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MARCH 2024

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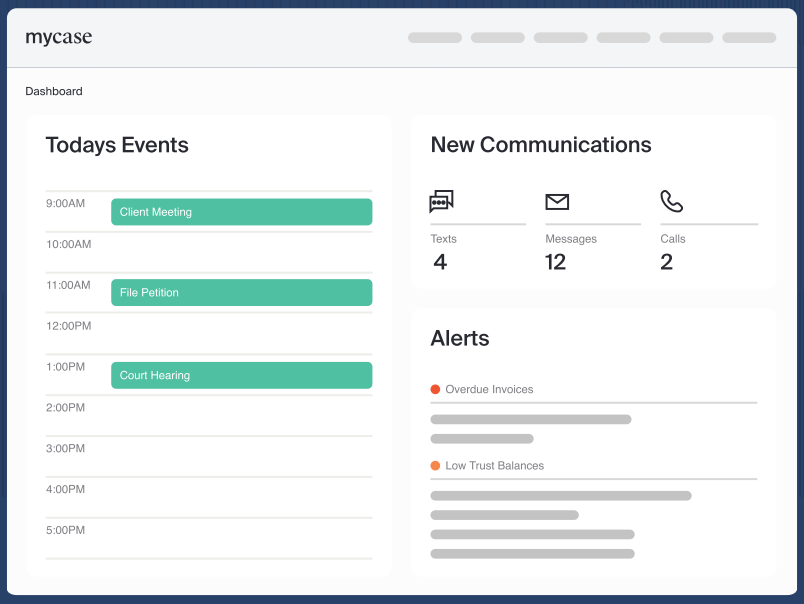

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OF INTEREST

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2. The defense attorney who represented the lawyer; and
3. The prosecutor or other authority

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WHERE TO REPORT:
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IN MEMORIAM

TONI JEAN BEATTY, P27969, of Las Vegas, Nevada, died Nov. 9, 2023. She was born in 1951, graduated from Wayne State University Law School, and was admitted to the Bar in 1977.

THEODORE E. BRATTON, P49378, of Grosse Pointe Woods, died Jan. 10, 2024. He was born in 1953, graduated from Wayne State University Law School, and was admitted to the Bar in 1994.

MAURICE M. BREEN, P11156, of Plymouth, died Jan. 3, 2024. He was born in 1933, graduated from Wayne State University Law School, and was admitted to the Bar in 1962.

PRENTISS M. BROWN JR., P11295, of Saint Ignace, died Dec. 3, 2023. He was born in 1925, graduated from University of Michigan Law School, and was admitted to the Bar in 1951.

TIMOTHY L. DUROCHER, P51361, of New York, N.Y., died June 17, 2023. He was born in 1967, graduated from Detroit College of Law, and was admitted to the Bar in 1994.

JOSEPH L. FALIK, P33406, of Huntington Woods, died Sept. 17, 2023. He was born in 1950 and was admitted to the Bar in 1981.

DANIEL J. GARBER JR., P35957, of Brighton, died Aug. 27, 2023. He was born in 1954, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1983.

ELIZABETH A. HACKER, P28488, of Grosse Ile, died March 22, 2023. She was born in 1948, graduated from Detroit College of Law, and was admitted to the Bar in 1978.

ARTHUR B. HADDRILL, P30662, of Las Vegas, Nevada, died Nov. 19, 2023. He was born in 1952, graduated from Detroit College of Law, and was admitted to the Bar in 1979.

WALTER HAGE, P14516, of Warren, died Oct. 4, 2023. He was born in 1943, graduated from Wayne State University Law School, and was admitted to the Bar in 1969.

CONSTANCE J. HOBSON, P24815, of Las Vegas, Nevada, died March 6, 2023. She was born in 1930, graduated from University of Detroit School of Law, and was admitted to the Bar in 1975.

GARY G. HOSBEIN, P15138, of Saint Joseph, died April 12, 2023. He was born in 1943, graduated from University of Detroit School of Law, and was admitted to the Bar in 1969.

MARK A. HULLMAN, P15254, of Traverse City, died April 20, 2023. He was born in 1946, graduated from University of Michigan Law School, and was admitted to the Bar in 1971.

KENT B. JOSCELYN, P29650, of Ann Arbor, died Dec. 24, 2023. He was born in 1936 and was admitted to the Bar in 1979.

LARRY L. JUSTICE JR., P53349, of Detroit, died Sept. 26, 2023. He was born in 1972, graduated from Wayne State University Law School, and was admitted to the Bar in 1998.

KEITH M. KERWIN, P33198, of Lansing, died Jan. 17, 2024. He was born in 1956, graduated from Wayne State University Law School, and was admitted to the Bar in 1981.

RICHARD M. KIPPEN, P15997, of Traverse City, died July 8, 2023. He was born in 1932 and was admitted to the Bar in 1957.

DEBI D. KIRSCH, P32088, of Glasgow, Kentucky, died June 11, 2023. She was born in 1955, graduated from University of Michigan Law School, and was admitted to the Bar in 1980.

DENNIS J. LEVASSEUR, P39778, of Detroit, died March 2, 2023. He was born in 1960, graduated from Wayne State University Law School, and was admitted to the Bar in 1985.

LAUREL F. MCGIFFERT, P31667, of Detroit, died Jan. 14, 2024. She was born in 1948, graduated from Wayne State University Law School, and was admitted to the Bar in 1980.

RUTH E. MCMAHON, P32166, of Bradenton, Florida, died Dec. 28, 2023. She was born in 1936, graduated from Wayne State University Law School, and was admitted to the Bar in 1980.

J. TIMOTHY MEGEL, P23477, of Rochester Hills, died Jan. 31, 2024. He was born in 1946, graduated from Detroit College of Law, and was admitted to the Bar in 1974.

DAVID W. MINER, P24490, of Bradenton, Florida, died Nov. 17, 2023. He was born in 1946, graduated from University of Detroit School of Law, and was admitted to the Bar in 1974.

MARY T. NEMETH, P34851, of Brighton, died March 22, 2023. She was born in 1955, graduated from Wayne State University Law School, and was admitted to the Bar in 1982.

GARY W. PARKER, P27795, of Englewood, Florida, died Oct. 25, 2023. He was born in 1947, graduated from University of Detroit School of Law, and was admitted to the Bar in 1977.

JAMES W. QUIGLY, P23435, of Northville, died Sept. 26, 2023. He was born in 1937, graduated from University of Detroit School of Law, and was admitted to the Bar in 1973.

JON R. ROBINSON, P27953, of Stevensville, died Sept. 12, 2023. He was born in 1952 and was admitted to the Bar in 1977.

JEROME SCHMIDT, P35379, of Peoria, Arizona, died July 8, 2023. He was born in 1952, graduated from Wayne State University Law School, and was admitted to the Bar in 1983.

JAMES E. SHULTZ JR., P64730, of Grand Haven, died March 31, 2023. He was born in 1961 and was admitted to the Bar in 2002.

L. CHRISTOPHER SMITH, P43997, of Farmington Hills, died Dec. 27, 2023. He was born in 1963, graduated from University of Detroit School of Law, and was admitted to the Bar in 1990.

GAIL S. SODERLING, P24691, of West Bloomfield, died April 27, 2023. He was born in 1942, graduated from Wayne State University Law School, and was admitted to the Bar in 1971.

ROBERT P. TREMP, P21557, of Williamsburg, died March 3, 2023. He was born in 1933, graduated from University of Detroit School of Law, and was admitted to the Bar in 1960.

PAUL L. TRIEMSTRA, P21568, of Troy, died Nov. 18, 2023. He was born in 1943, graduated from Wayne State University Law School, and was admitted to the Bar in 1970.

JOSEPH PATRICK TYLUTKI, P84003, of Lockport, Illinois, died Jan. 25, 2024. He was born in 1975 and was admitted to the Bar in 2019.

RANDALL K. VAUGHT, P36414, of Temperance, died June 21, 2023. He was born in 1954, graduated from Detroit College of Law, and was admitted to the Bar in 1984.

GORDON R. WYLLIE, P22594, of Jacksonville, Florida, died Jan. 9, 2024. He was born in 1933, graduated from Wayne State University Law School, and was admitted to the Bar in 1968.

HENRY C. ZAVISLAK, P49729, of Douglas, died Feb. 16, 2023. He was born in 1948, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1994.

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

We shouldn't tolerate bull$#!&[1]

Our profession is steeped in clichés, anachronisms, and intentionally obtuse rules and precepts parading as simple truths. Lawyers delight in exploiting, if not fabricating, ambiguities, loopholes, and exceptions. Add that to the misunderstood adage that lawyers are zealous advocates for clients, and it is not at all surprising that mischief ensues.

The phrase "zealous advocate" does not actually appear in the Michigan Rules of Professional Conduct (MRPC). Rather, under Rule 1.3 addressing diligence, the commentary notes:

> A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

Those seeking to justify out-of-bounds behavior apparently miss the very next sentence:

> However, a lawyer is not bound to press for every advantage that might be realized for a client.

Various other rules define and stress the constraints upon an attorney's advocacy, whether it would be beneficial to the client's interests or not. I commend to you in particular "Preamble: A Lawyer's Responsibilities," which follows MRPC Rule 1.0.

One of the few bright lines in the rules is a prohibition against lying. MRPC Rule 3.3 prohibits misrepresentations to a tribunal and Rule 4.1 states that "a lawyer shall not knowingly make a false statement of material fact or law to a third person." Rule 8.4 addresses misconduct by lawyers and, according to subsection (c), it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

So that covers lying. But what about the more generalized spewing of bull(excrement)?

In 1986, philosopher Harry G. Frankfurt penned an essay "On Bullshit" and turned it in to a book in 2005.[2] In the book, he makes a distinction between "bullshitters" and liars. He concludes that bull(crappers) are more insidious: they are more of a threat against the truth than are liars. When asked why he decided to focus on bull(poo), he explained:

> Respect for the truth and a concern for the truth are among the foundations for civilization. I was for a long time disturbed by the lack of respect for the truth that I observed bullshit is one of the deformities of these values.[3]

The dominant distinction between a liar and a bull(no. 2'er) is the knowing misrepresentation of facts. "Frankfurt paints the bullshitter as an amoral person, not concerned about whether what he says is true or false. Thus, the bullshitter is not a liar because the liar must say something he believes is false, and the bullshitter does not bother himself with such concerns."[4] At the same time, "it remains true that he is also trying to get away with something"[5] and "[a] quintessential feature of bullshit … is to make false or deceptive statements in order to sow confusion, obscure the truth, or bluff through a difficult situation."[6]

> It is impossible for someone to lie unless he thinks he knows the truth. Producing bullshit requires no such conviction. A person who lies is thereby responding to the truth, and he is to that extent respectful of it. […] For the bullshitter, however, all these bets are off: he is neither on the side of the true nor on the side of the false. His eye is not on the facts at all, as the eyes of the honest man and of the liar

> are, except insofar as they may be pertinent to his interest in getting away with what he says. He does not care whether the things he says describe reality correctly. He just picks them out, or makes them up, to suit his purpose.[7]

The law has not been immune to the rise of bull(droppings). Scholars have noted that a bull(deucing) lawyer "may be a more insidious threat to the rule of law and the public's confidence in the justice system than a lawyer who tells a lie."[8] Yet the existing rules are not particularly focused on bull(oney). MCR 2.109(E)(5) provides that an attorney signature constitutes a certification that "to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact," but that covers only a portion of an attorney's potential use of bull(caca) and, in any event, judges rarely invoke the rule and generally tend to deride an attorney asking for sanctions more than the putative wrongdoer. Indeed, the accused bull(plopper) will often retort that they were being sincere and respond with self-righteous denials. But, as Frankfurt concluded, "sincerity itself is bullshit" if used to justify behavior untethered to a concern with truth.[9] Yet, in popular culture and, I dare say, amongst many attorneys and certainly clients, there is admiration for the good bull(brown trouter), although this appreciation misconstrues bull(pucky) as a species of rhetoric when, in fact, it is its antithesis.[10] The motivations for and cultural acceptance of bull(guano) far outweigh the institutional safeguards.

Which brings us back to the Rules of Professional Conduct and their admonition that as "public citizens," lawyers owe duties beyond the pecuniary or the client — we owe duties to the improvement of law and administration of justice. While being on the receiving end of bull(scat) that, against all good logic and the facts, sways a judge or jury in a particular case is immensely frustrating, it also has long-term deleterious consequences.

Brandolini's law, also known as the "bullshit asymmetry principle," is an internet adage coined in 2013 that emphasizes the effort of debunking misinformation in comparison to the relative ease of creating it in the first place: The amount of energy needed to refute bull(fudge) is an order of magnitude bigger than that needed to produce it.[11] That certainly rings true with regard to legal bull(dookie) and speaks to the long-term negative effects it has on justice, the justice system, and our citizens' belief in the fairness of that system.

While the truth is sometimes elusive, it must be what we strive for. As Clarence Darrow, perhaps borrowing a line from Aristotle, quipped, "The pursuit of truth shall set you free — even if you never catch up with it."[12,] In this sense, perhaps our vision of justice as a blindfolded woman holding equally balanced scales no longer applies. Rather, consider justice as she appeared in "Gulliver's Travels" — a statue which had no blindfold and which, significantly, had eyes in the back of her head.[13] Spotting and calling out bull in all its forms is a necessity if we wish to preserve and reinforce belief in our courts.

ENDNOTES

1. The Bar staff has, out of an abundance of decorum, modified this colorful term throughout this article except when quoting another source. We recognize that some readers will find this unnecessarily prim while others may still take offense to including the full sweary term in direct quotes. Either way, we hope you enjoy the extensive use of euphemisms.
2. Harry Frankfurt, *On Bullshit*, (Princeton University, 2005). Available at: <https://www2.csudh.edu/ccauthen/576f12/frankfurt__harry_-_on_bullshit.pdf> [https://perma.cc/J8Q3-K8CG] (all websites cited in this article were accessed February 26, 2024).
3. Princeton University Press, *On Bullshit Part 1*, YouTube <https://www.youtube.com/watch?v=W1RO93OS0Sk> [https://perma.cc/52TC-NCH6].
4. L. Solan, *Lies, Deceit and Bullshit in Law,* 56 Duquesne L R 73, 75 (2018).
5. Frankfurt, *supra* n 1, p 7.
6. B. Gershman, *Rudolph Giuliani and the Ethics of Bullshit*, 57 Duq L Rev 293, 300 (2019).
7. Frankfurt, *supra* n 1, p 17.
8. Gershman, *supra* n 5. Judges, even Supreme Court justices, are not immune from bullshit. See A. Kolber, *Supreme Judicial Bullshit*, 50 Ariz L J 141 (2018).
9. Frankfurt, *supra* n 1, p 20.
10. J. Fredal, *Rhetoric and Bullshit,* 73 College English 3 (2011).
11. *Brandolini's Law*, Wikipedia <https://en.wikipedia.org/wiki/Brandolini%27s_law>.
12. Irving Stone, *Darrow for the Defense*, (The Bodley Head, 1949), p 86. Available at <https://archive.org/details/in.ernet.dli.2015.462663/page/n1/mode/2up> [https://perma.cc/77CY-XSZH].
13. Jonathan Swift, *Gulliver's Travels* (1726), ch 6.

NEWS & MOVES

ABA HOUSE OF DELEGATES SBM DELEGATE VACANCIES

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

ABA House of Delegates – SBM Delegate: Three vacancies for two-year terms beginning at the close of the ABA Annual Meeting in August 2024.

The ABA House of Delegates has the ultimate responsibility for establishing policy both as to the administration of the association and its positions on professional and public issues. The House elects officers of the association and members of the board of governors; it elects members of the Committee on Scope and Correlation of Work; it has the sole authority to amend the association's bylaws; and it may amend the constitution. It authorizes committees and sections of the association and discontinues them. It sets association dues upon the recommendation of the board of governors.

Deadline for response is April 5, 2024.

Applications received after the deadline indicated will not be considered.

Those applying for an agency appointment should submit a résumé and a letter outlining interest in the ABA, current position in the ABA, work on ABA committees and sections, accomplishments, and contributions to the State Bar and the ABA. Applications should be emailed to the SBM secretary in care of Marge Bossenbery at mbossenbery@michbar.org.

ARRIVALS & PROMOTIONS

AARON L. DAVIS and **JAMES J. URBAN** with Butzel have been appointed co-managing shareholders for the firm's Lansing office.

KURT DYKSTRA has joined Reinhart's Milwaukee office.

JESSE GOLDSTEIN has joined Antone, Casagrande & Adwers in Farmington Hills as a senior attorney.

REINE HAMDAR has joined Collins Einhorn Farrell in Southfield.

Twelve attorneys with **KITCH ATTORNEYS & COUNSELORS** in Detroit and Mount Clemens have been promoted.

AMANDA AFTON MARTIN has joined Kemp Klein in Troy as a shareholder.

BRETT J. MILLER with Butzel in Detroit was appointed co-chair of the firm's labor and employment practice.

MARJAN NECESKI has been named a partner at RCO Law in Toledo.

MARK OSZUST has joined Plunkett Cooney in Bloomfield Hills.

Eight attorneys have joined **WARNER NORCROSS & JUDD** – four in the firm's Detroit office and four in its Grand Rapids office.

AWARDS & HONORS

R. SCOTT KELLER and **BRIAN WASSOM**, partners with Warner Norcross & Judd, were recognized in the 2024 WTR 1000 by World Trademark Review.

MIKE MORSE LAW FIRM recently won a 2024 Golden Gavel Award presented by The National Trial Lawyers for best 30-second television commercial for its ad titled "What Matters."

LEADERSHIP

MICHAEL P. ASHCRAFT JR., **EMILY M. COYLE**, **MARC P. JERABEK**, **ELAINE M. POHL**, and **ROBERT A. MARZANO** were elected to Plunkett Cooney's board of directors.

EMILY FIELDS and **MICHAEL BUTTERFIELD** with Mantese Honigman were elected to partnership.

JUSTIN HANNA and **MICHAEL POMERANZ** of Taft's Detroit office and **JAMES KRESTA** and **BRIAN STONE** of Taft's Southfield office have been elected to the firm's partnership.

MICHAEL G. SARAFA with Butzel was appointed to the Oakland County Bar Association legislative committee.

CLAIRE D. VERGARA and **ALEANNA B. SIACON** with Plunkett Cooney were appointed to executive positions on the Michigan Asian-Pacific American Bar Association board of directors.

MARK J. WASSINK has been elected managing partner of Warner Norcross & Judd.

ADRIENNE YOUNG, assistant defender with the State Appellate Defender Office, has been appointed by Gov. Whitmer to serve as a judge on the Michigan Court of Appeals.

NEW OFFICE

KIRK A. PROFIT has opened a new office, Profit Legal Services, in Washtenaw County

OTHER

TAPROOT LAW announced a research and design partnership with the Michigan State University Experience Architecture program.

UPCOMING

The **INGHAM COUNTY BAR ASSOCIATION** hosts its 15th Annual Barristers' Ball on March 14, and its annual meeting and shrimp dinner is scheduled for May 15.

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

IN FOCUS

CONTRACT LAW & UCC

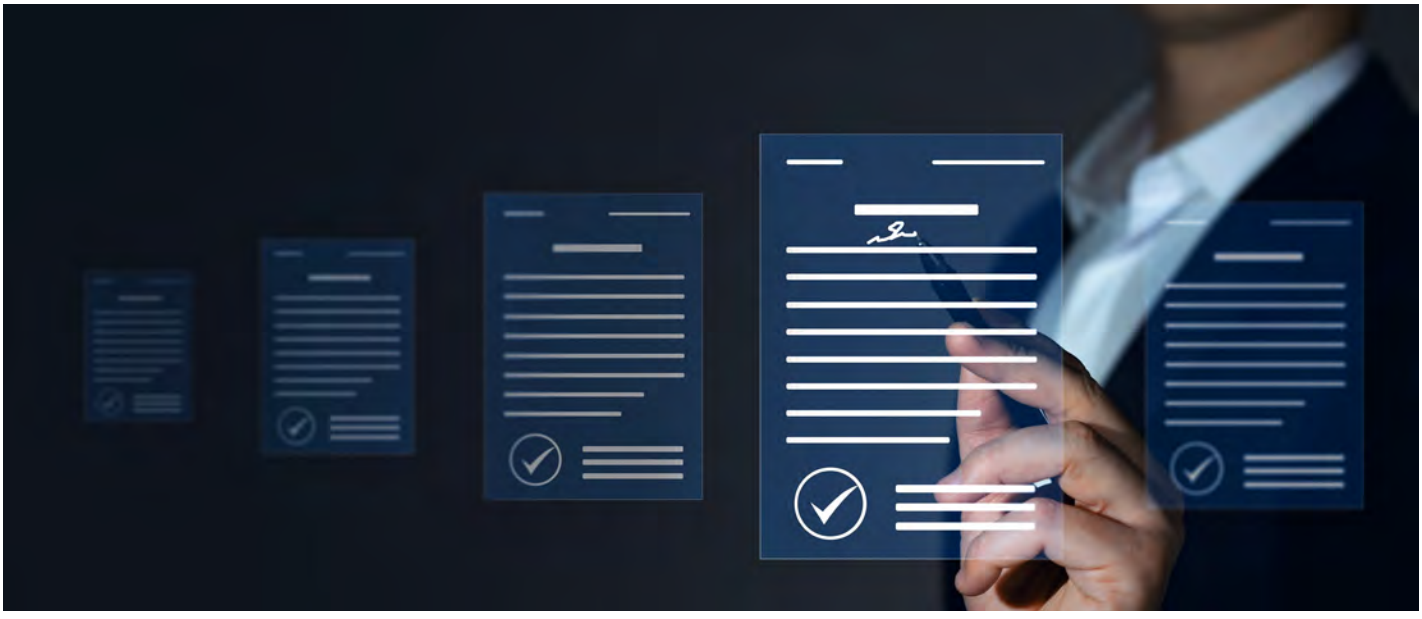
BY MICHAEL S. KHOURY AND KIMBERLY ROSS CLAYSON

Contract law in Michigan had not seen many major changes over the years. However, the recent past has provided a number of significant cases that have changed the common understanding about some aspects of contract law in the state. We have also seen the increasing importance of international contracts.

