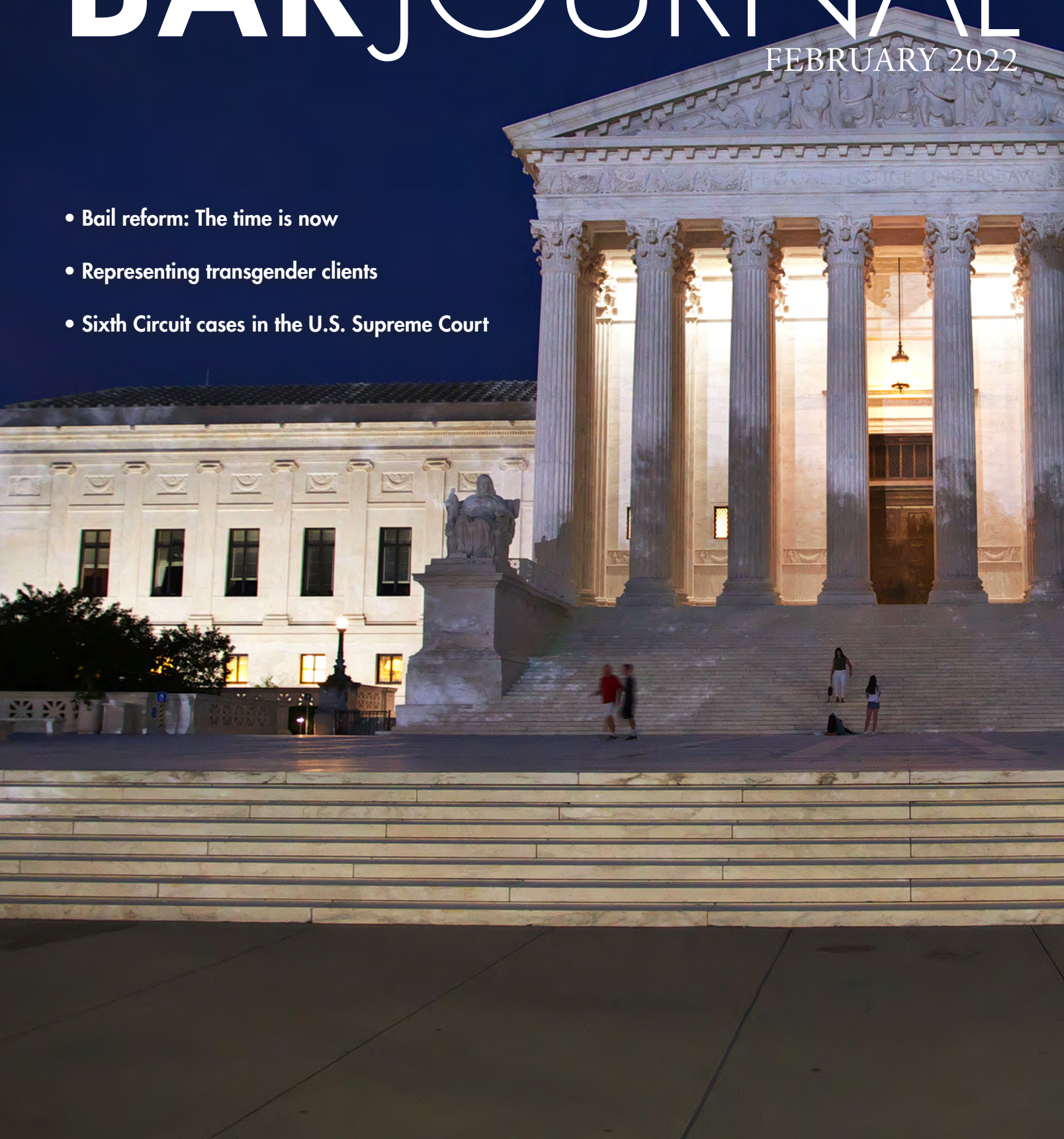
MICHIGAN
BAR JOURNAL
FEBRUARY 2022

- Bail reform: The time is now
- Representing transgender clients
- Sixth Circuit cases in the U.S. Supreme Court



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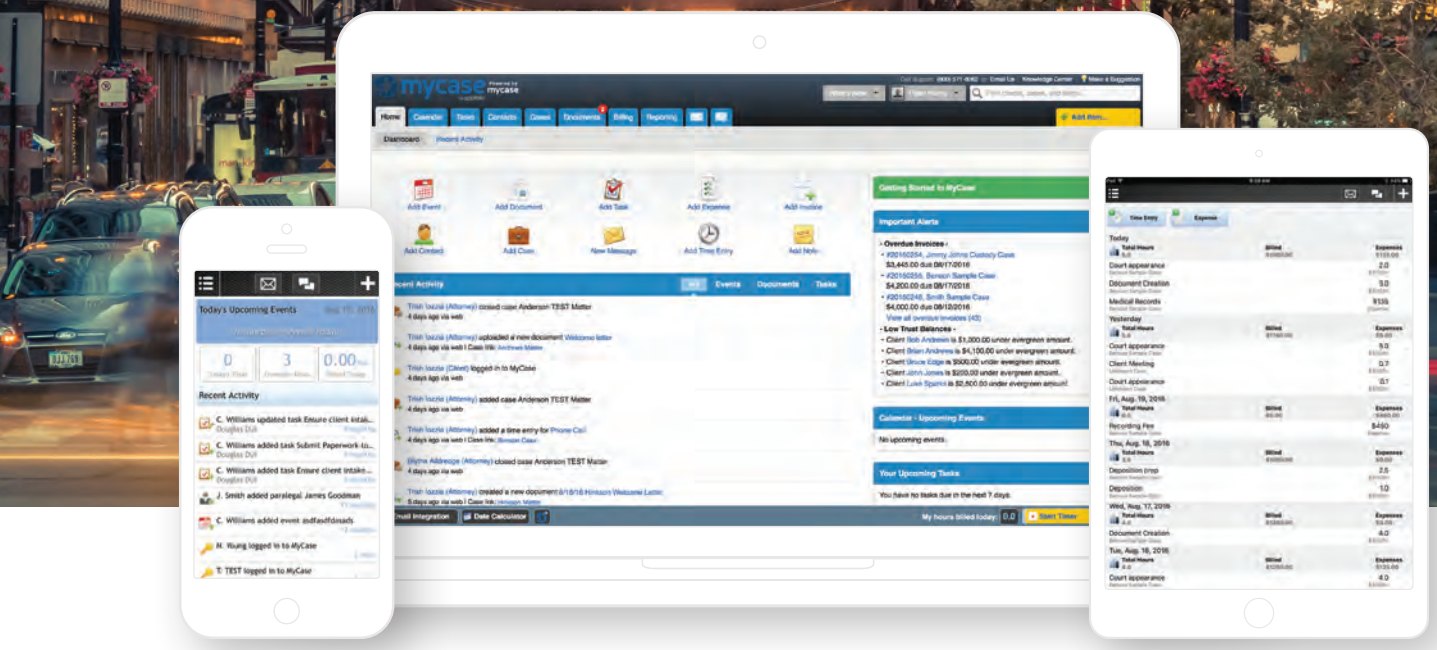

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WMU-Cooley Law School has announced a new scholarship opportunity for students beginning a Master of Laws (LL.M.) Program in January, May, or September 2022.

To find out more about WMU-Cooley Law School's LL.M. Program, contact Cathy J. McCollum, Director of Online Learning and Graduate & Extended Programs at LLM@cooley.edu or call 517-913-5725.

Visit cooley.edu/LLM to learn more.

Now is the time for ambitious attorneys who want to reinvent a current practice or specialize in an area of law. WMU-Cooley Law School is awarding up to $4,300 in scholarship to those who begin a WMU-Cooley LL.M. program in 2022. Classes are flexibly scheduled on weeknights and weekends to minimize interruptions to family and career.

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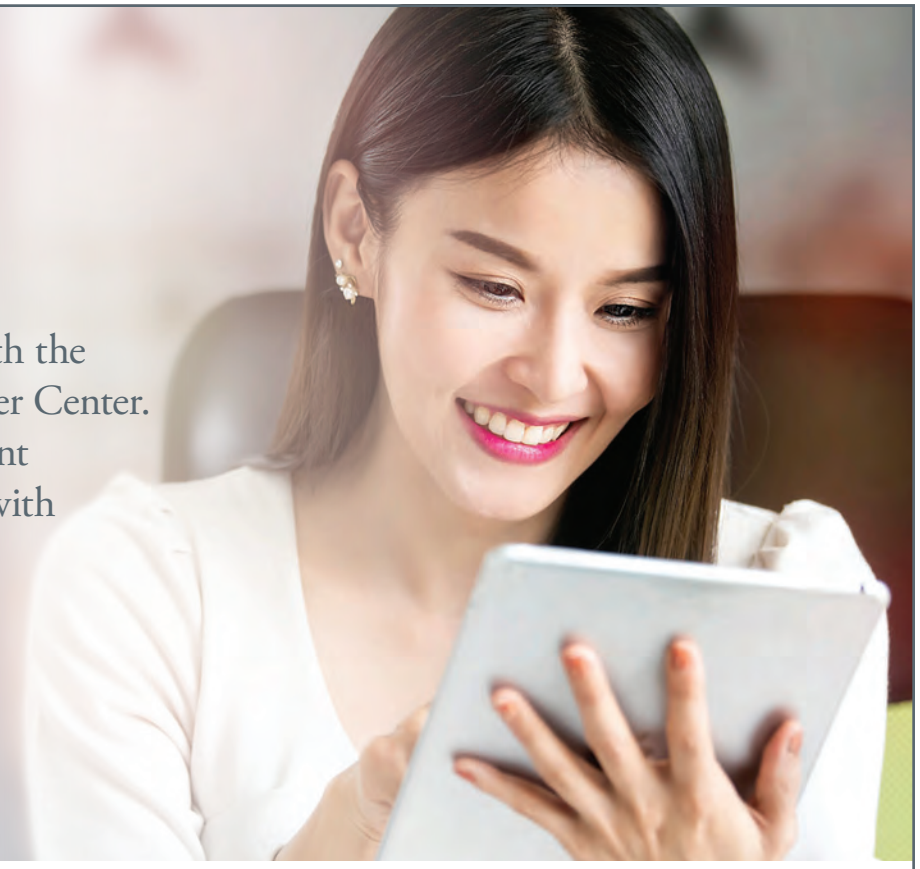

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CELEBRATING 100 YEARS

ON THE COVER:
Exterior of the United States Supreme Court in Washington D.C. at nightfall.

MICHIGAN
BAR JOURNAL

FEBRUARY 2022 • VOL. 101 • NO. 02

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COLUMNS

NOTICES

CORRECTIONS

A photograph in the December 2021 Michigan Bar Journal accompanying a feature honoring Judge Carroll Little was not Mr. Little. Mr. Little, an administrative law judge for more than 47 years, passed away in August 2021 at age 99.

The Michigan Bar Journal regrets the error.

Discover how one lawyer made $315,000 in less than a minute!

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2022 MEETINGS

BOARD OF COMMISSIONERS

MARCH 4, 2022 (IF NEEDED)
APRIL 8, 2022
JUNE 10, 2022
JULY 22, 2022
SEPTEMBER 16, 2022

REPRESENTATIVE ASSEMBLY

APRIL 9, 2022
SEPTEMBER 17, 2022

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MEMBER SUSPENSIONS
FOR NONPAYMENT OF DUES

The list of active attorneys who are suspended for nonpayment of their State Bar of Michigan 2021-2022 dues is published on the State Bar's website at michbar.org/generalinfo/pdfs/suspension.pdf.

In accordance with Rule 4 of the Supreme Court's Rules Concerning the State Bar of Michigan, these attorneys are suspended from active membership effective February 12, 2021, and are ineligible to practice law in the state.

For the most current status of each attorney, see our member directory at directory.michbar.org.

