 49.
25. *Id*.
26. *Id*.
27. *Id*.
28. MCL 333.27954.
29. 21 USC 844.
30. *Mosley v Pacific Specialty Insurance Co*., 263 Cal Rptr 3d 28, 36 (Cal Ct App. 2020), *reh den* (June 24, 2020).
31. *See United Specialty Insurance Co v Barry Inn Realty Inc*, 130 F Supp 3d 834 (SDNY 2015); *KVG Prop, Inc v Westfield Ins. Co*, 900 F3d 818, 821-22 (6th Cir 2018); *United Specialty Ins Co*, 130 F Supp 3d at 842; *Anh Hung Huynh v Safeco Ins. Co of Am*, Docket No C 12-01574-PSG (ND Cal Nov 23, 2012).
32. *Nationwide Mutual Fire Insurance Co v McDermott*, 603 F App'x 374 (6th Cir 2015).
33. MCL 559.205; Mich Admin Code, R 559.511(1).
34. Mich Admin Code, R 559.511(4).
35. Fannie Mae Selling Guide Announcement (SEL-2023-06) (July 5, 2023) <https://singlefamily.fanniemae.com/media/36376/display/>.
36. Community Associations Institute, *Reserve Funding and Requirements* <https://www.caionline.org/Advocacy/Priorities/ReserveStudy/Pages/default.aspx#:~:text=Reserve%20studies%20or%20a%20reserve,%2C%20Virginia%2C%20and%20Washington%20State>.

Explaining the ALTA homeowner's policy of title insurance

BY STACE L. BARBE

The American Land Title Association (ALTA) creates policy forms used by title insurance companies throughout most of the United States. These forms include the homeowner's policy of title insurance, which is the focus of this article.[1]

ALTA introduced the homeowner's policy in 1998 and has revised it several times since with the most current version released in 2021.[2] Like the ALTA owner's policy of title insurance, which is often referred to as a standard policy, the homeowner's policy is a contract of indemnity that contains a number of coverages, identified in the policy as covered risks. Covered risks are subject to exclusions, conditions, and Schedule B exceptions found in the policy. The homeowner's policy differs from the standard owner's policy in that it is a comprehensive policy providing additional coverage and benefits to meet the needs of most homeowners.

To qualify for the homeowner's policy, the real property it covers must be improved with an existing one-to-four family residence, and the party insured under the policy must be a natural person or an estate planning entity as defined in the conditions.[3] The homeowner's policy defines "natural person" as "[a] human being, not a commercial or legal organization or entity,"[4] and an "estate planning entity" as "[a] legal entity, a trust, or a trustee of a trust, if the entity or trust is established by a natural person for the purpose of planning the disposition of that person's estate."[5] In my experience, title insurers have varying guidelines on when a homeowner's policy can be issued; guidelines may include prohibiting issuance of a homeowner's policy for parcels on lakes, parcels over a certain acreage, or newly constructed residences. The premium charged policy also varies between title insurers, however, the premium is typically 110% of the applicable cost of a standard owner's policy.[6]

Both the homeowner's[7] and standard owner's[8] policies contain covered risks insuring against loss or damage for matters arising from liens, encumbrances, and defects in or unmarketability of title as of date of policy. A standard owner's policy may be issued with standard exceptions for off-record matters such as facts, rights, interests, or claims that could be ascertained by an inspection of the land or making inquiry of persons in possession of the land; easements, liens or encumbrances, or claims; matters affecting title that could be disclosed by an accurate and complete land survey; and construction liens.[9] A standard owner's policy issued without these exceptions is often called an extended policy and should not be confused with a homeowner's policy often referred to as an enhanced policy, which contains expanded coverages not found in the standard owner's policy. These expanded coverages are highlighted in this article.

POST-POLICY PROTECTION

The homeowner's policy includes post-policy coverage for forgery or impersonation, adverse possession, and easement by prescription.[10] Post-policy coverage is also provided if a "neighbor builds any structures after the date of policy — other than boundary walls or fences — that encroach onto the land."[11]

EXPANDED RIGHT OF ACCESS

A standard owner's policy insures a right of access to and from the land.[12] The homeowner's policy expands access coverage by insuring "actual vehicular and pedestrian access to and from the Land, based on a legal right."[13]

DISCRIMINATORY COVENANTS

The homeowner's policy provides coverage for enforcement of a discriminatory covenant claimed to affect the title to the property.[14] The policy defines "discriminatory covenant" as "[a]ny covenant, condition, restriction, or limitation that is unenforceable under applicable law because it illegally discriminates against a class of individuals based on personal characteristics such as race, color, religion, sex, sexual orientation, gender identity, familial status, disability, national origin, or other legally protected class."[15]

RESTRICTIVE COVENANT VIOLATIONS

The homeowner's policy provides coverage for restrictive covenant violations in the following covered risks:

> 12. You are forced to remove or remedy a violation, existing at the Date of Policy, of any Covenant, even if the Covenant is excepted in Schedule B. You are not covered for any violation of an obligation contained in a Covenant:
>
> a. to perform maintenance or repair on the Land, or
> b. relating to environmental protection of any kind, including hazardous or toxic conditions or substances, unless there is a notice of either of these violations recorded in the Public Records at the Date of Policy, and then, Our Liability for Covered Risk 12 is limited to the extent of the violation described in that notice.
>
> 13. Your Title is lost or taken because of a violation, existing at the Date of Policy, of any Covenant, even if the Covenant is excepted in Schedule B.[16]

SUBDIVISION LAW VIOLATIONS

Under covered risk 16, the homeowner's policy provides coverage for subdivision law violations existing at date of policy.[17] Coverage under this risk is limited to the inability to obtain a building permit from a municipal authority; the insured being ordered by a state or municipal authority to remove or remedy the violation; or someone else refusing to perform a contract to purchase, lease, or make a mortgage based on the violation.[18] The risk is subject to a cap and deductible. Coverage for violations of subdivision law is only available with a standard owner's policy via issuance of an ALTA 26 endorsement.[19]

BUILDING PERMIT VIOLATIONS

Covered risk 18 provides coverage for building permit violations that result in the insured being ordered to remove or remedy any portion of its existing structures — other than boundary walls or fences — built without obtaining a building permit from the proper municipal authority.[20] The risk is subject to a cap and deductible.

ZONING VIOLATIONS

Covered risk 19 provides coverage relating to zoning violations that result in the insured being "ordered by a State or Municipal authority to remove or remedy any portion of [the insured's] existing structures, because they violate an existing State or Municipal zoning law or ... regulation."[21] This risk is subject to cap and deductible set by the title insurer. The policy also provides coverage under covered risk 20 if use of land as a single-family residence violated existing zoning law or regulation.[22]

ENCROACHMENT COVERAGE

The homeowner's policy contains several covered risks that provide encroachment coverage. The first of these risks is covered risk 21 providing force removal coverage if any portion of an existing structure encroaches onto adjoining land.[23] If the encroaching structure is a boundary wall or fence, the risk is subject to a cap and deductible. Covered risk 22 provides coverage if "[s]omeone else exercises a legal right refusing to perform a contract to purchase, lease, or make a mortgage loan on the Land because Your neighbor's existing structures encroach onto the Land."[24] Covered risk 23 provides forced removal coverage for any portion of an existing structure that encroaches onto an easement or over a building setback line even if the easement or setback is excepted in Sched-

ule B.[25] The last of these risks falls under covered risk 28, which provides post-policy encroachment coverage if a "neighbor builds any structures after the Date of Policy — other than boundary walls or fences — that encroach onto the Land."[26]

STRUCTURAL DAMAGE FOR EASEMENT USE

Covered risk 24 provides coverage if existing structures are damaged because of the exercise of the right to maintain or use any easement affecting your title, even if the easement is excepted in Schedule B.[27]

STRUCTURAL DAMAGE FOR MINERAL ABSTRACTION

Covered risk 25 provides coverage if existing improvements or a replacement or modification made to them after the date of policy — including lawns, shrubbery, or trees — are damaged because of the future exercise of the right to use the land for extraction or development of oil, gas, minerals, groundwater, or any other subsurface substance even if those rights are excepted or reserved from the description of the land or excepted in Schedule B.[28]

LOCATION

Covered risk 31 provides coverage if "[t]he residence with the Property Address shown in Schedule A is not located on the Land at the Date of Policy."[29] Covered risk 33 provides coverage if a map attached to the policy does not show the correction location of the land according to public records.[30]

EXCLUSIONS

Like the standard owner's policy, the homeowner's policy contains exclusions from coverage. Most of the exclusions indicate they do not modify or limit the coverage provided under certain covered risks. For example, exclusion 4 provides:

> Lack of a right:
>
> a. to any land outside the area specifically described and referred to in item 3 of Schedule A; and
> b. in any street, road, avenue, alley, lane, right-of-way, body of water, or waterway that abut the Land.[31]

Exclusion 4 does not modify or limit coverage provided under covered risks 11 or 21.[32]

An example of exclusions that modify or limit coverage provided by covered risks are exclusions 7 and 8, which remove coverage for "[c]ontamination, explosion, fire, flooding, vibration, fracturing, earthquake, or subsidence"[33] and "[n]egligence by a person or an entity exercising a right to extract or develop oil, gas, minerals, groundwater, or any other subsurface substance."[34] These exclusions align with exclusions in the ALTA 35 series and 41 series endorsements[35] and effectively limit the coverage provided in covered risk 25.

CAPS AND DEDUCTIBLES

As mentioned in the discussion of covered risks, the homeowner's policy contains caps and deductibles for covered risks 16, 18, 19, and 21. Each title insurer sets its own caps and deductibles which are reflected in Schedule A of policy.[36]

Here's an example of what the caps and deductibles might be:

	Your Deductible Amount	**Our Maximum Dollar Limit of Liability**
Covered Risk 16	1% of amount of insurance shown in schedule A or $2,500 (whichever is less)	$10,000
Covered Risk 18	1% of amount of insurance shown in schedule A or $5,000 (whichever is less)	$25,000
Covered Risk 19	1% of amount of insurance shown in schedule A or $5,000 (whichever is less)	$25,000
Covered Risk 21	1% of amount of insurance shown in schedule A or $2,500 (whichever is less)	$5,000

The standard owner's policy does not contain caps and deductibles for covered risks.