The four articles appearing in this theme issue address a variety of topics related to contract law and the Uniform Commercial Code (UCC). In his article "*MSSC v. AirBoss*: Clarifications, Change, and the Next Questions," Jason Killips reviews the recent Michigan Supreme Court ruling in the case that addressed the enforceability of open or blanket purchase orders. In a similar vein, Daniel Quick and Gerard Mantese provide an overview of recent decisions issued by circuit courts and the Michigan Court of Appeals in "Contracts: A Recent Survey of Case Law." Another feature — "International Contracts: Practical Drafting Considerations" by Richard Walawender — touches on some of the issues lawyers must address and not take for granted when drafting and negotiating international contracts. And finally, Christopher Falkowski discusses how both emojis and emoticons can constitute electronic signatures under the Uniform Electronic Transactions Act and Electronic Signatures in Global and National Commerce Act.

As representatives of the SBM Business Law Section and its Uniform Commercial Code Committee, we hope Bar Journal readers find these articles informative and helpful. The section often addresses topics like these and many others. We invite all attorneys to become section members or attend one of our upcoming events. Find us at connect.michbar.org/businesslaw.

Michael S. Khoury and Kimberly Ross Clayson are the co-chairs of the Uniform Commercial Code Committee of the SBM Business Law Section. Khoury, a partner with the Detroit office of FisherBroyles and a former chair of the both the Business Law Section and the Information Technology Law Section, concentrates his practice on technology transactions, corporate and commercial law, and mergers and acquisitions. Ross Clayson, senior counsel with the Michigan offices of Taft Stettinius & Hollister, concentrates her practice on insolvency law, creditors' rights, business law, and health law. She has extensive experience restructuring business debtors and representing Chapter 7 trustees in fraud investigations and bankruptcy litigation.



MSSC v. AirBoss: Clarifications, changes, and questions

BY JASON D. KILLIPS

To determine the enforceability and scope of a contract for the sale of goods, the most fundamental question is: "How many?"

Last year, the Michigan Supreme Court issued a rare opinion on the Uniform Commercial Code (UCC), the statutory scheme that governs such contracts.[1] In *MSSC, Inc. v. AirBoss Flexible Prod Co.*,[2] the Court explained how different types of quantity terms affect the parties' obligations. It also overruled a key holding of the Michigan Court of Appeals decision in *Great Northern Packaging, Inc. v. General Tire and Rubber Co.* in 1986.[3]

The *AirBoss* opinion raised another round of questions that will need to be addressed in the future. This article intends to address a couple of them.

The concepts described here apply to any contract for the sale of goods but, for simplicity, this article focuses on the structure common in manufacturing supply chains involving purchase orders and terms and conditions. More complicated supply agreements, which may include capacity limits or complex dual-sourcing structures, are beyond the scope of this article. As always, the analysis and outcome in each case will depend on the specific contract at issue.

AIRBOSS AS TREATISE: CLARIFICATIONS AND EXPLANATIONS

UCC statute of frauds

Michigan Supreme Court Justice Elizabeth Welch's majority opinion in *AirBoss* begins with an authoritative summary of the law

surrounding contracts for the sale of goods and, in particular, the primacy of the quantity term.

The importance of quantity terms comes from the UCC statute of frauds, § 2-201.[4] The first sentence of § 2-201(1) "mandates that contracts entered into for the sale of goods worth $1,000 or more must be in writing."[5] The second sentence states that "[a] writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in the writing."[6] As the *AirBoss* Court explained, this "allows for some terms to be missing or incorrect but provides that a court can only enforce the contract up to the quantity set forth in writing."[7]

Quantity is thus "the only essential term" of contracts for the sale of goods.[8] When a contract states a quantity term "but fails to express details sufficient to determine the specific or total quantity," the term may be clarified with parol evidence.[9] When such a contract fails to state a quantity term, parol evidence cannot fill the gap and the contract will be deemed unenforceable.[10]

Fixed quantity contracts

The most straightforward type of quantity term is so simple that there is almost no case law about it: a fixed number. Whether a quantity term is 20 widgets or 38.75 gallons, there is no question about how many goods the buyer must purchase or the seller must deliver.

Requirements contracts

The UCC, however, envisions two other quantity terms that "lack specificity as to the total of goods agreed upon."[11] In § 2-306(1), it "allows for a contract's quantity to be measured 'by the output of the seller or the requirements of the buyer[.]'"[12] These contracts are called output or requirements contracts.

In an output contract, "a seller promises to supply and a buyer to buy all the goods or services that a seller produces during a specified period and at a set price."[13] A buyer might use this to buy all the coal a mine produces or all the hay a farm grows in a year. Output contracts are rarely, if ever, used in manufacturing supply chains, so this article will focus exclusively on requirements contracts.

A requirements contract is one "in which a buyer promises to buy, and a seller to supply, all the goods or services that a buyer needs during a specified period."[14] For example, a manufacturer might use such a contract if it doesn't know how many engines its customers will order but wants to ensure an adequate supply of the pistons it needs to build engines. As the specific needs for pistons arise, the manufacturer communicates to the supplier how many pistons it needs and on which dates; in most supply chains, these communications are often called releases.[15]

Both of the definitions above — which the *AirBoss* Court adopted from Black's Law Dictionary — use the word "all." But the Court held that under Michigan law, despite the word "all" in the definitions, requirements contracts need not be exclusive to be enforceable.[16] In the example above, the engine manufacturer could likely form an enforceable contract with a supplier for 70% of the pistons it needs because such a quantity term, while not exclusive, still "measures the quantity by … the requirements of the buyer[.]"[17]

Release-by-release contracts

In *AirBoss*, the Supreme Court formally recognized a new type of contract — what it called a release-by-release contract.[18] It is essentially a series of fixed-quantity contracts to which an overarching set of terms and conditions — with provisions covering topics like price, warranty, and indemnification — apply. Businesspeople often refer to them as spot-buy contracts. Once the parties agree to governing terms, they can enter into one or more fixed-quantity contracts without having to negotiate each one separately. In this arrangement, the buyer does not have to offer any fixed-quantity contracts and the seller does not have to accept those that are offered.[19]

Whether an agreement forms a requirements contract or a release-by-release contract isn't new. The U.S. District Court for the Eastern District of Michigan considered the issue more than 30 years ago in *Advanced Plastics Corp. v. White Consol Industries, Inc.*, issuing a ruling which the U.S. Sixth Circuit Court of Appeals affirmed.[20]

At issue in *Advanced Plastics* was a contract that said "Seller agrees to furnish Buyer's requirements for the goods," language that would in many cases create an enforceable requirements contract.[21] But the contract conditioned the "Buyer's requirements" language by adding "to the extent of and in accordance with" the buyer's releases.[22] This addition changed a contract that would have measured the quantity by the buyer's requirements into one that measured the quantity by whatever the buyer stated on its releases.[23] Nothing in the contract obligated the buyer to issue releases to the seller, so the contract itself contained no quantity term.[24] The contract was thus unenforceable on its own and became enforceable only once the buyer offered and the seller accepted a fixed-quantity release.[25] The buyer was free to stop offering releases and the seller was free to stop accepting them whenever they chose to do so.[26]

In *AirBoss*, the Michigan Supreme Court described such a release-by-release contract as "an umbrella agreement that governs the terms of future contract offers[,]"[27] adding that "[a]lthough the seller is not bound to accept future orders in the same manner as with a requirements contract, the seller is bound by the terms agreed to in the [overarching terms] when future releases are issued and accepted."[28]

BLANKET CONTRACTS: OVERRULING *GREAT NORTHERN*

After the Michigan Supreme Court clarified the fundamentals of

quantity terms in contracts for the sale of goods, it turned to the central question. Some goods buyers issue purchase orders or contract forms labeled "blanket" (as in a blanket order.) Nearly 40 years ago in *Great Northern*, the Michigan Court of Appeals held that "blanket," although an imprecise quantity term, created an enforceable contract.[29]

AirBoss overruled that holding, concluding that "blanket" is, at best, an imprecise quantity term and contracts with imprecise quantity terms aren't enforceable.[30] The Supreme Court drew a distinction between total quantity and quantity term,[31] ruling that total quantity may be imprecise in a requirements contract when the seller won't know how many widgets it must ultimately deliver until the buyer knows how many it needs.[32] The quantity term, however, must be precisely stated and the term "blanket" didn't pass muster.[33]

The distinction between total quantity and quantity term is vital to the holding in *AirBoss* and will be key in resolving future cases. The quantity term must be precise, and it seems clear that 98 widgets or 70% of buyer's requirements are all precise enough to create enforceable contracts. (Buyer's requirements, without any stated percentage, is discussed below.) It doesn't matter that the total quantity under the latter example is imprecise; it is enough to satisfy the UCC that the quantity term is precisely measured by the buyer's requirements.[34]

AFTER *AIRBOSS*: WHAT'S NEXT?

While *AirBoss* answered some questions, it left others unanswered and raised new ones. Here, we focus on two of them and try to predict how courts may answer them.

Are *Cadillac Rubber* and *AirBoss* compatible?

The question most obviously left open in *AirBoss* is what to make of the Court of Appeals' split decision in *Cadillac Rubber & Plastics, Inc. v. Tubular Metal Systems, LLC* in 2020.[35] The *AirBoss* seller urged the Supreme Court to overrule *Cadillac Rubber*, but the Supreme Court declined because it was not necessary to decide the case.[36]

In *Cadillac Rubber*, the Court of Appeals held that a contract stating the buyer had to buy "no less than one piece or unit of each of the Supplies and no more than [100%] of Buyer's requirements" was "indisputably" a requirements contract.[37] That appears to clash with the Court of Appeals' unpublished decision in *Acemco, Inc. v. Olympic Steel Lafayette, Inc.*, key parts of which were adopted by the Supreme Court in *AirBoss*.[38]

In *Acemco*, the Court of Appeals defined a requirements contract to be an agreement "in which the seller promises to supply all the specific goods or services which the buyer may need during a certain period at an agreed price in exchange for the promise of the buyer to obtain his required goods or services from the seller."[39] This definition highlights the mutuality necessary to a requirements contract — the seller's obligation to deliver must match the buyer's obligation to buy. The *AirBoss* Court emphasized mutuality's importance, stating that the primary difference between a requirements contract and a release-by-release contract is "the level of mutual obligation between the parties and the risk each party bears."[40]

Reconciling *Cadillac Rubber* with the mutuality described by *Acemco* and adopted by *AirBoss* is difficult. How many widgets must a buyer purchase under a contract with language like that in *Cadillac Rubber*? At least one. This is true even if the buyer requires 1,000 — it has the right to buy up to 1,000 because it can buy up to 100% of its requirements, but it doesn't have to. It has fulfilled its contractual obligation by buying a single unit. Whether it buys any more is entirely within its discretion.

Under *Cadillac Rubber*, however, the seller has no similar discretion: it had to deliver all the parts the buyer ordered. Whether measured by the buyer's requirements or otherwise, there is no mutual obligation to buy and sell the same quantity of parts. Put another way, *Cadillac Rubber* effectively permits a different quantity term for the buyer ("at least one") than the seller ("all that the buyer orders"). Nothing in the UCC contemplates the buyer and seller having different quantity terms in this way.

The Supreme Court opted not to overturn *Cadillac Rubber* because doing so wasn't necessary to decide *AirBoss*. But the definition of a requirements contract in *Acemco* adopted in *AirBoss* and the principles of mutuality it emphasized suggest that *Cadillac Rubber* should be overruled.

At least one federal district court has agreed with this analysis. In *Ultra Manufacturing Inc. v. ER Wagner Manufacturing Co.*, the Eastern District of Michigan interpreted a contract provision analogous to that enforced in *Cadillac Rubber*,[41] recognized the conflict between *AirBoss* and *Cadillac Rubber*, and held that *AirBoss* controlled.[42] While this decision does not bind state courts, they may find its reasoning persuasive.

Can "buyer's requirements" be enough to create an enforceable requirements contract?

Many supply chain lawsuits focus on whether the language at issue creates an enforceable requirements contract. Because requirements contracts lock in both parties for its duration while a release-by-release contract provides for either party to rapidly exit the relationship, scenarios will arise in which either the buyer or seller is pushing for each interpretation. After *AirBoss*, the question is whether the contract "leave[s] both the quantity term and total quantity undefined," resulting in a release-by-release contract?[43]

In this context, is "buyer's requirements" enough? Some parties will likely argue that the *AirBoss* Court held that a requirements contract is created only if the language "dictate[s] that the buyer will obtain

a set share of its total need from the seller (such as 'all requirements of the buyer.')"[44] Many of the examples in *AirBoss* use the word "all,"[45] so these parties might argue that "buyer's requirements for the parts" isn't precise enough and the parties are bound only one release at a time.

Such an argument seems likely to fail. Many courts that have considered similar language have implied that "all" renders the quantity term sufficiently precise — unless the rest of the contract contains a reason to do otherwise. For example, the Eastern District of Michigan recently interpreted a contract saying that "the quantity is for Purchaser's requirements" to be a requirements contract,[46] explaining that "this term means that [the buyer] committed to purchase all of its actual, good-faith requirements from [the seller]. If [the buyer] required a [part at issue], it was contractually obligated to purchase it from [the seller]."[47] In 2022, a different judge in the Eastern District reaffirmed that reasoning.[48]

Last year, another Eastern District judge considered the issue, this time after the Michigan Supreme Court decided *AirBoss*. In *Higuchi International Corp. v. Autoliv ASP, Inc*, which is currently on appeal to the Sixth Circuit, the court considered a contract that said it was "issued to cover [buyer's] requirements of the parts[.]"[49] The seller argued that this was an insufficient quantity term because it didn't "commit [the buyer] to buying a set share of its total need" from the seller.[50]

The court rejected that argument since "the plain meaning of 'requirements' as used in that paragraph is 'all requirements'"[51] while noting that the UCC doesn't use the word "all" when it defines a quantity term measured by the buyer's requirements.[52] And, the court explained, "[c]ommon sense teaches that, when someone refers to their 'requirements' or 'actual requirements' without any further qualification, that person is referring to all of their requirements."[53] Finally, the court noted that while *AirBoss* used "all" in its example, the Supreme Court "did not state that the word 'all' cannot be implied from an unqualified use of the word 'requirements.' Nor did it state that the word 'all' — or any other share-related modifier — is necessary to render 'requirements' an enforceable quantity term."[54]

The *Higuchi* court recognized that interpreting "requirements" without further qualification to mean "all requirements" is logical. If a guitar collector contracted "to sell my guitars for $50,000," he could not argue later that he was obligated to sell only some of his instruments. Without qualification, the "all" should be implied in this context.

Necessitating "all requirements" to create an enforceable requirements contract would run contrary to the spirit of the UCC, which generally avoids the invocation of "magic words" to trigger its provisions. For example, when a party wishes to perform without prejudicing its rights, it must explicitly reserve its rights.[55] But § 1-308 of the UCC states that any language will do so long as the meaning is clear: "Words such as 'without prejudice,' 'under protest,' or the like are sufficient."[56]

It seems likely that courts will continue to interpret "buyer's requirements" without other qualification to mean "all buyer's requirements" and either statement creates an enforceable requirements contract.

CONCLUSION

The Michigan Supreme Court's *AirBoss* decision will likely serve as a handbook for judges and lawyers determining the scope and enforceability of contracts for the sale of the goods. It explained in clear terms basic contract structures under the UCC and overruled *Great Northern*, making Michigan's case law in this area more consistent. And while it leaves unanswered questions for the next round of cases, it provides hints about how those issues should be resolved.

The author thanks Dan Sharkey and Andrew Fromm for their assistance with this article.

Jason Killips is a member of Brooks Wilkins Sharkey & Turco in Birmingham, where he specializes in complex litigation, appeals, and supply-chain counseling. Killips filed an amicus brief in the AirBoss case on behalf of 14 suppliers.

ENDNOTES

1. MCL 440.1101 *et seq*; *MSSC, Inc v AirBoss Flexible Prod Co*, 511 Mich 176; 999 NW2d 335 (2023).
2. *Airboss*, 511 Mich at 181.
3. *Great Northern Packaging, Inc v Gen Tire and Rubber Co*, 154 Mich App 777; 399 NW2d 408 (1986), overruled *Airboss*, 511 Mich 176 (2023).
4. MCL 440.2201.
5. *AirBoss*, 511 Mich at 181.
6. MCL 440.2201(1).
7. *AirBoss*, 511 Mich at 181.
8. *Id.*
9. *Id.*
10. *Id.*; MCL 440.2201(1).
11. *AirBoss*, 511 Mich at 182.
12. *Id.*
13. *Black's Law Dictionary* (11th ed); *AirBoss*, 511 Mich at 182.
14. *Id.*
15. *AirBoss*, 511 Mich at 183.
16. *Id.* at 194 ("A seller can agree to provide a nonexclusive part of the buyer's total need.")
17. MCL 440.2306(1).
18. *AirBoss*, 511 Mich at 182.

19. *Id.* at 184.
20. *Advanced Plastics Corp v White Consol Indus, Inc.*, 828 F Supp 484 (ED Mich, 1993) (*Advanced Plastics I*), aff'd, 47 F3d 1167 (CA 6, 1995) (*Advanced Plastics II*).
21. *Advanced Plastics I*, 828 F Supp at 486.
22. *Id.*
23. *Advanced Plastics II*, at *3.
24. *Id.*
25. *Id.*
26. *Advanced Plastics I*, 828 F Supp at 487.
27. *AirBoss*, 511 Mich at 184.
28. *Id.*
29. *Great Northern*, 154 Mich App 777.
30. *AirBoss*, 511 Mich at 188-189.
31. *Id.*
32. *Id.*
33. *Id.* at 189.
34. UCC § 2-306(1), MCL 440.2306(1).
35. *Cadillac Rubber & Plastics, Inc v Tubular Metal Sys, LLC*, 331 Mich App 416; 952 NW2d 576 (2020).
36. *AirBoss*, 511 Mich 194, n 4.
37. *Cadillac Rubber*, 331 Mich App at 420, 429.
38. The conflict in Michigan caselaw regarding exclusivity in requirements contracts was discussed in detail in *Exclusivity and Requirements Contracts: Michigan's Muddled Law, the Majority Rule of Other States, and their Impact on Automotive Suppliers*, 91 Michigan Bar Journal 3 (March 2012), D. Sharkey and B. Warner. The article notes something that *Cadillac Rubber* did not discuss: that nearly all of the other jurisdictions to consider the issue have held that requirements contract must be exclusive.
39. *Acemco Inc v Olympic Steel Lafayette, Inc*, unpublished per curiam opinion of the Court of Appeals, issued Oct. 27, 2005 (Docket No. 256638), p 8; see *AirBoss*, 511 at 182 (adopting this definition).
40. *AirBoss*, 511 at 185.
41. *Ultra Mfg Inc v ER Wagner Mfg Co.*, ___ F Supp ___ (EDMI, 2024), slip op at 3.
42. *Id.* at 4.
43. *Id.* at 9.
44. *Id.; AirBoss*, 511 Mich at 183.
45. See *AirBoss*, 511 Mich at 190-193.
46. *Dayco v Thistle Molded Group*, unpublished opinion of the United States District Court, issued 2019 (ED Mich 2019).
47. *Id.* at *5.
48. *BAE Indus v Agrarian-Medina*, unpublished opinion of the United States District Court, issued 2022 (ED Mich 2022).
49. *Higuchi Int'l Corp v Autoliv ASP, Inc*, ___ F Supp 3d ___, (ED Mich, 2023). (Note: The author represents Autoliv in this action.)
50. *Id.* at *6 (cleaned up).
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*; see also *Empire Gas Corp v American Bakeries Co*, 840 F2d 1333, 1335–1336, 1339 (7th Cir 1988) (interpreting "Approximately 3,000 units, more or less depending on requirements of Buyer" to be a requirements contract).
55. UCC § 1-308(1), MCL 440.1308(1).
56. *Id.*

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Contracts: A survey of recent case law

BY DANIEL D. QUICK AND GERARD V. MANTESE

Business contracts are vital to our economy. Understanding and drafting a wide panoply of agreements — including those establishing new businesses or involving acquisitions of property, sales and supply terms, and myriad other transactions — are foundational skills for business attorneys.