STATE BAR OF MICHIGAN

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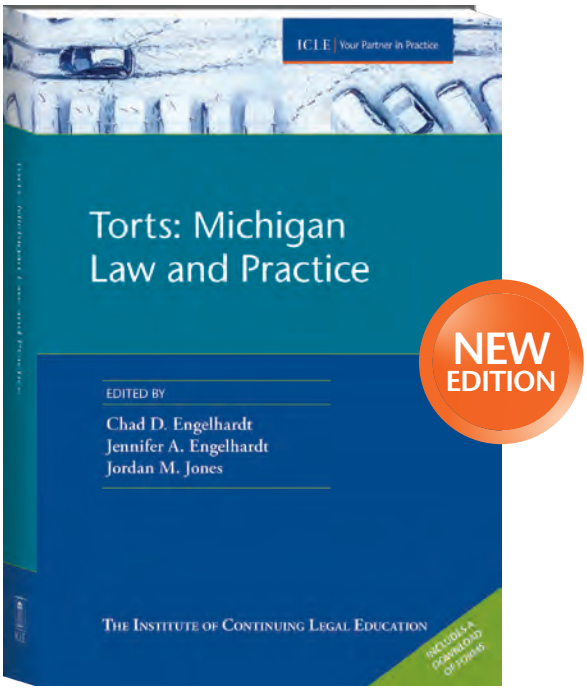

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FROM THE PRESIDENT

DANA WARNEZ

At the finish line

SELECTING OUR NEW EXECUTIVE DIRECTOR

Recently, I got home from a run on a gloriously crisp, bright winter day and went to the backyard to get some firewood to take into the house. When I say backyard, I should say the lakeside of the property where my grandfather built a cottage on Anchor Bay/ Lake St. Clair in Chesterfield Township and where I have been spending time when I'm not at my mom's house in Warren.

As I walked out to the woodpile, I saw two people, perhaps a dad and his son, on the ice with hockey sticks, skating by with the family dog. I grabbed my phone to take a movie of it; while it's common to see fishing shanties, this was the first time I've ever seen people actually skate on the lake. As I raised my phone to record the scene, the boy and his dog shot out together in a race to see which one of them could go the fastest. It reminded me of all that was good about my childhood (I played a lot of youth sports, including ice hockey in high school) and how good it feels to give all you have to accomplish something, especially when you're doing something you love.

Having said all that, you might ask what this has to do with selecting Peter Cunningham as the sixth executive director of the State Bar of Michigan.

First, I am completely confident that Peter Cunningham will put his head down and work hard with integrity, loyalty, and dedication to the State Bar of Michigan and its members. He will serve the legal profession with the same love and determination as that boy and his dog setting off on their race. Cunningham begins his new role starting March 1, so I will wait to share more about him.

The second connection, and what I really want to share with you now, is just how much commitment, energy, and thoughtfulness the Executive Director Search Committee gave in executing the search process that culminated with the recommendation to hire Peter Cunningham. Committee members knew that taking on the challenge of selecting our next executive director to step in after Janet Welch's retirement was not going to be easy. The committee began its work in April and put forth the time and effort necessary to take methodical strides forward and do our best to fairly evaluate each candidate. The committee maintained a disciplined commitment to the hiring process that was established and kept its unwavering focus on the finish line—identifying the candidate best suited to be our next executive director.

The Executive Director Search Committee was composed of past SBM presidents Robert Buchanan, Jennifer Greico, Lori Buiteweg, Julie Fershtman, and Ronald Keefe, along with past Representative Assembly Chair Chelsea Rebeck, current Young Lawyers Section Chair Kristina Bilowus, and current Board of Commissioners members including myself, President-Elect James Heath, and commissioner Erika Bryant.

We determined in the initial stages of the search that, in addition to having the support of SBM executive coordinator Margaret Bossenbery, it would be beneficial to have some consulting assistance. Our chosen consultant, Elizabeth Derrico, came to us with significant expertise in her field — she began her career in bar association work, serving with the New York State Bar as communications director for 10 years and associate executive director for another three years. Derrico expanded the scope of her work on a national scale as an associate director with the American Bar Association Division of Bar Services for nearly two decades. Since 2018, she

has focused her energy on providing private consulting services for bar associations.

With Derrico's help, the search committee understood that the first step of the process was creating a job description. The committee wanted very much to incorporate into the description those attributes and skills our stakeholders thought would be essential and important for our new executive director to have. To find this out, we polled members of the Representative Assembly, the Board of Commissioners, our section and committee chairs, past presidents, and SBM staff to gather the requisite feedback.

Committee members knew that taking on the challenging of selecting our next executive director to step in after Janet Welch's retirement was not going to be easy.

Once this stakeholder feedback was available, the search committee reviewed the information, discussed and approved the job description, and set out to recruit a pool of diverse, high-quality candidates. The job description was posted on the SBM website and with the Michigan Society of Association Executives, the ABA Division for Bar Services Job Announcement Board, Indeed, LinkedIn, and the National Black MBA Association. Committee members also used their personal networks to encourage interested and qualified candidates to apply.

The application period closed, and more than 50 candidates expressed interest in becoming our next executive director. The committee carefully reviewed the information and narrowed the number of candidates down to approximately 15 for first-round interviews. Our committee, with Derrico's assistance, created a series of questions designed to better understand each candidate's talents, motivations, interests, experiences, and knowledge of and commitment to our strategic plan. The committee conducted 30-minute interviews with each candidate, then identified four finalists whom we thought would be suitable for the position.

The search committee, once again with Derrico's help, staged the final round of interviews using a compiled set of questions designed to address each candidate's management style, leadership, depth of relationships within legal community, governance, and skill sets. Furthermore, the search committee required each of the final candidates to make a presentation about a predetermined scenario as if that person were the executive director appearing before the Board of Commissioners. Each finalist was asked the same questions and graded using agreed-upon metrics developed with the stakeholder's guidance and feedback in mind.

The last piece of the process was soliciting input from the SBM staff. The search committee and Derrico created a process to give the staff the opportunity to ask questions similar to those used by the committee and allow them to evaluate the four finalists. Staff members selected to participate in interviewing the final candidates were chosen carefully — because some of the finalists were internal, none of the participants could report to any of the final candidates. The staff used the committee's agreed-upon metrics to objectively assess each finalist.

Derrico pulled all the data together into a report and the search committee met to review and debate it all to make its final recommendation. Upon careful review and consideration and based on the metrics and feedback, it was clear that it was in the Bar's best interests to recommend Peter Cunningham as our next executive director. The Board of Commissioners, also after careful review and consideration, unanimously ratified the recommendation.

I am so very grateful for the guidance and support provided by our consultant, Elizabeth Derrico, and I am extremely proud of the work that the search committee did. We brought out the best in each other and we very much reached the finish line having achieved the goal of finding the most appropriate candidate to lead the State Bar in the years to come.

To the members of the search committee, please know that your service throughout the strenuous process speaks volumes about your love for and commitment to the Bar; each of you deserves much recognition. I extend my sincere and deep gratitude to all members of our search committee for their excellent service. I also thank Elizabeth Derrico and Margaret Bossenbery for the excellent support they provided to the search group.

Now at the finish line, we can look back at the work we did and enjoy that feeling of knowing we have given all we have to accomplish our goal while doing something we love.

IN BRIEF

ABA HOUSE OF DELEGATES VACANCY 2022

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

ABA House of Delegates – State Bar Delegate: Two vacancies for a two-year term beginning at the close of the ABA Annual Meeting in August 2022.

The ABA House of Delegates has the ultimate responsibility for establishing association policy, both as to the administration of the association and its positions on professional and public issues. The House of Delegates 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 association's 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 1, 2022.

Applications received after the deadline will not be considered.

Those applying for an agency appointment should submit a resume 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 to the ABA. Applications should be emailed to mbossenbery@michbar.org.

2022 REPRESENTATIVE ASSEMBLY AWARDS

Nominations are now being accepted for two State Bar of Michigan Representative Assembly awards honoring attorneys for their outstanding achievements.

The Michael Franck Award is presented to a Michigan attorney for contributions to the improvement of the legal profession. The Unsung Hero Award honors a Michigan attorney who exhibits the highest standards of practice and commitment for the benefit of others. Both awards are given annually.

Nominations forms are available at www.michbar.org/generalinfo/awards and are due by Saturday, Feb. 26. Nominees must be State Bar of Michigan members in good standing. The honors can be for contributions made in the past year or by virtue of cumulative effort or service.

The Representative Assembly Nomination and Awards Committee will review the submissions and select the recipients. The Representative Assembly is the final policymaking body of the State Bar of Michigan.

For more information, contact Carrie Sharlow at repassembly@michbar.org or (517) 346-6317.

SECTION BRIEFS

APPELLATE PRACTICE SECTION

The Appellate Practice Section has two upcoming webinars. The first addresses the use of technology on appeal and will be held on March 24. The second covers free legal research resources and will be held on June 16. Please visit the Appellate Practice Section webpage and subscribe to the section's SBM Connect emails to receive updates and registration information.

BUSINESS LAW SECTION

The Business Law Institute will be held on Oct. 7 in Grand Rapids. Stay tuned for further information. Congratulations to Douglas Toering, the recipient of the 2021 Schulman Outstanding Business Lawyer Award. He was honored at the section's annual meeting in September. Visit http://connect.michbar.org/businesslaw/home to learn about section events.

CANNABIS LAW SECTION

The Cannabis Law Section held a December webinar on municipal law featuring Denise Pollicella and Barton Morris. A new link was created during the webinar due to a Zoom bomb attack. The webinar series continued in January with new security measures and recordings of past webinars are available on our SBM page. The first set of new MRA rules should be adopted soon. CLS will schedule a training on the amendments once adopted.

FAMILY LAW SECTION

The Family Law Section's next council meeting is scheduled for March 5 at the Amway Grand Hotel in Grand Rapids. All section members are invited to attend this in-person meeting. Breakfast and networking starts at 9 a.m., and the council meeting begins promptly at 9:30 a.m. and typically ends around noon.

HEALTH CARE LAW SECTION

The 28th Annual Health Law Institute will be held in person on March 8-9. The event will offer updates on state and federal regulations including fraud and abuse and Stark regulations and provide guidance on hot topics such as ransomware and cybersecurity attacks, reimbursement issues, and diversity and inclusion in health care. For more information, go to www.icle.org/ health.

GOVERNMENT LAW SECTION

The Government Law Section recently adopted a mission statement: "To serve its members and the community at large by fostering public trust in the law, advancing the competent, civil, and ethical practice of governmental law, providing education, training, communication and support among its members, advancing government law understanding before all branches of government, and proactively encouraging public service." Meet with us at our Feb. 11 winter seminar at Summit on the Park in Canton, our June 24-25 summer conference at Grand Traverse Resort in Acme, and our Sept. 10 annual meeting at a site to be determined.

IMMIGRATION LAW SECTION

The Biden administration is trying what every administration since 1996 has tried: comprehensive immigration reform. So far there are bits and pieces of policy changes but nothing substantive yet. We are hopeful that "Dreamers" will have a secure future as well as many of the 11 million undocumented

immigrants who have been major contributors to our communities and economies over the years. Crossing our fingers for something fair and humane. Stay tuned!

INSURANCE AND INDEMNITY LAW SECTION

Please join us for our next business meeting at the Detroit Athletic Club on April 14 at 4 p.m., followed immediately by a back-to-the-future discussion with prior chairs for a renewal of our five-year strategic plan. Space is limited. For details on our next business meeting and our 2022 scholarship program, visit us on Facebook or at https://connect.michbar.org/insurance/home.

INTELLECTUAL PROPERTY LAW SECTION

The IP Law Section spring IP seminar will be held virtually on March 3. The 47th annual Summer IP Institute will be held in person from July 21-23 at the Grand Hotel on Mackinac Island. Recent seminars are also available on demand. Visit https://www.icle.org/modules/store/seminars to register.

LABOR & EMPLOYMENT LAW SECTION

Join us on Feb. 17 from noon-1:30 p.m. for an engaging conversation about the various concerns and legal issues that can arise when an employee discloses a disability to an employer. Panelists for the webinar presented by the section's Diversity and Wellness Committee include Angela Walker, whose practice focuses on the workplace disability rights of employees; Michelle Crockett, who advises and defends employers in employment-related matters; and Jeanne Goldberg, senior attorney in the Office of Legal Counsel of the Equal Employment Opportunity Commission in Washington, who works extensively on disability rights issues. We encourage you to grab a sandwich and log in for this important conversation.

LGBTQA SECTION

The LGBTQA Section submitted an amicus brief in support of defendant-appellants to the Michigan Supreme Court in the case *Rouch World, LLC and Uprooted Electrolysis, LLC v. Department of Civil Rights and Director of Department of Civil Rights*. The section also presented to the Michigan Judicial Institute for a second time on "Being a Culturally Competent Court: Fairness and Access to Justice for LGBTQ+ Court Users."