ADDITIONAL BENEFITS

The homeowner's policy has two added benefits not found in the standard owner's policy. One is an additional liability provision within conditions 6(e):

> ii. if You are unable to use the Land because of a claim covered by this policy:
>
> (a). You may rent a reasonably equivalent substitute residence and We will repay You for the actual rent You pay, until the earlier of:
>
> (1). the cause of the claim is removed; or
>
> (2). we pay you the amount required by this policy. If Your claim is covered only under covered risk 16, 18, 19, or 21, that payment is the Amount of Insurance then in force for the particular Covered Risk.
>
> (b). We will pay reasonable costs You pay to relocate any personal property You have the right to remove from the Land, including transportation of that personal property for up to 50 miles from the Land, and repair of any damage to that personal property because of the relocation. The amount We will pay You under Condition 6.e.ii.(b). is limited to the value of the personal property before You relocate it.[37]

The second is a provision increasing the amount of insurance. This provision is found in condition 10 of the policy:

> The Amount of Insurance then in force will increase by 10% of the Amount of Insurance shown in Schedule A each year for the first five years following the Date of Policy shown in Schedule A, up to 150% of the Amount of Insurance shown in Schedule A. The increase each year will happen on the anniversary of the Date of Policy shown in Schedule A.[38]

This provision is beneficial because real property typically increases in value due to market conditions or inflation and the increase is automatically included in the policy at no additional cost. A post-policy increase to the amount of insurance is available through a standard owner's policy but requires a fee or additional premium.

CONCLUSION

This article highlights additional coverage and benefits provided in the homeowner's policy. However, it is not an exhaustive list of covered risks, exclusions, or conditions. Readers are encouraged to review the complete homeowner's policy on ALTA's website at www.alta.org.

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ENDNOTES

1. American Land Title Association, *ALTA Homeowner's Policy of Title Insurance* <https://www.alta.org/policy-forms/> (2021) p 1 (all websites accessed December 15, 2023).
2. *Id.* at p 1.
3. *Id.* at p 1.
4. *Id.*, at p 7.
5. *Id.*, at p
6. National Association of Insurance Commissioners, *SERFF Filing Access* <https://filingaccess.serff.com/sfa/home/MI>.
7. *Homeowner's Policy*, *supra* n 1, p 9.
8. American Land Title Association, *ALTA Owner's Policy of Title Insurance* <https://www.alta.org/policies-and-standards/policy-forms/download.cfm?formID=603&-type=word> (2021), p 1.
9. *See generally*, *Id.*
10. *Homeowner's Policy*, *supra* n 1, pp 1, 3, 5.
11. *Id.* at p 7.
12. *Owner's Policy*, *supra* n 9, p 1.
13. *Homeowner's Policy*, *supra* n 1, p 2.
14. *Id.* at p 3.
15. *Id.* at p 7.
16. *Id.* at p 2.
17. *Id.*at p 3.
18. *Id.*
19. *Owner's Policy*, *supra* n 9, p 2.
20. *Homeowner's Policy*, *supra* n 1, p 3.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at p 4.
27. *Id.* at p 3.
28. *Id.*
29. *Id.* at p 4.
30. *Id.*
31. *Id.* at p 5.
32. *Id.*
33. *Id.*
34. *Id.*
35. The endorsements are available for review on ALTA's website at https://www.alta.org/policies-and-standards/policy-forms/, but only for members or subscribers.
36. *Id.* at p 13.
37. *Id.* at pp 9-10.
38. *Id.* at p 11.

More than just words: Plain Language column turns 40

BY SCOTT ATKINSON

Joe Kimble was working as a staff analyst for the Michigan Supreme Court in the mid-1970s when he was faced with an assignment that he wasn't quite sure how to tackle: revising Michigan court rules.

He had majored in literature at Amherst College before going to law school at the University of Michigan and even earned a few student writing awards along the way, but legal writing was something he'd yet to master. So before putting pen to paper, he decided to educate himself. He went to the law library and checked out The Fundamentals of Legal Drafting by Reed Dickerson, which at the time appeared to be the one and only book on the subject.

"It never quite hit me in law school, even with that kind of background, that there's something wrong with the way lawyers write," he said. "As many law students do, I just took it as a given that this is the way it is, and this is the way it has to be."

Dickerson showed Kimble the light. He still remembers a particularly eye-opening part of the book, laid out in two easy-to-read columns. One listed common legal and formal terms, and the other listed simpler equivalents, sometimes even just a single word.

Instead of *prior to*, one could simply write *before*.

Pursuant to could become *under*.

In the event that could be shortened all the way to *if*.

It just made sense. Why would anyone want to write in a way that wasn't the clearest, most straightforward way possible?

"It was a revelation," Kimble said.

After all that time in law school and as a lawyer becoming well-versed in the confusing and clunky world of legalese, he found it to be like discovering a secret lying in plain sight. Everyone, and particularly lawyers, should be writing in a plain — or much plainer — way.

And yet, they weren't — at least not yet.

Kimble has committed his legal career to improving the clarity of legal documents. He has served on state and national committees; was a founding director of the Center for Plain Language and a president of Clarity, an international organization promoting plain legal language; was a style (drafting) consultant on the projects to completely redraft the Federal Rules of Civil Procedure, Bankruptcy Procedure, and Evidence; is a prolific author of articles and books; and has taught thousands of students the art of plain language. Now a distinguished professor emeritus, Kimble taught legal writing for 30 years at Cooley Law School and the school's Center for Legal Drafting bears his name. In 2023, he won the State Bar of Michigan's highest honor, the Roberts P. Hudson Award, for his career achievements.

This year marks yet another milestone: The Michigan Bar Journal's Plain Language column — for which he has served as editor, inspiration, and frequent author since 1988 — is celebrating its 40th year. (See more about that in this month's column.)

"It's a labor of love," he said.

ALL ABOUT THE READER

Kimble didn't realize it then, but the moment he found Dickerson's book was just about the time that the plain-language movement (called plain English at that point before growing into an international movement) was gaining steam. It was good timing because Kimble was passionate about the subject and quickly emerged as one of its most prominent voices.

Plain language, Kimble is quick to point out, is not just about language (although that was what first caught his eye): Proper design and layout are just as important as eschewing every *herein* and *thereon*. Readers need more headings and subheadings, white space, tables, and vertical lists — "the mighty vertical list," as he terms it.

In some sense, educating attorneys about plain language means teaching them that the term itself is too limiting, although that is the shorthand that has stuck.

"It doesn't do justice to the scope of what we're trying to accomplish, which is what you might think of more generally as clear communication," he explained. "Those of us who are involved in it understand that plain language is more than just words."

What is it about, then?

It's about trying to make sure that readers can easily find, understand, and use information. It's about avoiding confusion. Kimble thinks about the readers trying to sort their way through legal documents, government and business paperwork and websites, and medical forms. He thinks about the jargon, the stuffed sentences, the disjointed organization, the poor layout, and all the other unclear elements that make life unnecessarily difficult for people.

"It's a matter of having empathy for your reader," he said. "And then having the skill to write in plain language."

In his work, he's studied the impact that unclear writing can have on organizations and individuals. "We're talking about millions and billions of dollars wasted because public documents are not clear and because websites are not clear," he said. "It is an enormous waste of time, energy, and money, and it creates ill will, frustration, and anxiety in people."

In a recent interview, Kimble pointed to a Plain Language article he wrote in April 2023. Part of it was written in the style of the book that had set him on his plain-language journey all those years ago: two columns with side-by-side comparisons. The examples came from the recent revisions to the Michigan Rules of Evidence, for which he served as the drafting consultant.

One particular example grabbed his attention.

> Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

"Look," he said. "Count the prepositions."

There are eight.

The plain-language version:

> Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

New preposition count: One.

PUTTING IN THE WORK

Plain language is designed to be as simple as possible, but it does take skill and effort to create.

As an example, Kimble points to two documents on the website of the Kimble Center for Legal Drafting — a medical power of attorney and a power of attorney for finances. (Both are available for free to the public.) Traditionally, these powers of attorney, like most legal documents, are dense and difficult. Then he shows the medical power of attorney that he and his colleagues developed. At the beginning, it introduces what the document does, how it's organized, and how to use it. And it's clean throughout, formatted with plenty of white space and headings that make it easy to follow.

He looks up from the document with a sly smile. "Now, does that look like any legal document you've ever seen?"

Nope.

"That's the difference. Look at all the headings. Look at the use of bullet points. The white space — look at the white space. Look at the little informational items on the left-hand side."

He pauses.

"It's more than just the words and sentences, as important as they are. That's what I'm trying to say."

Those two documents didn't come easily. Kimble put his revisions through field tests by having nonlawyer readers review a draft and provide feedback. That meant a lot of additional revising. In the end, the medical power of attorney went through 50 drafts.

"Of course," he said, "we knew, or hoped, that these documents would be used by hundreds, maybe thousands, of people."

It might sound tedious and laborious, but those who work with Kimble say they enjoy the process.

"Joe's an encouraging editor," said Mark Cooney, a longtime Cooley colleague and frequent column contributor. "By now, I can look at my drafts and see Joe's edits before he suggests them. A few years ago, we worked together on a project redrafting the school's bylaws. We worked separately and then compared notes. About 95% of our edits were identical. It was as if we'd used the same red pen, so to speak. But Joe had a few special ideas that made me think, 'Wow, *that's* Joe Kimble.'"

NOT DONE YET

In his time editing Plain Language, the column has covered "everything," Kimble noted, from how to cut unnecessary prepositions to avoiding "zombie nouns" to improving document design to how artificial intelligence can be taught to use plain language.

But that doesn't mean that his work — or that of the Plain Language column— is done. Far from it, in fact.

"There is some value, I think, in persistence," Kimble said with a smile.

Besides, Kimble added, there's always more to learn.

"I'm learning new stuff all the time," he said.

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

PLAIN LANGUAGE

40 years and counting

BY JOSEPH KIMBLE

This column updates one that I wrote 10 years ago. Tempus fugit. *And the story grows ever more remarkable.*

You know what is by far the longest-running legal-writing column in the history of the known universe? This one. And because 2024 marks its 40th year, perhaps readers will allow me a look back and a little celebration.

Credit for introducing the column goes to George Hathaway, who was then a staff attorney at Detroit Edison. Earlier, in 1979, the same year that two plain-English bills were introduced in the legislature, the State Bar had formed a standing Plain English Committee. The first chair was Irwin Alterman. Sadly, the bills never passed (one opponent: the Michigan Bankers Association), but the committee lived on, and Hathaway became the chair. In November 1983, he coordinated a superb "Plain English" theme issue of the *Bar Journal* — still worth reading today[1] — which was the precursor to this column. The first one appeared in May 1984, written by Gregory Ulrich.

A complete collection is available at www.michbar.org/generalinfo/plainenglish/home. I am grateful to Linda Novak, the *Bar Journal*'s former editor, for getting all the older columns online.