Contracts come in all sizes and shapes. Indeed, the figurative napkin agreement is not a fictional creation, but persists in real life. The authors of this article have seen agreements drafted on college-ruled notebook paper and even scraps of stray paper.

Statutes and case law are important in advising parties about their duties and rights, of course, but agreements may often override statutory and judicially created default rules.[1] Contracts are the cornerstones of parties' business relationships; as the Michigan Supreme Court has stated, it is a "bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy."[2]

Here, we survey some important court decisions in business contract law that have been issued over the past few years.

CONTRACT ISSUES RELATIVE TO VALUATION

"With great power comes great responsibility."[3]

Uncle Ben's sage words to his nephew, Peter Parker (and his alter

ego, Spider-Man), apply in equal force where a contractual provision confers discretionary authority on one party.

In its 2023 published opinion in *Kircher v. Boyne USA, Inc.*,[4] the Michigan Court of Appeals held that a shareholder stated a valid claim when she pled that the CEO acted in bad faith by refusing to value her shares using a methodology different from that specified in their agreement where the original methodology yielded an unfairly low value. In *Kircher,* the plaintiff and CEO were siblings who jointly ran a ski resort for many years. After the plaintiff's employment was terminated, the parties entered into a settlement agreement in 2014 allowing the plaintiff to redeem her shares of stock in the company by a value "as determined in accordance with Paragraph 2c, unless otherwise agreed by the Parties[.]"[5] The redemption formula was tied to the company's earnings before interest, taxes, depreciation, and amortization (EBITDA) and was affected by factors such as its debt. In 2014, the plaintiff's stock was worth several million dollars, yet after the company took on significant debt in 2018 by purchasing real estate and assets it had been leasing, the stock had negative value.

The plaintiff filed suit, arguing that the defendants breached the agreement by consummating the real estate transaction that added debt to the company. She claimed the new debt effectively eliminated her right to redeem her shares and made them worthless under the redemption formula. She argued that in good faith, the defendants should have agreed to an alternate method to calculate the redemption price as permitted by the 2014 settlement. The trial court found there were questions of fact regarding whether the plaintiff could succeed premised on a theory that the agreement carried an implied duty of good faith that required the defendants to use an alternative valuation formula.

On appeal, the court agreed that the plaintiff stated a claim for breach of contract by alleging the defendants acted in bad faith by not agreeing to use a different formula to calculate her redemption price. It noted that the 2014 settlement expressly allowed the defendants to agree to an alternate valuation methodology, and a good faith/breach of contract action may be based on this type of discretionary authority. The court held that the trial court did not err by denying the defendants' motion for summary disposition, showing that the duty of good faith has continuing vitality in Michigan contract law.

DISGORGEMENT UNAVAILABLE AS A BREACH-OF-CONTRACT REMEDY

"And so we go back to the remedy"[6]

In *Ford Motor Co v. Intermotive, Inc*[7], a U.S. District Court Eastern District of Michigan judge emphasized that disgorgement is not an available remedy for a claim of breach of contract. On a motion for reconsideration, defendant/counter-plaintiff Intermotive argued that its damages should reach the profits earned by Ford for its breach of the parties' contract rather than just the lost profits of which Intermotive was deprived. The judge was unpersuaded, upheld his prior opinion, and reiterated that disgorgement is a remedy for unjust enrichment but not contract damages.

GET IT IN WRITING AND DON'T LOSE THE WRITING!

"Contracts are like hearts; they're made to be broken."[8]

The movie "The Founder" highlighted Roy Kroc's brazen breaches of contract with the McDonald brothers, whose business ideas, corporate opportunities, profits, and name Kroc shamelessly usurped. In *Fowler v. Keiper*,[9] a common scenario played out in the Michigan Court of Appeals: friends and alleged business partners dealt with each other informally for many years and reduced their arrangement to writing in an informal way on a sheet of paper.

Two friends grew an HVAC and plumbing business together over a period of nearly 20 years. When one friend purported to terminate the employment of the plaintiff and locked the doors, the plaintiff sued, alleging shareholder oppression and breach of fiduciary duty, breach of partnership agreement, and breach of contract related to:

1. the alleged agreement that plaintiff was a shareholder of a company,
2. the alleged agreement to split the proceeds from the eventual sale of a property, and
3. the alleged agreement that plaintiff was an owner of another company.

All claims were dismissed on summary disposition, which the court of appeals affirmed. In brief, the court found the plaintiff never became a shareholder or member (and could not sue for oppression or breach of fiduciary duty) and had not pled the existence of a super partnership as existed in *Byker v. Mannes*.[10]

As to the breach of contract claim, the facts alleged by the plaintiff were deemed too tenuous to establish a meeting of the minds and, in some cases, adequate consideration. The dismissal of the contract claim was upheld by the court of appeals even though the plaintiff filed affidavits or depositions of seven witnesses who testified that the two were co-owners of the business and even though the plaintiff testified that the defendant signed a writing stating that the parties were co-owners of the business — the signing was witnessed by a third party who testified as such — the plaintiff lost the agreement during a move.

THE REAL PARTY IN INTEREST IN OWNERSHIP DISPUTES

In *Krstovski v. Kukes*,[11] the Michigan Court of Appeals held that the plaintiff lacked standing and was not the real party in interest in a

dispute over a limited liability company (LLC) because his claims were derivative and sued in his individual capacity. The LLC at issue, JV, was partly owned by K2 — an LLC the plaintiff owned — and partly owned by LIP, an LLC the defendant owned. The plaintiff's complaint alleged that the defendant had sabotaged negotiations to lease certain property, diminishing JV's assets. Based on these allegations, the plaintiff claimed that the defendant breached JV's operating agreement, causing direct harm. Notably, the plaintiff and defendant only owned JV through their respective LLCs and not in their individual capacities.

The court invoked the direct or derivative test from *Murphy v. Inman*,[12] which provides that an action is derivative, and thus must be brought on behalf of the corporation or LLC at issue, unless the plaintiff alleges harm independent of that suffered by the entity and would receive the remedy instead of the corporation. Applying this framework, the court found that the plaintiff's claims were derivative because the plaintiff alleged no harm independent of that allegedly suffered by K2, the entity through which he owned JV.[13] For example, if the defendant had sabotaged lease negotiations to JV's detriment, the injury would be suffered by JV's members — which included K2 but not the plaintiff as an individual. Even if the plaintiff was injured because he owned K2, the injury would not be independent of K2 and would be derivative under *Murphy*. Therefore, since the plaintiff's claims were derivative, he lacked standing to sue in his individual capacity and was not the real party in interest.

A DEFAULT DOESN'T ALLEVIATE PLAINTIFF'S BURDEN TO PROVE DAMAGES

"It's not what you know, it's what you can prove."[14]

While obtaining a default against a defendant establishes the defendant's liability on the plaintiff's claims, the plaintiff must still provide sufficient evidence to establish damages.

In *Jackson v. Bulk AG Innovations, LLC*,[15] the Michigan Court of Appeals held that "[i]n our adversarial system, even when a defendant chooses not to engage in civil litigation, the plaintiff still bears the burden of proving damages by a preponderance of the evidence"[16] and ruled that the plaintiffs failed to satisfy this burden with respect to a verbal contract claim.

The plaintiffs, who sold their business to the defendant, ultimately sued the company and its CEO for failure to make earnout payments required under the parties' asset purchase agreement and failure to repay an orally agreed-upon loan. Neither defendant answered the plaintiffs' complaint, so the court clerk entered defaults against them.

While the plaintiffs sought damages for both claims — breach of the asset purchase agreement and breach of the verbal loan agreement — the trial court found that the plaintiffs failed to provide sufficient evidence of damages as to the verbal contract claim. It refused to award damages and denied the plaintiffs' motion for reconsideration. The appeals court affirmed the ruling, noting that while the defendants' default rendered them liable on all claims, the plaintiffs were still required to prove damages and found that the plaintiffs "offered neither an explanation nor a citation of any evidence in the record to support"[17] their damages figure with respect to the breach, thereby precluding recovery on the claim.

ANALYZING AND ENFORCING FORUM-SELECTION CLAUSES

Specificity matters. Under Michigan law, dismissal of a breach of contract case is only required on forum selection grounds if that clause specifically excludes Michigan as a permissible forum.

In *Barshaw v. Allegheny Performance Plastics, LLC*,[18] a terminated employee sued his former employer, a Pennsylvania-based company, in Macomb County Circuit Court. Prior to the suit, the parties executed a separation agreement with a provision containing choice-of-law and forum-selection clauses. Under the provision, the agreement was to be governed by Pennsylvania law and the parties agreed to confer jurisdiction on Pennsylvania courts to adjudicate any disputes.

The trial court found that the forum-selection clause was enforceable under Pennsylvania law and dismissed the plaintiff's claim, but the Michigan Court of Appeals reversed, holding that analyzing a forum-selection clause is a "threshold, nonmerits issue"[19] that should be considered under Michigan law irrespective of any choice-of-law provision in the contract. Accordingly, the trial court was required to apply Michigan law to determine whether the forum-selection clause was enforceable.

The appeals court then considered whether the forum-selection clause was mandatory (requiring any disputes to be litigated in the specified jurisdiction) or permissive (allowing, but not requiring, claims to be brought in the designated jurisdiction). If the clause was mandatory, the suit's dismissal would be required under MCL 600.*745*(3) unless an exception applied.

Adopting the words of exclusivity test, the appeals court looked to the forum-selection clause and found it was permissive because the parties merely agreed to confer jurisdiction upon Pennsylvania courts without the intent to "forgo the personal jurisdiction of all forums other than those within the state of Pennsylvania."[20] Accordingly, the court concluded that the trial court was not required to dismiss the plaintiff's claim, reversed the order of dismissal, and remanded the case.

DISSOLUTION RESOLVING AN LLC DEADLOCK

"Well, if there can be no arrangement, then we are at an impasse."[21]

In *Thomas A. Robinson and The Mack Shop, LLC v. Gretchen C.*

Valade Revocable Living Trust,[22] Robinson in 2012 established The Mack Shop with Valade; they were 50/50 owners and co-managers of the company, which owned a commercial building in which Valade occupied 20% and Robinson occupied 80%. Each paid below-market rent of $1,000 per month and shared the building's operating expenses.

Nearly a decade later, Valade transferred her interest in the company to the defendant trust and granted authorization to her son and business representative to manage the company on the trust's behalf. At this time, Valade also relinquished her tenancy, leasing her portion of the building to a third party, who continued to pay $1,000 in rent.

In December 2021, the trust's representatives called a member/manager meeting and submitted two resolutions — one that would require the company to increase its rent for both tenants and one that would require the company to sell the building before March 2022. Robinson voted against both resolutions, prompting the trust to submit a third resolution to dissolve the company. Robinson voted against this resolution as well. The trust filed a demand for arbitration, claiming that the members were at an impasse and seeking dissolution pursuant to Michigan's LLC Act. Robinson countered that the company had operated the same way for a decade and that as long as it maintained its historical operations, there was no deadlock. The arbitrator agreed with the trust and ordered dissolution.

Robinson and the company filed a complaint in Wayne County Business Court seeking to vacate the arbitrator's ruling; while the trust moved to dismiss and confirm the award. Robinson argued that the arbitrator erred by applying the LLC Act dissolution provision instead of a provision in the company's operating agreement prohibiting its members from seeking to "compel dissolution of the company, even if such power is otherwise conferred by law."[23]

Given the conflict between the provision and the statute, the court considered the question of which should prevail. After reviewing the particulars of the case, the court agreed with the arbitrator harmonizing the statute and the operating agreement, finding that where an LLC operating agreement lacks a mechanism to resolve a deadlock, MCL 450.4802 authorizes a court to order dissolution. Thus, the court upheld the arbitration award.

CONCLUSION

It is impossible to overstate the importance of comprehensive, well-drafted contracts in business transactions and relationships. They can safeguard against undesirable default rules (such as those in the UCC), guide the parties' interactions with each other and third parties, and mitigate the risk of future litigation. Failure to reduce business dealings to a written contract can prove disastrous and lead to unintended and inequitable results. Despite the awesome power and critical role of contracts, however, they are limited by the drafter's skill, expertise, and knowledge of the law.

As the foregoing cases illustrate, contract drafters must err on the side of specificity and adopt a litigator's mindset when drafting: Where are the weaknesses in this provision and in the contract generally? Would a court find this language ambiguous? What are some possible disputes that could arise down the line, and does the contract address those scenarios?

Given that even the best, most experienced attorneys cannot anticipate and account for every future event, it is essential for practitioners — transactional attorneys and litigators alike — to keep abreast of recent cases and developments pertaining to contract law and thoughtfully consider their impact on future negotiations, contract drafting, and litigation strategy.

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ENDNOTES

1. See, e.g., MCL 450.4306 ("Except as provided in an operating agreement, a member, regardless of the nature of the member's contribution, has no right to demand and receive a distribution from a limited liability company in any form other than cash[.]").
2. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003).
3. *Spider-Man* (2002).
4. *Kircher v Boyne USA, inc*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket No. 360821).
5. *Id.* at ___.
6. Lyric from chorus in "Remedy" by Seether.
7. *Ford Motor Co v Intermotive,* inc, ___ F Supp 3d ___ (ED Mich, 2023); slip op at 2.
8. Words spoken by Michael Keaton in *The Founder* (2017), in an alleged conversation between Roy Kroc and the McDonald brothers.
9. *Fowler v Kepier*, unpublished per curiam opinion of the Court of Appeals, issued June 22, 2023 (Docket No. 360216).
10. *Byker v Mannes*, 469 Mich 881; 668 NW2d 909 (2003).
11. *Kristovski v Kukes*, unpublished per curiam opinion of the Court of Appeals, issued October 19, 2023 (Docket No. 363511).
12. *Murphy v Inman*, 509 Mich 132; 983 NW2d 354 (2022).
13. *Id.*
14. Words spoken by Denzel Washington as corrupt detective Alonzo Harris in *Training Day* (2001).

15. *Jackson v Bulk AG Innovations, LLC*, 342 Mich App 19; 993 NW2d 11 (2022).
16. *Id.* at 20.
17. *Id.* at 26.
18. *Barshaw v Allegheny Performance Plastics, LLC*, 334 Mich App 741; 965 NW2d 729 (2020).
19. *Id.* at 752.
20. *Id.* at 760.
21. Words spoken by the Man in Black to Vizzini before competing in a "battle of wits" in *The Princess Bride* (1987).
22. *Thomas A Robinson and The Mack Shop, LLC v Gretchen C Valade Revocable Living Trust*, Wayne County, Case No. 23-001951-CB, Hon. Annette J. Berry, Sept. 21, 2023.
23. *Id.*

International contracts: Drafting considerations

BY RICHARD A. WALAWENDER

When drafting domestic contracts, lawyers need to have a good understanding of the client's business and the underlying transaction in order to properly allocate and mitigate attendant risks. But when the other party to the contract is located outside the United States and performance is a cross-border affair, the parties are likely subject to additional commercial risks and issues such as war, government instability, currency risk, export controls, shipping risks, and tariffs. Of course, lawyers should address these commercial issues in drafting the contract but must also pay attention to some basic legal concepts that, if not taken into consideration, can lead to problems for the client. This article sets forth a few considerations lawyers cannot ignore when drafting international contracts.

SHIPPING AND DELIVERY TERMS

Contracts involving the sale of goods typically use certain terms meant to define the time, place, and manner of delivery from a buyer to a seller such as FOB (free on board); FAS (free alongside); CIF (cost, insurance, and freight); and C&F (cost and freight). These terms serve as shorthand for describing and setting forth obligations of the parties in shipping and accepting delivery of the goods and defining when title and the risk of loss transfers from seller to buyer.

While these terms are commonly employed in sales contracts, they do not mean the same thing around the world. The Uniform

Commercial Code (UCC) defines these terms in a specific way not shared by the rest of the world. Under the UCC, FOB could be followed by a vessel at a named port of shipment. This means the seller bears the risk of loss and is responsible for delivering the goods onboard that vessel and the buyer is responsible for the goods thereafter.[1] However, FOB could also be followed by final destination and could be used to cover any mode of transportation, not just waterway shipment.

A more comprehensive compendium of shipping and delivery terms is the Incoterms 2020 Rules.[2] These rules more precisely define many more shipment and delivery possibilities. For those reasons, they are used throughout the world, especially in cross-border commercial contracts. For instance, under the Incoterms rules, FOB [named port of shipment] is used specifically to denote sea and inland waterway transport of cargo and means the seller bears the costs of delivering the goods to the named port of shipment, paying the vessel loading charges and export duties and taxes, and clearing export customs. The buyer arranges and bears all costs and risks of loss of goods after the seller delivers the goods on the ship nominated by the buyer at the named port.

Using the UCC shipment and delivery terms rather than the Incoterms rules may not only cause unnecessary confusion but, depending on the governing law of the contract, may shift and allocate costs and risk of loss to the parties in ways they did not intend. Thus, it is much more effective to use and expressly define the shipment and delivery terms pursuant to the Incoterms rules, which are recognized and used throughout the world in a uniform and coherent manner.

GOVERNING LAW

A very important question to be resolved when drafting international contracts — what law should govern it? — is often glossed over too quickly. This is important not only because it will determine how the contract will be interpreted but could also determine which terms are even part of the contract. In instances when parties are unable to agree on what law should govern a contract, a client may push to settle on a neutral jurisdiction such as England or Switzerland in order to compromise and finalize an agreement, thinking that will solve the issue and they can get on with the transaction. For several obvious and not-so-obvious reasons, that may not be a good idea.[3]

First, in most countries, parties to a contract are free to designate the law to be applied to their contract; that designation, so long as it is unambiguously worded, will generally be respected, with some exceptions. In Michigan, the Michigan Supreme Court defined those exceptions in *Chrysler Corp. v. Skyline Indus Servs., Inc.*, by adopting the approach laid out in the Restatement Conflicts of Law 2d, holding that a contractual choice-of-law provision will not be followed if either:

1. "the chosen state has no substantial relationship to the parties or the transaction and there is no … reasonable basis" for that choice of law, or

2. the application of the chosen law "would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue" and which "would be the state of the applicable law in the absence of [a] choice of law by the parties."[4]

Although Michigan continues to adhere to the principles set forth in the Restatement Conflicts of Law 2d, many arbitration tribunals and the courts of most other countries do not follow its principles.[5] Therefore, depending on the jurisdiction of the court hearing the case, arbitrarily making the governing law of a contract the law of a neutral country creates a risk — the court may not honor the choice of law agreed to by the parties.

Second, if the parties agree to designate in their contract the governing law of a jurisdiction outside the United States, they may unwittingly incorporate other terms into their contract. This is because many countries, especially in civil law jurisdictions, have detailed commercial and civil codes which incorporate certain statutory terms into contracts, much like the UCC provides gap-fillers when these terms are not otherwise addressed.

Third, even when an international sales contract designates the law of a specific state or country to govern it, a court may interpret that provision to require application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) rather than the law of that jurisdiction. This is because the United States and nearly 100 other countries[6] have adopted and ratified the CISG as taking precedent over local law. Pursuant to the CISG, so long as the parties to an international sale of goods contract are located in different countries and both countries have signed the CISG, the CISG is to be applied as the governing law of the contract unless the contract expressly excludes it.[7] For example, if an agreement for the sale of goods between a party in Michigan and one in Ontario provided that Michigan laws govern the contract without expressly excluding the CISG, a Michigan court would apply the CISG, and not Michigan's UCC, in interpreting the contract[8] because the CISG, being part of U.S. federal law, preempts state contract law.

Lawyers should not be too anxious to exclude the CISG without considering the potential advantages it might have for the client since several of its gap-filling provisions are different from the UCC. For instance, absent a provision in the contract detailing the seller's recourse against a buyer who has not paid when due,[9] Section 2-703 of the UCC provides that the seller may stop delivery, sell the goods, and recover damages. In contrast, the CISG calls for more

limited seller remedies in that situation — it requires a fundamental breach before allowing the seller to cancel performance.[10] Such an application, therefore, would be more buyer friendly.