RELIGIOUS LIBERTY LAW SECTION

This year, the section is focusing on providing resources and benefits for its members. Councilperson David Campbell is organizing a day at the Supreme Court in 2023, which is tentatively scheduled for Tuesday, March 21, 2023. Watch for emails regarding a section-wide coffee event this winter and a luncheon on the west side of the state this spring. Tracey Lee continues her excellent work on the section's biannual newsletter.

SOCIAL SECURITY SECTION

We will livestream a free seminar on our YouTube channel on Feb. 11 starting at 9 am. Register through our section email at statebarmichigansocsecsection@gmail.com. The format is a roundtable discussion with a question-and-answer segment featuring Social Security attorneys from across the state. Also, our summer seminar will be held at Boyne Mountain in Boyne Falls from June 12-14. Join our section listserv for updates.

IN MEMORIAM

JERALD N. AARON, P10003, of Pinckney, died April 21, 2021. He was born in 1947, graduated from Wayne State University Law School, and was admitted to the Bar in 1972.

DEAN D. ALAN, P29237, of Mount Clemens, died Sept. 2, 2021. He was born in 1953, graduated from University of Detroit School of Law, and was admitted to the Bar in 1978.

WILLIAM F. ANHUT, P10212, of Ypsilanti, died Oct. 23, 2021. He was born in 1929, graduated from University of Michigan Law School, and was admitted to the Bar in 1956.

HENRY BASKIN, P10520, of Birmingham, died Oct. 2, 2021. He was born in 1933, graduated from Wayne State University Law School, and was admitted to the Bar in 1958.

RUSSELL B. BAUGH, P29531, of Traverse City, died Aug. 29, 2021. He was born in 1953, graduated from Detroit College of Law, and was admitted to the Bar in 1978.

DONALD E. BISHOP, P10824, of Rochester, died May 28, 2021. He was born in 1933, graduated from Detroit College of Law, and was admitted to the Bar in 1967.

RICHARD L. BOLHOUSE, P29357, of Grandville, died Dec. 10, 2021. He was born in 1953 and was admitted to the Bar in 1978.

JANE L. BRIGGS-BUNTING, P25977, of Harrisville, died March 23, 2021. She was born in 1950, graduated from University of Detroit School of Law, and was admitted to the Bar in 1976.

JOHN F. BROWER, P44950, of Brighton, died July 27, 2021. He was born in 1947, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1995.

THOMAS C. CAREY, P11607, of Detroit, died Aug. 15, 2021. He was born in 1944 and was admitted to the Bar in 1971.

HON. RICHARD J. CELELLO, P24291, of Iron Mountain, died Nov. 13, 2021. He was born in 1948 and was admitted to the Bar in 1974.

THOMAS R. CONKLIN, P29310, of Osprey, Fla., died Sept. 18, 2021. He was born in 1949, graduated from Detroit College of Law, and was admitted to the Bar in 1978.

WILLIE J. DAVIS, P25426, of Southfield, died March 18, 2021. He was born in 1948, graduated from Wayne State University Law School, and was admitted to the Bar in 1975.

ANTONIO FORCELLINI, P13561, of Northville, died July 14, 2021. He was born in 1943, graduated from Wayne State University Law School, and was admitted to the Bar in 1968.

SAM W. FRIIA, P13734, of Albion, died Sept. 3, 2021. He was born in 1930, graduated from Detroit College of Law, and was admitted to the Bar in 1969.

JOSEPH J. GOLUBAN, P23648, of Riverview, died April 10, 2021. He was born in 1939, graduated from Wayne State University Law School, and was admitted to the Bar in 1974.

HON. CASPER O. GRATHWOHL, P14282, of Notre Dame, Ind., died June 17, 2021. He was born in 1934, graduated from University of Michigan Law School, and was admitted to the Bar in 1965.

DAVID P. GRUNOW, P27768, of Flat Rock, died Nov. 20, 2021. He was born in 1951, graduated from Wayne State University Law School, and was admitted to the Bar in 1977.

DOUGLAS L. HENNEY, P33807, of Olivet, died March 9, 2021. He was born in 1953, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1982.

HON. GARY R. HOLMAN, P15079, of Hastings, died May 4, 2021. He was born in 1942, graduated from Wayne State University Law School, and was admitted to the Bar in 1969.

EDWARD J. HOORT, P25561, of Flint, died Feb. 23, 2021. He was born in 1950, graduated from University of Detroit School of Law, and was admitted to the Bar in 1975.

BRIAN V. HOWE, P15182, of Canton, died Nov. 12, 2021. He was born in 1943, graduated from Wayne State University Law School, and was admitted to the Bar in 1972.

MARY KAY KANE, P15680, of San Francisco, Calif., died June 3, 2021. She was born in 1946, graduated from University of Michigan Law School, and was admitted to the Bar in 1972.

CARL G. KARLSTROM, P15717, of Clarkston, died Oct. 7, 2021. He was born in 1939, graduated from Wayne State University Law School, and was admitted to the Bar in 1967.

PERCY L. LEWIS, P38072, of Bloomfield Hills, died July 28, 2021. He was born in 1944 and was admitted to the Bar in 1985.

NORMAN L. LIPPITT, P16716, of Birmingham, died July 26, 2021. He was born in 1936, graduated from Detroit College of Law, and was admitted to the Bar in 1961.

HON. CARROLL D. LITTLE, P16732, of Detroit, died Aug. 12, 2021. He was born in 1922, graduated from Wayne State University Law School, and was admitted to the Bar in 1957.

WILLIAM L. LITTLEJOHN JR., P55040, of Holland, died May 8, 2021. He was born in 1931 and was admitted to the Bar in 1996.

JOSEPH H. LUPLOW, P39752, of Saginaw, died June 8, 2021. He was born in 1949, graduated from Detroit College of Law, and was admitted to the Bar in 1987.

WILLIAM E. MCDONALD JR., P36844, of Grand Rapids, died March 23, 2021. He was born in 1955, graduated from Detroit College of Law, and was admitted to the Bar in 1984.

JAMES L. MEYER, P17663, of Detroit, died Feb. 1, 2021. He was born in 1934, graduated from Detroit College of Law, and was admitted to the Bar in 1973.

JOHN F. MORREALE, P66457, of Glen Ellyn, Ill., died Feb. 26, 2021. He was born in 1939 and was admitted to the Bar in 2003.

RALPH E. MUSILLI, P18132, of Saint Clair Shores, died Feb. 23, 2021. He was born in 1943, graduated from Detroit College of Law, and was admitted to the Bar in 1969.

NORM R. PERRY, P25847, of Berrien Springs, died Dec. 12, 2021. He was born in 1946 and was admitted to the Bar in 1970.

BLAISE A. REPASKY, P19369, of Woodhaven, died Nov. 14, 2021. He was born in 1943, graduated from University of Detroit School of Law, and was admitted to the Bar in 1973.

LAWRENCE H. RUDZKI, P19751, of Rochester Hills, died Aug. 26, 2021. He was born in 1938, graduated from Wayne State University Law School, and was admitted to the Bar in 1963.

JOSEPH A. SHORE, P20389, of Brighton, died July 8, 2021. He was born in 1931, graduated from Wayne State University Law School, and was admitted to the Bar in 1962.

GEORGE C. STEWART, P25135, of Ann Arbor, died Dec. 19, 2021. He was born in 1934, graduated from University of Michigan Law School, and was admitted to the Bar in 1960.

JOHN T. SVENDSEN, P21183, of Grand Rapids, died March 18, 2021. He was born in 1942, graduated from University of Michigan Law School, and was admitted to the Bar in 1968.

MARTIN A. TYCKOSKI, P21651, of Flint, died July 21, 2021. He was born in 1945 and was admitted to the Bar in 1972.

JAMES J. WASCHA, P23077, of Grand Blanc, died May 6, 2021. He was born in 1946, graduated from Wayne State University Law School, and was admitted to the Bar in 1973.

RICHARD J. ZETTEL, P36594, of Cleveland, Ohio, died April 24, 2021. He was born in 1948, graduated from Detroit College of Law, and was admitted to the Bar in 1984.

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.

INTEREST RATES FOR MONEY JUDGMENTS

Subsection 6 of Section 6013, and Subsection 2 of Section 6455 of Public Act No. 236 of 1961, as amended, (M.C.L. Sections 600.6013 and 600.6455) state the following:

Sec. 6013(6) Except as otherwise provided by subsection (5) and subject to subsection (11), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action shall be calculated at 6-month intervals from the date of filing the complaint at a rate of interest which is equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, pursuant to this section.

Sec. 6455 (2) Except as otherwise provided in this subsection, for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action shall be calculated from the date of filing the complaint at a rate of interest which is equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, pursuant to this section.

Pursuant to the above requirements, the State Treasurer of the State of Michigan, hereby certify that 1.045% was the average high yield paid at auctions of 5-year U.S. Treasury Notes during the six months preceding January 1, 2022.

HISTORICAL INTEREST RATES

TIME PERIOD	INTEREST RATE
1/1/2022	1.045%
7/1/2021	0.739%
1/1/2021	0.330%
7/1/2020	0.699%
1/1/2020	1.617%
7/1/2019	2.235%
1/1/2019	2.848%
7/1/2018	2.687%
1/1/2018	1.984%
7/1/2017	1.902%
1/1/2017	1.426%
7/1/2016	1.337%
1/1/2016	1.571%
7/1/2015	1.468%
1/1/2015	1.678%
7/1/2014	1.622%
1/1/2014	1.452%
7/1/2013	0.944%
1/1/2013	0.687%
7/1/2012	0.871%
1/1/2012	1.083%
7/1/2011	2.007%
1/1/2011	1.553%
7/1/2010	2.339%
1/1/2010	2.480%
7/1/2009	2.101%
1/1/2009	2.695%
7/1/2008	3.063%
1/1/2008	4.033%
7/1/2007	4.741%
1/1/2007	4.701%
7/1/2006	4.815%
1/1/2006	4.221%
7/1/2005	3.845%
1/1/2005	3.529%
7/1/2004	3.357%

TIME PERIOD	INTEREST RATE
1/1/2004	3.295%
7/1/2003	2.603%
1/1/2003	3.189%
7/1/2002	4.360%
1/1/2002	4.140%
7/1/2001	4.782%
1/1/2001	5.965%
7/1/2000	6.473%
1/1/2000	5.756%
7/1/1999	5.067%
1/1/1999	4.834%
7/1/1998	5.601%
1/1/1998	5.920%
7/1/1997	6.497%
1/1/1997	6.340%
7/1/1996	6.162%
1/1/1996	5.953%
7/1/1995	6.813%
1/1/1995	7.380%
7/1/1994	6.128%
1/1/1994	5.025%
7/1/1993	5.313%
1/1/1993	5.797%
7/1/1992	6.680%
1/1/1992	7.002%
7/1/1991	7.715%
1/1/1991	8.260%
7/1/1990	8.535%
1/1/1990	8.015%
7/1/1989	9.105%
1/1/1989	9.005%
7/1/1988	8.210%
1/1/1988	8.390%
7/1/1987	7.500%
1/1/1987	6.660%

PUBLIC POLICY REPORT

2021-2022 LEGISLATURE

HB 5340 (Whiteford) Courts: other; Courts: family division. Courts: other; family treatment court; create. Amends sec. 1082 of 1961 PA 236 (MCL 600.1082) & adds ch. 10D.

POSITION:
Support the concept of family treatment courts but oppose the requirement of participant waiver of counsel and the categorical exclusion of violent offenders.

HB 5436 (Fink) Criminal procedure: bail. Criminal procedure: bail; procedure for pretrial release determinations, criteria a court must consider for pretrial release determination, and reporting of data on pretrial release decisions; provide for. Amends sec. 6 & 6a, ch. V of 1927 PA 175 (MCL 765.6 & 765.6a) & adds sec. 6g, ch. V.

HB 5437 (Yancey) Criminal procedure: bail. Criminal procedure: bail; criteria a court must consider before imposing certain conditions of release and due process hearing related to pretrial detention; provide for. Amends sec. 6b.

HB 5438 (VanWoerkom) Criminal procedure: other. Criminal procedure: other; certain definitions in the code of criminal procedure and time period required for disposition of criminal charges; provide for. Amends sec. 1, ch. I & sec. 1, ch. VIII of 1927 PA 175 (MCL 761.1 & 768.1).