Hathaway's contributions during those earlier years were memorable in more ways than one. I've always thought that a table he created for his "Overview" article in the 1983 theme issue was a masterstroke — at least for that time; it replied to "reasons" given for traditional legal language.[2] Hathaway adopted a pseudonym, T. Selden Edgerton, the name of a great-grandfather, to write eight columns in the mid-'80s. Most were accompanied by drawings and photos that must have brought smiles and laughs to readers. In one column (January 1986), Edgerton was photographed with a bag over his head because, as a plain-English lawyer, he wanted to remain anonymous. In another (July 1986), he was covered with a blanket to demonstrate the "security blanket" style of writing with doublets and triplets. Hathaway even invented Mr. Edmund Z. Righter for a mock column (January 1987) called *In Defense of Legalese*, and Edgerton answered (March 1987) with one called *In Disgust of Legalese*.

I became the column's editor in 1988 — last year was my own 35th anniversary — and Hathaway continued as the chair of the Plain English Committee. Over the years, the committee organized two more "Plain English" theme issues of the *Bar Journal* (January 1994 and January 2000); produced a videotape called *Everything You Wanted to Know About Legalese . . . But Were Afraid to Ask*; promoted the move from legal size to standard 8½-by-11-inch paper in Michigan courts; worked on a number of forms projects; and gave nationally publicized Clarity Awards to well-written documents throughout the 1990s. The committee itself was discontinued in 2001 but left the column as its enduring legacy.

How do I try to capture the column's accomplishments and influence? We have published articles by the luminaries of legal writing and plain language: Bryan Garner, Reed Dickerson, Robert Benson, Irving Younger, Peter Butt, Christopher Balmford, Wayne Schiess, Ross Guberman, my colleague Mark Cooney, and many others. We published articles by former Chief Justice Bridget Mary McCormack and three federal judges. Perhaps you'll take my word that the column has an international reputation and has been cited in countless books, articles, and news releases — not to mention the committee notes to Rule 1 of the restyled Federal Rules of Evidence and restyled Federal Rules of Bankruptcy Procedure. The column was even praised in a two-page piece in the *ABA Journal*.[3]

40 FORTY YEARS OF PLAIN LANGUAGE

"Plain Language," edited by Joseph Kimble, has been a regular feature of the *Michigan Bar Journal* for 40 years. To contribute an article, contact Prof. Kimble at 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.

We have published hundreds and hundreds of before-and-after examples. We previewed the complete redrafts of the Federal Rules of Evidence, Federal Rules of Bankruptcy Procedure, and Michigan Rules of Evidence. We ran about a dozen contests to revise passages and gave books to the winners (I need to revive that). We have covered seemingly every subject under the sun — from word choice, to supposed terms of art, to sentence structure, to organization, to design (formatting) and headings, to artificial intelligence, to developments in the world of plain language.

Several columns (October 1987, May 1990, March 2006, September 2011, September 2012, and October 2016) have reported on the incontrovertible empirical evidence that all readers — legal and nonlegal — strongly prefer plain language to legalese. We were among the first to develop data from the actual testing of legal documents (October 1987 and March 2006). Similarly, another influential column (October 1985) reported on a study of a real-estate sales contract: the authors found that less than 3% of the words had significant legal meaning based on precedent. So much for the myth that terms of art subvert efforts to write in plain language.

Ah, yes, the myths and false criticisms. We have seen — and exposed — them all (I won't cite columns because we've addressed these myths repeatedly):

- Plain language is baby talk, or Dick-and-Jane style. It dumbs down. [Has any reader ever complained about a legal document in those terms — that it is just too clear or too condescendingly simple?]
- Plain language is dull and drab. [It can be lively and expressive in the right context, such as an appellate brief. And how ironic that critics would say this about plain language, given that legal writing has been assailed for centuries as verbose, opaque, convoluted, confounding — pick your adjective.]
- Plain language is all about simple words and short sentences. [It is about all the techniques for clear communication, and they number in the dozens.]
- Plain language is less precise than traditional legal style. [It's actually more precise because it unearths the ambiguities, inconsistencies, and errors that traditional style, with all its excesses, tends to hide.]
- Legalese is required by law — statutes or regulations or precedent. [While these sources may require that certain information be provided, they typically do not prescribe exact wording.]
- Some ideas are too complex for plain language. [For the last several decades around the world, proponents have revised countless legal documents and passages of all kinds into plain — or much plainer — language.][4]

The only things standing in the way of plain language are the will and the skill to use it. I said in the 1994 theme issue that "nothing would do more to improve the image of lawyers." And I think nothing is more likely to make readers and listeners happy.

Finally, some thank-yous are in order. To the State Bar and the *Bar Journal* Committee for supporting the column. To the *Bar Journal* editors — Nancy Brown, Sheldon Hochman, Valerie Robinson, Amy Ellsworth, Linda Novak, and Mike Eidelbes — for putting up with my nonstop tinkering. (One of them told me once, "I am putting my foot down." No more changes to that column.)

And of course, thanks to all you loyal readers. In a 2002 readership survey, "Plain Language" ranked third on the list of monthly features that members are most likely to read always or most of the time. Almost half of those who responded fell into that category — always or usually. A 2014 readership survey produced similar rankings and results: third most popular of the monthly features, frequently read by 40% of those who responded, and occasionally read by another 45%. On the electronic front, according to data that I received from the State Bar back in 2013 — a decade ago — the column had received over 100,000 page views.

The column is a labor of love, but a labor nonetheless. It's taken a good slice of my working life. But I'm proud to have done it. Happy anniversary, "Plain Language."

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

ENDNOTES

1. 62 Mich B J 945 (1983). This issue (like all others going back to 1921) is available through HeinOnline at the member area of the State Bar's website <https://e.michbar.org> (accessed December 11, 2023).
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BEST PRACTICES

15 tips for a successful arbitration

BY STEPHEN A. HILGER

Arbitration is a time-honored vehicle that can offer parties a speedy and economic resolution to their disputes. Here are 15 tips developed over 40 years of arbitration both as a litigator and arbitrator which can help expedite and streamline the process.

TO ARBITRATE OR NOT TO ARBITRATE?

First and foremost, you need to decide whether you want to use arbitration as your dispute resolution method. Some parties are reluctant to arbitrate, particularly public entities. If you elect to arbitrate, generally, the decision needs to be made at the time of contracting with a valid and enforceable arbitration clause in the contract that is the subject of the dispute. However, if you have no arbitration clause, the parties can still participate in arbitration if they negotiate a clause either before litigation, or even during litigation, provided both parties mutually agree. Whenever you have a complex case that involves specialized knowledge — factual or legal — arbitration is highly recommend because you can often select decision makers uniquely qualified by their deep experience with the substantive issues at hand. This is certainly no criticism of judges, who are generally well equipped to handle complex matters, but when you are dealing with highly complex factual and legal issues, it helps to have someone in the decision-making chair with experience in the area.

USE THE CORRECT LANGUAGE IN YOUR ARBITRATION AGREEMENT

In most states, there is specific language that must be included in an arbitration agreement to make it enforceable. For example, arbitration must be agreed upon, final, binding, and enforceable in a court of competent jurisdiction. Without that language, you may have difficulty enforcing the arbitration process and, more importantly, the arbitration award.

SELECT APPROPRIATE AND QUALIFIED ARBITRATORS

Most arbitration rules allow you to select panelists from a pool of qualified candidates. Usually, you are not bound by that list: the parties can also designate, by mutual agreement, someone who is not on any of the designated lists. Finding the right person is immeasurably important. You want someone who is qualified and has the requisite knowledge both from years of experience and a demonstrated career performance so she or he will handle, manage, and decide the case expeditiously and proficiently.

USE OF DISCOVERY

Make sure discovery options are included in your arbitration agreement. Discovery is not automatic under most arbitration rules. There is typically an exchange of documents but nothing quite like the rules of civil procedure. If you are anticipating an exchange and enforcement of documentation similar to the rules of civil procedure, you need to make sure that is spelled out in the arbitration agreement. Further, bear in mind that arbitrators generally do not like dealing with discovery disputes and view them as a nuisance. If you have a discovery dispute, it is much better to attempt to work it out before you get the arbitrators involved.

USE OF MOTIONS FOR SUMMARY DISPOSITION

Most rules of arbitration do not permit the type of motion practices typical in state or federal courts regarding summary disposition. While arbitrators generally are empowered to deal with claims in a summary fashion, there is no consistency of rules across the board. Accordingly, it is very difficult to succeed in getting a summary disposition order. Nevertheless, a summary disposition motion can be a good strategic move if you have a sound basis under the rules of civil procedure and need to educate the arbitration panel on a complex or difficult issue it will face. Motion practice

"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.

gives you an opportunity to pre-argue the merits of your case — or at least portions of it. Just bear in mind that granting summary disposition in an arbitration proceeding is very difficult and, if you clearly have no basis in that there are multiple issues of fact, filing a motion could reduce your credibility.

BE PREPARED

This cannot be emphasized enough. Walking into arbitration with an expandable folder stuffed with all the documents and meandering through direct and cross-examination in a matter that makes it look like you are taking a deposition will not endear you to the arbitrators.

DON'T REINVENT THE WHEEL

Understand that you have retained arbitrators who are knowledgeable in a certain area of the law or industry. It is not necessary to re-educate them in every detail regarding your case. And if an arbitrator indicates to you that they have the knowledge, move on with your direct examination. In essence, get to the point. Along the same lines, do not be repetitive. You do not need 12 witnesses to say the same thing. Take the ones that are most credible and utilize their testimony. Using multiple witnesses will hurt you more than it will help you. With multiple witnesses on the same topic, there is a greater opportunity for the testimony not to be properly aligned.

AVOID MULTIPLE INCONSISTENT ARGUMENTS

We are all taught in law school to make every argument, even in the alternative. However, when dealing with a sophisticated arbitrator familiar with the law and industry of the case, making multiple inconsistent arguments can reduce your overall credibility. Pick the best arguments and pursue them. Avoid the temptation to turn over every stone.

ABSOLUTELY NO BICKERING

One of the worst things you can do in an arbitration is bicker or be petty with an adverse lawyer. Arbitrators do not want to hear it, they are not tied up with all the emotions, and it reduces your overall credibility. Avoid it like the plague. Demonstrate civility.

USE A CHESS CLOCK

Figure out how much time you have in the arbitration and divide it among the parties. Use a chess clock or keep time on a yellow pad and make sure the time is evenly allocated between the parties in accordance with the agreements set out at the beginning of the arbitration. This will ensure that the arbitration completes on time, which is otherwise rarely the case, and forces parties to carefully consider and refine their direct and cross examinations.

USE OF SUBPOENAS

Be careful how you use subpoenas and understand the law regarding the use of subpoenas in arbitration proceedings. An arbitrator may issue a subpoena, but it may not be worth the paper it is written on. Arbitrators in most jurisdictions do not have power to enforce subpoenas. Generally, subpoenas on parties are considerably more effective than subpoenas on non-parties. If an arbitrator issues a subpoena to a party and that party refuses to comply, the arbitrator has the power to deal with that in terms of analyzing the evidence presented or suppressed.