There are other important differences between the CISG and UCC,[11] but two are worth noting. One relates to contract formation and the so-called battle of the forms. Under UCC §2-207,[12] an offer is deemed accepted, and therefore a contract formed, even though it includes terms additional to or different from those in the offer[13] unless the offeree clearly indicates it is unwilling to proceed unless the offeror accepts the additional or different terms.[14] In contrast, Article 19 of the CISG states that any acceptance containing limitations or modifications to the original terms of the offer does not constitute an acceptance, but rather a rejection and a counter-offer.

A second significant difference relates to the parol evidence rule. Under Michigan law, the parol evidence rule holds that negotiations and extrinsic evidence preceding execution of a written contract are generally not admissible to interpret the meaning of a written contract.[15] The intent of the parties is to be found in the written contract.[16] However, the CISG does not follow the parol evidence rule. Article 8(3) of the CISG provides:

> In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

As a Michigan federal court noted, "given the wording of the [CISG], federal courts have determined that international sales agreements under the [CISG] are not subject to the parol evidence rule and are to be interpreted based on the 'subjective intent' of the parties based on their prior and subsequent statements and conduct."[17] Thus, if a party to a contract is concerned that its real intentions, expressed in negotiations, will not be adequately reflected in the four corners of a written contract, that party would benefit with the CISG because it would allow for introducing such extrinsic evidence in the event of a dispute.

In summary, it is important for drafters of international sales contracts to understand the CISG and how it differs from the UCC. Understandably, foreign parties are often unwilling to accept Michigan or other U.S. state law as the governing law of their contracts. For the same reason, U.S. lawyers need to be wary of accepting a foreign jurisdiction's law to govern the contract. Understanding the CISG and addressing its gap-filling defaults may not only help resolve a deadlock over governing law but, in certain situations, may benefit the client.

DISPUTE RESOLUTION

As with the governing law provision, the choice of jurisdiction and dispute resolution clause in an international contract is significant. Whether a court will hear a dispute just because two parties to a contract agreed to the jurisdiction of that court depends on several factors. Michigan courts, for example, generally enforce contractual forum selection clauses as provided in MCL 600.745(3).[18] However, Michigan law provides that even if the parties agree in a written contract that a court of another jurisdiction would exclusively resolve a dispute between them, a Michigan court could agree to take the case in any of the following instances:

(a) The court is required by statute to entertain the action.
(b) The plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the action.
(c) The other state would be a substantially less convenient place for the trial.
(d) The agreement as to the place of the action is obtained by misrepresentation, duress, abuse of economic power, or other unconscionable means.
(e) It would for some other reason be unfair or unreasonable to enforce the agreement.[19]

Many foreign jurisdictions apply similar principles with similar exceptions, which could lead to a surprise in the context of an international contract dispute where one party can pursue a lawsuit against the other in a jurisdiction not agreed upon by the parties.

An even more pressing concern is whether a judgment obtained in the chosen jurisdiction's courts will be enforceable against the other party. Obtaining a judgment from a Michigan court against a Chinese counterpart whose assets are only located in China is not worth much if the judgment is not enforced in China. The problem is exacerbated because there is no international treaty or convention to which the U.S. belongs regarding enforcement and recognition of foreign court judgments, and vice versa. Some foreign courts may recognize judgments from other jurisdictions on some notion of comity, but such a principle cannot be relied on; foreign judgments can often be challenged in domestic courts based on improper service of process, lack of jurisdiction, violation of public policy, or other grounds.

One effective strategy in mitigating these problems is for the parties to provide for arbitration. Often, when negotiating an international contract, it is easier for parties to agree on an arbitration clause than on a jurisdiction clause with a choice of forum. With international contracts, arbitration is also a more efficacious option because the U.S. and 168 other countries are signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[20] The U.S. is also a signatory to the 1975 Panama Inter-American Conven-

tion on International Commercial Arbitration (the Panama Convention)[21] with 18 other North and South American countries. These conventions encourage recognition and enforcement of international arbitration awards and agreements; each signatory pledges to recognize foreign awards in its domestic courts.[22] Underscoring this point, the U.S. Supreme Court has held that the general policy favoring arbitration "applies with special force in the field of international commerce."[23]

When drafting the arbitration provision in an international contract, using a short, canned arbitration clause may lead to uncertainty and delays in the proceedings. A custom arbitration clause is better. The drafter should specify the arbitration tribunal, the country in which the arbitration will take place (ensuring it is a signatory to the New York Convention), the procedural law and rules governing the proceedings, the number of arbitrators, how arbitrators will be selected, exclusivity of the arbitration as a dispute resolution mechanism, and the language of the proceeding.[24] Otherwise, the arbitration tribunal may decide those issues.

SCOPE OF DAMAGES AND LIMITATION OF LIABILITY

American lawyers usually spend some time negotiating the scope of damages and limitations of liability in domestic commercial contracts and whether liquidated damages should be used. UCC § 2-718(1) codifies the common law principle regarding liquidated damages, which provides that parties to a contract can agree to liquidated damages only to an amount reasonable in light of anticipated or actual harm caused by the breach; a term fixing unreasonably large liquidated damages is void as a penalty.[25] Additionally, under Michigan law, a party may contract against liability ordinary negligence, but may not insulate itself against liability for gross negligence or willful misconduct.[26]

Many foreign civil law jurisdictions, in contrast, recognize and enforce penalty clauses. In Switzerland, for example, a contractual penalty may be agreed to for the purpose of punishing one of the parties[27] even if the creditor has not suffered any loss or damage.[28] In many of these civil law jurisdictions, however, courts may use discretion to reduce penalties it considers excessive.[29]

As for general liability limitations and exclusions, many foreign jurisdictions have statutory rules on which types of damages are enforceable and which are not. German courts, for instance, have ruled that clauses in a party's standard terms and conditions that exclude or limit the liability of a party for a breach of fundamental contractual obligations are not enforceable.[30] Such obligations can include timely delivery, delivery of goods free from defects, and the obligation to provide the purchaser with information on proper use and maintenance of the goods.[31] German law also does not award punitive damages and, as a matter of law, its courts do not enforce foreign punitive damage awards even if the contract allows for it.

CISG Articles 74-76 require only that damages be foreseeable at the time the contract is executed, that losses be proved with reasonable certainty, and losses were not caused by the aggrieved party's failure to mitigate. Thus, recoverable damages are reduced if it is established that the aggrieved party failed to mitigate losses.[32]

CONCLUSION

By their very nature, international contracts are often more complex than domestic contracts due to special issues and risks inherent in dealing with foreign parties and cross-border transit of goods and services. Provisions that may be considered boilerplate in domestic contracts suddenly take on considerable significance in an international contract. This article touched on only some of the issues lawyers must address and not take for granted when drafting and negotiating international contracts.[33]

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ENDNOTES

1. MCL § 440.2319(1); MSA. § 19.2319(1).
2. The Incoterms 2020 Rules updated the Incoterms 2010 Rules.
3. Parties to a sales contract can also agree to have their contract governed by the CISG and/or the UNIDROIT Principles rather than the laws of any specific jurisdiction. See Christiana Fountoulakis, *The Parties' Choice of "Neutral Law" in International Sales Contracts*, at CISG-online at <https://cisg-online.org/files/commentFiles/Fountoulakis_EJLR_2005_303.pdf> [https://perma.cc/5C2B-74P5] (all websites cited in this article were accessed February 26, 2024).
4. *Chrysler Corp v Skyline Indus Servs, Inc*, 448 Mich 113, 120-123; 528 NW2d 698 (1995); see also *Hudson v Mathers*, 283 Mich App 91, 97; 770 NW2d 883 (2009).
5. For example, in the "Rome I Regulation" (i.e., Regulation (EC) No 593/2008[1] of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, *Official Journal of the European Union*. L (177)), which governs the choice of law in European Union member countries, "entitles the parties to choose the legal system of the country…they prefer, including the legal system of a country which does not have any substantial connection with the transaction or the parties." See also Gary Born and Cem Kalelioglu, *Choice-of-Law Agreements in International Contracts*, 50 Ga. J. Int'l Comp. L., 44, 78-84 (2021).
6. See *United Nations Convention on Contracts for the International Sale of Goods*, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&clang=_en> [https://perma.cc/D3AS-TFJD].
7. CISG Article 6.
8. *Business Mobility Sys, Inc. v Fibernetics Corp*, (WD Mich 2014) (quotation marks and citations omitted) states: "The CISG governs contracts for the sale of goods if the parties to the contract are located in different nations and both nations have signed the

CISG. Both the United States and Canada are signatory nations. Parties from different nations are free to designate a choice of law in their contract, or opt out of the CISG's application, but such an agreement must appear on the face of the contract and evince the parties' clear intent to opt out of the CISG. As incorporated federal law, the CISG governs the dispute so long as the parties have not elected to exclude its application. Accordingly, where the parties have not opted out of CISG application, there is no need to conduct a state choice of law analysis."

9. Also commonly referred to as an application of the "perfect tender rule." *See Capitol Dodge Sales, Inc v Northern Concrete Pipe, Inc*, 131 Mich App 149, 539; 346 NW2d 535 (quotation marks and citation omitted), interpreting UCC § 2–601 as providing that "the buyer may reject goods which fail in any respect to conform to the contract, creates a perfect tender rule replacing pre-code cases defining performance of a sales contract in terms of substantial compliance."

10. CISG, Articles 59, 61-65.

11. For a detailed comparison, see the presentation prepared by Pace University's Institute of International Commercial Law at <https://iicl.law.pace.edu/sites/default/files/bibliography/ucc-cisg_0.pdf> [https://perma.cc/U5LM-L856].

12. M.C.L. § 440.2207; M.S.A. § 19.2207.

13. *Ralph Shrader, Inc v Diamond Int'l Corp*, 833 F2d 1210, 1213 (6th Cir 1987).

14. *Challenge Machinery Co v Mattison Machine Works*, 138 Mich App 15; 359 NW2d 232 (1984).

15. *Brachman v Wheelock, Inc*, 343 Mich 230; 72 NW2d 246 (1955).

16. For exceptions to Michigan's parol evidence rule, see the discussion in Chapter 12, Michigan Contract Law, (ICLE) John Trentacosta and Vanessa Miller.

17. *Shuttle Packaging Systems, L.L.C. v. Tsonakis*, (WD Mich 2001).

18. *See, e.g., Turcheck v Amerifund Financial, Inc*, 272 Mich App 341;725 NW2d 684 (2006).

19. MCL 600.745(3)(a)-(e).

20. See 9 U.S.C. § 201, *et seq.*

21. See 9 U.S.C. § 301, *et seq.*

22. See *Scherk v Alberto–Culver Co*, 417 US 506, 520 n 15; 94 S Ct 2449; 41 LEd2d 270 (1974).

23. *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 US 614, 631; 105 S Ct 3346; 87 LE2d 444 (1985).

24. See Nicholas C. Ulmer, *Drafting the International Arbitration Clause*, 20 International Lawyer 1335 (1986). See also International Bar Association, *IBA Guidelines for Drafting International Arbitration Clauses* (2010).

25. MCL 440.2718(1).

26. See *Universal Gym Equip, Inc v Vic Tanny Int'l, Inc*, 207 Mich App 364, 367–368; 526 NW2d 5 (1994), vacated in part on other grounds, 209 Mich App 511 (1994). See also, *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 617-618; 513 NW2d 428 (1994); *Wagner v Regency Inn Corp*, 186 Mich App 158, 169; 463 NW2d 450 (1990).

27. Swiss Code of Obligations, Article 160(1).

28. Swiss Code of Obligations, Article 161(1).

29. Swiss Code of Obligations, Article 163(1); Austrian Civil Code, Section 1336(2); German Civil Code, Section 343.

30. Decision of the German Bundesgerichtshof, BGH I ZR 58/03, in NJW-RR 2006, 267.

31. Decision of the German Bundesgerichtshof, BGH X ZR 211/98, in NJW-RR 2001, 324, at 343.

32. Dr. Mohammed Zaheeruddin, *Claim for damages and their Requirements under the United Nations Convention on Contracts for International Sale of Goods*, 4 International Journal of Liberal Arts and Social Science 46 (2016).

33. A useful resource addressing many of the other issues to be considered in the context of international contracting is Legal Aspects of International Sourcing, Thomson Reuters (2015 Edition).

Forming contracts through the use of emojis and emoticons

BY CHRISTOPHER J. FALKOWSKI

Emojis such as the "thumbs up" and emoticons comprised of text characters are common in the world of texting, social media, email, and other forms of what can be very informal methods of electronic communications. However, you may be surprised to learn that emojis and emoticons can constitute electronic signatures under the Uniform Electronic Transactions Act (UETA)[1] and the Electronic Signatures in Global and National Commerce Act (E-Sign).[2] Lawyers and clients alike should never presume that the informality of a method of communication or the fact that it occurs electronically will render as non-binding an exchange of promises between parties.

ELECTRONIC CONTRACTING IS UBIQUITOUS

People increasingly interact with one another via digital networks, and those interactions include engaging in binding contracts. Be it business to business (B2B) or consumer to business (C2B), e-commerce transactions comprise an increasingly large segment of the U.S. economy. Many contracts are proposed, finalized, and executed exclusively in digital formats using keystrokes and mouse clicks. The following statistics suggest that the increase in electronic contract formation shows no sign of abating:

- Since 2001, online sales have grown by 300% while department store sales have dropped by 50%.[3]
- 67% of millennials prefer online shopping to in-store shopping.[4]
- By 2040, it is estimated that 95% of all purchases will occur via e-commerce.[5]
- 65% of B2B companies were fully transacting online in 2022.[6]
- Online sales on B2B ecommerce sites, log-in por-

tals, and marketplaces in 2021 increased 17.8% to $1.63 trillion.[7]
- 46% of B2B buyers use social media to learn about available solutions.[8]

FOUNDATIONS OF ELECTRONIC CONTRACT FORMATION

The principles of contract formation were well established under common law and the Restatement (2nd) of Contracts for many years. The "formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and consideration."[9] Contract formation can be subject to special rules such as the requirement of writing under the statute of frauds.[10] By way of example under UCC 2-201, "a contract for the sale of goods for a price of $500 or more is not enforceable … unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought."[11]

Given the growing use of online contracting, efforts at both the state and federal level were made to try to ensure that contracts were not invalid simply because the writing is in an electric form, or the signature is conveyed through electronic means rather than an actual pen being used to sign a physical piece of paper.

The Uniform Electronic Transactions Act was published by the Michigan Commission on Uniform Laws in 1999 and enacted into state law the following year.[12] Under the UETA, a "record or signature shall not be denied legal effect or enforceability solely because it is in electronic form."[13] Therefore, arguing that no contract was formed because a writing or signature is electronic is not a viable defense. The attribution function of an electronic signature is also addressed under UETA:

> (1) An electronic record or electronic signature is attributable to a person **if it is the act of the person**. The act of the person **may be shown in any manner**, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.
>
> (2) The effect of an electronic record or electronic signature attributed to a person under subsection (1) is **determined from the context and surrounding circumstances** at the time of its creation, execution, or adoption, including any agreements of the parties, and otherwise as provided by law [emphasis added].[14]

The UETA requirements are very much open-ended and contextual, flexible to how parties interact and communicate electronically, but the use of emojis and emoticons are not specifically addressed. Emoticons, which are text-based versions of emojis — like :) to indicate a smiling face — existed when UETA passed. Emojis, however, did not become prominent in the U.S. until smartphones were introduced in the late 2000s.

The federal Electronic Signatures in Global and National Commerce Act was enacted in 2000 to preserve the viability of electronic "writings"[15] and "signatures"[16] and reinforces UETA in many respects. Other nations have passed laws similar to E-Sign and UETA such as Canada's Electronic Information and Documents Act (EIDA).[17]

CANADIAN COURT HOLDS EMOJI CONSTITUTES CONTRACTUAL ACCEPTANCE

A Saskatchewan court in 2023 generated headlines worldwide when it ruled that a thumbs-up emoji in a text message could serve as an electronic signature to form a binding contract between a farmer and a grain cooperative.[18] In *South West Terminal Ltd v. Achter Land*, a farmer claimed a breach of contract based on the cooperative's failure to deliver promised flax seeds.[19] The farmer prepared a written contract that he had signed,[20] took a photo of the signed contract, and texted the photo to the cooperative with a message asking to "Please confirm flax contract."[21] The cooperative replied from the same number with a thumbs-up emoji.[22]

The defendant argued that he was "generally unaware of what a [thumbs-up] emoji means and in particular what [the plaintiff] meant to convey."[23] In litigating the dispute, the parties engaged in "a far-flung search for the equivalent of the Rosetta Stone in cases from Israel, New York State, and some tribunals in Canada, etc. to unearth what a [thumbs-up] emoji means."[24] The defendant argued that he sent the emoji to:

> simply confirm that I received the Flax contract. It was not a confirmation that I agreed with the terms of the Flax Contract … I did not have time to review the Flax Contract and merely wanted to indicate that I did receive his text message.[25]

The court found the argument to be "self-serving"[26] as the defendant "from that point on never contacted" the plaintiff about the contract.[27]

The defendant also argued that "an actual signature is essential because it confirms the person's identity, and a signature conveys a message — in this case acceptance."[28] The long contracting history between the parties — "approximately fifteen to twenty contracts" between the parties that had previously executed while communicating through the same cell phone numbers used to send and receive the emoji signature — was also noted by the court.[29]

Ultimately, the Saskatchewan court expressly held that the "thumbs-up emoji is an action in electronic form that can be used to express

acceptance as contemplated under" EIDA, a statute functionally similar to both Michigan's UETA law and the federal E-Sign law.[30] The court emphasized that the case was determined "in accordance with an objective theory of contract formation" looked at "how each party's conduct would appear to a reasonable person in the position of the other party."[31]

ANGELAKOS v. INST. FOR BLDG. TECH. & SAFETY

In *Angelakos v. Institute for Building Technology and Safety*,[32] a 2019 federal case from the Eastern District of New York, the plaintiffs were employees of the defendant who sued based on claims of sexual discrimination and retaliation.[33] Through their respective attorneys, the parties engaged in court-directed mediation during which a series of emails were exchanged.[34] The emails involved various acceptances, confirmations, and clarifications.[35]

At one point, a settlement check had been mailed and a draft of a "formal settlement agreement" had been promised when one of the plaintiffs communicated that the settlement offer was no longer acceptable.[36] The defendants argued that the totality of email exchanges through counsel meant that the parties "entered into a valid and enforceable settlement agreement."[37] In litigating the matter, the defendants argued under Section 4 of the Restatement (2nd) of Contracts that the formation of a contract "may be stated in words either oral or written, or may be inferred wholly or partly from conduct."[38] The defendants argued that "[c]ounsel seemed comfortable negotiating via email, sometimes using informal language such as an emoticon or a one-word 'Thanks' reply, suggesting that the agreements might be simple and not require full written agreement to be binding."[39]

The court held that no binding contract had been formed, adding that the finding was not based on the use of emoticons to convey acceptance, but rather the complexity of the settlement and a finding that the parties required a formal writing.[40]

CONCLUSION

One can see why journalists would highlight a story about courts finding that emojis constitute valid signatures under contract law. However, practitioners should not be surprised by such events, which are very much in line with relevant statutory language as well as long-standing contractual principles. Parties using technology in informal ways to exchange promises and communicate assent will not be able to escape the implications of their communications on the basis of such novelty or informality. Clients prone to unusually informal communication practices would be well-advised to understand that such novelty and informality will not negate the finding that a binding contract has been entered into. What ultimately matters is the context of the interactions, the history of the parties, and what an objectively reasonable party would assume is transpiring.

Chris Falkowski is a solo practitioner based in Novi who focuses primarily on technology and intellectual property matters. A registered patent practitioner, he is a former chairperson of the SBM Information Technology Law Section and a former editor of Michigan Computer Lawyer. Before attending law school, Falkowski worked as a software developer. He is a graduate of Northwestern University and University of Michigan Law School.