HB 5439 (Young) Criminal procedure: bail. Criminal procedure: bail; interim bail bonds for misdemeanors; modify. Amends sec. 1 of 1961 PA 44 (MCL 780.581).

HB 5440 (LaGrand) Criminal procedure: bail; Criminal procedure: pretrial procedure; Criminal procedure: sentencing. Criminal procedure: bail; requirements for the use of a pretrial risk assessment tool by a court making bail decision; create. Amends 1927 PA 175 (MCL 760.1 - 7677.69) by adding sec. 6f, ch. V.

HB 5441 (Johnson) Criminal procedure: bail; Traffic control: violations. Criminal procedure: bail; act that provides bail for traffic offenses or misdemeanors; repeal. Repeals 1966 PA 257 (MCL 780.61 - 780.73).

HB 5442 (Meerman) Traffic control: driver license; Criminal procedure: bail. Traffic control: driver license; reference to surrendering license as condition of pretrial release and certain other references; amend to reflect changes in code of criminal procedure. Amends secs. 311 & 727 of 1949 PA 300 (MCL 257.311 & 257.727) & repeals sec. 311a of 1949 PA 300 (MCL 257.311a).

HB 5443 (Brann) Criminal procedure: bail; Family law: child support. Criminal procedure: bail; setting of bond related to spousal or child support arrearage; modify. Amends sec. 165 of 1931 PA 328 (MCL 750.165).

POSITION: Support bail/bond legislation that aligns with the recommendations of the Michigan Joint Task Force on Jail and Pretrial Incarceration — namely, HB 5436-HB 5439 and HB 5441-HB 5443 — and to oppose HB 5440, as it was not based upon any task force recommendation.

(Position adopted by roll call vote. Commissioners voting in support of the position: Anderson, Danielle; Anderson, David; Bennett; Bilowus; Bryant; Burrell; Christenson; Clement; Detzler; Easterly; Gant; Hamameh; Heath; Howlett; Kuchon; Larsen; Low; McGill; Newman; Ohanesian; Orvis; Simmons; Simpson; Sinas; Washington; Warnez. Commissioners voting in opposition of the position: Mason; Walton; Wisniewski.)

HB 5482 (Howell) Courts: drug court. Courts: drug court; eligibility to drug treatment courts; modify. Amends sec. 1066 of 1961 PA 236 (MCL 600.1066).

POSITION: Support and recommend an amendment to MCL 600.1064(1) to align that provision's language related to drug treatment court eligibility requirements for violent offenders with the language proposed in HB 5482.

HB 5483 (LaGrand) Courts: other; Mental health: other. Courts: other; eligibility for mental health court participants; modify. Amends sec. 1093 of 1961 PA 236 (MCL 600.1093).

POSITION: Support.

HB 5484 (Yancey) Courts: drug court. Courts: drug court; termination procedure for drug treatment courts; modify. Amends sec. 1074 of 1961 PA 236 (MCL 600.1074).

POSITION: Support and recommend an amendment to MCL 600.1064(1) to align that provision's language related to drug treatment court eligibility requirements for violent offenders with the language proposed in HB 5482.

HB 5541 (Fink) Occupations: attorneys; Occupations: individual licensing and registration; State agencies (existing): boards and commissions. Occupations: attorneys; requirements for admission to state bar; modify. Amends secs. 931, 934 & 946 of 1961 PA 236 (MCL 600.931 et seq.) & adds sec. 935.

POSITION: Support.

HB 5593 (Calley) Criminal procedure: mental capacity; Mental health: community mental health. Criminal procedure: mental capacity; community mental health oversight of competency exams for defendants charged with misdemeanors; provide for. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding sec. 20b to ch. VIII.

POSITION: Support providing defendants in need with mental health referrals and treatment, but oppose the legislation as drafted.

IN THE HALL OF JUSTICE

Proposed Amendments of Rules 6.001, 6.003, 6.006, 6.102, 6.103, 6.106, 6.445, 6.615, and 6.933 and Proposed Additions of Rules 6.105, 6.441, and 6.450 of the Michigan Court Rules (ADM File No. 2021-41) – Scope; Applicability of Civil Rules; Superseded Rules and Statutes; Definitions; Video and Audio Proceedings; Arrest on a Warrant; Voluntary Appearance; Pretrial Release; Early Probation Discharge; Probation Revocation; Technical Probation Violation Acknowledgment; Misdemeanor Traffic Cases; Juvenile Probation Revocation (See Michigan Bar Journal January 2022, p 58)

STATUS: Comment Period Expires 3/1/22.
POSITION: Support.

Proposed Amendments of Rules 6.302 and 6.310 of the Michigan Court Rules (ADM File No. 2021-05) – Pleas of Guilty and Nolo Contendere; Withdrawal or Vacation of Plea (See Michigan Bar Journal January 2022, p 59)

STATUS: Comment Period Expires 3/1/22.
POSITION: Support with additional language added to Rule 6.302 to state explicitly that the defendant be allowed to withdraw plea should the guideline range be different than the one stated on the plea agreement.

Proposed Amendment of Rule 7.212 of the Michigan Court Rules (ADM File No. 2019-16) – Briefs (See Michigan Bar Journal December 2021, p 66)

STATUS: Comment Period Expires 3/1/22.
POSITION: Support.

Amendment of Rule 7.306 of the Michigan Court Rules (ADM File No. 2021-45) – Original Proceedings (See Michigan Bar Journal December 2021, p 67)

STATUS: Comment Period Expires 2/1/22.
POSITION: Support.

Proposed Amendment of Rule 8.110 of the Michigan Court Rules (ADM File No. 2021-31) – Chief Judge Rule (See Michigan Bar Journal December 2021, p 68)

STATUS: Comment Period Expires 2/1/22.
POSITION: Support Option D.

1940s

As part of our celebration of the Michigan Bar Journal's 100th year, each month we highlight important events and legal news in a decade-by-decade special report. This month, we look at the 1940s, a decade shaped by World War II.

At the decade's beginning, American isolationism declined; the country abruptly entered the war following an attack on its shores. Fierce battles in the Pacific, Europe, and north Africa exacted a tragic toll on U.S. forces, and Americans at home anxiously sought war news on the radio, in newspapers, and from movie newsreels. Those on the home front endured hardships like rationing of food and other essentials and participated in war efforts like recycling and buying bonds. When the Allies defeated the Axis in 1945, our soldiers, sailors, and Marines returned home and reentered civilian life, often displacing the women who had assumed their jobs. Struggles to understand and navigate a global landscape the war had radically altered, a tremendous economic expansion, and the first wave of baby boomers closed out the decade.

Radio, which was in every household and cost nothing, was a major source of news and where Americans listened to baseball games, big band and orchestral music, and pop hits from Bing Crosby, the Andrews Sisters, and Frank Sinatra. Popular radio comedies included "Fibber McGee and Molly," "The Baby Snooks Show," and "Lum and Abner" as well as shows hosted by Jack Benny, George Burns and Gracie Allen, Bob Hope, and Dean Martin and Jerry Lewis. Radio dramas included "The Whistler," "Inner Sanctum Mystery," "The Lone Ranger," and "Lux Radio Theater," which presented radio adaptations of current movies. Speaking of film, for a modest price, moviegoers could escape for a few hours to watch a cartoon, short feature, newsreel, and double feature of movies like "Fantasia," "Casablanca," "Double Indemnity," "It's a Wonderful Life," and "Mr. Blandings Builds His Dream House." So-called "slick" magazines with glossy pages like The Saturday Evening Post, Colliers, and Good Housekeeping included fiction from leading authors and illustrations by well-known artists; cheaper pulp magazines printed stories and serials in the western, detective, science fiction, and horror genres; and Look and Life were general interest magazines with a strong emphasis on photographs.

FEB. 5, 1940

Frank Murphy — former high commissioner to the Philippine Islands, Detroit mayor, Michigan governor, and U.S. attorney general — is sworn in as a U.S. Supreme Court justice, serving until his death in 1949. His 1942 unanimous opinion in *Chaplinsky v New Hampshire* established the fighting-words exception to freedom of speech.

→

OCT. 29, 1940

Though still focusing on aid to Britain and other allies fighting in Europe, the U.S. conducts its first peacetime draft lottery.

→

NOV. 5, 1940

Franklin Delano Roosevelt becomes the first president elected to a third term.

↓

JULY 11, 1941

New York Yankees centerfielder Joe DiMaggio hits safely in his 56th consecutive game, a Major League Baseball record that remains unbroken.

←

DECEMBER 7, 1941

A surprise dawn attack by Japanese aircraft on the U.S. pacific fleet home base at Pearl Harbor in Hawaii kills more than 2,300 military personnel and civilians and destroys five battleships and more than 200 aircraft. The U.S. declares war on Japan the next day; Germany and Italy declare war on the U.S. on December 11.

Looking back: 1940s

BY JOHN O. JUROSZEK

AUGUST 7, 1942
U.S. Marines land on the South Pacific island of Guadalcanal, the first American offensive of WWII. They suffer horrific casualties but succeed in taking the island.

MAY 30, 1943
Founded in part in response to the large number of males serving in the war, the All-American Girls Professional Baseball League plays its first game. The 1992 movie "A League of Their Own," starring Geena Davis and Tom Hanks, is based on the AAGPBL.

JUNE 20-22, 1943
A massive and violent race riot erupts in Detroit. Finally quelled by 6,000 army troops with tanks, it leaves 34 dead. It is the deadliest of five such riots in the country that summer. Axis propaganda uses the riots as proof of the Allies' moral decline.

1943
Penicillin, discovered in 1928 and first used successfully in 1942, begins to be mass-produced. Anticipating the casualties from D-Day, the U.S. government orders millions of doses. The antibiotic makes a significant difference in the war, saving large numbers of Allied lives.

The 1940s begin with the world at war after Hitler's September 1939 invasion of Poland. America does not enter the war immediately. A desire for isolationism left over from World War I lingers, though it is waning fast, and Naziism still has admirers in the United States. Even though the economy has improved under the New Deal, the Great Depression is not yet over.

At the decade's dawning, a Michigan State Bar Journal subscription is $3.50 a year ($4 for foreign subscribers) for nine issues. Sporting the table of contents on the cover, most issues include local and state bar news, case notes, committee reports, one or two articles, and similar features of general interest to lawyers as well as the occasional joke and poem. On the agenda for the 1940 State Bar meeting in Lansing — tucked in among a few educational programs — are a "Speechless Dinner Dance and Floor Show," a meeting for lawyers under 36 "interested in forming a Junior Bar Section," a women's program with "a Recital and Tea" arranged by the "Wives of Members" for "Ladies attending the Convention," and an ox roast. Presaging the plain English column that will debut later in the century, an article titled "Better Opinions — How?" discusses a recent ABA survey showing that "a great majority of lawyers prefer" short opinions and the "omission of pure dicta." Long opinions "are lacking in clarity and conciseness," "result in an overburden of and confused statements of the law and in excessive burdens upon the work of the research lawyer," and "cause difficult, if not unbearable, expense to the lawyer who makes an effort to buy the published decisions of the courts of the country."

The Dec. 7, 1941, surprise attack on Pearl Harbor plunges the nation fully into World War II. Meat, sugar, milk, and other food staples; tires and other rubber products; and cars are rationed. Having produced war materials for our allies since December 1940 as part of FDR's Arsenal of Democracy, Detroit manufacturing plants begin full-bore production of tanks, planes, and armaments for Uncle Sam. With men enlisting or being drafted, women take jobs in those factories and elsewhere. Blackouts and dim-outs are ordered on the East and West coasts and in Detroit and other industrial areas. Nearly 120,000 Japanese Americans are interned in camps in the United States in the name of national security. Countless land, sea, and air battles are fought in the Pacific, Europe, and north Africa with staggering casualties. Almost nothing stays normal or routine.