USE OF DEPOSITION TRANSCRIPTS

Deposition transcripts, which are merely handed to an arbitrator, are basically ineffective. You are asking the arbitrator to read a discovery deposition which involves a scope far greater than what you want to establish at the proceeding and relying on the arbitrator to pick up all the nuances you believe are important. You are better off taking the deposition transcript and highlighting specific references. In addition, when an arbitrator reads a deposition transcript, she or he needs to review side-by-side the documents that are discussed with the witness. This is a cumbersome process. Using depositions also deprives arbitrators of making credibility decisions or evaluating testimony, which likely will default to not credible. Depositions should only be used as a last resort or as a manner of simply authenticating other evidence. You cannot expect to win a case by putting a deposition in front of an arbitration panel.

USE OF AFFIDAVITS

Like depositions, affidavits are basically ineffective to establish important facts. Affidavits can be used to authenticate evidence but beyond that, their use is very limited. Remember, arbitrators are required to make credibility determinations. Affidavits do not give the arbitrator that opportunity.

EXPERTS

Many complex cases involve using experts. Experts are very expensive and prepare detailed reports. On many occasions, however, you hired arbitrators with a specialized area of knowledge who are probably as familiar or more familiar with many of the theories experts discuss. Therefore, make sure that if you elect to use experts, you specifically refine and define how you were going to use them, whether the reports could be utilized, how you were going to provide direct and cross examination, whether you will use a panel approach, how you will conduct rebuttal, what demonstratives you will use to illustrate testimony, and all the other considerations. Streamlining the use of experts in arbitration will definitely be to your benefit.

FINAL BRIEFING

At the close of most complex arbitrations, the panel will ask the parties to present post-hearing briefs along with findings of fact and conclusions of law. Many times in the final briefing, arbitrators will ask for comment on specific issues with page limitations. By all

means, confine your brief to those issues. The arbitrators are signaling that they understand the rest of the case. Avoid the temptation to reinvent the pre-arbitration brief and cover all the ground in the case. The arbitrators want specific information; provide that information. If you need to go into detail, you can do so in the findings of fact and conclusions of law. However, when preparing findings of fact and conclusions of law, be certain to cite or quote specific evidence to the greatest possible extent. Otherwise, findings of fact turn into he said/she said scenarios.

CONCLUSION

Following these 15 tips makes you more likely to present a better case at arbitration and obtain a more meaningful result. You will certainly increase the credibility of you and your client with the arbitrators. The key is finding competent, qualified arbitrators; delivering to those arbitrators a case in a neat, concise, and understandable package; being professional while doing it; and giving the arbitrators a post-arbitration brief with findings of fact they can analyze in accordance with their own notes.

Stephen Hilger, a shareholder with Hilger Hammond in Grand Rapids, has been involved in complex litigation, arbitration, and mediation throughout the nation for more than 40 years. He has appeared in multiple state and federal courts, U.S. Courts of Appeal, and the Supreme Court. Hilger has arbitrated cases both as a litigant and arbitrator in 35 states and continues today through his alternative dispute resolution practice.

Biophilic design and biophilic cities: an explainer

BY KINCAID C. BROWN

The COVID-19 pandemic brought into focus that outdoor activities in natural settings have a positive impact on mental health, and individuals participating in outdoor activity report higher rates of emotional well-being than individuals who do not participate in such activity.[1] Biophilic design is an architectural practice that aims to connect people to nature through design concepts with one of the benefits being psychological.[2] Other benefits of biophilic design include improvements to environmental quality, physical health, support of animal species and habitats, and more resilient and energy-efficient cities.[3]

While there is a breadth of aspects utilized in biophilic design, some major features include utilization of natural light and ventilation, inclusion of plants and vegetation (such as a living wall), visual connection with the natural world outside, and the use of natural materials and shapes. Examples of buildings that utilize biophilic design concepts are Frank Lloyd Wright's Fallingwater in Pennsylvania, the Khoo Teck Puat Hospital in Singapore, and the Metropol Parasol in Seville, Spain.

The biophilic cities movement is one in which cities across the world work to incorporate biophilic design concepts on a citywide level to reimagine how urban areas interact with the natural world. Many cities are taking advantage of the positives of green (e.g., parks, trees, open space, urban agriculture) and blue (e.g., urban ponds and lakes, storm drainage) infrastructure[4] because of the real benefits of better water management and energy savings, the population's improved mental and physical health in these settings, and increased equity of access to the natural environment.[5]

Urban tree planting, planning, and maintenance are prime examples of biophilic practice that many cities have intentionally or unintentionally taken part in because of its myriad benefits. These benefits include reduced air temperatures leading to lower energy costs; reduced noise and environmental pollution; mitigation of runoff and flooding; and improvements to the health and well-being of the urban population.[6] A 2020 report estimated that tree cover in urban areas produced more than $18 billion in air pollution removal and upwards of $5 billion in reduced building energy use.[7] The Vibrant Cities Lab,[8] created in part by the U.S. Department of Agriculture Forest Service, is proponent of urban forestry for these benefits as well as other reasons including traffic calming,[9] improved academic performance for children,[10] and crime reduction.[11] Many Michigan cities, including Ann Arbor,[12] Detroit,[13] and Royal Oak,[14] have tree planting programs for these reasons.

There are many aspects to making a biophilic city.[15] Most obvious is the relation the city has to nature including the availability of parks, proximity of natural habitats and tree cover, and impact on urban biodiversity. Other characteristics include the amount and demographics of the local population visiting nature, places where school children are able to have recess, community engagement in planning and programing, and ecoliteracy.[16] A network of partner biophilic cities exists and includes cities in the United States like Austin, Texas; Kansas City, Missouri; and Pittsburgh, Pennsylvania as well as international cities like Barcelona, Spain; Edinburgh, Scotland; and Singapore.[17]

There are many ways that cities can employ to embrace biophilic values that involve planning and governance. The most obvious one is allocating budget for urban greenery improvements including park and nature area conservation, tree planting, and incorporating green space in urban construction projects. Another is to plan and strategize toward carbon neutrality or flood mitigation infrastructure, like in Hoboken, New Jersey.[18] Cities can also move in this direction by revising zoning, tax, and construction regula-

tions and ordinances to make development incorporating biophilic facets more cost-effective and attractive. Examples include biophilic standards or goals in zoning schemes, tax incentives to construct sustainable buildings, and guidance for builders to conserve habitat and public rights-of-ways. Other measures that cities can employ to embrace biophilic tenets include nature-based education in public schools, public support of nature-based events and stewardship programs, and community information sharing.[19]

While it is not mandatory to employ biophilic design elements in construction, there are certification organizations that employ biophilic elements in their standards. Two of the most well-known of these standards are the International WELL Building Standard[20] and the LEED Rating System.[21] While the two standards have similarities,[22] they differ from their starting points. The WELL standards are focused on the individual, with the grounding that the buildings, where humans spend so much or our time, impact health and well-being.[23] LEED, the more widely used green building rating system, has a focus on environmental, social, and governance benefits reached through sustainability, enhanced human health and community quality of life, and environmental benefits through reduced energy consumption and conservation of water resources.[24]

Kincaid C. Brown is the director of the University of Michigan Law Library. He is a member of the SBM Michigan Bar Journal Committee and a former member of the Committee on Libraries, Legal Research and Legal Publications.

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LAW PRACTICE SOLUTIONS

Reducing attrition and increasing productivity by tapping into employee discretionary effort

BY VICTORIA VULETICH AND JUNE KENNY

The times they are a changin'.

When Bob Dylan wrote these words in 1963, baby boomers were the emergent workforce. Now, a new generation of lawyers entering the profession present managing partners and supervisors with a multitude of challenges. This article is designed to equip managers with practical leadership strategies that will increase productivity, reduce financial loss due to unwanted attrition, and find ways to tap into self-motivators that successfully work across generational groups including Generation Z. These motivators exist, but tapping into them takes effort and intentionality.

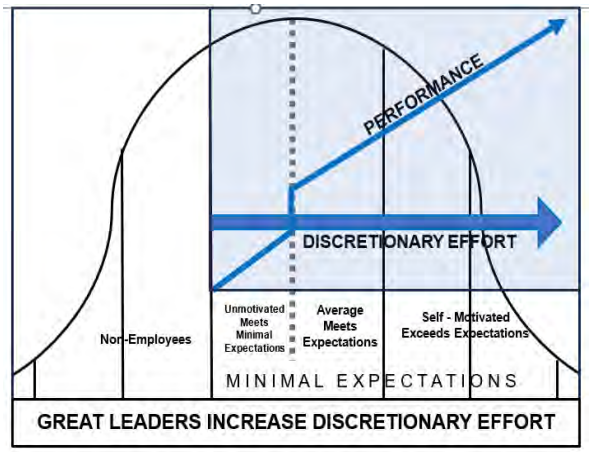
Many reports on the Great Resignation have focused on dissatisfaction with pay.[1] However, according to a May 2023 report from the Citizens Research Council of Michigan, compensation ranks 16th on the list of reasons for leaving a job.[2] This result is consistent with evidence that pay has only a moderate impact on employee turnover.[3] Generally, corporate culture is a more reliable predictor of attrition than compensation.

An October 2023 survey of associates in large law firms found that one in four plan to leave their firm within the next year.[4] Three out of five associates believe that their firms are not actively trying to retain them.[5] Additionally, associate discontent appeared disconnected from the recent slowdown in lateral hiring[6] despite general industry-wide pay increases by firms attempting to attract and retain skilled associates.

Current marketplace challenges are influenced by dynamics already impacting the legal workforce, namely the goals of Generation Z employees. Gen Z seeks greater work-life balance, a culture focused on the long-term development of people, and mental health — or "whole person" — needs.[7] Attracting and retaining skilled employees today requires managers to understand that maintaining the status quo may be perilous.

Finding an answer to attrition, lack of employee motivation, and/or commitment problems starts by looking at a universal performance factor: employee discretionary effort.

Look at the bell curve. You'll notice that one standard deviation (+1SD/-1SD) on either side of the median represents most of your staff. People perform to expectations, some a little higher, some a little lower, but still within the safety margin. Lower performing employees (-1SD) understand they are not in immediate danger of



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.

termination. Average performers (+1SD) are working harder (or are more talented) but not going the extra mile. Then, there are the stars. You know who they are and compensate them well for the increased revenue they generate.

So, what's really going on here? And what can you do about it?

FOCUS ON DISCRETIONARY EFFORT

Discretionary effort is effort an employee is not required to give but capable of giving if they are self-motivated to do so. In reality, no one is required to give much more than their supervisor expects. They are aware their jobs are not at risk. Those performing above minimal expectations may be more skilled and more motivated than those below. So, how can you influence and increase self-motivation, effort, and skill totally at your employees' discretion?