ENDNOTES

1. MCL 450.831-450.840.
2. 15 USC §7001(a)(1).
3. Nick Perry, Fundera, *Brick-and-Mortar Stores vs. Online Stores Statistics* <https://www.fundera.com/resources/brick-and-mortar-vs-online-statistics> [https://perma.cc/53R8-CZGG] (updated January 31, 2023) (all websites cited in this article were accessed February 12, 2024).
4. *Id.*
5. *Id.*
6. Big Commerce, *Top 7 B2B Ecommerce Trends to Transform Your Business* <https://www.bigcommerce.com/articles/b2b-ecommerce/b2b-ecommerce-trends/> [https://perma.cc/6DZ4-GRSG].
7. *Id.*
8. *Id.*
9. Restatement Contracts, 2d, § 17(1).
10. *See* Restatement Contracts, 2d, § 17(2).
11. MCL 440.2201.
12. MCL 450.831-450.840.
13. MCL 450.837(1).
14. MCL 450.839.
15. 15 USC §7001(a)(1).
16. 15 USC §7001(a)(2).
17. Personal Information Protection and Electronics Documents Act, SC 2000, c. 5, accessible at <https://laws-lois.justice.gc.ca/eng/acts/p-8.6/page-1.html> [https://perma.cc/6XU8-GB62].
18. Aaron Gregg, *Canadian court gives thumbs up on emoji counting as binding contract*, The Washington Post <https://www.washingtonpost.com/business/2023/07/07/thumbs-up-emoji-contract-canada/> [https://perma.cc/K9FV-BQY9] (updated July 7, 2023).
19. 2023 SKKB 116(CanLil), at [1] accessible at <https://www.canlii.org/en/sk/skkb/doc/2023/2023skkb116/2023skkb116.html> [https://perma.cc/ETE7-US26].
20. *Id.* at [15].
21. *Id.*
22. *Id.*
23. *Id.* at [30].
24. *Id.* at [30].
25. *Id.* at [31].
26. *Id.* at [32].
27. *Id.* at [33].
28. *Id.* at [39].
29. *Id.*at [19].
30. *Id.* at [37].
31. *Id.* at [18].
32. *Angelakos v Institute for Bldg Technology & Safety*, Docket no. 1:2018-cv-02365 (EDNY, 2019).
33. *Id. at* 2.
34. *Id.* at 4.
35. *Id.* at 4-6.
36. *Id.* at 7-8.
37. *Id. at* 9.
38. *Id. at* 9.
39. *Id. at* 19.
40. *Id. at* 20.

SBM STATE BAR OF MICHIGAN

BRUNCH FOR BARS

SAVE THE DATE

Join us for Brunch for Bars for an opportunity to network and collaborate with Michigan attorneys and bar leaders from around the state. Hosted the morning after the Wolverine Bar's Barristers' Ball, the cost is $10 per person.* Registration is required.

Brunch for Bars
Sunday, April 21, 2024
Andiamo Detroit Riverfront
Renaissance Center Wintergarden

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*Free for law students

STATE BAR OF MICHIGAN ELECTION NOTICE

GENERAL ANNOUNCEMENT

Members of the State Bar of Michigan are notified that the following elections will be held in June 2024:

- A statewide election for a **judicial member of the Judicial Tenure Commission**
- Elections for 89 members of the **Representative Assembly** in 44 judicial circuits
- Elections for seven members of the **Board of Commissioners** in five commissioner districts
- Elections for 11 members of the **Young Lawyers Section Executive Council** in three districts

Nominating petitions may be filed no earlier than April 1, 2024, nor later than April 30, 2024. Ballots will be distributed no later than June 1, 2024, and must be completed online no later than June 17, 2024. Nominating petitions for all elections can be accessed using the QR code on page 39.

JUDICIAL TENURE COMMISSION

Active members will elect one judicial member to the Judicial Tenure Commission for a term of three years beginning on Jan. 1, 2025, and expiring on Dec. 31, 2027. Article 6, Section 30 of the Michigan Constitution provides that three of the Commission's nine members shall be State Bar members elected by the members of the State Bar. One of these shall be a judge and two shall not be judges. The seat to be filled by an election in 2024 is to be held by a member who is a judge.

It is now held by: Brian R. Sullivan

Any active member of the State Bar who is a judge may be nominated by petitions bearing the signatures of not fewer than 50 active members of the State Bar. No member may sign a nominating petition for more than one Judicial Tenure Commission candidate. All signatures in violation of this rule will be deemed invalid. It is suggested to people circulating petitions that at least 75 signatures be obtained to ensure that at least 50 valid signatures remain should any be ruled invalid or be found illegible and therefore unverifiable.

REPRESENTATIVE ASSEMBLY

Active members in certain judicial circuits will elect members of the Representative Assembly for their circuits as follows:

1. The terms of certain elected members of the Assembly from judicial circuits as indicated below will expire at the close of the September 2024 meeting of the Representative Assembly. These seats are to be filled by election in June 2024 for terms of three years.
2. Vacancies in certain judicial circuits as indicated below are to be filled by election for the balance of the respective unexpired terms. The candidates elected will assume their office immediately upon the certification of their election in June 2024.
3. Terms of Assembly members in certain judicial circuits as indicated below, who serve by virtue of interim appointment by the Representative Assembly to fill seats for which there were no candidates for election in 2023, expire immediately upon certification of the election of their successors in June 2024 for the balance of the respective unexpired terms.

1ST CIRCUIT — HILLSDALE COUNTY

Elect one for a three-year term.

2ND CIRCUIT — BERRIEN COUNTY

Elect one for a three-year term.

Incumbent eligible for reelection:
Blair M. Johnson

3RD CIRCUIT — WAYNE COUNTY

Elect seven for a three-year term.
Elect two for a two-year term.

Incumbent eligible for reelection:
Deborah K. Blair
Robin E. Dillard
Jennifer C. Douglas
Elizabeth M. Johnson
Daniel S. Korobkin
Rita O. White

4TH CIRCUIT — JACKSON COUNTY

Elect one for a three-year term.

Incumbent eligible for reelection:
Andrew P. Kirkpatrick

5TH CIRCUIT — BARRY COUNTY

Elect one for a three-year term.

Incumbent eligible for reelection:
Steven G. Storrs

6TH CIRCUIT — OAKLAND COUNTY

Elect ten for a three-year term.
Elect five for a two-year term.
Elect two for a one-year term.

Incumbent eligible for reelection:
J. Matthew Catchick, Jr.
Alec M. D'Annunzio
Michael A. Knoblock
Steven L. Rotenberg
James T. Weiner

7TH CIRCUIT — GENESEE COUNTY

Elect one for a three-year term.
Elect one for a two-year term.

8TH CIRCUIT — MONTCALM AND IONIA COUNTIES

Elect one for a two-year term.

9TH CIRCUIT — KALAMAZOO COUNTY

Elect one for a one-year term.
Elect one for a three-year term.
Incumbent eligible for reelection:
Reh Starks-Harling

10TH CIRCUIT — SAGINAW COUNTY

Elect one for a two-year term.

12TH CIRCUIT — BARAGA, HOUGHTON, AND KEWEENAW COUNTIES

Elect one for a one-year term.

13TH CIRCUIT — ANTRIM, GRAND TRAVERSE, AND LEELANAU COUNTIES

Elect two for a one-year term.
Incumbent eligible for reelection:
Jacqueline P. Olson *
Anca I. Pop *

14TH CIRCUIT — MUSKEGON COUNTY

Elect two for a three-year term.

15TH CIRCUIT — BRANCH COUNTY

Elect one for a three-year term.

16TH CIRCUIT — MACOMB COUNTY

Elect three for a one-year term.
Elect one for a two-year term.
Elect two for a three-year term.
Incumbent eligible for reelection:
Alyia M. Hakim
Laura Polizzi
Lauren D. Walker *
Ashley L. Zacharski *

17TH CIRCUIT — KENT COUNTY

Elect one for a one-year term.
Elect one for a two-year term.
Elect three for a three-year term.
Incumbent eligible for reelection:
Ashleigh K. Russett

18TH CIRCUIT — BAY COUNTY

Elect one for a one-year term.

22ND CIRCUIT — WASHTENAW COUNTY

Elect two for a two-year term.

23RD CIRCUIT — ARENAC, IOSCO, ALCONA, AND OSCODA COUNTIES

Elect one for a three-year term.

25TH CIRCUIT — MARQUETTE COUNTY

Elect one for a one-year term.

26TH CIRCUIT — ALPENA AND MONTMORENCY COUNTIES

Elect one for a two-year term.

27TH CIRCUIT — NEWAYGO AND OCEANA COUNTIES

Elect one for a two-year term.

28TH CIRCUIT — MISSAUKEE AND WEXFORD COUNTIES

Elect one for a two-year term.

29TH CIRCUIT — CLINTON AND GRATIOT COUNTIES

Elect one for a one-year term.
Elect one for a three-year term.

30TH CIRCUIT — INGHAM COUNTY

Elect one for a two-year term.
Elect one for a one-year term.
Elect four for a three-year term.
Incumbent eligible for reelection:
Alena M. Clark *
Kara R. Hart-Negrich
Joshua M. Pease *

31ST CIRCUIT — ST. CLAIR COUNTY

Elect one for a one-year term.

32ND CIRCUIT — GOGEBIC AND ONTONAGON COUNTIES

Elect one for a three-year term.
Incumbent eligible for reelection:
Rudolph F. Perhalla

33RD CIRCUIT — CHARLEVOIX COUNTY

Elect one for a three-year term.

34TH CIRCUIT — ROSCOMMON AND OGEMAW COUNTIES

Elect one for a three-year term.
Incumbent eligible for reelection:
Troy B. Daniel

35TH CIRCUIT — SHIAWASSEE COUNTY

Elect one for a three-year term.

36TH CIRCUIT — VAN BUREN COUNTY

Elect one for a one-year term.

37TH CIRCUIT — CALHOUN COUNTY

Elect one for a one-year term.

38TH CIRCUIT — MONROE COUNTY

Elect one for a one-year term.
Elect one for a three-year term.

42ND CIRCUIT — MIDLAND COUNTY

Elect two for a one-year term.

43RD CIRCUIT — CASS COUNTY

Elect one for a one-year term.

44TH CIRCUIT — LIVINGSTON COUNTY

Elect one for a three-year term.

45TH CIRCUIT — ST. JOSEPH COUNTY

Elect one for a two-year term.

47TH CIRCUIT — DELTA COUNTY

Elect one for a three-year term.
Incumbent eligible for reelection:
Lauren M. Wickman

48TH CIRCUIT — ALLEGAN COUNTY

Elect one for a two-year term.

49TH CIRCUIT — MECOSTA AND OSCEOLA COUNTIES

Elect one for a two-year term.

* CANDIDATE WAS APPOINTED AT THE SEPTEMBER 2023 RA MEETING

52ND CIRCUIT — HURON COUNTY

Elect one for a three-year term.

53RD CIRCUIT — CHEBOYGAN AND PRESQUE ISLE COUNTIES

Elect one for a three-year term.

54TH CIRCUIT — TUSCOLA COUNTY

Elect one for a two-year term.

55TH CIRCUIT — CLARE AND GLADWIN COUNTIES

Elect one for a three-year term.

BOARD OF COMMISSIONERS

Active members in certain commissioner election districts will elect members of the Board of Commissioners for their districts. The terms of the following commissioners of the State Bar will expire at the close of the September meeting of the 2023-2024 Board of Commissioners.

The seats are to be filled by election in June 2024 for terms of three years commencing at the close of the September meeting of the 2023-2024 Board of Commissioners. The following are the districts in which elections are to be held, the number of seats to be filled, and the names of the incumbents.

DISTRICT D — JUDICIAL CIRCUITS 16 AND 31

One seat – one incumbent
Sherriee L. Detzler

DISTRICT E — JUDICIAL CIRCUITS 5, 8, 29, 30, 35, 44, AND 56

One seat – one incumbent
Kristen D. Simmons

DISTRICT G — JUDICIAL CIRCUITS 4 AND 22

One seat – one vacancy

DISTRICT H — JUDICIAL CIRCUITS 3, 38, AND 39

One seat – one incumbent
Aaron V. Burrell

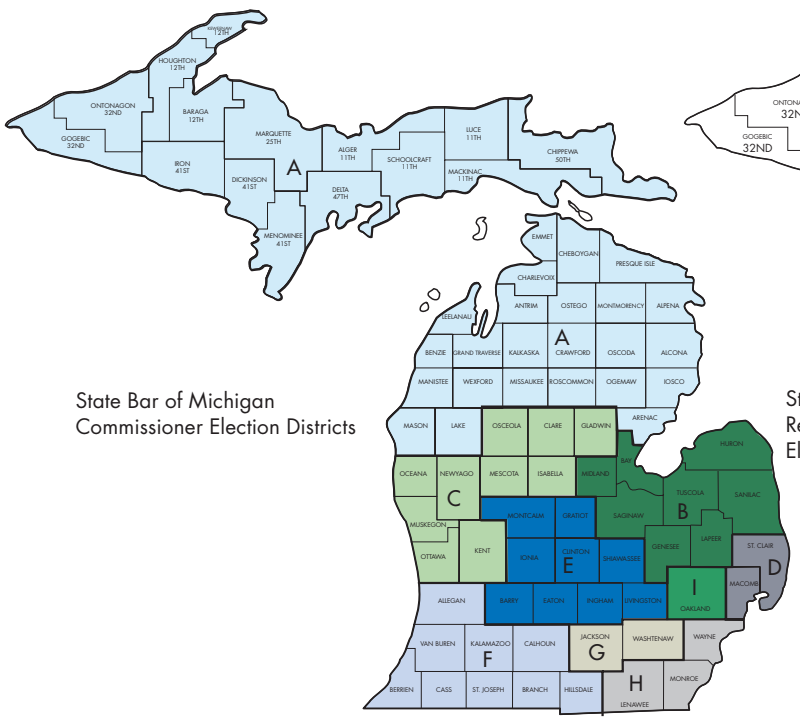
DISTRICT I — JUDICIAL CIRCUIT 6

Three seats - one incumbent and two vacancies +
Kameshia D. Gant
Vacancy
Vacancy

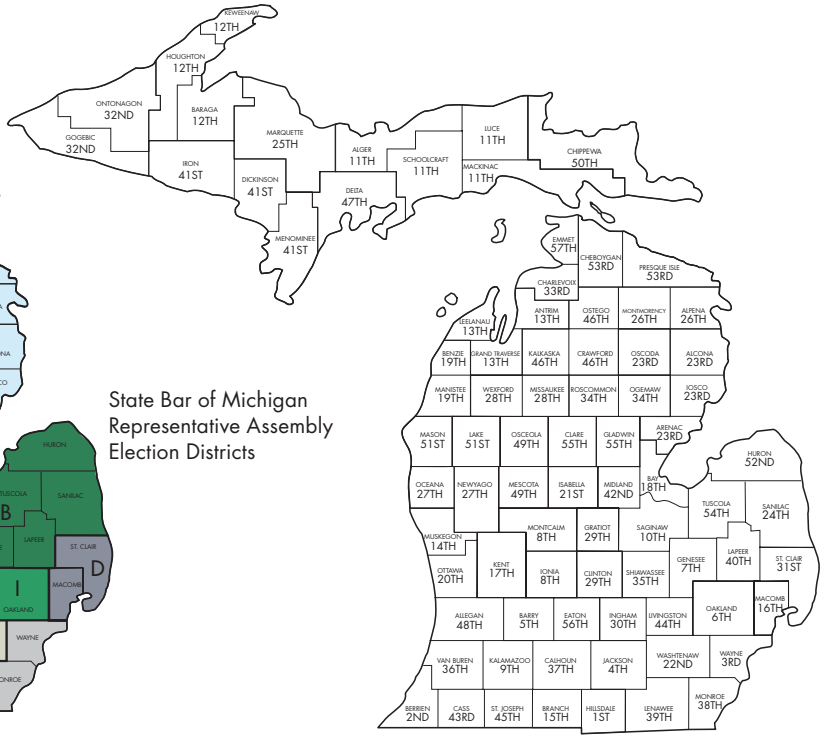
(+ Lisa J. Hamameh is an incumbent but under the applicable rules, her tenure is extended without election so she can serve as president in 2025-2026. The authorized number of board members is increased accordingly. The board seat allocated to District I is filled by election.)

(+ Thomas H. Howlett is an incumbent but under the applicable rules, his tenure is extended without election so he can serve as president in 2027-2028. The authorized number of board members is increased accordingly. The board seat allocated to District I is filled by election.)

Commissioners are nominated from among the active members of the State Bar having their principal offices within the commissioner election district. Any active member may



State Bar of Michigan
Commissioner Election Districts



State Bar of Michigan
Representative Assembly
Election Districts

circulate petitions for a candidate for district commissioner in his or her district. Five valid signatures of members entitled to vote in that district are required to nominate.

No member may sign nominating petitions for more district commissioner candidates than there are seats to be filled in the district. All signatures in violation of this rule will be deemed invalid. It is suggested to people circulating petitions that at least seven signatures be obtained to ensure that at least five valid signatures remain should any be ruled invalid or found illegible and therefore unverifiable.

YOUNG LAWYERS SECTION EXECUTIVE COUNCIL

The members of the Young Lawyers Section will elect members of the Executive Council for their districts. The terms of the following Executive Council members expire at the close of the Young Lawyers Section Executive Council meeting in September 2024.

These seats are to be filled by election in June 2024 for terms of two years. The following are the districts in which elections are to be held, the number of seats to be filled, and the names of the incumbents.

DISTRICT 1 — MACOMB AND WAYNE COUNTIES

4 seats - three incumbents and one vacancy

Myles J. Baker
Matthew J. High
Laila A. Malki
Vacancy

DISTRICT 2 — OAKLAND COUNTY

3 seats – three incumbents

Aysha F. Allos
Elizabeth Erickson
Antwuan M. Hawkins

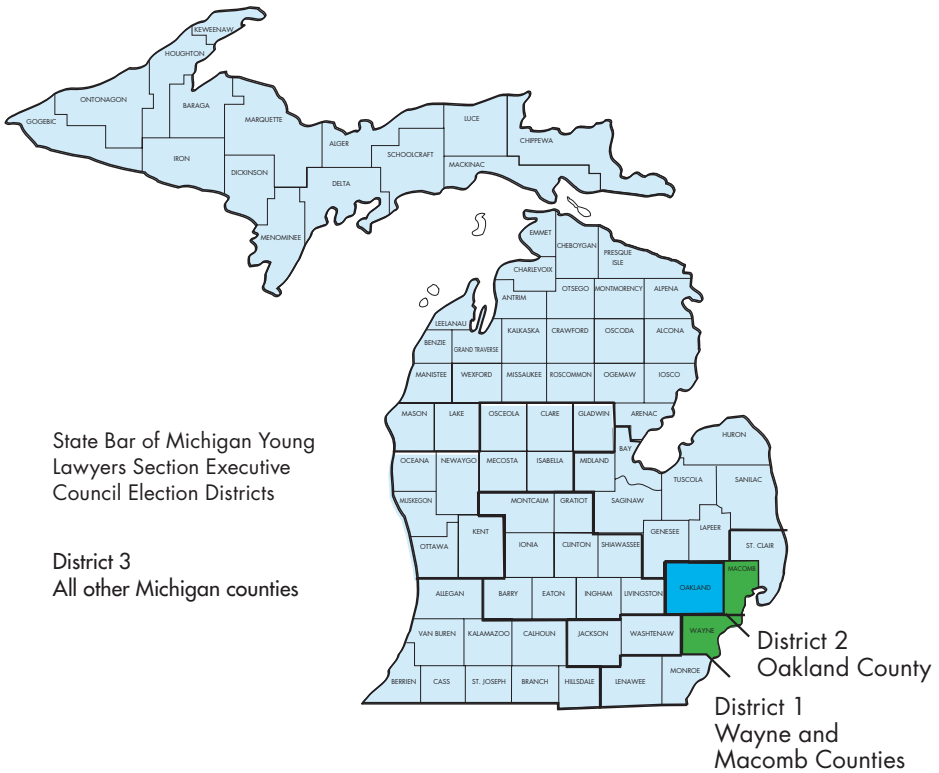
DISTRICT 3 — ALL MICHIGAN COUNTIES EXCEPT MACOMB, OAKLAND, AND WAYNE

4 seats – three incumbents and one vacancy

Chad L. Antuma
Emma N. Green
Marisa A. Vinsky
Vacancy

Executive Council members shall be elected from the active membership of the Young Lawyers Section in the three districts by the active members having their address of record on file with the State Bar. Any active member may circulate petitions for a candidate for council member in his or her district. Five valid signatures of members entitled to vote for the nominee are required to nominate.

No member may sign nominating petitions for more Executive Council candidates than there are seats to be filled in the district. No member may sign nominating petitions for candidates outside of their district. All signatures in violation of these rules will be deemed invalid. It is suggested to people circulating petitions that at least seven signatures be obtained to ensure that at least five valid signatures remain should any be ruled invalid or found illegible and therefore unverifiable.



State Bar of Michigan Young Lawyers Section Executive Council Election Districts

District 3
All other Michigan counties

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STATE BAR OF MICHIGAN

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OF INTEREST

From the couch to the courtroom: Remote work is here to stay

BY SCOTT ATKINSON

For Austin Blessing-Nelson, it came down to the people — and the coffee.

He began his legal career at a small firm in 2020 as pandemic restrictions were becoming the norm for workers. He later worked for a slightly larger firm and although restrictions had eased, employees — including attorneys — and their desire to work remotely had not.