The Bar Journal reflects what is happening in the country. In 1942, it publishes appeals for lawyers to mobilize in all manner of capacities — enlistment, civil defense, assisting local draft boards, legal help for service members and veterans — and includes a form that lawyers can return to the State Bar expressing their willingness to enlist or assist "in some form of civilian defense work." There are rosters of lawyers in the military and exhortations to buy war bonds. Lawyers are asked if they are "performing services essential" to the country or the war effort, discouraged "from seeking soft spots for pleasant work," and encouraged to "enter

the combat troops" to demonstrate leadership and "develop themselves individually for their own betterment following the war." We are told that the Navy can use lawyers. The Bar Journal publishes the obituary of Joseph Leo McInerny, who died on Aug. 9, 1942, the first SBM member "to make the supreme sacrifice in this war." Articles with titles like "Termination and Settlement of Ordnance Contracts" appear. Guidance is given for lawyers to "assume an especial responsibility in relation to our alien population." Concerns are raised about "War Time Social Protection," prompted by the significant number of men rejected for military service because of syphilis or gonorrhea infections and the reported increase of prostitution in Michigan, especially among adolescent girls.

Not all Bar Journal pages are devoted to the war, however. The article "Portrayals of Lawyers, Judges and Court Scenes in Motion Pictures During the Year 1943" analyzes whether they are "sympathetic," "unsympathetic," or "touched upon so slightly as to be called 'indifferent'" or played as "straight" or for "comedy."

When World War II finally ends in September 1945, more than 16 million Americans have served in the armed forces, almost 675,000 of them from Michigan; 130,000 Americans were prisoners of war. An estimated 70 to 85 million people have died, almost 420,000 of them Americans. The war's aftermath includes trials of war criminals. In Europe, from November 1945 to October 1946, the International Military Tribunal conducts the Nuremberg trials, prosecuting notorious, high-level Nazi war criminals such as Martin Bormann, Albert Speer, and Hermann Göring. A series of subsequent trials from December 1946 to April 1949 involve Nazi defendants who worked in or ran concentration and death camps. In Tokyo, the International Military Tribunal for the Far East holds similar trials for Japanese war criminals from April 1946 to November 1948.

The Bar Journal published an article by Walter I. McKenzie, a Detroit bankruptcy referee serving as an assistant counsel in the Tokyo trials. In a letter to the editor captioned "Judge Swearingen Writes from Nurnburg," alternate tribunal member Victor C. Swearingen recounts some of his experiences and those of three other Michigan lawyers — Robert M. Toms, Don C. Noggle, and DeHull N. Travis — at the subsequent Nuremberg trials.

As troops return to the United States, the country does its best to rebound. Many military personnel return to work, usually displacing both the women who took on the jobs of the fighting men and the Rosie the Riveters who produced the war materials they needed. Others don't have jobs to go back to. Many use financial benefits offered by the GI Bill: low-cost loans and mortgages and money for education. Others cannot, or cannot benefit as fully, because of the GI Bill's discriminatory aspects. Women are generally encouraged to return to the home. Americans, deprived of many goods by wartime rationing, eagerly buy cars and appliances made in factories that no longer produce the tools of war.

The August 1945 Bar Journal reports that 657 members are returning from the service. In 1946, it publishes an article titled "The Veterans Return to the Law." Another feature addresses lawyers whose business cards announce their return to practice, criticizing the cards' additional mention of war-related public service as serving no purpose other than improperly suggesting "unusual qualifications." The Bar Journal experiments with proto-theme issues, like one collecting articles on "aeronautical law."

The format changes in 1947, adding slicker pages, black-and-white photographs, and covers graced by Michigan luminaries. The war has mostly receded from the Bar Journal's pages, though it publishes a commissioned article called "How Law Is Being Restored in Germany." A new column called "Irrelevant and Immaterial" features humorous anecdotes from members, "preferably about lawyers and courts and clients." They range from "true incidents" to "real hoary old chestnut favorites long stored in memory" with "nothing barred except what the Hays Office or the Postmaster General might censor." The first anecdote comes from Marquette County Prosecutor John D. Voelker, who will later became a Michigan Supreme Court justice and bestselling author. Articles about members' hobbies appear — fly fishing, archery, curling. Both features disappear at year's end. Women lawyers are still guests at teas.

The Bar Journal becomes monthly in 1948 and subscriptions jump to $5 a year ($6 foreign). It experiments with point/counterpoint-style articles: a question followed by discussions labeled "Yes!" and "No!" The 1949 meeting of the Inter-American Bar Association is held in Detroit. The association, which includes almost all the countries in North and South America, first met in Havana in 1941 and subsequently met in Rio de Janeiro; Mexico City; Santiago, Chile; and Lima, Peru.

While the country's economy and optimism expand postwar, new and potentially more deadly challenges emerge. Germany had worked intensively to develop an atomic bomb during the war. The destruction of Hiroshima and Nagasaki revealed to the world that the United States had succeeded in doing so, and other countries race during the second half of the decade to produce their own atomic bombs, particularly our former ally, the Soviet Union. Under wartime Allied agreements, Europe is now divided by an Iron Curtain with the Soviets controlling the eastern and central countries as well as the newly formed East Germany and East Berlin. The Soviet Union blockaded access to West Berlin — wholly surrounded by East Germany — and the U.S. and Britain organize a massive airlift of food and critical supplies. The Cold War has started. And just as they began for the United States, the 1940s end with another war looming on the horizon, this time in Korea.

John O. Juroszek was reporter of decisions for the Michigan Supreme Court and a nonpartisan legislative drafter for the Michigan Legislature. He has been a member of the Michigan Bar Journal Committee and its predecessor since 2006.

JUNE 6, 1944

D-Day, the Allied invasion of Europe, begins on the coast of Normandy in France. Despite enormous casualties, the Allies hold the beaches and begin an arduous push into Germany.

NOV. 7, 1944

FDR is elected to a fourth term. He dies on April 12, 1945, before the end of the war. Vice President Harry S. Truman assumes the presidency.

DEC. 18, 1944

In *Korematsu v U.S.,* the U.S. Supreme Court upholds FDR's Executive Order 9066, which created exclusion zones and led to the internment of Japanese-American citizens in camps within the U.S. Justice Frank Murphy writes a scathing dissent; he is the first U.S. Supreme Court justice to use the word "racism" in an opinion.

MAY 8, 1945

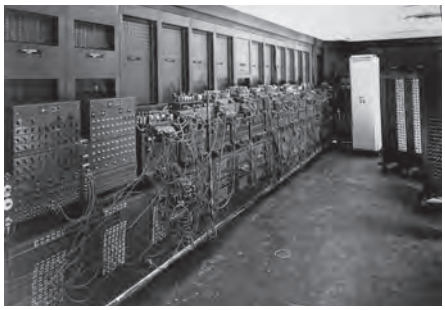
America celebrates V-E Day, Germany's unconditional surrender and the end of WWII in Europe.

AUGUST 1945

The B-29 Enola Gay drops the first atomic bomb on Hiroshima, Japan, on August 6, killing an estimated 100,000 people. Three days later, the Bockscar drops a second atomic bomb on Nagasaki, killing up to 80,000. WWII ends when Japan formally surrenders on Sept. 2.

OCT. 10, 1945

The Detroit Tigers win Game 7 of the World Series, beating the Chicago Cubs 9-3 and winning their second championship.



FEB. 15, 1946

The Electronic Numerical Integrator and Computer (ENIAC) is dedicated at the University of Pennsylvania. Housed in a 1,500-square-foot basement, it is the first programmable, general-purpose digital computer.

OCT. 14, 1947

Flying an experimental Bell X-1 named Glamorous Glennis after his wife, Chuck Yeager is the first human to officially break the sound barrier.

NOV. 2, 1948

Contrary to the infamous Chicago Daily Tribune headline, President Truman wins reelection, defeating New York Gov. Thomas E. Dewey, a native of Owosso, Michigan.

APRIL 4, 1949

The U.S. and 11 other countries sign a mutual defense pact that establishes the North Atlantic Treaty Organization (NATO).

Saying goodbye to Janet Welch

AFTER 15 YEARS, STATE BAR'S EXECUTIVE DIRECTOR RETIRES THIS YEAR

BY MARJORY RAYMER

For 15 years, Janet Welch has been the leader of the State Bar of Michigan. She retires this year, capping a career that earned her a reputation as a master problem solver, crusader for access to justice, national expert on integrated bars, and international thought leader on innovation in the legal profession.

Her tenure is stacked with awards and recognitions, and her impressive résumé is well-documented. There has been little effort to capture that here, because Welch's legacy is so much more than the official transcript of her achievements.

There is an air of regality about Janet Welch. It comes neither from her prowess nor from her position. It is not quite definable, and yet it is clearly apparent to all who meet her. She stands 5 feet, 5 inches tall and might not always wear black, but there isn't much evidence to the contrary. She would never be described as loud or boisterous, and yet she commands the room. Always.

Some of it is perhaps the grace and presence she learned from all those years in ballet, a love that started as a child growing up in Livonia and continued through adulthood, even installing a barre in the family's East Lansing home.

Some of it surely is her incessant intelligence. She approaches all

matters with a logic and analysis so constant that it causes thoughtful pauses and, at times, an almost halted speech.

Her daughter, Mara Harwel, describes Welch as "exacting."

Her son, Andrew Harwel: "In a word, she is unflappable."

The thing is, there is this other part of Welch, too. It's not soft and cuddly. It is, though, intensely kind and caring with jarring sincerity. Her laugh is joyful. Her interest in you, your family, your achievements, and your challenges is earnest. She helps others tackle their problems, and her willingness to assist is both patient and persistent.

In this side, we see the traits that are completely contradictory to her tendency toward precision. Here, we see that while her work is thorough and orderly, her desk is nothing short of a mess, strewn with reports, notes, newspapers, and draft documents. Often, one could find her sitting at her desk at the State Bar, surrounded in the clutter, usually not wearing any shoes.

"She is not at all flighty, but she also cannot ever find her phone," Mara Harwel said.

In short, Welch just doesn't fit well into any standard label.

The Welch family started very conventionally. Like so many others in the late 1940s and early 1950s, their lives were defined by World War II.

Like 4 million[1] other Americans, Welch's father, Robert, enlisted between 1941 and 1942.[2] However, he was among just 3.7% of enlistments that signed on to the Army Reserves,[3] joining just five months after the Air Corps Enlisted Reserve was established.[4]

On Sept. 8, 1944, Capt. Robert Welch was assigned to the 343rd Fighter Squadron, 55th Fighter Group, 8th Air Force,[5] officially a pilot and a good one. Based in England, the 343rd's primary job was protecting bombers on long-range missions.

Five days later, on Sept. 13, 1944, Robert Welch is credited with downing his first and second Nazi planes in air combat over Eisenach and Gotha, Germany. He also lent critical support during the Battle of the Bulge, shooting down one enemy aircraft on Christmas Eve and two more on Christmas Day as part of an air campaign to cut off German supply lines to advancing Nazi troops.[6]

In all, Robert Welch was credited with destroying 12 targets on the ground and six planes in air combat,[7] earning him the title of World War II flying ace for the U.S. Army Air Force. For his service, he was honored with an Air Medal and eight Oak Clusters, a Silver Medal, and the Distinguished Flying Cross.[8]

After returning home from war, Robert Welch married a Detroit girl, Jean Lewis, and remained in the Michigan Air National Guard. They settled into family life and planted roots in Livonia, buying a house in one of the many new neighborhoods sprouting up to house the returning troops and the baby boomer generation. All the houses were tidy, with cookie-cutter frames and the same well-groomed lawns.

He and Jean welcomed their first daughter, Janet, and two years later were a month away from the birth of their second daughter, Jill, when then-Major Welch was one of 1,500 members of the 127th Fighter Wing activated in response to the Korean War.

He was 27 years old and one of the Air Guard's most decorated members.[9] Six weeks after being reactivated and 19 days after the birth of his second child, he was leading four Thunderjets flying formation in a training exercise near Luke Air Force Base, Arizona. Welch's plane and one of the others came too close and collided midair, causing both planes to crash. Robert Eadon Welch died March 23, 1951.[10]

Nothing was ever normal again.

Today, there is still marked sadness when Welch talks about her father, but also a recognition that his untimely death made her who she is.

"I think for sure I don't follow any conventional template, and I don't know whether that is the way I would be if my father hadn't died," Welch said. "The story line just got ripped up when my dad died. I didn't get reinserted into that (typical) narrative because my mother never remarried. … I never got a script to follow. I just did what made sense."

She notes, though, that she also had the opportunity to come of age when society and historic norms were being challenged by both the civil rights and women's rights movements.