As a leader, you have three tools at your disposal:

- To know or be known.
- To be a part of something bigger than oneself.
- To make a positive difference for someone or something.

TO KNOW OR BE KNOWN

Personal acknowledgement

No one wants to be a nameless face in the crowd, just another suit on the 2nd floor, or that lady from our admin pool. "To know or be known" does not mean your associate wants to be your Facebook friend or dinner guest; it means that you recognize their face, know their name, and know what they do for you and your firm. When you tell them they've done a good job, they believe you have a clue about what they did.

As for memorizing names and faces, Nike said it best: just do it. It also helps to greet them on occasion.

Professional acknowledgement: successful work

Leaders don't just teach skills; they notice when skills are being performed well. It's a subtle way of showing employees that what they do matters and is important. Unfortunately, providing credible positive feedback is challenging.[8]

Most compliments focus on an admirable trait or characteristic:

> "Great job!"
> "Way to go!"
> "You are the best!"
> "Excellent job on the Smith case."

You'll notice that most compliments are primarily adjectives (great, best, excellent) describing nouns (job, way, case). Unfortunately, these compliments consistently fail the credibility test. Compliments with the best chance of being received positively zero in on behavior. This means using verbs. What did the person do?

> **The home run compliment**
> The home run compliment model provides effective, credible, encouraging feedback that positively affects the bottom line.
>
> **First base:** A statement of appreciation or quality, such as "Thanks"; "I appreciate ..."; "Great job!"; Way to go!" Using three at the same time is not a home run. You've just reached first base three times.
>
> **Second base:** A behavior-specific statement, like, "Thanks for putting in the extra time yesterday to modify the Phillips brief to address the last-minute points we discussed. I know the brief is due today and I appreciate your effort."
>
> **Third base:** A positive impact statement. It expands upon the specific behavior you mentioned at second base by noting the positive impact on your organization's goals and reputation, your client's goals, your goals, and your associate's career.
>
> "Thanks for putting in the extra time yesterday to modify the Phillips brief to address the last-minute points we discussed. You took a good brief and made it excellent. It best positions the Phillips Company in this 'bet the business' litigation. Sam Phillips and I deeply appreciate your sacrifice to help him save his life's work."
>
> **Home run:** Delivering your statement with sincerity. Groucho Marx once said, "The secret of life is honesty and fair dealing. If you can fake that, you've got it made."[9] While sincerity is key to success, it must be genuine, and sincerity alone is never enough. Not getting thrown out at first, second, or third base makes your statement credible.

Professional acknowledgement: less than expected performance

Leaders are responsible for helping employees succeed. Sometimes, this means correcting behavior that doesn't produce the best results. The reality is that no one takes a job intending to fail. We all want to succeed.

If you do not believe this about an employee, adopt an "as if" approach that will help you always keep your cool, which is essen-

tial. The very hint of criticism can elicit defensiveness, but someone must control the situation and, unfortunately, that job falls to you. It is important that your employee recognizes your positive intent – that your recommendations, directions, and guidance are meant to help them achieve success and you believe they have the potential to be a valuable asset.

THE COMPASSIONATE CRITICISM MODEL

This article's co-author, leadership trainer June Kenny, cites compassionate criticism as one of her most requested training topics.[10] Using a compassionate criticism model to address performance lets you state what needs to be done and why without anger or accusation and give reasons they might want to change their behavior; allows you to act in a respectful, non-adversarial manner; and gives all parties an avenue to find personal satisfaction in making a positive impact.

In her book, "Lead Strategically", Kenny outlines a method called Criticism With A. H.E.A.R.T.[11]

Criticism With A. H.E.A.R.T.

- **A.** The opener: *ask* for help to solve a problem.
- **H.** Describe what's *happening* now, i.e. the negative/ineffective behavior.
- **E.** Explain the *end* result, i.e. the negative impact of their behavior.
- **A.** Make a request for *alternate* behavior you believe fixes the problem.
- **R.** *Resolve* the problem together by engaging in two-way dialogue and selecting the best fix.
- **T.** *Thank* them in advance for their future cooperation.

Each step of the model works in the following way:

- **A.** *Ask* for help to solve a problem. You have a reasonable, non-threatening, effective way to start a difficult conversation; you acknowledge there is a problem, and the others are either unaware or discount the severity; and you provide a reason/motivator to change their behavior.
- **H**. Describe what's *happening* in objective terms — what you've seen and heard without exaggeration or interpretation. Use your "butter voice" (the voice you use when you ask someone at the dinner table to pass the butter.
- **E.** Explain the *end* result. This is the most important motivator you have. Most people seem genuinely surprised their behavior is causing a problem.
- **A.** Make a request for *alternate* behavior you believe fixes the problem. Note that is important to get through the first four steps in 60 seconds or less!
- **R.** *Resolve* the problem together by engaging in two-way dialogue and selecting the best fix. Ask, *what do you think? Would this be possible? Do you have any ideas that might resolve this problem?* You might get a better solution than the one you proposed.
- **T.** *Thank* them in advance for their future cooperation. Genuine gratitude motivates. Remember, you are the one with the problem and need their cooperation.

As the newest generation enters the multi-generational legal profession, successful law firms will have the skills to minimize turnover and increase productivity in a healthy work culture.

Next month, we'll complete our look at how law firms can reduce attrition and increase productivity by tapping into employee discretionary effort.

Victoria Vuletich was a faculty member at the Grand Rapids campus of Thomas M. Cooley Law School, where she taught professional responsibility. Prior to joining the faculty at Cooley, she served as staff ethics counsel at the State Bar of Michigan.

June Kenny has worked with corporate and community organizations across the country since 1998 to improve leadership skills, strengthen teamwork, and increase volunteer impact through her leadership training programs. Based in Livonia, is the author of "Lead Strategically: Tools for Success in your Ministry or Mission."

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PRACTICING WELLNESS

Knowing when to rest your case

BY DAWN GRIMES-KULONGOWSKI

> *"[M]ost of our energy goes into upholding our importance … if we were capable of losing some of that importance, two extraordinary things would happen to us. One, we would free our energy from trying to maintain the illusory idea of our grandeur; and two, we would provide ourselves with enough energy to … catch a glimpse of the actual grandeur of the universe."*[1]
>
> — Carlos Castaneda

We all have that one friend who is always late. Mine is A.J. and he lives in California. On a recent visit, true to form, he was late meeting me for dinner.

"Sorry I'm late," he said, mumbling some excuse involving children as he wrestled out of his jacket.

"The excuses are not needed," I said with a smile. "I knew you'd be late. You've been late to everything we've done together since we were about 6."

"Actually, *you're* about 2.5 hours late," he said with some measure of authority.

"How so?" I said, my brow furrowed in confusion.

"Well, you're on Michigan time," he said as a proud and sarcastic grin formed at the corners of his mouth, "and in Michigan it's like 9 p.m."

At that point, all I could do was laugh and hug my dear friend.

A.J. is a successful attorney. We have enjoyed this obnoxious brand of banter since grade school. Many of our friends don't see these conversations as fun, though; they see them as sarcastic and petty arguments. That has never stopped A.J. from engaging with them in this same manner. Even knowing that some don't appreciate it, he can't seem to help himself. It's a trait that I've learned to love, but I'm the minority in our friend group. Even he admits it is a habit that can have a high cost.

As a society, we have agreed that everyone has a voice, and attorneys help individuals have that voice and amplify it on their behalf.[2] Even when wrong, it is the attorney's job to find some form of right, some argument in favor of their client. It is a highly noble pursuit. However, when this pursuit of being right is applied in the wrong places — like with family and friends at the dinner table, for example — it becomes considerably less noble. It morphs into something resembling arrogance and aggression. It can cause great damage to our personal relationships.

Professional people tend to believe that career and financial achievements are at the core of happiness and fulfillment.[3] While these things are important, research shows that positive relationships are the real key to long-term happiness. Harvard University has researched happiness for 85 years, monitoring health records and asking detailed questions of more than 700 participants. Its most consistent finding has been that *positive* relationships keep us happier, healthier, and help us live longer.

Cultivating healthy relationships is one of the greatest gifts we can give ourselves.[4] Petty arguments and the desire to "win" every conversation cultivates negative emotions and resentments. Occasional arguments and disagreements are certainly a part of every relationship, but taking home the adversarial mindset used in the courtroom can be extremely detrimental.[5]

> Your mind is an instrument, a tool. It is there to be used for a specific task, and when the task is completed, you lay it down. As it is, I would say about 80 to 90 percent of most people's thinking is not only repetitive and useless, but because of its dysfunctional and often negative nature, much of it is also harmful. Observe your mind and you will find

"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

> this to be true. It causes a serious leakage of vital energy. This kind of compulsive thinking is actually an addiction. What characterizes an addiction? Quite simply this: you no longer feel that you have the choice to stop. It seems stronger than you. It also gives you a false sense of pleasure, pleasure that invariably turns into pain.[6]
>
> — Eckhart Tolle

I've spent nearly a decade studying and teaching stress management focused primarily on meditation practice. Learning to manage stress is an exercise in prioritization. We reorganize where and how we spend our energy. Meditation practice helps us establish our priorities and implement the changes necessary to prioritize those things in our daily lives.

Meditation practice trains us in three main skills: concentration, mindfulness, and compassion.[7] The first of these, concentration, is a regathering of energy. We waste a lot of energy on nonsensical distractions. When we practice meditation, we learn to regather energy from unnecessary outlets and apply it to the things that take us closer to happiness and fulfillment. We consciously choose to apply our excellent arguing skills to our work for the benefit of our clients; likewise, we can learn to choose *not* to apply it to convince everyone in our lives that we are right about everything.

The second skill that meditation trains is mindfulness. Mindfulness is a way of paying attention — full, undisturbed, and unpolluted attention to the present moment. We see the present moment clearly and don't impose anything upon it. We leave behind judgment, defensiveness, and our need to be right. One of the hardest things when breaking negative habits is simply being aware we are doing it. All too often, we are neck deep in an argument about why mashed potatoes would have gone better with dinner than couscous before we realize that we have damaged a relationship we care about. Mindfulness gives us the ability to be aware when we are about to engage in habitualized behavior and stop the words before they come out.