It was at that second job where Blessing-Nelson said he could see the best of both worlds.

"I chose to go into the office the majority of the time because I liked talking to coworkers and being in the office (which had free coffee and snacks too), but I also enjoyed the flexibility to work from home and did it often," he said.

Remote work is part of a new era for legal professionals, transforming the landscape for both private and non-private practice attorneys. The State Bar of Michigan 2023 Economics of Law report shows the dynamics of work environments, not only in law offices but also in courtrooms, have significantly evolved since the onset of the pandemic.

The majority of attorneys in private practice no longer work in the office five days a week and only 30.5% of non-private practice attorneys do so. The number of remote days varied, and 11.9% of private practitioners and 9.3% of non-private practice attorneys worked entirely remote.

Remote and hybrid schedules have become more common, and some firms and offices are now using it as a way to retain employees. In the report, 23.7% of private practice attorneys said that employers offered remote work flexibility as an incentive. (A total of 39.9% of private practitioners said their firms offered some form of incentive, with 23.2% saying they were offered increased compensation and 19.9% offered bonuses.) Non-private practitioners reported similar figures, with 40.5% receiving some form of incentive and 32.2% saying remote work flexibility was an option.

While employees seem to be on board, navigating business practices under remote conditions brought forth specific challenges, according to the report. For private practitioners, adapting to changing court directives and policies (32%) and handling reduced collaboration due to remote work (28.4%) emerged as primary concerns. Meanwhile, non-private practitioners highlighted issues such as managing staff working remotely (35.2%) and grappling with limited in-person networking opportunities (24.4%).

Both private and non-private practitioners shared concerns regarding pandemic-related challenges. For private practitioners, issues included managing stress (26.2%), fear of getting sick (38.9%), and balancing work and home demands (37.3%). Conversely, non-private practitioners expressed concerns about learning new technology (28.8%), balancing work and home demands (20.2%), and fear of getting sick (24.6%).

It isn't only legal offices where drastic changes have taken place. In fact, while the COVID-19 pandemic is largely responsible for the normalizing of virtual court proceedings, Michigan was ahead of the curve when it came to using videoconferencing technology like Zoom in the courtroom. The Michigan Supreme Court announced it 2019 that it would allow some courtroom proceedings to take place via technology rather than in person. When the pandemic hit in the spring of 2020, many courtrooms were at least somewhat prepared to work fully remote.

For criminal attorney Steve Fishman, those changes were particularly positive for the legal profession.

Fishman said there were a lot of things in the legal process that he saw as a waste of time. Pre-trials, for example, or setting court dates

required an attorney to dress up and head downtown for something that was almost automatic.

"Basically, you're there for 15 minutes and you go home," he said.

Then came the COVID-19 pandemic, and everything changed.

"The best thing that came of (the pandemic) was that we were able to avoid a lot of unnecessary courtroom appearances and just do them on Zoom, which would take five minutes," Fishman said.

Since then, virtual proceedings have not only become the norm, but are here to stay. In 2022, the Michigan Supreme Court adopted an administrative order to increase access to justice through use of videoconferencing technology.

Flexibility and having remote options available is key, said Blessing-Nelson, who enjoys a hybrid schedule as associate counsel for the Attorney Grievance Commission.

"I personally love the flexibility to work remotely, but also enjoy being able to converse with coworkers and bounce ideas off of them," he said.

Scott Atkinson is communications specialist at the State Bar of Michigan

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SPOTLIGHT

Joan Vestrand, professionalism and civility committee

BY SCOTT ATKINSON

Long before the Michigan Supreme Court adopted the 12 Principles of Professionalism for Lawyers and Judges, Joan Vestrand was hard at work advancing the importance of civility and professionalism to a functioning and effective legal system. A lawyer with more than 40 years of experience in legal and judicial ethics, her commitment to the subject continues today as a member of the State Bar of Michigan Special Committee on Professionalism and Civility.

The committee works to promote the highest standards of professional conduct among lawyers and judges, consistent with the principles adopted in 2020 by the Michigan Supreme Court in Administrative Order 2020-23. Through educational initiatives and collaborative efforts with legal and judicial stakeholders, the committee is working to advance the principles and the importance of professionalism, including the rule of law, in strengthening public faith and trust in our system of justice.

In 2018, Vestrand participated in the Promoting Professionalism in the 21st Century Summit chaired by former State Bar President Edward Pappas. The summit gathered more than 80 judges and attorneys at the Michigan Supreme Court Hall of Justice to address the need for greater professionalism in the legal community. The summit spawned the creation of a Professionalism and Civility Work Group in 2019, with Vestrand serving as a member. Over the next year, Vestrand worked with others to develop the 12 Principles of Professionalism.

Asked about being part of this monumental task, she said she was honored to have the privilege to be involved in something so important.

"I was fortunate enough to be a part of that working group," she said. "I did the initial research and worked very closely in drafting those principles, which then of course went through the Representative Assembly and then to the (Michigan Supreme) Court. Lots of people had their hands on them, and it was really rewarding to play a role."

In December 2020, the Supreme Court issued Administrative Order 2020-23 adopting the principles to guide, inspire, and govern all Michigan lawyers and judges in this vital area. After the order was issued, the work group became a permanent State Bar committee charged with continuing to advance professionalism principles.

Vestrand's volunteer work with the committee is a natural extension of her professional commitment to ethics. As a law student, Vestrand's father, the late Ronald R. Pentecost, also an attorney, encouraged her to investigate different areas of the law to find her interests. In her third year of law school, she served as a law clerk for the Michigan Judicial Tenure Commission and found her passion.

"It just appealed to me, and I really didn't think about why that might be," she said. "Then it kind of dawned on me that growing up, I was a person who always gravitated towards stories with morals — "Aesop's Fables", "Grimms' Fairy Tales", and Dr. Seuss. I've always really been fascinated by what makes people tick, like, 'Why do we do the things that we do?' Which is why ethics is such a great fit for me."

Now a professor at Western Michigan University Cooley Law School, her experience also includes several years as a staff attorney at the Attorney Grievance Commission, co-founding a law firm specializing in defending lawyers and judges facing ethical allegations, being an Attorney Discipline Board hearing panel member, acting as a

"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.

special master for the Michigan Supreme Court, and serving on the SBM Standing Committee on Character and Fitness. Vestrand, a recipient of the State Bar Champion of Justice Award for her work in the field of legal ethics, was instrumental in helping to form the Professionalism in Action orientation program in which students at the state's five law schools discuss with attorneys and judges ethics issues that can arise in the profession. Looking at similar programs in other states and adding her own stamp, Vestrand worked with Pappas to develop the offering. The first session was held in 2009 and continues to be part of presentations to new law students today.

Vestrand said that current goal of the Committee on Professionalism and Civility is to further spread the word on the professionalism principles and their importance to the effective administration of justice as well as building the public's trust, faith, and confidence in our legal system. The committee has a speaker's bureau to better acquaint lawyers and judges with the professionalism principles. Vestrand, who chairs the subcommittee that creates the material used in committee presentations, noted that speakers are available to all law firms, law schools, and professional organizations upon request and at no cost. To learn more, visit michbar.org/professionalism.

Another committee goal is working with the courts to incorporate the principles into all phases of litigation with the expectation that all persons involved in the legal process conduct themselves with professionalism and civility.

Vestrand said the principles have played a significant role in how she teaches her Cooley students about the legal profession — "They really are a roadmap for practice success. That's exactly what they are," she said — and also noted the importance of getting involved in the law beyond their practice.

"I tell students all the time, the practice of law is very rewarding, but it pales in comparison to the returns from actively participating in the profession," Vestrand said. "Those rewards are amazing."

Scott Atkinson is communications specialist at the State Bar of Michigan

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PLAIN LANGUAGE

What the Michigan summmons should look like (Part 2)

BY KAREN SCHRIVER

In spring 2021, with the approval of the former Chief Justice and encouragement from the State Court Administrative Office and leaders of the State Bar Justice for All Commission, the Kimble Center for Legal Drafting began work on revising Michigan's summons. The form was designed by Karen Schriver, who is internationally recognized as a top expert in document design and plain language. Of course, others connected with the Kimble Center reviewed each draft. We held Zoom meetings with several people at SCAO who work on forms and another Zoom meeting with several court clerks. After we had prepared one of the earlier drafts, we sent it to SCAO and to those same court clerks for their comments — and we received lots of good ones. We also received comments from the Ottawa County Legal Self-Help Center and from the Legal Design Lab at Stanford Law School. All told, the form went through 20 drafts. We submitted the final draft in January 2022. We have always been prepared to test it with users — the gold standard for whether a document works. Note that the form itself has been reduced by about 10 percent for this column. Last month, we published the summons itself. This month, the proof of service. —JK

Karen Schriver is president of KSA Communication Design & Research in Pittsburgh, Pennsylvania. A former faculty member at Carnegie Mellon University, she taught students to apply research on document design, plain language, and cognitive science to design everyday communications. Her book, *Dynamics in Document Design: Creating Texts for Readers*, was named a landmark by the Society of Technical Communication. Winner of many awards for her research, Schriver focuses on making complex information clear, compelling, and usable.

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.

Proof of Service — Summons & Complaint

State of Michigan

Case Number

To be filled out by the Court Clerk

Which Michigan Court?

_____ District Court
_____ Circuit Court
_____ Probate Court

Who gets this form?

Original – Court
1st copy – Defendant
2nd copy – Plaintiff
3rd copy – Process Server

Instructions to the Process Server

1. Deliver the summons and the complaint to the defendant, or the defendant's agent, no later than:
   - the expiration date on the summons or
   - the date that the order for a second summons expires.
2. Ask the defendant(s) to sign the Acknowledgment of Service.
3. File this proof of service with the court clerk. If you cannot complete service, you must return this original and all copies to the court clerk.

Defendant's Acknowledgment of Service

Process Server: *If the defendant does not sign the Acknowledgment, you must fill out the next three sections (Affidavit, Certificate, and Declaration) about your service.*

I acknowledge that I have received service of the Summons and Complaint.

(If applicable) I also received the following documents:

_____

_____

Signature _____

Day, date & time _____

(If applicable) I received the papers on behalf of:

_____

Affidavit of My Authority to Make Service

Check one box.

Officer Certificate (notarization not required)

❑ I am a sheriff, deputy sheriff, bailiff, appointed court officer, or attorney for a party (MCR 2.104[A][2]).

OR

Affidavit of Process Server Who Is Not an Officer (notarization required on the next page)

❑ I am a legally competent adult, and I am not a party or an officer of a corporate party (MCR 2.103[A]).

Certificate or Affidavit of Actual or Attempted Service

Process Server: *List other documents you served or attempted to serve, if any. Then fill in the boxes at the top of the next page.*

❑ I certify or swear that I served or attempted to serve these documents on the defendant(s) listed on the next page:

- ❑ Summons & Complaint
- ❑ Other documents

_____

_____

❑ I have listed the place and manner of service or attempted service on the next page.

Proof of Service — Summons & Complaint

State of Michigan

Case Number

Certificate or Affidavit of Actual or Attempted Service (continued)

Defendant(s) name(s) and the address(es) where I made or attempted service	**Day, date, time of service or attempted service**	**Method**
		❑ In person ❑ Registered or certified mail* ❑ Unable to serve
		❑ In person ❑ Registered or certified mail* ❑ Unable to serve
		❑ In person ❑ Registered or certified mail* ❑ Unable to serve

* Return receipt required

Process Server's Declaration

I declare under the penalties of perjury that I have examined this proof of service and that its contents are true to the best of my information, knowledge, and belief.

Process Server's Signature

Name (type or print)

Title

→ If you are not a sheriff, deputy sheriff, baliff, appointed court officer, or party's attorney, do not sign the declaration **until** you're in front of a notary.

→ Submit a copy of the return receipt (if sent via registered or certified mail).

Service fee $	Miles traveled	Fee $	+	Incorrect-address fee $	Miles traveled	Fee $	=	**Total Fee $**

Notarization (if required)

Signed and sworn to before me on _____
Date

in _____ County, Michigan

Signature _____

My commision expires _____
Date

Notary public in _____ County, Michigan

ETHICAL PERSPECTIVE

Ethics news: Looking back at the 2022-2023 Bar year

BY ROBINJIT K. EAGLESON

At the hub of legal ethics are the principles governing the conduct of members of the legal profession — attorneys and judges alike — are expected to observe throughout their legal careers. Sometimes, living up to these standards of honor and dignity seems simple enough; other times, however, the ethical lines are not so clear.

This is where the State Bar of Michigan Standing Committee on Judicial Ethics and the Standing Committee on Professional Ethics step in to assist members with the application of the Rules of Professional Conduct through ethics opinions. During the 2022-2023 Bar year, both committees fulfilled their duties by providing guidance with formal opinions, answers to frequently asked questions, and other resources.

STANDING COMMITTEE ON PROFESSIONAL ETHICS

The Standing Committee on Professional Ethics recognized that the guidance provided in CI-947 was outdated and needed to be modernized. To accomplish this goal, the committee rescinded CI-947 and published Ethics Opinion RI-384[1] to ensure lawyers and law firms understand their responsibility so that all funds maintained within an Interest on Lawyer Trust Account (IOLTA) are accounted for. Further, the committee provided guidance stating that if unidentified funds are found within an IOLTA and diligent and reasonable inquiries and efforts have been made to identify the source, the lawyer or firm may donate the funds to the Michigan State Bar Foundation or the State Bar of Michigan Client Protection Fund.

The Standing Committee on Professional Ethics also provided analysis on the complex ethics issue of keyword advertising with Ethics Opinion RI-385. The topic generated many comments to committee members and calls to the SBM Ethics Helpline as potential clients increased their use of technology to locate an attorney rather than relying on word of mouth. The committee analyzed MRPC 7.1, 7.5, and 8.4 and looked at outcomes from several states that had also investigated the topic and concluded that attorneys may not utilize a keyword advertising campaign that involves using the name of another attorney, law firm, or the attorney's or law firm's trade names without the express consent of the other attorney or law firm.

Additional opinions the Standing Committee on Professional Ethics issued included Ethics Opinion RI-386, which provided long-awaited guidance on how attorneys can ethically provide representation to clients whose decision-making abilities are impaired, what attorneys may wish to consider as next steps when a client is diagnosed, and what to do when a client is undiagnosed. The opinion concludes that lawyers must exercise professional judgment and continue representation to safeguard the client's best interests and the attorney-client relationship. And Ethics Opinion RI-388 provided for the duty to safeguard digital property under MRPC 1.15(d). The committee concluded that the obligations found under MRPC 1.15(d) apply to digital property like it does for any other lawful property entrusted to the lawyer and offers guidance regarding lawyers' obligations of storage versus access.

STANDING COMMITTEE ON JUDICIAL ETHICS

The Standing Committee on Judicial Ethics reviewed various topics during the past Bar year and published opinions addressing disclosure to all parties of prior relationships and children in common and a judge's ethical duty to maintain technological competence, including artificial intelligence.

One judge inquired whether a lawyer appearing before a judicial officer who had divorced or terminated a prior dating relationship must disclose that relationship to all parties. Further inquiry was

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

made regarding whether disclosure is required if the lawyer and the judicial officer have a child in common. These issues were analyzed in Ethics Opinion JI-153, which examined the divorce or termination of a relationship with and without children and how the passage of time affects that disclosure. To avoid the appearance of impropriety and ensure the neutrality of the bench, disclosure is required, and the judicial officer must consider disqualification under MCR 2.003.

In light of the rapidly evolving use of artificial intelligence, the committee issued Ethics Opinion JI-155 ensuring that judicial officers are aware of their obligations to maintain competence with advancing technology including, but not limited to, artificial intelligence. The opinion explores the obligation set forth in canons 2 and 3 of the Michigan Code of Judicial Conduct.[2] The committee will continue to watch and provide ethical guidance as the growing use of artificial intelligence in the legal field affects the way judicial officers operate. Committee members will also partner with the Michigan Judicial Institute this year to provide regional presentations on the ethics of artificial intelligence and the bench.

ADDRESSING THE MOTION TO WITHDRAW

Both the Standing Committee on Professional Ethics and the Standing Committee on Judicial Ethics found that guidance was absolutely necessary on a topic that plagues both judges and lawyers — how to ethically handle a motion to withdraw. The SBM Ethics Helpline routinely receives calls from judges and lawyers asking how to handle motions to withdraw, specifically regarding confidences, bases, the amount of information or evidence to place on the record, and more.

To ensure that both judges and lawyers received the needed guidance, the committees released opinions JI-154 and RI-387. Ethics Opinion JI-154 provides that courts may require lawyers to reveal information protected under MRPC 1.6 only to the extent reasonably necessary to adjudicate the motion to withdraw, but doing so should order lawyers to reveal information under MRPC 1.6(c)(2) and ensure that no other counsel or parties examine the withdrawing lawyer. Ordering disclosure of protected information should be an exceptional, rather than normal, practice narrowly tailored to what is reasonably necessary to allow courts to fulfill the duties of impartiality and diligence as required under Canon 3.

Ethics Opinion RI-387 provides that lawyers may not ethically reveal confidences or secrets protected under MRPC 1.6 unless ordered by the court or tribunal to do so. The opinion offers guidance on mandatory and permissive withdrawals and the amount of information necessary to relay within the motion.

MORE FROM THE COMMITTEES

In addition to opinions, the Professional Ethics Committee and Judicial Ethics Committee continued to provide guidance by issuing answers to frequently asked questions and guidebooks, all of which can be found on the SBM ethics homepage at www.michbar.org/opinions/ethicsopinions. Recent guidebooks include Changing Firms: Ethical Responsibilities for Lawyers and Law Firms[3] and Navigating Ethical Complexities: Child Protective Proceedings for L-GALs.[4]

Both committees provide advisory, nonbinding written ethics opinions. Requests for opinions may be made by any attorney, and information on how to make a request an ethics opinion can be found at michbar.org/generalinfo/ethics/request. Ethics opinions are researched and drafted by the committees. As a way to encourage members to seek guidance and facilitate open deliberations on issues, requests for written ethics opinions — including the identity of the inquirer, identifying facts, and draft opinions — are confidential.

CONCLUSION

Ethics rules set the foundation for the legal profession in a modern, culturally complex society. Navigating these issues requires guidance, and ethics opinions help members address the complex situations they may face on a daily basis. There is no denying that the practice of law is becoming increasingly complex; it is important to develop frameworks to ensure we make decisions consistent with the core fundamentals of law. Accomplishing this requires SBM members to be aware of the Rules of Professional Conduct and how to apply them. The simplest way to do so is relying on the ethical opinions written by the attorneys and judges facing these issues every day.

Robinjit K. Eagleson is ethics counsel at the State Bar of Michigan. She is also a member of the State Bar of Michigan and staffs the Professional Ethics Committee and the Judicial Ethics Committee.

ENDNOTES

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LAW PRACTICE SOLUTIONS

Firms in the digital age: Streamlining operations for enhanced efficiency

BY MARGARET T. BURKE

Law firms are not typically considered the epitome of efficiency. Even the most successful firms can struggle to fully leverage their resources for any number of valid reasons — the complex nature of legal work, time constraints, other priorities, and a lack of business-oriented training in law schools.

For many firms, pressing client needs and looming deadlines make finding the time and energy to implement new systems seem daunting. However, the time legal teams devote to activities that don't make money infringes on time they could be practicing law. Not only does this cut into their billable time, but it can potentially diminish the quality of the service they deliver to clients.

Simply put, speed and efficiency are critical to success. Efficiency means eliminating wasted time, and there is no doubt that investing in the integration of technology can significantly enhance operational efficiency and team performance, which then allows practitioners to spend less time on non-billable tasks, focus on client matters, and deliver greater profits.

LEVERAGING TECH TOOLS

Advances in technology give law firms access to an array of communication, project management, and productivity tools that can enhance or, in some cases, replace their basic operating systems. For example, knowledge management has progressed well beyond standard tools like Outlook or Google Drive to include options similar to intranet sites that house updated, easily accessible information.

Practice management systems like Clio or MyCase, work management platforms such as Monday.com and Asana, and robust knowledge management systems play crucial roles in increasing efficiency and boosting productivity in the demanding legal environment.

ESTABLISHING INFORMATION PROTOCOLS

Law firms are inherently data heavy, which makes them susceptible to email overload. Countless hours are wasted managing emails. Establishing and implementing internal communication and information protocols is an essential first step in the process of developing greater efficiency. By defining where and how internal communication is managed and using specific tools for different types of information, firms can all but eliminate email as an internal communication platform and reserve it primarily for external use.

This approach aligns with the modern ethos of achieving a "zero inbox," a concept well-articulated by Nick Sonnenberg in his book, "Come Up for Air."[1] It allows people to quickly and efficiently deal with every email that comes into their inbox, reduces the amount of time spent checking email, and ensures that nothing falls through the cracks.