So, she got her first job at age 13 helping in the ballet studio that, Welch said, first introduced her to culture. She became the first person in her family to earn a college degree (followed soon after by her sister), an achievement earned by just 8.5% of US women at the time. Then, she took off on her own to Yugoslavia as a Fulbright scholar in 1971 and stayed despite ongoing civil unrest because she "intellectually needed to figure out what was happening with the development of socialism in Yugoslavia and the resolution of historically opposed ethnic cultures within a federated structure." She married and didn't take her husband's name, waited to have children and when she did, she and her husband combined both names to create a new name, unique to their children.

She was told by the hospital's name registrar that they couldn't just create a new last name. "She said, 'Yes, we can,'" daughter Mara Harwel said with a laugh. "Even before she was a lawyer, she was lawyer-minded."

Then, after already building a career — rising to serve as the inaugural director of the state Senate Analysis Section (later a division of the Senate Fiscal Agency) — she decided to quit her job and go to law school.

Not just any law school: the University of Michigan Law School. In her mid-30s. More than a decade after she finished her undergrad (in history with a bit of dabbling in comparative literature from Albion College). Commuting an hour each way to classes. A mother of one at first. Then while expecting her second, even when she was put on bed rest and listened to taped lectures. She finished in two years and graduated cum laude.

Why did she do it? "I guess I knew enough about the law at that point that I was interested in the legal processes and the law, and I thought that it could be an avenue to do interesting things," Welch said.

Then, Welch acknowledges when she went to law school she didn't really have plans for what she would do with the degree once she earned it. Then, she thought again about why she went to law school: "I don't have a good explanation."

But she did it.

"I remember being there. I was only 7 or 8 years old when she graduated," said son Andrew Harwel, also a Michigan Law grad. "I didn't have any sense of how much work she put in. … The ability to do all those things, I can't imagine. I don't know how she did it." Welch held Andrew's hand and carried Mara, who was 13 months old, when she graduated. Afterward, Welch's mother told her that on a trip to Ann Arbor once when she was just a child, the young Welch looked at the Law Quad and said, "I'm going to go there some day."

So maybe that's why.

Janet Welch's children join her on stage as she graduates from the University of Michigan Law School in 1988. Her son, Andrew, would also go on to graduate from Michigan Law and daughter, Mara, went to Yale.

Through it all, Welch had Ben Hare by her side. They met at Albion. Several friends claim to have introduced them, but all Welch remembers for sure is that she agreed to a first date while holding a pan of green beans and wearing a hairnet.

He was on the university's first soccer team. She was a bookworm who worked in the campus cafeteria to make it through school. And, they were extraordinarily similar.

When she went to Yugoslavia, as Mara Harwel describes it, they wrote love letters back and forth. "Then, he said, 'I need to come join you,' and she said, 'OK, fine.'" Both were disciplined and sharp. They shared the same values, or as Welch put it, "a common view of the universe."

"Neither of them were at all interested in rules about how their partnership would work or how their lives would work," Mara Harwel said.

And, they made each other laugh. That shared sense of humor is what Welch talks about first when she talks about Hare.

They married in Yugoslavia, then moved to Vienna for a year before returning home jobless and uncertain about the future. They worked odd jobs, and Hare got his law degree from Cooley Law School. Eventually, they both ended up working for nonpartisan branches of the state Legislature. He wrote bills for the Michigan Legislative Services Bureau. She summarized and analyzed the impact of bills, first for the House Legislative Analysis Section and then in the newly created Senate Analysis Section.

Both Welch and Hare brought their own strength, sense of purpose, and fierce independence to their shared lives.

"My dad did not care what anyone else thought about what he did," Andrew Harwel said. "He had his man bag. He was an early feminist." Similarly, he notes that Welch "has this strong sense of what she believes is right and she is not going to compromise on those lines."

The children were 16 and 9 when Hare was diagnosed with brain cancer. The treatments soon started, and Welch juggled it all. She never once seemed to never flinch, Mara Harwel said.

"Growing up, I always had the feeling that she had all the answers. If anything bad happened, I could go to her and it would work out. She would fix it; she would solve it," Andrew Harwel said. "As I'm older now, I recognize that she doesn't always have all the answers right away, but she always has the calm demeanor."

The cancer spurred Hare's early retirement in 2002. For their 40th wedding anniversary, Welch and Hare took their family to Croatia, showing them the sites and the history of the former Yugoslavia. It remains one of their most special family experiences, Mara Harwel said.

"They had a really long and loving relationship," Mara Harwel said. Ben Hare died June 20, 2017, years after doctors said he would, but still far too soon.

Welch became the first woman to serve as executive director of the State Bar of Michigan in 2007. She didn't actually want the job.

After becoming the first director of the new Senate Analysis Section and graduating from Michigan Law, she served as a clerk for Supreme Court Justice Robert P. Griffin. Then, Welch was named the first general counsel of the Supreme Court, a new position in which she stayed on to serve under four chief justices in five years.

Then, the State Bar of Michigan created a new position, and Welch became its first general counsel. When the executive director left, the board president asked Welch if she would be interested in applying. No, she said, but she would be willing to serve as interim while commissioners searched for a new E.D.

The search commenced and a few months went by. Welch was approached again, this time by incoming SBM Board of Commissioners President Kim Cahill. She convinced Welch to reconsider. After all, Welch was already doing the job and doing it well. Welch put her name in. After five months as interim director and a national search, Welch was named executive director with Cahill serving as president.

"It was a really wonderful, relatively late in her career shift, and she has really thrived in that role," Mara Harwel said.

Naturally an introvert, Welch even forced herself to become comfortable beyond her normal scope, becoming a frequent keynote speaker and panelist on national and international stages. (This is where

Janet Welch is surprised to learn she is chosen as Michigan Lawyers Weekly's Woman of the Year in 2011. Her husband, Ben Hare, is at her side.

Welch would be sure to note that she always paid her own way to any international conferences, never at the expense of the Bar.)

"She is effortless, but it disguises how much she works at things, how much preparation goes into things," Andrew Harwel said. "She's brilliant — I've always thought she was the smartest person I know — but she also works hard."

Among staff, Welch's commitment is undisputed. Many still recollect with awe when Welch was hospitalized for seven weeks after a car accident, and she called a meeting in her hospital room so important work could continue while she was out of the office.

She always works hard, especially at what has become her most important role, "Eema" (pronounced Ē-mă). The exact spelling is uncertain, but it is the name bestowed on her by her first grandson before he could pronounce "grandma." It stuck and she is now proudly Eema Jan to Everett, 7; Clara, 5; Asa, 3; and another on the way in June.

"She is so much fun as a grandma. She works so hard on creating new, fun experiences. It's not just buying a toy: She is going to create a scavenger hunt or do artwork with them," Andrew Harwel said.

She always appreciates her grandchildren's unique qualities, treats them with respect, and listens intently to their thoughts and opinions, Mara Harwel said. "She treats kids the same way she treats adults. She is very curious to know them and absolutely delighted to watch as their personalities unfold."

Although they live out of state, Eema Jan stays active in their lives, even FaceTiming the grands every night to read them bedtime stories. Retirement was inspired in part by a desire to spend more time with them and her children.

As for Welch, well, it seems her whole career she's been doing new things, so in some ways retirement is no different from all her other career moves. In fact, Welch's plan for retirement is doing "what I've been doing all along — thinking about the things I care about and trying to figure out if I can help."

Welch considers herself the lucky one.

"I'm really, really glad that I stumbled into this community of lawyers. It feels like home: people that think analytically and carefully, and really care about justice and fairness," Welch said. "What grand luck to be in that world."

State Bar of Michigan President Dana Warnez said Welch's leadership is a source of inspiration for others. Welch embraced as executive director her ability to help others achieve more for themselves, Warnez said.

"She empowers you to be the best person you can be on your own terms," Warnez said. "She offers so much respect. She mentors you in a way you don't even realize you are being mentored."

With remarkable diplomacy, Welch can push people and challenge their thinking to create solutions, Warnez said. Welch simply doesn't accept things at face value. Just because things are the way they are, doesn't mean they have to be that way. It's the crux of Welch's ability to spark innovation, Warnez said, and it also gives her incredible foresight.

At the end of 2019 and beginning of 2020, the State Bar modernized multiple systems so it could function better and differently than it ever had before. While others were scrambling to figure out how to make things work when the entire state shut down because of COVID-19 in March 2020, new systems already had been purchased, hardware distributed, and staff trained at the State Bar.

Perhaps that foresight also helped in 2012, when Peter Cunningham called Welch to turn down the job as director of governmental relations for the State Bar of Michigan.

"You would not take no for an answer. You rejected my rejection," Cunningham said with a laugh during a staff celebration for Welch in December. As usual, she was right. He took the job and went on to become assistant executive director. "It was the best decision I ever made," Cunningham said.

One month later, on Jan. 21, 2022, the Board of Commissioners named Cunningham the next executive director for the State Bar of Michigan. (It was 14 years to the day after the death of Cahill, who as president ushered Welch into leadership and died of cancer the following year. As circumstances would have it, Cahill's sister, Warnez, is the president who welcomed Cunningham as the new executive director.)

It is a new beginning, for Welch and for the State Bar of Michigan.

"It feels very good to hand the reins to over to someone as capable and qualified as Peter Cunningham," said Welch, who agreed to delay her planned December retirement date to help with the transition. "I know the Bar had wonderful candidates to choose from. It feels very good at this moment to know that the Bar is in great hands."

As always, Welch is exiting gracefully, with both strength and tenderness, giving more than could be expected.

Marjory Raymer is the director of communications for the State Bar of Michigan.

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BAIL REFORM

The time is now

BY PHIL MAYOR & DAN KOROBKIN

In Michigan, as in much of the United States, using cash bail to incarcerate people prior to their trials is commonplace. Yet Michigan law, as well as the state constitution, requires that cash bail be used only infrequently and in response to a particular defendant presenting a realistic flight risk or threat to public safety. Unfortunately, inquiries into these threats or flight risks are often not conducted — and with devastating results for all involved.

This article examines this persistent problem, explores the legal framework that is supposed to govern pretrial release, describes efforts being undertaken to combat the misuse of cash bail, and suggests opportunities for further action and reform.

CASH BAIL: DEFINING THE PROBLEM

Criminal defendants are presumed innocent until proven otherwise. When a court imposes cash bail, it subjects a person who is presumed innocent to the prospect of lengthy pretrial detention with all the attendant personal impacts and harm to their ability to defend their case. Even defendants who can afford bail often have to borrow from family or friends or use scarce financial resources that otherwise would go toward rent, food, or child care. Troublingly, pretrial incarceration in Michigan is the rule rather than the exception. A recent bipartisan task force found that half of the state's jail population are pretrial detainees.[1]

The result is disastrous both for defendants and society. The economic impact on someone detained pretrial is obvious: "It often means loss of a job; it disrupts family life; and it enforces idleness."[2] These impacts extend to the defendant's family members, who often struggle to scrape together resources to pay bond or who may find their child care, housing, and employment arrangements irrevocably frayed as the result of their loved one's incarceration.[3]

IN PERSPECTIVE

PHIL MAYOR

DAN KOROBKIN

It is beyond dispute that a defendant's pretrial incarceration impacts legal outcomes. Academic studies confirm what common sense suggests — controlling for other factors, pretrial incarceration induces guilty pleas, causing defendants to plead in order to speed their release from jail.[4] The same studies show that pretrial detention leads to higher conviction rates and lengthier sentences. As the U.S. Supreme Court has explained, "[I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare [their] defense."[5]

And all this harm is inflicted for naught. Cash bail does not reduce flight risks; there is, quite simply, "no evidence that money bail increases the probability of appearance" as compared to personal bonds and other nonfinancial conditions of release.[6] As for protecting the public from harm, cash bail has the effect of increasing crime. Defendants who were detained before trial are 1.3 times more likely to recidivate, even years later and regardless of whether they were ultimately convicted, likely because of the economic havoc pretrial incarceration wreaks on them and their families.[7]

Worse yet, but predictably, these burdens fall disproportionately on communities of color, exacerbating the systemic racism that already plagues our criminal legal system. In the cross-section of counties studied by Michigan's recent bipartisan task force, Black defendants constituted 29% of jail admissions in the state although only 6% of the total population of the same counties is Black.[8] In turn, Black and Latinx defendants are more likely than whites to be held in continued detention because they cannot afford bail.[9]

MICHIGAN LAW GOVERNING CASH BAIL

Under Michigan law, cash bail is — or is supposed to be — disfavored. As a matter of law, cash bail may not be imposed unless a court first makes findings, supported by individualized record evidence, that release under the defendant's own recognizance with a personal bond or pursuant to non-financial release conditions would be insufficient to protect against an otherwise unmanageable flight risk or specific danger to the public. When a court imposes cash bail without meaningfully considering non-cash alternatives and without engaging in an individualized analysis of whether cash bail is truly necessary to address a proven flight risk or danger to others, the court abuses its discretion under Michigan law.