Compassion is the final skill of meditation practice. Compassion is the ability to see the interconnectedness of all beings and using it to become more skillful in our interpersonal exchanges. Emotional intelligence has been found to be the greatest indicator of personal success.[8] When we look at the most successful leaders of our time, they are virtuosos of interpersonal skills. They know how to relate to people and move them towards a common goal. Increasing our compassion improves our professional and personal relationships.[9]

Meditation is not mystical or complicated. Its positive effects are backed by countless scientific studies.[10] The most common reason I hear as to why people don't meditate is because they believe meditation is cessation of thought. My students have a minimum of seven years of higher education and their brains are very busy; they can't stop thoughts. Meditation is not cessation of thought, but training our brains to return from thought to an object of focus. It is remembering to remember. We sit somewhere quiet, breathe in and out, and, pretty quickly, start having thoughts. That is not a failure. Having thoughts *is* the exercise of meditation. When you realize you are distracted by thought, you make a conscious effort to shift your attention back to the object of focus over and over.

A very simple exercise to dip your toe into the pool of meditation is a technique from Ram Dass called rising/falling.[11]

1. Set a timer for five minutes.

2. Sit comfortably. There is no correct position. If you're comfortable, that's the correct position.

3. Place your attention on your breath. Notice that as you breathe in, your chest rises and as you breathe out, the chest falls.

4. As you breathe in, quietly say in your mind, "Rising."

5. As you breathe out, quietly say in your mind, "Falling."

6. When you notice your attention drifting away to thoughts, sounds, or other distractions, come back to "rising" as you inhale and "falling" as you exhale.

Do this until the timer goes off. Once a day is great. Over time, you will notice that you become quicker to notice when you drift off to distractions. During the rest of the day, a buffer zone is built. Things come at you a little slower and there is more time to make good choices before acting. You become more aware of yourself and what is going on around you and within you. It becomes easier to head off occasions when you might be tempted to start an unnecessary argument.

Letting go of our need to be right can feel like sacrificing part of our identity we are proud of and have worked hard for, but it isn't a complete relinquishment. It's merely choosing the times and places when this hard-earned and well-honed skill applies. By choosing not to argue, we open space for relationships to flourish. We all walk a path with the same end goal — to be happy. Positive

relationships with healthy communication offer much more long-term satisfaction than being right in one moment ever could.[12]

Dr. Dawn Grimes-Kulongowski is the owner of Creative Smiles Dental Group in Holly and The Peaceful Practice.

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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.)

ORDERS OF DISCIPLINE & DISABILITY

AUTOMATIC INTERIM SUSPENSION

Eric A. Buikema, P58379, Farmington, effective Aug. 7, 2023.

On Aug. 7, 2023, the respondent was convicted by guilty plea of one count of operating while intoxicated, third offense, in violation of MCL 257.625(1)(a), a felony offense, in a matter titled *People v. Eric Allen Buikema,* Lapeer County Circuit Court, Case No. 23-014499-FH. In accordance with MCR 9.120(B)(1), the respondent's license to practice law in Michigan was automatically suspended on the date of his felony conviction.

This matter has been assigned to a hearing panel for further proceedings. The interim suspension will remain in effect until the effective date of an order filed by a hearing panel under MCR 9.115(J).

1. The respondent has been continuously suspended from the practice of law in Michigan since June 20, 2019. Please see Notice of Suspension (By Consent), Case Nos. 19-15-MZ; 19-25-JC (Ref. 16-112-AI; 17-3-JC), issued July 2, 2019.

REPRIMAND (WITH CONDITIONS)

Michael H. Fortner, P46541, Southfield, by the Attorney Discipline Board before Tri-County Hearing Panel #69. Reprimand, effective Dec. 6, 2023.

After proceedings conducted pursuant to MCR 9.115 and based on the evidence presented by the parties at the hearings held in this matter, the panel found that the respondent committed professional misconduct during his representation of his client in a no-fault insurance action. The panel found that the respondent failed to timely comply with discovery requests and failed to attend hearings and depositions which resulted in the dismissal of his client's complaint. The panel found that the respondent neglected a legal matter entrusted to him in violation of MRPC 1.1(c) and failed to take reasonable efforts to expedite the litigation consistent with the interests of his client in violation of MRPC 3.2.

On Nov. 14, 2023, the panel ordered that the respondent be reprimanded, effective Dec. 6, 2023, and comply with conditions relevant to the established misconduct. Costs were assessed in the amount of $2,695.56.

SUSPENSION AND RESTITUTION WITH CONDITION (BY CONSENT)

Steven M. Gittleman, P32828, Southfield, by the Attorney Discipline Board Tri-County Hearing Panel #52. Suspension, 179 days, effective Dec. 1, 2023.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Discipline pursuant to MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contained the respondent's admissions to the factual allegations and allegations of professional misconduct — that he misused his client trust account and during his representation of a client in a probate matter, he failed to deposit fees paid by a client into his IOLTA, failed to file a probate case with the court, failed to complete the legal work as agreed, and failed to provide a refund of the fees and costs despite promising his client he would do so — set forth in counts 1-2 of the formal complaint.

Based on the respondent's admissions and the stipulation of the parties, the panel found that the respondent neglected his client's legal matter in violation of MRPC 1.1(c) (count 2); failed to seek the lawful objectives of his client in violation of MRPC 1.2(a) (count 2); failed to act with reasonable diligence and promptness in violation of MRPC 1.3 (count 2); failed to keep his client reasonably informed about the status of a matter and comply promptly with reasonable requests for information in violation of MRPC 1.4(a) (count 2); failed to safeguard his client's property in violation of MRPC 1.15 (counts 1-2); failed to hold property of clients or third persons in connection with a representation separate from the lawyer's own property in violation of MRPC 1.15(d) (count 1); deposited personal funds into his IOLTA account in an amount in excess of an amount reasonably

necessary to pay financial institution service charges or fees in violation of MRPC 1.15(f) (count 1); failed to deposit advance legal fees and expenses into an IOLTA and withdraw them only as fees were earned or expenses incurred in violation MRPC 1.15(g) (count 2); and failed to take reasonable steps to protect a client's interests upon termination of representation, such as failing to refund any advance payment of fee that has not been earned, in violation of 1.16(d) (count 2). In addition, the panel found that the respondent engaged in conduct prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1) (counts 1-2); engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2) (counts 1-2); and engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3) (counts 1-2).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent's license to practice law in Michigan be suspended for 179 days, effective Dec. 1, 2023. The panel also ordered that the respondent be subject to conditions relevant to the established misconduct and that he pay restitution in the amount of $1,030. Total costs were assessed in the amount of $907.33.

REPRIMAND (BY CONSENT)

Martin M. Holmes, P24240, North Muskegon, by the Attorney Discipline Board Muskegon County Hearing Panel #1. Reprimand, effective Nov. 28, 2023.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Discipline in accordance with MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The parties' stipulation contained the respondent's admissions that he was convicted on April 22, 2022, by guilty plea of operating while intoxicated, a misdemeanor, in violation of MCL 257.625(1)(A) in a matter titled *People v. Martin Holmes,* 60th District Court (City of Muskegon, County of Muskegon, State

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

of Michigan), Case No. 22-220522-SD, and that his conduct in that regard constituted professional misconduct. The stipulation also contained the respondent's no-contest plea to the factual allegations and the allegations of professional misconduct set forth in paragraphs 7-10 of the formal complaint — that he did not give notice of his conviction to the grievance administrator and the Attorney Discipline Board.

Based on the respondent's admissions, no-contest plea, and stipulation of the parties, the panel found that the respondent engaged in conduct that violated a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615 in violation of MCR 9.104(5) and 8.4(b). The panel also found that the respondent failed to notify the grievance administrator and Attorney Discipline Board of his conviction in violation of MCR 9.120(A) and (B) and MRPC 8.1(a)(2); engaged in conduct prejudicial to the administration of justice in violation of MCR 9.104(1) and MRPC 8.4(c); engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3); and engaged in conduct that violates the standards and rules of professional conduct adopted by the Supreme Court in violation of MCR 9.104(4).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be reprimanded. Total costs were assessed in the amount of $780.47.

AUTOMATIC INTERIM SUSPENSION

Tyler N. Ross, P75530, Bloomfield Hills, effective Sept. 28, 2023.

On Sept. 28, 2023, the respondent was convicted by guilty plea of conspiring to commit an offense against the United States in violation of 18 U.S. C. § 371 in a matter titled *United States of America v. Tyler N. Ross,* U.S. District Court, Eastern District of Michigan, Case No. 23-cr-20451. In accordance with MCR 9.120(B)(1), the respondent's license to practice law in Michigan was automatically suspended on the date of his felony conviction.

Upon the filing of a certified judgment of conviction, this matter will be assigned to a hearing panel for further proceedings. The interim suspension will remain in effect until the effective date of an order filed by a hearing panel under MCR 9.115(J).

SUSPENSION (BY CONSENT)

Ernest J. Walker, P58635, Benton Harbor, by the Attorney Discipline Board Berrien County Hearing Panel #1. Suspension, 30 days, effective Dec. 2, 2023.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Discipline pursuant to MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contained the respondent's admissions to the factual allegations that he filed a frivolous lawsuit in Colorado federal court against Dominion Voting Systems, Facebook, Mark Zuckerberg, and others and allegations of professional misconduct set forth in paragraphs 34 (a) and (c) of the formal complaint filed by the grievance administrator.

Based on the respondent's admissions and the stipulation of the parties, the panel found that the respondent brought or defended a proceeding, or asserted or controverted an issue therein, where the basis for doing so was frivolous in violation of MRPC 3.1 and engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent's license to practice law in Michigan be suspended for 30 days. The panel further found that good cause existed for the order to take effect on Dec. 2, 2023, as agreed to by the parties. Total costs were assessed in the amount of $777.85.

FROM THE MICHIGAN SUPREME COURT

ADM File No. 2023-08
Retention of the Amendment of Rule 7.202 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 April 20, 2023, amendment of Rule 7.202 of the Michigan Court Rules is retained.

ADM File No. 2017-28
Amendments of Rules 1.109, 5.302, and 8.108 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 1.109, 5.302, and 8.108 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 1.109 Court Records Defined; Document Defined; Filing Standards; Signatures; Electronic Filing and Service; Access

(A)-(C) [Unchanged.]

(D) Filing Standards.

(1)-(9) [Unchanged.]

(10) Request for Copy of Public Document with Protected Personal Identifying Information; Redacting Personal Identifying Information; Responsibility; Certifying Original Record; Other.

(a)-(b) [Unchanged.]

(c) Redacting Personal Identifying Information.

(i)-(iii) [Unchanged.]

(iv) Unredacted protected personal identifying information may be included on transcripts filed with the court but must be redacted by the clerk of the court pursuant to a written request submitted under MCR 1.109(D)(10)(c)(i). The written request must identify the page and line number for each place in the transcript where the protected information is located.

(d)-(e) [Unchanged.]

(11) [Unchanged.]

(E)-(H) [Unchanged.]