ENHANCING INTERNAL COMMUNICATION

Developing clear communication protocols and showcasing strategies that blend visionary ideas with practical solutions can serve as a valuable guide for legal professionals. The key is having a clear use for each tool to ensure consistency and prevent information from being scattered across multiple platforms.

For example:

- Chat programs like Microsoft Teams, Google Chat, and Slack are excellent for quick queries not related to client matters and casual internal communication in a virtual environment.

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.

- Client-matter information, updates, deadlines, and tasks should be communicated through features in your practice management system. If your current system doesn't capture external emails or allow for internal notes, implementing a more integrated system can save time, reduce frustration, and enhance client service. Work management tools such as Monday.com, Airtable, and Asana are invaluable for handling the business side of a law firm.

The focus should be on optimizing company processes based on the ease and speed of retrieving information, not on the ease of transferring or storing information. In other words, everyone should be able to find what they're looking for — not just the person who stored it.

IDENTIFYING PAIN POINTS

While opportunities for automation and streamlining are always emerging, the complexity of those options can be overwhelming. The lack of unbiased information and the desire for perfect implementation creates a challenge.

To start, law firms should identify pain points such as missed deadlines, information overload, and the frustrating digital scavenger hunt for documents. Understanding your challenges can guide the selection and implementation of technological solutions. Implementing a framework like Sonnenberg's Communication, Planning, and Resources (CPR) model,[2] for example, allows firms to identify and separate the different types of communication (internal, external, and personal) and tailor its tools to each type and the unique needs of the practice.

Keep in mind that effective use of technology hinges on well-designed standard operating procedures, thorough training, and adherence to processes.

ADDRESSING SYSTEMIC INEFFICIENCIES

Rather than simply managing work pressures, firms need to dedicate considerable time, attention, and resources to resolving systemic operational issues. This is especially crucial for growth-minded firms. Expanding your team before a solid framework for operational efficiency is in place is likely to amplify problematic processes. To prevent scaling issues, it is imperative to address systemic inefficiencies with the necessary upgrades in place before hiring more people or developing new business.

CONCLUSION

Ultimately, law firm inefficiency can hurt client satisfaction and potentially lead to a loss of business. Regardless of time and resources, law firms must prioritize technology to streamline operations, enhance efficiency, and maintain a competitive edge.

Heinan Landa, author of "The Modern Law Firm,"[3] poses a compelling question: "What does a thriving law firm look like in five years?"

In a word: Different.

Margaret T. Burke, president and founder of MB Law Firm Consulting in Marblehead, Massachusetts, has decades of experience consulting with lawyers, partners, and small to midsize law firms. She specializes in management, strategy, and finance to improve law firm operations, streamline processes, and scale revenue and has advised and led acquisitions, relocations, succession planning, restructuring, and startups.

ENDNOTES

1. Sonnenberg, *Come Up for Air* (Nashville: HarperCollins Leadership, 2023).
2. *Id.*
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LIBRARIES & LEGAL RESEARCH

Contracts close to home

BY JAN BISSETT

Legal information, the stuff of legal research, is big business. And legal research is often associated with big spending. With artificial intelligence becoming part of the legal research landscape, big spending becomes even bigger.

The 2022 ABA Survey on Technology Report: Online Services revealed that "46% of survey respondents reported their firms negotiated a flat fee with their primary legal research provider[,]" down from 64% in 2019.[1] The recently released 2023 survey noted that 56% of respondents use fee-based online legal research services while 12% reported not using fee-based online legal research services at all.[2]

Are the costs associated with legal research a concern? How are you managing these costs? Who advises you on legal information access, content, and other research considerations? Which course is best for your clients and firm members? When confronted with these and similar questions, you can consider employing a law librarian, legal information professional, consulting firm, or a savvy member.

Librarians are knowledgeable about legal resource offerings and the vendors who provide them. In its 2023 report,[3] legal consulting and outsourcing company Harbor Global identified cost management as the top issue for law firm libraries. The costs of proprietary legal research tools such as Lexis, Westlaw, Bloomberg Law, and others continue to push higher. Librarians and information professionals can help determine which sources may be a better value in print than online, recommend content-specific resources of value for client research and the firm's practice areas, and develop expertise in using current research trends including free research tools. Librarians often see lists of so-called free legal research websites[4] and have the experience and expertise necessary — as well as familiarity with client research needs — to evaluate sources found in the endless search for free tools.

Academic law librarians are also excellent sources of information on vendors and product offerings even though the law school cost structure is substantially different from that for firms or companies. Academic law librarians similarly support students, faculty, and the legal community with their expertise in legal research methods, making resources available to support faculty research and student learning. Their role also emphasizes instruction and introducing legal research resources to law students and other researchers and students throughout the college or university.

Online databases such as Lexis, Westlaw, and Bloomberg Law are licensed for law student, faculty, and staff use; other law-related online services may be offered campuswide or for use to the public by visiting the law library. Remember that the vendors of legal-research platforms like to get their users while they're young by providing law students with full access to their offerings and, once they enter the workforce, the new lawyer feels lost without his or her preferred online source.

Full access has started to include AI-related materials, a feature recently introduced by both Lexis and Westlaw. For example, Thomson Reuters gathered comments about its recent generative AI products launch[5] to further interest. Law students are among the first introduced to these new tools, creating a desire for advanced research tools outside of academia. Law firms then face a decision about which platforms to contract with — do they prefer a favorite vendor at exorbitant prices or a less-expensive product that may require retraining researchers?

What can law firms and libraries do when looking at contracts for legal research? If your firm lacks an expert of its own, perhaps calling in an experienced consultant is the way to go. Primary legal research provider contracts have become a staple of library management. Considerations other than price or duration can be a concern including licensing, the number of users, and the impact of additions or departures from a practice group on usage.

Just as you may counsel a client on the terms of a contract, consider what type of analysis may be helpful for your business. Using legal research consultants has become more popular over the years. While not an exhaustive list, entities like Research Contract Consultants, Feit Consulting, and Harbor Global have expertise in negotiating legal research contracts and can substantially reduce concerns about whether a contract is right for your firm or library. Consultants with broad view of the industry can advise on whether a quoted price is high, low, or in the midpoint of the marketplace. As a party to a contract, one cannot discover what other firms or libraries of your size are paying, but a consultant may provide a better assessment of the landscape.

Consultants also may have a broad view of which parts of a contract to push back on if the price seems too high. For instance, we all remember receiving print materials and routing copies to interested parties within our firm or law school. Now, we seldom see print materials and instead need licenses for each viewer of the product. This has led some vendors to require an enterprise license giving everyone access, but it also means that the consumer is paying for access for individuals who will never use the product. Consultants may offer suggestions based on other products or solutions that can keep you from excessive access and underutilization.

Do you know who in your organization actually uses the expensive contract materials? A Research Contract Consultants article[6] reminds us to do our due diligence before starting negotiations. Bar associations (including the State Bar of Michigan) are providing members with FastCase or other research tools. Are your attorneys using these tools for research while barely touching Westlaw, Lexis, or Bloomberg Law?

Finally, consider your use of legal research resources and your practice. An experienced, savvy firm member has an advantage in knowing both your client and practice needs and evaluating what works for your practice.

Jan Bissett is reference and faculty liaison services librarian with the Wayne State University Arthur Neef Law Library.

ENDNOTES

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PRACTICING WELLNESS

Mental health: Welcoming differences, overcoming stigmas

BY DAN BERSTEIN

I have been hospitalized five times due to my bipolar disorder. As disruptive as these unexpected episodes have been to my life, managing my day-to-day instability can be even harder. Having this diagnosis has helped me better understand the ways I am different from others and accept that my neurodivergence means I sometimes have trouble regulating my emotions, communicating well, and functioning to fit social norms.

Because I am open with my condition as part of my advocacy work, there are times it can be easier for me to raise my hand and let people know when I need help in the form of reasonable accommodations under the Americans with Disabilities Act or just informal patience, acceptance, and courtesy.[1] After all, I'm not concealing my condition. Yet I have also experienced times where people notice my disorder label or symptoms and avoid me due to stigmatizing assumptions that I might be dangerous, unreliable, or socially undesirable — or their frustrations with the ways my special needs during more challenging times may make me seem difficult, high conflict, or toxic.[2]

It's nobody's fault that we live in a society that often forgets that the people who strike us as difficult may be privately managing a serious mental health condition, like mine, or coping with hidden traumas such as workplace harassment or any number of things. The pressure to appear professional has silenced many people experiencing prejudice or sexual violence[3] and the societal stigmas toward mental illnesses lead many to make the understandable choice to conceal their disorders so they don't have to worry about people distrusting them at work, questioning their parenting in a custody case, or not inviting them to parties.[4]

Though it is often very rational for people with mental health problems to hide that they have them or deny their symptoms for fear of backlash, it means that our social consciousness takes longer to evolve and adjust because stories like mine are not being told often enough.[5] It also means more people are accidentally perpetrating mental illness discrimination every day without ever meaning to do so – and more people with illnesses like mine feel pressure to pretend they do not have them at all.

Luckily, things are changing. The stigma associated with mental illness is decreasing. The American Bar Association passed a resolution urging state bars to stop using mental illness screening questions as part of the character and fitness section of their applications.[6] More people know their rights; the Equal Employment Opportunity Commission reported an uptick in psychiatric disability cases, meaning more people are speaking up.[7] Through the Mental Health Safe Project, I have been working with many legal institutions to reduce inadvertently discriminatory guidance by teaching lawyers to engage in appropriate inquiries, screening, and disparate treatment.[8] Moreover, I've partnered with National Alliance on Mental Illness (NAMI) chapters and mental health advocates around the country, hosting workshops that have taught more than a thousand people living with mental illnesses how to use tools to set boundaries, ask for reasonable accommodations, respond to discrimination, and discuss trauma.

It is wonderful that people with mental health problems are speaking up more in the face of stigma so everyone can learn to stop rejecting people who seem aberrant, and we can all start finding more ways to be welcoming across the spectrum of mental health.

"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

There are also ways anyone can learn to become empowering and supportive of people with varying mental health needs while preventing instances of accidental discrimination. Here are a few projects I have worked on that created free resources for that purpose:

- **BiasResistantCourts.org:** Funded by the American Arbitration Association-International Centre for Dispute Resolution Foundation and a project of the City University of New York Dispute Resolution Center and MH Mediate, the website provides free user-friendly resources that teach 12 key skills to help people be trauma informed, accessible, and resistant to discrimination.

- **Responding to Poor Performance Without Discriminating:** A quick guide that teaches law firms how to give feedback to underperforming employees without inadvertently saying something that could become part of a discrimination claim. I created it as part of my work with Mindquity. It is available with a short free training video at www.mindquity.com/freeresources.

- **Speak Up: Conflict Resolution Skills for Self-Advocacy:** A Mental Health Safe Project program that provides free guidance to NAMI chapters and others so people with mental health problems have tools for communicating and responding to bias. It is available at www.mhsafe.org/about.

Also note that the State Bar of Michigan Lawyers and Judges Assistance Program provides a number of valuable resources. If you are experiencing challenges or looking to maximize your overall well-being, call their confidential help line at (800) 996-5522 or email them at contactLJAP@michbar.org.

Mental health stigma is nobody's fault — it is an age-old problem amplified by a widespread culture that often sensationalizes, demonizes, and disparages mental health problems without exploring it further. In my view, the way forward is for all of us to learn skills for empowerment and communicate with one another to change our cultural norms instead of blaming or canceling each other. I have made great friends by connecting with people who initially labeled me as difficult or high conflict or aberrant in other ways, and I live my life hoping and waiting for more of those moments.

The tools mentioned in this article can help lawyers and law firms similarly turn moments of embarrassment, friction, and escalation into opportunities for growth. That is what we must do so people no longer have to live in fear of being discredited or shunned because of their mental health differences.

Dan Berstein is chief advocacy officer of Mindquity, a company that helps legal professionals promote mental health equity and empowerment while preventing inadvertent mental illness discrimination. He is available for questions, comments, and feedback at dan@mhmediate.com.

ENDNOTES

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BEST PRACTICES

The 10 commandments of mediation advocacy

BY SHELDON J. STARK

Mediation presents an opportunity — unique in the litigation process — to take a step back from the conflict, climb to the balcony, and look for a mutually beneficial off-ramp that meets the needs of all parties. Accordingly, advocates should replace traditional practices of zealous advocacy with an alternative approach to mediation advocacy. As a longtime trial lawyer and mediator, here are my suggestions for making the most of the mediation process.

I. SELECT THE RIGHT TIME FOR MEDIATION

The right time to recommend mediation is when the parties have all the information needed to make a good judgment about resolution: before suit is started to save transaction costs; after the exchange of documents if discovery is needed; following a key deposition; or just before a dispositive motion, which allows the mediator to leverage the risk factor.

II. CHOOSE THE RIGHT MEDIATOR

Select a mediator suited to the dispute and design a process most likely to result in a resolution. No two disputes are alike. Not every mediator is the same. Sometimes, subject matter expertise is warranted. Sometimes, a people person skilled at managing highly charged emotions is better. Sometimes, a mediator the other side trusts completely is warranted. If the parties have an ongoing relationship, the best choice might be a mediator with experience improving communications or managing joint sessions. Think it through with your client.

III. UNDERSTAND WHAT'S DRIVING THE DISPUTE

Analyze the underlying needs and interests that are driving the dispute — for both sides. This can help you formulate and analyze offers and counteroffers that could result in a win/win settlement. Dig down to better understand what clients really need and want, not simply what they are demanding. Move past positional bargaining to engage in the more robust process of interest-based bargaining envisioned by Roger Fisher and William Ury in their seminal work, "Getting to Yes."[1]

IV. PITCH YOUR WRITTEN SUBMISSION TO THE PROPER PARTY

Aim your mediation summary at persuading the decision-maker on the other side — not the mediator. Tell a good story and attach material supportive of claims or defenses. Highlight your strongest evidence. With less than 1% of federal civil cases[2] and less than 1.5% of Michigan civil cases going to trial[3] today, saving information for trial makes little sense. Address your vulnerabilities and explain how you intend to minimize them.

Mediation is a unique aspect of the litigation process. You're not trying to persuade a judge or jury; the objective here is convincing the decision-maker on the other side that resolution is in their best interest, so your goal is making sure key points and arguments are heard and considered, which is very different from what you might argue to a judge or jury.

Mediation advocacy requires using the language of diplomacy, framing arguments in a way the other side will listen to. For example, calling the other side a liar is likely to result in consternation and a response in kind. Suggesting that one impediment to resolution is your concern about credibility and setting out your reasoning for that stance is likely to capture their attention — perhaps leading to the reward of an understandable, satisfying explanation.

V. EDUCATE YOUR CLIENT

Prepare your client to get the most out of the process, and coach clients to speak from the heart when presenting at the mediation table. Parties need to understand what mediation is about. It is not

"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@ingham.org.

a justice process; it's a dispute resolution process. The goals are different. Getting valuable information requires disclosing valuable information. For negotiations to succeed, parties must recognize a productive offer will typically stimulate a productive counteroffer and vice versa.

VI. EVALUATE THE CLAIM/DEFENSE AND AGREE ON A TOP/BOTTOM LINE

Realistically evaluate the case for settlement. Account for strengths and weaknesses, risks and their magnitude, the range of potential outcomes, the economic costs and attorney fees, and the threat of collateral consequences such as public exposure of private and embarrassing facts. Make certain your client understands the risks and weaknesses. Negotiate with your own client to reach consensus on a top or bottom line.

VII. DEVELOP AN OFFER/CONCESSION STRATEGY

In addition to setting a top or bottom line and an opening offer, do not rely on your instincts or gut to manage offers and counteroffers. Arrive at the table with an offer/concession strategy.

Plan for and anticipate as many rounds as possible to achieve your clients' settlement goals. For example, if I offer X, the other party is likely to counter with offer Y. If they offer Y, my next move will be X+1. If I offer X+1, they're likely to respond with Y-1 and so on until the goal is reached.

An offer/concession strategy prevents buffeting of good judgment by emotion. Wrap your proposals in a thoughtful and realistic rationale to explain how you came up with your numbers, which will enhance your credibility and provide a solid foundation for further discussion. Stick to your plan but be flexible to adjust as necessary.

VIII. MAKE USE OF THE MEDIATOR

Be candid with the mediator and ask for any available assistance. Trust the mediator and have confidence in his or her processes, skills, and integrity. Exaggerating to the mediator or trying to manipulate them threatens your credibility. The mediator is generally the only person at the table who will be in both rooms. Ask the mediator for help in understanding how the other side is reacting, what their perspective might be, how they might respond to a proposal, or how to present a proposal in a more constructive way. Ask for assistance in weighing the magnitude of the identified risks, and brainstorm with the mediator on potential outcomes.

IX. BE PREPARED

Know your dispute cold. Since 80% or more of all disputes settle during or shortly after mediation,[4] this will be the only day in court for most of your clients. Prepare with the same passion, thoroughness, and diligence as you would for a trial. Do not squander the chance to bring this dispute to an end. Review pleadings, outline depositions, pull together the most powerful documentary evidence, and organize your remarks. Have everything at your fingertips at the table, and prepare your client to deliver candid, honest remarks to the other side in the event of a joint session.

X. BE FLEXIBLE AND OPEN MINDED

If the dispute does not resolve, learn all you can. Don't assume you know where the other side is coming from. You may think you've heard it all, but they may refine their theories in light of what they've learned from you. Is their story plausible? If it is, of course, there's a greater risk a judge or jury will buy it. By maintaining an openness to learning, you're better prepared to prosecute or defend the dispute at trial.

Implement your mediation plan unclouded by emotions — but be flexible. Be prepared to adjust the top/bottom lines with which you started based upon new material, information, or insights brought to light during the process. Your valuation was based on a careful analysis of the facts, law, risks, costs, and more. Mediation is nothing if not a vehicle for the transfer of new information and insight. Accordingly, if you and your client are paying attention, your valuation number should change. If a modest risk turns out to be greater than initially thought, surely the case value is not the same. As your assessment changes, help your client make a sound decision about resolution.

Finally, for most parties, closure has value. It is different for different individuals. Litigation can be an emotional roller-coaster ride — some parties lose sleep during litigation, others experience flashbacks, and for others, litigation is simply the cost of doing business. For many people, there is great value in ending a dispute, putting it in the rearview mirror, and closing the book on a traumatic experience. Understand the value of closure to your client. As more information is exchanged during the later stages of the negotiation process, examine the value of closure more closely.

Until retiring in 2022, **Sheldon J. Stark** offered mediation, arbitration, case evaluation and neutral third-party investigative services. He is a distinguished fellow of the National Academy of Distinguished Neutrals and the International Academy of Mediators, an employment law panelist for the American Arbitration Association, a member of the Professional Resolution Experts of Michigan, and a past chair of the State Bar of Michigan Alternative Dispute Resolution Section Council.

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ORDERS OF DISCIPLINE & DISABILITY

AUTOMATIC INTERIM SUSPENSION

Charles Hua Cui, P65379, Chicago, Illinois, effective Dec. 21, 2023.

On Dec. 21, 2023, the respondent was convicted by guilty verdict of bribery involving federal programs; false statements to the Federal Bureau of Investigation; and use of interstate commerce to facilitate illegal activity which constitute violations of 18 USC Secs, 666(a)(2); 1001(a)(2); and 1952(a)(3) and (2) in *United States of America v. Charles Cui, et al.*, US District Court for the Northern District of Illinois, Case No. 1:19-cr-00322. Upon the respondent's conviction and in accordance with MCR 9.120(B)(1), the respondent's license to practice law in Michigan was automatically suspended.

Upon the filing of a 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).

AMENDED NOTICE OF ORDER IMPOSING NO DISCIPLINE

Kenneth M. Essad, P36638, Warren, by the Attorney Discipline Board Tri-County Hearing Panel #108. Order imposing no discipline, effective Jan. 31, 2024.

The hearing panel found that the respondent committed misconduct while representing the plaintiff mother in proceedings to, in part, modify parenting time and child support when he sent email messages directly to the defendant father, whom he knew to be represented by counsel, in violation of MRPC 4.2(a).

The panel majority concluded that the specific facts and circumstances presented in this case warranted the entry of an order which imposes no discipline. Actual costs were assessed in the amount of $1,681.50.

SUSPENSION

Garrett C. Kerr, Frankenmuth, by the Attorney Discipline Board Tri-Valley Hearing Panel #4. Suspension, one year, effective Jan. 30, 2024.