Rule 5.302 Commencement of Decedent Estates

(A) Methods of Commencement. A decedent estate may be commenced by filing an application for an informal proceeding or a petition for a formal testacy proceeding. A request for supervised administration may be made in a petition for a formal testacy proceeding.

(1) When filing either an application or petition to commence a decedent estate, two~~a~~ copies~~y~~ of the death certificate must be filed with the application or petition~~attached~~. If the death certificate is not available, the petitioner may file two copies of~~provide~~ alternative documentation of the decedent's death. In either instance, the petitioner must redact from one of the copies being filed all protected personal identifying information as required by MCR 1.109(D)(9). The unredacted copy of the death certificate or alternative documentation must be maintained by the court as a nonpublic record.

(2) If a will that is being filed with the court for the purposes of commencing an estate contains protected personal identifying information, the filer must provide the will being filed for probate and a copy that has the protected personal identifying information redacted as required by MCR 1.109(D)(9). The unredacted version of the will must be maintained by the court as a nonpublic record.

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

(B)-(D) [Unchanged.]

Rule 8.108 Court Reporters and Recorders

(A)-(E) [Unchanged.]

(F) Filing Transcript.

(1)-(2) [Unchanged.]

(3) Unless notice has been previously provided under a different rule, immediately after the transcript is filed, the court reporter or recorder must notify the court and all parties that it has been filed and file in the court an affidavit of mailing of notice to the parties.

(G) [Unchanged.]

Staff Comment (ADM File No. 2017-28): The amendments of MCR 1.109, 5.302, and 8.108 provide direction on the process for protecting personal identifying information in transcripts, wills, and death certificates.

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. 2022-14
Amendment of Rule 2.311 of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 2.311 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 2.311 Physical and Mental Examination of Persons

(A) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental or blood examination by a physician (or other appropriate professional) or to produce for examination the person in the party's custody or legal control. The order may be entered only on motion for good cause with notice to the person to be examined and to all parties. The order must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.~~,~~ Upon request of a party, the order~~and~~ may also provide that

(1) the attorney for the person to be examined may be present at the examination, or

(2) a mental examination be recorded by video or audio.

(B) If the court orders that a mental examination be recorded, the recording must

(1) be unobtrusive,

(2) capture the examinee's and the examiner's conduct throughout the examination, and

(3) be filed under seal.

(B) [Relettered (C) but otherwise unchanged.]

Staff Comment (ADM File No. 2022-14): The amendment of MCR 2.311 allows a mental examination to be recorded by video or audio under certain circumstances.

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

ADM File No. 2023-28
Appointment of Chief Judge of the Grosse Pointe Municipal Court

On order of the Court, effective immediately, Hon. David R. Draper is appointed as chief judge of the Grosse Pointe Municipal Court for the remainder of a term ending Dec. 31, 2023, and for a two-year term commencing on Jan. 1, 2024, and ending on Dec. 31, 2025.

ADM File No. 2023-01
Appointments to the Commission on Diversity, Equity, and Inclusion in the Michigan Judiciary

On order of the Court, pursuant to Administrative Order No. 2022-1, Justice Elizabeth M. Welch and Judge Austin W. Garrett are appointed as co-chairs on the Commission on Diversity, Equity, and Inclusion in the Michigan Judiciary, effective Jan. 1, 2024.

WELCH, J. (*concurring*). On Jan. 5, 2022, we issued Administrative Order No. 2022-1, which created the Commission on Diversity, Equity, and Inclusion in the Michigan Judiciary (the Commission). The Commission's stated purpose is "to assess and work towards elimination of demographic and other disparities within the Michigan judiciary and justice system." Administrative Order No. 2022-1, 508 Mich ___ (Jan. 5, 2022). In addition to setting forth various goals for the Commission, AO 2022-1 also established the executive leadership of the Commission and outlined the process for selection of the commissioners.

Within 120 days, as required by AO 2022-1(IV)(B)(3) and following a robust selection process, the Commission's leadership recommended the appointment of the remaining commissioners. This Court did not, however, make those appointments until June 16, 2022. See Appointments to the Commission on Diversity, Equity, and Inclusion in the Michigan Judiciary, 509 Mich ___ (June 16, 2022).

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

Significantly, AO 2022-1 required the Commission to "work with an expert facilitator to develop a strategic plan to guide the initial work of the Commission." AO 2022-1(II). Accordingly, the Commission's leadership researched and selected a strategic planner with broad experience working with governmental entities and court systems. In keeping with the planning process agreed to by the Commissioners, throughout 2023 Commission members have convened for four hours each month and additionally met in smaller work groups on a regular basis. The Commission has remained true to its agreed-to timeline; a draft plan is now complete and will soon be available for the public to review.

I thank my co-chair, Judge Cynthia Stephens (now retired), for her leadership on the Commission and her years of dedication to this important work. I also thank all the Commissioners for their incredible dedication this past year as they devoted countless hours to the strategic planning process. I look forward to working with Judge Austin Garrett and the Commission in the years ahead as the objectives set forth in the strategic plan are implemented.

VIVIANO, J. (*dissenting*). I maintain my previously expressed objections to the existence of the Commission on Diversity, Equity, and Inclusion in the Michigan Judiciary. See Administrative Order No. 2022-1, 508 Mich ___, ___ (Jan. 5, 2022) (VIVIANO, J., *dissenting*). Nearly two years after it was created, the Commission still has not defined these key terms or outlined its mission and goals. As I have noted previously, any definition of these terms that would require or encourage the judiciary to engage in unlawful discriminatory practices would certainly place judges and court administrators in an untenable position. See *id.* at ___ ("If the Commission created today sets about to encourage the judiciary to consider [race, gender, or other protected personal characteristics] in any area under our purview, I fear that our ethics, fidelity to law, and impartiality will justly be called into question"). The United States Supreme Court recently reaffirmed the need for neutral decision-making, striking down the use of race in college admissions programs. *Students for Fair Admissions, Inc v President & Fellows of Harvard College,* 600 US 181, 230 (2023). The Court's reasoning has potential ramifications far outside the educational setting. See *id.* at 287-291 (GORSUCH, J., *concurring*) (explaining that the schools' actions would be unlawful under terms in the Civil Rights Act that apply broadly to various types of entities).

As I indicated when the Court made its initial appointments to the Commission, assessing the applicants is difficult without knowing what the Commission stands for and whether the applicants will serve as a group dedicated to removing obstacles to participation in the courts and fostering viewpoint diversity or a group that will advocate for the unconstitutional use of race and other protected characteristics in the courts' decision-making processes. See Appointments to the Commission on Diversity, Equity, and Inclusion in the Michigan Judiciary, 509 Mich ___, ___ (June 16, 2022) (VIVIANO, J., *dissenting*). Thus, while I have no objection to the individuals appointed as co-chairs, at least until we receive more clarity regarding its aims, I remain opposed to the existence of the Commission and respectfully dissent.

ADM File No. 2023-05 Amendment of Rule 3.613 of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 3.613 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 3.613 Change of Name

(A) [Unchanged.]

(B) Published Notice; Contents. Unless otherwise provided in this rule, the court must order publication of the notice of the proceeding to change a name in a newspaper in the county where the action is pending. If the court has waived fees under MCR 2.002, it must pay the cost of any ordered publication, including any affidavit fee charged by the publisher or the publisher's agent for preparing the affidavit pursuant to MCR 2.106(G). Any case record reflecting court payment must be nonpublic. A published notice of a proceeding to change a name must include the name of the petitioner; the current name of the subject of the petition; the proposed name; and the time, date, and place of the hearing. Proof of service must be made as provided by MCR 2.106(G)(1).

(C)-(G) [Unchanged.]

Staff Comment (ADM File No. 2023-05): The amendment of MCR 3.613 requires a court to pay the costs of publication in a name change proceeding if fees are waived under MCR 2.002 and ensures that any case record reflecting the court payment be made nonpublic.

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.

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by March 1, 2024. Comments may be sent in writing to Sam Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The Committee proposes the following new model criminal jury instruction, M Crim JI 5.16, directing the jury to consider testimony provided through videoconferencing technology. MCR 6.006(A)(2), (B)(4), and (C)(4) authorize the use of videoconferencing technology to take trial testimony in criminal proceedings "in the discretion of the court after all parties have had notice and an opportunity to be heard on the use of videoconferencing technology." The language in the new instruction is based M Crim JI 2.13 (Notifying Court of Inability to Hear or See Witness or Evidence), M Crim JI 4.10 (Preliminary Examination Transcript), and M Civ JI 4.11 (Consideration of Deposition Evidence). This instruction is entirely new.

[NEW] M Crim JI 5.16
Testimony Provided Through Videoconferencing Technology

The next witness, [*identify witness*], will testify by videoconferencing technology. You are to judge the witness's testimony by the same standards as any other witness, and you should give the witness's testimony the same consideration you would have given it had the witness testified in person. If you cannot hear something that is said or if you have any difficulty observing the witness on the videoconferencing screen, please raise your hand immediately.

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by March 1, 2024. Comments may be sent in writing to Sam Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The Committee proposes the following amendment to M Crim JI 16.5, for second-degree murder. In light of the Court of Appeals opinion in *People v. Spears* (Docket No. 357848), holding that "without justification or excuse" is not an element of the offense of second-degree murder, it is proposed that paragraph (4) be deleted. Deletions are in strikethrough. No new language was added.

[AMENDED] M Crim JI 16.5
Second-Degree Murder

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

(2) First, that the defendant caused the death of [*name deceased*], that is, that [*name deceased*] died as a result of [*state alleged act causing death*].[2]

(3) Second, that the defendant had one of these three states of mind: [he/she] intended to kill, or [he/she] intended to do great bodily harm to [*name deceased*], or [he/she] knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of [his/her] actions.[3]

~~[(4) Third, that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime.]~~[4]

Use Note

1. Where there is a question as to venue, insert M Crim JI 3.10, Time and Place (Venue).
2. Where causation is an issue, see the special causation instructions, M Crim JI 16.15-16.23.
3. Second-degree murder is not a specific intent crime. *People v. Langworthy,* 416 Mich 630; 331 NW2d 171 (1982).
~~4. Paragraph (4) may be omitted if there is no evidence of justification or excuse, and the jury is not being instructed on manslaughter or any offense less than manslaughter. Justification or excuse instructions may be inserted here, but they are more commonly given at a later time.~~

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by March 1, 2024. Comments may be sent in writing to Sam Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The Committee proposes a new jury instruction, M Crim JI 23.10a (failure to return rental property), for the crime found at MCL 750.362a. This instruction is entirely new.

[NEW] M Crim JI 23.10a
Failure to Return Rental Property

(1) [The defendant is charged with/You may also consider the lesser offense of[1]] failure to return rental property with [a value of $20,000 or more/a value of $1,000 or more but less than $20,000/a value of $200 or more but less than $1,000/some

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS (CONTINUED)

value less than $200]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that there was a written lease or rental agreement for [*identify property leased*] between [*identify complainant*] and the defendant.