After proceedings conducted pursuant to MCR 9.115, the panel found by default that the respondent committed professional misconduct during his employment as a law clerk at a Michigan law firm. As a condition of the respondent's employment at the firm, he was supposed to apply for admission to the State Bar of Michigan. In July 2021, the respondent told his employer that he had not actually applied to become licensed to practice law in Michigan[1] and he was terminated from the firm. After the respondent's termination, his former employer discovered that the respondent had held himself out to several clients as a Michigan-licensed attorney despite specific instructions that he not sign any pleadings, appear in court, or offer any legal advice to clients. The respondent rendered legal advice, signed retainer agreements, took or intended to take money from clients in exchange for legal services, and otherwise engaged in the practice of law in Michigan. In addition, the respondent failed to answer a grievance administrator's request for investigation inquiring into the respondent's employment at the firm.

Based on the respondent's default, the hearing panel found that the respondent engaged in the unauthorized practice of law in violation of MRPC 5.5 and MRPC 8.1(b)(1); engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of MRPC 8.4(b); neglected a legal matter entrusted to the lawyer in violation of MRPC 1.1(c); failed to seek the lawful objectives of a client in violation of MRPC 1.2(a); failed to act with reasonable diligence and promptness in representing his clients in violation of MRPC 1.3; failed to keep his clients reasonably informed about the status of a matter and comply promptly with reasonable requests for information in violation of MRPC 1.4(a); violated or attempted to violate the Rules of Professional Conduct in violation of MRPC

8.4(a); engaged in conduct prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposes the legal profession to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3); engaged in conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court in violation of MCR 9.104(4); and failed to respond to a request for investigation in violation of MCR 9.104(7) and 9.113(B)(3).

The panel ordered that the respondent be suspended for one year, effective Jan. 30, 2024, and that, should the respondent seek licensure, special admission, or other permission to practice as an attorney in Michigan, he shall disclose this disciplinary sanction to the admitting court, agency, or other authority. Costs were assessed in the amount of $1,897.69.

1. Contrary to what respondent told his employer, he had applied for reciprocal admission but was rejected by the Board of Law Examiners.

DISBARMENT (BY CONSENT)

Benjamin F. Liston, P44366, Warren, by the Attorney Discipline Board St. Clair County Hearing Panel #1. Disbarment, effective Jan. 6, 2024.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Disbarment 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 that he was convicted on Sept. 17, 2020, of three counts of willful neglect of duty by a public officer holding public trust (a misdemeanor) in violation of MCL 750.478 and that his conviction constituted professional misconduct.

Based on the respondent's admissions and the stipulation of the parties, the panel found that the respondent committed professional

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

misconduct when he engaged in conduct that violated a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615 in violation of MCR 9.104(5) and engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b).

In accordance with the stipulation of the parties, the panel ordered that the respondent be disbarred from the practice of law in Michigan. Total costs were assessed in the amount of $794.82.

VACATING INTERIM SUSPENSION AND NOTICE OF REINSTATEMENT

Thomas J. Wilson, P33071, Lexington, by Attorney Discipline Board Genesee County Hearing Panel #3. Reinstated, effective Jan. 9, 2024.

On August 22, 2023, Genesee County Hearing Panel #3 issued an Order of Suspension Pursuant to MCR 9.115(H)(1) [Failure to Appear] suspending the respondent's license to practice law in Michigan effective Aug. 29, 2023.[1]

On Jan. 9, 2024, the panel issued an order granting respondent's motion for reconsideration and vacating the Aug. 22, 2023, Order of Suspension Pursuant to MCR 9.115(H)(1) [Failure to Appear]. The panel's order reinstated the respondent's license to practice law in Michigan effective immediately.

1. See Notice of Suspension Pursuant to MCR 9.115(H)(1), issued Aug. 22, 2023.

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GREAT LAKES
LEGAL CONFERENCE

FROM THE MICHIGAN SUPREME COURT

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

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ADM File No. 2023-36
Proposed Amendments of Rules 3.901, 3.915, 3.916, 3.922, 3.932, 3.933, 3.935, 3.943, 3.944, 3.950, 3.952, 3.955, 3.977, and 6.931 and Proposed Addition of Rule 3.907 of the Michigan Court Rules

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ADM File No. 2023-36
Proposed Amendments of Rules 3.937, 3.950, 3.955, 3.993, and 6.931 of the Michigan Court Rules

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

ADM File No. 2022-26
Amendments of Rules 6.425 and 6.610 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 6.425 and 6.610 of the Michigan Court Rules are adopted, effective May 1, 2024.

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

Rule 6.425 Sentencing; Appointment of Appellate Counsel

(A)-(C) [Unchanged.]

(D) Sentencing Procedure.

(1) The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing, the court must, on the record:

(a)-(b) [Unchanged.]

(c) before imposing sentence

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf,

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence,

(iii) provide the prosecutor an opportunity to speak equivalent to that of the defendant's attorney, and

(iv) address any victim of the crime who is present at sentencing or any person the victim has designated to speak on the victim's behalf and permit the victim or the victim's designee to make an impact statement,

~~(c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence,~~

(d)-(f) [Unchanged.]

(2)-(3) [Unchanged.]

(E)-(H) [Unchanged.]

Rule 6.610 Criminal Procedure Generally

(A)-(F) [Unchanged.]

(G) Sentencing.

(1) For sentencing, the court shall:

(a)-(b) [Unchanged.]

(c) before imposing sentence

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf,

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence,

(iii) provide the prosecutor an opportunity to speak equivalent to that of the defendant's attorney, and

(iv) address any victim of the crime who is present at sentencing or any person the victim has designated to speak on the victim's behalf and permit the victim or the victim's designee to make an impact statement.

(c)-(d) [Relettered (d)-(e) but otherwise unchanged.]

(2)-(4) [Unchanged.]

(H)-(I) [Unchanged.]

Staff Comment (ADM File No. 2022-26): The amendments of MCR 6.425(D)(1)(c) and MCR 6.610(G)(1)(c) require a trial court, on the record before sentencing, to personally address the defendant regarding his or her allocution rights and to ensure that, if present at sentencing, the victim or the victim's designee has an opportunity to make an impact statement.

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. 2023-34
Proposed Amendment of Rule 3.967 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.967 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 3.967 Removal Hearing for Indian Child

(A)-(C) [Unchanged.]

(D) Evidence. An Indian child may be removed from a parent or Indian custodian, or, for an Indian child already taken into protective custody pursuant to MCR 3.963 or MCR 3.974(B), remain removed from a parent or Indian custodian pending further proceedings, only upon clear and convincing evidence, including the testimony of at least one qualified expert witness, as described in MCL 712B.17, who has knowledge about the child-rearing practices of the Indian child's tribe, that active efforts as defined in MCR 3.002 have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that these efforts have proved unsuccessful, and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The active efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. The evidence must include the testimony of at least 1 qualified expert witness, who has knowledge of the child rearing practices of the Indian child's tribe, that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child.

(E)-(F) [Unchanged.]

Staff Comment (ADM File No. 2023-34): The proposed amendment of MCR 3.967 would align the rule with MCL 712B.15, as amended in 2016, to clarify the applicability of qualified expert witness testimony in a removal hearing involving an Indian child.

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

A copy of this order will be given to the secretary of the State Bar and to the state court administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by May 1, 2024, by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2023-34. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2024-01
Appointment to the Judicial Education Board

On order of the Court, pursuant to Mich CJE R 3 and effective immediately, Hon. Anica Letica is appointed to the Judicial Education Board to fill the remainder of a term ending on Dec. 31, 2024.

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

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Virtual meeting
Contact Mike M. for meeting information
517.242.4792

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SUNDAY 7 PM*
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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)

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

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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)
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Pilgrim Congregational Church
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FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

The committee has adopted a new jury instruction, M Crim JI 7.25a (Self-Defense as Defense to Brandishing a Firearm) for the defense to brandishing a firearm found at MCL 750.234e(2)(b). The instruction is effective March 1, 2024.

[NEW] M Crim JI 7.25a
Self-Defense as Defense to Brandishing a Firearm

(1) The defendant claims that [he/she] acted in lawful [self-defense/defense of (*identify person*)] when [he/she] brandished the firearm. A person may brandish a firearm to defend [himself/herself/another person] under certain circumstances, even where it would otherwise be unlawful for [him/her] to point it, wave it about, or display it in a threatening manner. If a person brandishes a firearm to act in lawful [self-defense/defense of others], [his/her] actions are justified, and [he/she] is not guilty of brandishing a firearm.

(2) Just as when considering the claim of self-defense to the charge of [*identify principal assaultive charge to which the defendant is asserting self-defense*],[1] you should consider all the evidence and use the following rules to decide whether the defendant used a firearm to act in lawful [self-defense/defense of (*identify person*)]. You should judge the defendant's conduct according to how the circumstances appeared to [him/her] at the time [he/she] acted.

(3) First, when [he/she] acted, the defendant must have honestly and reasonably believed that [he/she] had to brandish the firearm to protect [himself/herself/(*identify person*)] from the imminent unlawful use of force by another. If [his/her] belief was honest and reasonable, [he/she] could act to defend [himself/herself/(*identify person*)] with a firearm, even if it turns out later that [he/she] was wrong about how much danger [he/she/(*identify person*)] was in.

(4) Second, a person is only justified in brandishing a firearm when necessary at the time to protect [himself/herself/(*identify person*)] from danger of death, great bodily harm, or sexual assault.[2] The defendant may only point, wave about, or display a firearm in a threatening manner if it is appropriate to the attack made and the circumstances as [he/she] saw them. When you decide whether the brandishing of the firearm was what seemed necessary, you should consider whether the defendant knew about any other ways of protecting [himself/herself/(*identify person*)], but you may also consider how the excitement of the moment affected the choice the defendant made.

(5) Third, at the time [he/she] brandished the firearm, the defendant must not have been engaged in a criminal act that would tend to provoke a person to try to defend [himself/herself] from the defendant.[3]

Use Notes

The court must read M Crim JI 7.20, Burden of Proof — Self Defense, for this instruction.

1. There will not always be an assaultive-offense count charged with the brandishing-a-firearm charge. Eliminate this first phrase if no assaultive offense is charged as a principal offense.

2. *People v Ogilvie,* 341 Mich App 28; 989 NW2d 250 (2022), holds that merely pointing a firearm is not deadly force. The Committee on Model Criminal Jury Instructions expresses no view whether the limitation of brandishing a firearm to cases where the danger of death, great bodily harm, or sexual assault was alleged to have been the reason for brandishing the firearm as used in this sentence may be too restrictive.

3. This paragraph should be given only when supported by the facts; i.e., where there is evidence that at the time the defendant brandished the firearm, he or she was engaged in the commission of some crime likely to lead to the other person's assaultive behavior. For example, this paragraph is usually unwarranted if the defendant was engaged in a drug transaction and used force in self-defense against an unprovoked attack by the other party in the transaction. *See People v Townes,* 391 Mich 578, 593; 218 NW2d 136 (1974). On the other hand, this paragraph would apply to a defendant who engaged in a robbery of another person and that other person reacted with force. This paragraph is unnecessary where there are no issues other than who was the aggressor in the situation, whether the defendant had an honest and reasonable belief of the use of imminent force by another, or whether the degree of force used was necessary.

The committee has adopted new jury instructions, M Crim JI 12.10 (Illegal Sale or Disposition of Untaxed Cigarettes), M Crim JI 12.10a (Illegal Possession or Transportation of Untaxed Cigarettes), M Crim JI 12.10b (Making, Possessing, or Using an Unauthorized Michigan Department of Treasury Tobacco Tax Stamp), M Crim JI 12.10c (Illegally Purchasing or Obtaining a Michigan Department of Treasury Tobacco Tax Stamp), M Crim JI 12.10d (Falsifying a Tobacco Manufacturer's Label), and M Crim JI 12.10e (Making or Possessing a False License to Purchase or Sell Tobacco Products as a Retailer or Wholesaler) for the crimes found in the Tobacco Products Tax Act at MCL 205.428. The instructions are effective March 1, 2023.

[NEW] M Crim JI 12.10
Illegal Sale or Disposition of Untaxed Cigarettes

(1) The defendant is charged with the crime of illegal sale or disposal of untaxed cigarettes by a manufacturer's representative. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was a manufacturer's representative for [*identify tobacco manufacturer*].

(3) Second, that the defendant [exchanged/sold/offered to sell/disposed of] tobacco cigarettes or a tobacco product.

(4) Third, that the tobacco cigarettes or product [did not have a stamp from the Michigan Department of Treasury showing that the tax imposed under the Tobacco Products Tax Act has been paid/had a tax stamp from another state].

(5) Fourth, that when the defendant [exchanged/sold/offered to sell/disposed of] tobacco cigarettes or a tobacco product, [he/she] knew that the tobacco cigarettes or product [did not have a stamp from the Michigan Department of Treasury showing that the tax imposed under the Tobacco Products Tax Act has been paid/had a tax stamp from another state].

[NEW] M Crim JI 12.10a
Illegal Possession or Transportation of Untaxed Cigarettes

(1) [The defendant is charged with the/You may also consider the less serious] crime of acquiring, possessing, transporting, or offering for sale [(3,000 or more untaxed cigarettes/untaxed tobacco products with a value of $250 or more)/(between 1,200 and 2,999 untaxed cigarettes/untaxed tobacco products with a value between $100 and $249.99)/(between 600 and 1,199 untaxed cigarettes/untaxed tobacco products with a value between $50 and $99.99)]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [acquired/possessed/transported/offered for sale] tobacco cigarettes or a tobacco product.

(3) Second, that the tobacco cigarettes or product did not have a stamp from the Michigan Department of Treasury showing that the tax imposed under the Tobacco Products Tax Act has been paid.

(4) Third, that when the defendant [acquired/possessed/transported/offered for sale] the tobacco cigarettes or tobacco product, [he/she] knew that the tobacco cigarettes or product did not have a stamp from the Michigan Department of Treasury showing that the tax imposed under the Tobacco Products Tax Act has been paid.

(5) Fourth, that the defendant [acquired/possessed/transported/offered for sale] [(3,000 or more untaxed cigarettes/untaxed tobacco products with a value of $250.00 or more)/(between 1,200 and 2,999 untaxed cigarettes/untaxed tobacco products with a value between $100.00 and $249.99)/(between 600 and 1,199 untaxed cigarettes/untaxed tobacco products with a value between $50.00 and $99.99)].

[NEW] M Crim JI 12.10b
Making, Possessing, or Using an Unauthorized Michigan Department of Treasury Tobacco Tax Stamp

(1) The defendant is charged with the crime of making, possessing, or using [a counterfeit tobacco tax stamp/a tobacco tax stamp without authorization from the Michigan Department of Treasury]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant intentionally [made/possessed/used] [a counterfeit tobacco tax stamp/a tobacco tax stamp without authorization from the Michigan Department of Treasury].

(3) Second, that the defendant knew that the tobacco tax stamp [he/she] [made/possessed/used] was [a counterfeit tobacco tax stamp/a tobacco tax stamp not authorized by the Michigan Department of Treasury].

[NEW] M Crim JI 12.10c
Illegally Purchasing or Obtaining a Michigan Department of Treasury Tobacco Tax Stamp

(1) The defendant is charged with the crime of illegally purchasing or obtaining a Michigan Department of Treasury tobacco tax stamp as a licensee. To prove this charge, the prosecutor must prove the following elements beyond a reasonable doubt:

(2) First, that the defendant was a licensee under the Tobacco Products Tax Act.

(3) Second, that the defendant bought or obtained a Michigan Department of Treasury stamp for showing that the tax imposed under the Tobacco Products Tax Act has been paid from a person other than the Michigan Department of Treasury.

(4) Third, that when the defendant bought or obtained the Michigan Department of Treasury stamp for showing that the tax imposed under the Tobacco Products Tax Act had been paid, [he/she] knew that the person from whom [he/she] bought or obtained a Michigan Department of Treasury stamp was not an employee of the Michigan Department of Treasury.

[NEW] M Crim JI 12.10d
Falsifying a Tobacco Manufacturer's Label

(1) The defendant is charged with the crime of falsifying a tobacco manufacturer's label. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS (CONTINUED)

(2) First, that the defendant intentionally made a label that was an imitation of a label used by the tobacco manufacturer [*identify tobacco manufacturer*].

(3) Second, that the defendant used the imitation label to falsely identify cigarettes that [he/she] knew were not produced by [*identify tobacco manufacturer*] as being made by [*identify tobacco manufacturer*].

[NEW] M Crim JI 12.10e
Making or Possessing a False License to Purchase or Sell Tobacco Products as a Retailer or Wholesaler

(1) The defendant is charged with the crime of [making or possessing a false license to purchase or sell tobacco products as a retailer or wholesaler/possessing a device that could be used to forge, alter, or counterfeit a license to purchase or sell tobacco products as a retailer or wholesaler]. To prove this charge, the prosecutor must prove beyond a reasonable doubt:

[*Select according to the charge and evidence:*]

(2) That the defendant intentionally [made, counterfeited, or altered/assisted in making or caused to be made/purchased or received] a false [license to purchase or sell tobacco products as a retailer or wholesaler/vending machine disc or marker for the sale of tobacco cigarettes or products] knowing it was false.

[*Or*]

(2) That the defendant intentionally possessed a device that [he/she] knew could be used to forge, alter, or counterfeit a [license to purchase or sell tobacco products as a retailer or wholesaler/vending machine disc or marker for the sale of tobacco cigarettes or products].

The committee has adopted an amendment to jury instruction, M Crim JI 13.15 (Assaulting Employee of Place of Confinement) to comport with the statutory language found at MCL 750.197c. The amended instruction is effective March 1, 2024.

[AMENDED] M Crim JI 13.15
Assaulting Employee of Place of Confinement

(1) The defendant is charged with the crime of assaulting an employee of [*state place of confinement*]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was legally confined at [*state place of confinement*[1]].

(3) Second, that [*name complainant*] was employed at [*state place of confinement*].

(4) Third, that the defendant knew that [*name complainant*] was an employee[2] or custodian at [*state place of confinement*].

(5) Fourth, that the defendant assaulted [*name complainant*]. An assault is an attempt to commit a battery or to do something that would cause someone to fear a battery. A battery is a forceful, violent, or offensive touching of the person. An assault cannot happen by accident.

(6) Fifth, that the defendant committed the assault through the use of violence, a threat to use violence, or the use of a dangerous weapon. Violence is the use of physical force likely to cause embarrassment, injury, death, or harm.[3] A dangerous weapon is an instrument that is used in a way that is likely to cause serious physical injury or death.

Use Notes

This is a specific intent crime. *See People v Norwood,* 123 Mich App 287; 333 NW2d 255; *leave denied,* 417 Mich 1006 (1983).

1. Place of confinement in this context may include a prison. *See People v Wingo,* 95 Mich App 101; 290 NW2d 93 (1980).

2. An *employee* may include an independent contractor.

3. This definition of *violence* comes from *People v Terry,* 217 Mich App 660, 662; 553 NW2d 23 (1996).

The committee has adopted an amended jury instruction, M Crim JI 13.17 (Absconding on a Bond) to add a "notice" element and further refine the language of the instruction to comport with case law. The instruction is effective March 1, 2024.

[AMENDED] M Crim JI 13.17
Absconding on a Bond

(1) The defendant is charged with the crime of absconding on a bond posted in a criminal case. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was on bond for a felony charge. [(*State charge*) is a felony.][1] A bond is an agreement to do or not do certain things, including to appear in court when required.

(3) Second, that the defendant was informed that [he/she] could not leave the state of Michigan without permission of the court or that [he/she] had to appear at all scheduled court dates unless otherwise directed by the court.

(4) Third, that the defendant absconded on the bond. Absconding means to leave the state of Michigan or to hide or conceal oneself.

(5) Fourth, that when the defendant left the jurisdiction of the court, or hid or concealed [himself/herself], [he/she] did so with the intent to avoid the legal process or in reckless disregard of a known obligation to appear and defend.[2]

Use Notes

1. The defendant may stipulate that he or she was on bond for a felony to avoid the court identifying that specific felony and the prosecutor offering proof of that felony. *See People v Swint,* 225 Mich App 353; 572 NW2d 666 (1997), citing *Old Chief v United States,* 519 US 172 (1997).

2. *See People v Rorke,* 80 Mich App 476; 264 NW2d 30 (1978).

The committee has adopted a new jury instruction, M Crim JI 40.6 (indecent or obscene conduct) for the disorderly person offense found at MCL 750.167(f). This new instruction is effective March 1, 2024.

[NEW] M Crim JI 40.6
Indecent or Obscene Conduct

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

(2) First, that the defendant was in a public place at [*identify location*].

(3) Second, that while at [*identify location*], the defendant performed an act of [(*describe sexual conduct by the defendant*)/(*describe other conduct alleged to have been indecent or obscene*)].

(4) Third, that the defendant's conduct was shocking to the sensibilities of a reasonable person, was outside of reasonable societal standards of decency, and would be offensive to a reasonable person.

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