(3) Second, that the [*identify property leased*] was given or delivered to the defendant according to the agreement.

(4) Third, that the agreement called for the return of the [*identify property leased*] at a specific time and place.

(5) Fourth, that [*identify complainant or agent*] sent a written notice by registered or certified mail to the defendant at [his/her] last known address directing the defendant to return the property by [*specify date*].

(6) Fifth, that the defendant refused to return the [*identify property leased*] or willfully failed to return it by that date.

(7) Sixth, that the defendant intended to defraud [*identify complainant*].

(8) Seventh, that the [*identify property leased*] had [a value of $20,000 or more/a value of $1,000 or more but less than $20,000/a value of $200 or more but less than $1,000/some value less than $200].

[(9) You may add together the value of all property leased in a 12-month period when deciding whether the prosecutor has proved the amount required beyond a reasonable doubt.][2]

Use Note

1. Use this where the value of the leased property is in dispute and the instruction is read as a lesser offense.
2. Use this paragraph only where applicable.

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by March 1, 2024. Comments may be sent in writing to Sam Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The Committee proposes the following new model criminal jury instruction, 25.8, to cover criminal activity for trespassing at a key facility under MCL 750.552c. This instruction it entirely new.

[NEW] M Crim JI 25. 8

Trespassing on Key Facility Property

(1) The defendant is charged with the crime of trespassing on the property of a key facility. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was intentionally on the premises of or in a structure that was part of [*identify key facility*][1], which is a key facility.

(3) Second, that the [*identify key facility*] was completely enclosed by a physical barrier, which could include a water barrier that would prevent pedestrian access.

(4) Third, that there were signs prohibiting entry to the key facility at every point where access could be gained to the facility that were at least 50 square inches in size with letters at least 1 inch high.

[*Select the appropriate fourth element:*]

(5) Fourth, that the defendant did not have permission or authority to [enter/remain at/enter and remain at] the facility.

[*Or*]

(5) Fourth, that the defendant [entered/remained/entered and remained] on the property without permission or authority after being instructed to leave the facility.

[(6) Fifth, that the defendant was not present on the premises of the key facility as part of a lawful assembly or a peaceful and orderly petition for the redress of grievances, such as a labor dispute between an employer and its employees.][2]

Use Note

1. The list of key facilities is found at MCL 750.552c(1)(a) through (l):
   (a) A chemical manufacturing facility.
   (b) A refinery.
   (c) An electric utility facility, including, but not limited to, a power plant, a power generation facility peaker, an electric transmission facility, an electric station or substation, or any other facility used to support the generation, transmission, or distribution of electricity. Electric utility facility does not include electric transmission land or right-of-way that is not completely enclosed, posted, and maintained by the electric utility.
   (d) A water intake structure or water treatment facility.
   (e) A natural gas utility facility, including, but not limited to, an age station, compressor station, odorization facility, main line valve, natural gas storage facility, or any other facility used to support the acquisition, transmission, distribution, or storage of natural gas. Natural gas utility facility does not include gas transmission pipeline property that is not completely enclosed, posted, and maintained by the natural gas utility.
   (f) Gasoline, propane, liquid natural gas (LNG), or other fuel terminal or storage facility.
   (g) A transportation facility, including, but not limited to, a port, railroad switching yard, or trucking terminal.
   (h) A pulp or paper manufacturing facility.
   (i) A pharmaceutical manufacturing facility.
   (j) A hazardous waste storage, treatment, or disposal facility.
   (k) A telecommunication facility, including, but not limited to, a central office or cellular telephone tower site.
   (l) A facility substantially similar to a facility, structure, or station listed in

subdivisions (a) to (k) or a resource required to submit a risk management plan under 42 USC 7412(r).

2. MCL 750.552c(4) exempts persons present at a "key facility" from the statute if they are part of a "lawful assembly or a peaceful and orderly petition for the redress of grievances, including, but not limited to, a labor dispute between an employer and its employees." This appears to be an affirmative defense requiring some supporting evidence. Read this paragraph only where the defendant asserts the defense and there is evidence to support it.

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by March 1, 2024. Comments may be sent in writing to Sam Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The Committee proposes the following new model criminal jury instruction, M Crim JI 38.5, to cover the crime of Using the Internet to Disrupt Government or Public Institutions under MCL 750.543p. This instruction is entirely new.

[NEW] M Crim JI 38.5
Using the Internet to Disrupt Government or Public Institutions

(1) The defendant is charged with the crime of using the Internet to disrupt government or public institutions. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant used [the Internet/a telecommunications device or system/an electronic device or system][1] in a way that disrupted the functioning of [public safety/educational/commercial/governmental] operations. To disrupt operations means to interrupt the normal functioning of those institutions.

(3) Second, that when the defendant disrupted [public safety/educational/commercial/governmental] operations, [he/she] intended to commit [a felony/the felony offense of (*identify specific offense and provide elements*)].

(4) Third, that the defendant acted willfully and deliberately. This means that [his/her] conduct was intentional and not the result of an accident and that [he/she] considered the pros and cons of committing the crime, thought about it, and chose [his/her] actions before [he/she] did it.

(5) Fourth, that the defendant knew or had reason to know that [his/her] action [would be likely to cause serious injury or death/would cause a person to be restrained to be held for ransom, as a shield or hostage, for sexual conduct, for servitude, or for child sexually abusive activity/would conceal a child from his or her parent or guardian)[2]].

(6) Fifth, that through or by [his/her] action, the defendant intended to intimidate or coerce a civilian population or intended to influence or affect the conduct of government or a unit of government through intimidation or coercion.

Use Notes

1. These terms are defined in 47 USC 230(f)(1), MCL 750.145d(9)(f), 750.540c(9), and 750.219a(6)(b).

2. See MCL 750.543b(b) citing the kidnapping statutes, MCL 750.349 and 750.350.

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by March 1, 2024. Comments may be sent in writing to Sam Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The Committee proposes the following new model criminal jury instruction, M Crim JI 40.12, to address the crime of failing to report a dead body under MCL 333.2841. This instruction is entirely new.

[NEW] M Crim JI 40.12
Failure to Report a Dead Body

(1) The defendant is charged with the crime of failing to report a dead body. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [identify deceased person] died on or before [*date of offense*].

(3) Second, that the defendant discovered [*identify deceased person*]'s body.

(4) Third, that the defendant knew or had reason to know that [*identify deceased person*] was dead on discovering the body.

(5) Fourth, that the defendant failed to inform a law enforcement agency, a funeral home, or a 9-1-1 operator that [he/she] discovered the body.

[(6) Fifth, that the defendant did not know or have reason to know that a law enforcement agency, a funeral home, or a 9-1-1 operator had already been informed of the presence of the dead body.[1]]

Use Notes

1. The Committee on Model Criminal Jury Instructions believes that a claim that the defendant knew or had reason to know that a law enforcement agency, a funeral home, or a 9-1-1 operator had already been informed of the location of the body is an affirmative defense, requiring evidence to support the claim. Read this paragraph only where the defendant asserts the defense and there is evidence to support the claim.

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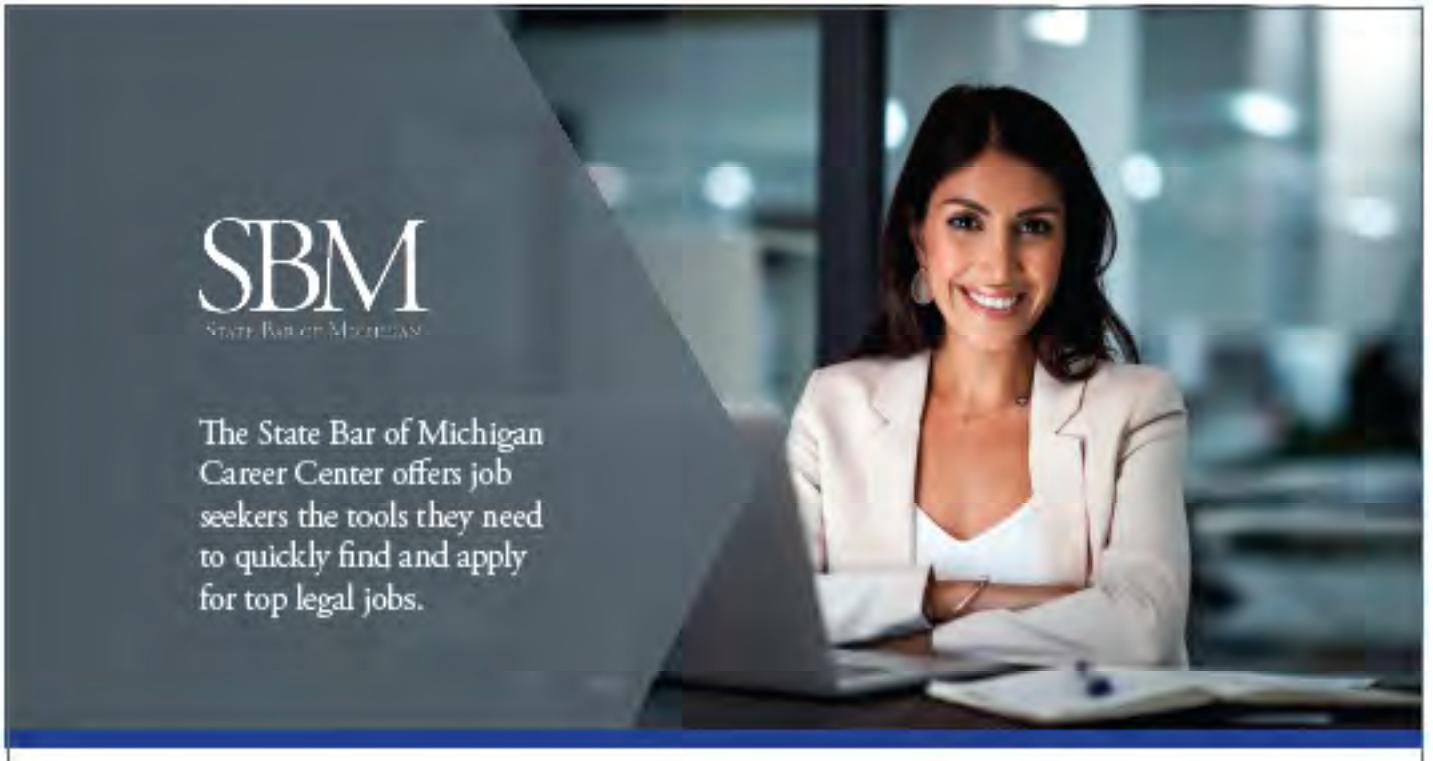

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