Begin with the Michigan Constitution: "All persons shall, before conviction, be bailable by sufficient sureties" except in four specifically delineated circumstances involving particularly serious charges or criminal history.[10] And "[e]xcessive bail shall not be imposed."[11]

Courts, in turn, have held that "[m]oney bail is excessive if it is in an amount greater than reasonably necessary to adequately assure that the accused will appear when his presence is required."[12] In so doing, they have emphasized that "pretrial release of an accused is a matter of constitutional right and the State's favored policy."[13]

The Michigan Supreme Court has promulgated rules designed to enforce these principles. Under these rules, there is a double presumption that a pretrial arrestee will be released without any cash bail requirement. First, Michigan Court Rules provide that "the court must order the pretrial release of the defendant on personal recognizance, or on an unsecured appearance bond . . . unless the court determines that such release will not reasonably ensure the appearance of the defendant as required, or that such release will present a danger to the public."[14] (Emphasis added.)

Second, even if the court does determine that there is evidence of a possible flight risk or danger to the public, the presumption of release without cash bail remains. Before imposing cash bail, a court must consider releasing a defendant under non-financial release conditions including, but not limited to, 14 conditions (such as no-contact orders, curfews, drug testing, and the like) specifically enumerated by court rule.[15] It is only "[i]f the court determines . . . that the defendant's appearance or the protection of the public cannot otherwise be assured [that] money bail, with or without conditions . . . may be required."[16] Furthermore, the court's reasons for requiring any amount of cash bail must be stated on the record.[17] The Michigan Supreme Court has been "emphatic" that this "rule is to be complied with in spirit, as well as to the letter."[18]

Even if a court concludes that some amount of cash bail is justified by the record evidence in a particular case, determining the proper amount of bail necessarily requires an inquiry into a defendant's financial situation.[19] Michigan Court Rules specifically require the court to consider a "defendant's employment status and history and financial history insofar as these factors relate to the ability to post money bail."[20] They also specifically prohibit "pretrial detention . . . on the basis of . . . economic status."[21] That prohibition is arguably violated when cash bail is set at an amount that a defendant cannot afford.

FEDERAL CONSTITUTIONAL REQUIREMENTS

Bail determinations are also constrained by two separate principles of federal constitutional law. The equal protection clause of the 14th Amendment prohibits incarceration of indigent defendants because they have a liberty interest in pretrial release while otherwise similar defendants who are wealthier would be permitted to pay cash to remain free. The due process clause prohibits depriving anyone of their liberty prior to a criminal conviction unless individualized findings have been made, with rigorous procedural protections, establishing that the individual poses an unmanageable flight risk or an identifiable danger to the public prior to trial. When a court fails to inquire into and make findings regarding these matters, it violates a defendant's federal constitutional rights.

The equal protection analysis flows from the U.S. Supreme Court decision in *Bearden v. Georgia,*[22] recognizing that it is "contrary to the fundamental fairness required by the Fourteenth Amendment" to "deprive [an individual] of his conditional freedom simply because, through no fault of his own, he cannot pay."[23] In recent years, federal courts have held that setting cash bail without accounting for a defendant's ability to pay violates the right to equal protection under the law because doing so causes low-income defendants who pose little risk of flight or danger to the public to be deprived of their liberty while similarly situated defendants who are wealthier are set free.[24]

Separately, "the 'general rule' of substantive due process [is] that the government may not detain a person prior to a judgment of guilt in a criminal trial."[25] To justify a pretrial exception to that rule, the government interest must be compelling and any infringement on liberty narrowly tailored to serve that interest.[26] In the context of federal pretrial detention, the U.S. Supreme Court upheld the constitutionality of the federal Bail Reform Act because it limits pretrial detention to "specific categor[ies] of extremely serious offenses" and, in such cases, requires evidentiary proof by clear and convincing evidence "that an arrestee presents an identified and articulable threat to an individual or the community" and that "no conditions of release can reasonably assure the safety of the community or any person."[27] Defendants' due process rights are therefore implicated when courts set unaffordable cash bail resulting in pretrial detention while failing to meet those rigorous standards.

Cash bail does not reduce flight risks; there is, quite simply, "no evidence that money bail increases the probability of appearance" as compared to personal bonds and other nonfinancial conditions of release.

FIGHTING CASH BAIL ABUSES IN THE COURTS

The American Civil Liberties Union of Michigan has been fighting back against the abuses of cash bail. In 2019, the ACLU filed a federal class-action lawsuit in Detroit arguing that the widespread use of cash bail at the 36th District Court was unconstitutional.[28] The case was filed in Detroit, where a single lawsuit could impact the greatest number of defendants due to sheer quantity, but such a suit could have been filed in almost any jurisdiction in Michigan.

Indeed, the ACLU has also filed bail appeals on behalf of individuals throughout the state where courts have continued to flout the law. For example, in Oakland County, the circuit court imposed unaffordable bail on a defendant charged with felony firearm and intent to deliver fentanyl who was late to court due to bus delays. The Court of Appeals held that the circuit court had abused its discretion.[29] A few weeks later, the ACLU appealed another Oakland County decision imposing unaffordable bail on a defendant charged with felony firearm (fourth habitual.) The circuit judge had reasoned that the lengthy prison sentence the defendant potentially faced rendered him a flight risk. The Michigan Supreme Court found the cash bail to be an abuse of discretion with Justice Megan Cavanagh explaining that a court cannot "conclude that defendant [i]s a flight risk . . .. [He has] no history of absconding on bond or failing to appear for court, and based only on defendant's presumed incentive to avoid punishment — an incentive present in virtually every case."[30]

More recently, a judge in Kent County was raising bond for defendants shortly after they rejected plea bargains — essentially punishing them for exercising their constitutional right to proceed to trial. The ACLU appealed two such cases and in both, the circuit judge was reversed. The Court of Appeals emphasized the law that "[m]oney bail may only be imposed where the 'defendant's appearance or the protection of the public cannot be otherwise assured.'"[31] The defendant in question had been released for some time prior to having his bond increased and the court emphasized that a successful record of pretrial release "demonstrates that the modification made by the trial court was not required to ensure defendant's appearance at court proceedings or to protect to public."[32]

These cases represent only a small fraction of the number of cases statewide involving the abuse of cash bail, but they show that when an erroneous bail determination is appealed, our appellate courts stand ready and willing to enforce the law.

FIXING THE SYSTEM

It is past time for Michigan to turn the page on a badly broken cash bail system and enter a new chapter in which pretrial detention is truly the exception and not the norm, governed by principles of fairness

and public safety rather than being used to cause wealth-based detention. Effective reform will require courts, attorneys, and policymakers to work together.

First, judges and magistrates must take seriously their obligation to comply with the court rules on pretrial release. Chief judges and court administrators around the state need to dedicate the resources, time, staffing, and training to ensure that each defendant is given individualized consideration so most defendants are released on non-monetary conditions that comply with the law and protect public safety.

At the same time, appointed counsel must be prepared to challenge bail determinations gone awry. Under standards adopted by the Michigan Indigent Defense Commission and approved for implementation statewide, all courts in Michigan are required to provide defendants with counsel at arraignment.[33] And under Michigan Court Rules, after a bail determination is made, a defendant has the right to pursue an immediate appeal of the decision to the next highest court.[34] The Court of Appeals entertains such appeals on an expedited basis and has repeatedly ruled in defendants' favor as described above. To satisfy the duty of zealous advocacy, counsel should pursue such appeals whenever doing so is in the client's best interest.[35]

At the policymaking level, we must move toward a system in which cash bail is abolished altogether. Last year, Illinois enacted legislation to do away with cash bail entirely.[36] Other states have, also through legislation, strictly curtailed its use.[37] In Michigan, a bipartisan group of legislators recently introduced a package of bills that will, among other things, reinforce a presumption of release on personal recognizance, require the release of most people charged with misdemeanors, mandate ability-to-pay determinations if cash bond is used, and require courts to provide data on their use of cash bail.[38] The Michigan Joint Task Force on Jail and Pretrial Incarceration has likewise identified pretrial release as a legislative priority.[39]

CONCLUSION

For too long, our pretrial system in Michigan has been working on autopilot, flouting both state law and constitutional protections designed to ensure that pretrial incarceration is a rare and carefully justified exception to the rule. The time has come to enforce the law as it exists and reform the law to better protect the presumptive right of the criminally accused not to be detained while awaiting trial.

Phil Mayor is a senior staff attorney at the ACLU of Michigan and lead counsel in its bail reform work. He also litigates civil rights cases involving prisoners' rights, religious liberties, facial recognition and right to privacy, and the First Amendment. He has formerly worked at the U.S. Department of Labor and the United Auto Workers.

Dan Korobkin is legal director at the ACLU of Michigan. In addition to bail reform, his criminal law reform advocacy has included legal challenges to juvenile life without parole, pay-or-stay sentencing, and the warrantless fingerprinting of youth.

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Representing transgender clients

BY CHRISTINE A. YARED

An increasing number of laws, court decisions, and policies address issues related to gender identity. Transgender people have specialized legal needs in many areas, including employment, family, education, health care, housing, and criminal law. Attorneys representing transgender clients have an obligation to learn about transgender identity and the needs of this population in order to effectively advocate for them. This also applies to those representing corporations, nonprofit organizations, and public entities as they provide advice and represent their clients' interests.

THE NEED FOR EFFECTIVE REPRESENTATION

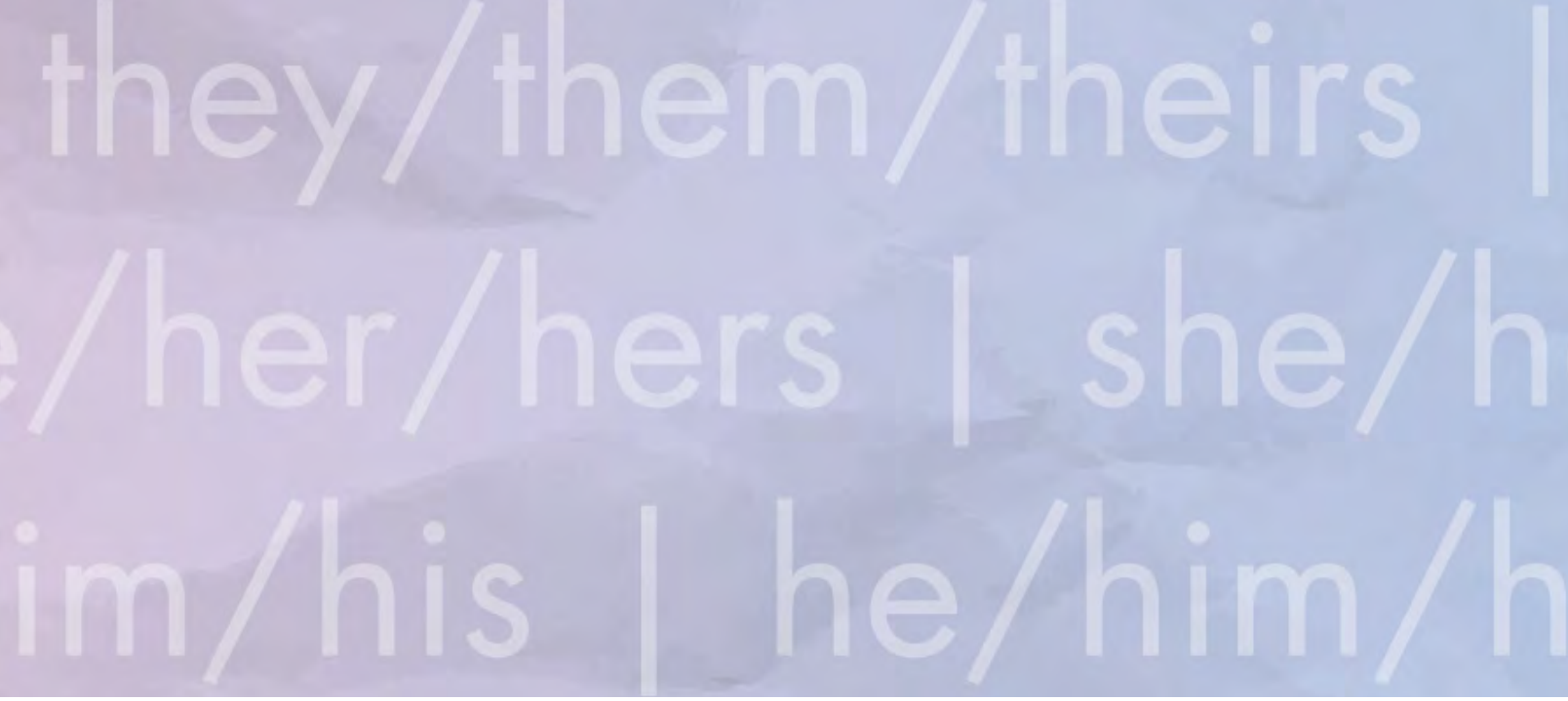
Transgender adults and youth experience high rates of:

- homelessness, being mistreated in or denied access to shelters, evictions, and denial of housing.
- discrimination in the workplace, including verbal and sexual harassment, being physically and sexually assaulted, denied employment, and being fired.
- denial of equal treatment or service, verbal harassment, or physical attacks at many places of public accommodation.
- mistreatment and harassment by law enforcement and in jails and prisons.
- discrimination and harassment in health care, including denial of coverage, denial of care, and harassment and sexual assault while seeking routine care or gender transition treatment.[1]

One of the largest studies of transgender people found that 81.7% of respondents seriously thought about suicide and 40.4% attempted suicide. Those who had been victims of violence or experienced discrimination or mistreatment in education, employment, housing, health care, public accommodations, or from law enforcement had a higher incidence of suicidal thoughts and attempts.[2] Transgender people of color, those with disabilities, and those in other marginalized groups experience higher rates of discrimination, harassment, and violence.[3]

LANGUAGE AND CONCEPTS

Practitioners should understand the terminology and medical science pertaining to gender identity. Language has evolved to reflect advances in understanding gender identity. These terms are used



in health care, social science, and are increasingly found in legal briefs, case law, law review articles, corporate policies, employee handbooks, and customer-service training. This knowledge will create an attorney-client relationship based on trust and respect, facilitate constructive communication, and lead to a more thorough understanding of the facts in the case.

"Gender expression" is a term used to describe a person's outward presentation of their gender, including their physical appearance and behaviors. "Gender identity" refers to one's internal understanding of one's own gender or the gender with which a person identifies. Gender identity is distinct from sexual orientation. A person's gender does not determine a person's sexual orientation.[4]

"Sex" refers to a person's biological status and is typically categorized as male, female, or intersex. Sex determinations made at birth are typically based solely on the observation of external genitalia.[5] However, "biological sex is determined by numerous elements, which can include chromosomal composition, internal reproductive organs, external genitalia, hormone prevalence, and brain structure."[6] "Intersex" refers to people born with anatomy which is not clearly female or male.[7] "Nonbinary" refers to a person who identifies with a gender identity that is neither entirely male nor entirely female.[8] Nonbinary identity reflects a person's relationship to social expectations or their biological relationship to the female/male binary.[9] A person who identifies as nonbinary may or may not also identify as transgender. In a footnote to *People v. Gobrick,* the Michigan Court of Appeals addressed the use of the nonbinary pronouns "they" and "them," stating:

> … defendant's appellate brief indicates that defendant identifies as female and prefers to be referred to using the nonbinary pronouns they and them. … Like the prosecution, we choose to honor defendant's request as well. Thus, apart from references to the record that use the pronouns he/him, we use the they/them pronouns where applicable. All individuals deserve to be treated fairly, with courtesy and respect, without regard to their race, gender, or any other protected personal characteristic. Our use of nonbinary pronouns respects defendant's request and has no effect on the outcome of the proceedings.[10]

"Transgender" is an umbrella term for persons whose gender identity or expression (masculine, feminine, other) is different from the sex they were assigned at birth. A transgender man is a person who was designated, or assigned, as female at birth but has a male gender identity. A transgender woman is a person who was designated, or assigned, as male at birth but has a female gender identity. "Cisgender" describes a person whose gender identity aligns with the sex assigned to them at birth.[11]

"Gender dysphoria" is a condition characterized by debilitating distress and anxiety caused by a discrepancy between a person's gender identity and their sex assigned at birth.[12] The World Professional Association for Transgender Health (WPATH), the widely accepted authority on transgender health care, publishes standards of care for treating gender dysphoria.[13]

"Transition," also called "gender confirmation," refers to steps a transgender person takes to live consistently with their gender identity. It may include changes in clothing, hair style, adopting a new name, changing sex designation on identity documents, and medical treatment such as hormone therapy or other procedures.[14]

The degree of transition and the need for medical treatment is unique to each person. Also, some people require surgical treatment but cannot afford or otherwise gain access to it. Transition treatment is private medical information. Disclosure could violate one or more state or federal laws.[15]

Attorneys should refrain from asking transgender clients whether they have had medical transition treatment unless it is relevant to

representation. Prior to asking about medical treatments, attorneys should review the WPATH standards of care.

GENDER MARKERS

"Gender marker" is a term used to describe a person's gender identity on documents such as a driver's license, birth certificate, or passport. Transgender individuals who do not have an ID consistent with their gender identity are vulnerable to discrimination, harassment, and violence. The lack of an appropriate ID can negatively impact mental health[16] and create obstacles as they engage in actions such as banking, voting, reporting a crime, and handling traffic stops.

Many laws and administrative procedures have been passed to facilitate the changing of gender markers on government documents. As of November 2021, in Michigan a person can designate nonbinary ("X") as their sex marker on their driver's license or state identification document.[17] The Michigan Secretary of State (SOS) also has a sex designation form which allows transgender persons to change their gender marker by swearing, under penalty of perjury, that the purpose of the change is to accurately reflect their identity and not for fraudulent or illegal purposes. The SOS will also take an updated photo. The process does not require any supporting documents.

A transgender person's adoption of a new name is often critical to their identity. Changing a name on a license or state ID requires the person to present either a certified copy of a name change court order or marriage license. The term "dead name" refers to the name given to the transgender person at birth.

In 2000, Michigan's name change law was amended to address the safety concerns of some people seeking a change.[18] Based on good cause, the court has discretion to waive the publication requirement of the law and order that the record of the proceeding be confidential.[19] Good cause includes, but is not limited to, evidence that the name change procedure might place the petitioner in physical danger.[20] Petitions should include any concerns about stalking, violence, harassment, or discrimination such as losing their employment or housing, and provide statistics establishing that transgender people are often assaulted or attacked solely because of their gender identity. In addition, attorneys should point out that publication could lead indirectly to disclosure of private medical information.

After obtaining a court-ordered name change, a person can get a new birth certificate reflecting their name and a sex designation other than what was assigned at birth. The statute, however, states that the request "shall be accompanied by an affidavit of a physician certifying that sex-reassignment surgery has been performed."[21] Michigan Attorney General Dana Nessel issued an opinion concluding that this requirement violates the equal protection clauses of the Michigan and United States constitutions.[22] Nessel noted that when issuing passports:

> Even the U.S. Department of State requires only that the individual have received "appropriate clinical treatment for transition" in order to change the sex marker on their individual passport, and gives physicians the discretion to determine what clinical treatment is "appropriate" for each individual.[23]

Attorney general opinions are binding on state agencies and officers but not on the courts.[24]

BOSTOCK AND BEYOND

Federal and state efforts to prohibit transgender discrimination have proceeded in a patchwork manner. In the landmark case *Bostock v Clayton County,* the U.S. Supreme Court ruled that employment discrimination based on a person's sexual orientation or gender identity constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964. The Court reasoned:

> By discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today. Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals' sex. [25]

The decision applies to the private sector, state and local governments, employment agencies, and labor organizations, and has led to other protections.

Early in 2021, President Joe Biden issued an executive order directing agencies to enforce federal laws that prohibit sex discrimination to include discrimination based on sexual orientation and gender identity consistent with *Bostock*. The order applies to discrimination in employment, education, housing, health care, and credit.[26] Section 1557 of the Affordable Care Act prohibits discrimination on the bases of race, color, national origin, sex, age, and disabilities. In May 2021, pursuant to the order, the U.S. Department of Health and Human Services announced it will interpret and enforce the Section 1557 prohibition on discrimination on the basis of sex to include discrimination based on gender identity and sexual orientation.[27]

AT A GLANCE

Language has evolved to reflect advances in understanding gender identity. These terms are increasingly found in legal briefs, case law, law review articles, corporate policies, and employee handbooks.

In 2019, Gov. Gretchen Whitmer issued an executive directive prohibiting state agencies from discriminating based on gender identity, gender expression, or sexual orientation, and requiring equal opportunity in state employment, state contracts, grants and loans, and provision of state services.[28]

There are numerous efforts to create federal and state consistency in prohibiting discrimination based on gender identity, gender expression, sexual orientation, and other areas. A bill in Congress referred to as the Equality Act would prohibit discrimination against people based on their sexual orientation or gender identity in employment, housing, credit, education, public spaces and services, federally funded programs, and jury service.[29]

The Michigan Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101, prohibits discrimination based on religion, race, color, national origin, age, sex, height, weight, familial status, or marital status. In 2018, the Michigan Civil Rights Commission determined that discrimination because of "sex" as used in the ELCRA includes discrimination based on gender identity and sexual orientation.[30] A bill pending in the state legislature would add sexual orientation and gender identity as protected classes in ELCRA.[31] Significantly, the Michigan Supreme Court will decide the same question this term upon review of *Rouch World v Michigan Dep't of Civil Rights* (Docket No 162482).

In August 2021, the reasoning in *Bostock* led to an important interpretation of Michigan's criminal hate crime law. The crime referred to as ethnic intimidation prohibits certain criminal acts involving physical contact or destruction of property where the person acts with malice and a "specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin."[32] In *People v Rogers*, the Michigan Court of Appeals considered a case where the defendant made derogatory remarks about a transgender woman, pulled out a gun, and threatened to kill her. The victim was shot when she grabbed the defendant's arm in self-defense. The suspect asked the trial court to quash the charges against him for shooting the victim because he engaged in the criminal behavior on the basis that he believed the victim to be male.[33] The Court of Appeals ruled that the trial court erred by granting defendant's motion.

FIRST AMENDMENT

In *Masterpiece Cakeshop, Ltd v Colo Civ Rights Comm'n,* 584 US ___; 138 S Ct 1719; 201 L Ed 2d 35 (2018), the U.S. Supreme Court held that based on the free exercise of religion clause, a baker did not unlawfully discriminate against a same-sex couple when he refused to make a cake for their wedding because of his religious beliefs. In *Meriwether v Hartop,* a state university professor was disciplined for failing to use a pronoun that reflected the student's gender identity. The professor stated that the pronoun policy violated his belief that "God created human beings as either male or female, that this sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feeling or desires."[34] Relying in part on *Masterpiece*, the U.S. Court of Appeals for the Sixth Circuit overturned the district court's dismissal of the professor's free speech and free exercise claims and remanded the case to the trial court.

EIGHTH AMENDMENT

In *Edmo v Corizon*, Inc., the U.S. Court of Appeals for the Ninth Circuit held:

> "… where, as here, the record shows that the medically necessary treatment for a prisoner's gender dysphoria is gender confirmation surgery, and responsible prison officials deny such treatment with full awareness of the prisoner's suffering, those officials violate the Eighth Amendment's prohibition of cruel and unusual punishment.[35]

The opinion in *Edmo* contains detailed information and sources regarding gender dysphoria. The First Circuit adopted a case-by-case approach similar to the Ninth Circuit.[36] This approach has also been adopted by the Michigan Department of Corrections.[37] However, the Fifth Circuit concluded that a blanket ban of gender reassignment surgery does not violate the Eighth Amendment.[38]

OTHER CONSIDERATIONS

Lawyers representing transgender clients should take the lead in educating others involved in the case.[39] Where applicable, court and alternative dispute resolution documents and oral arguments should include references to sources which include definitions, statistics, mental and physical health care information and standards, and other information necessary for effective representation. As always, make a compete record. Many issues affecting transgender people will continue to be decided at the appellate level.

Sharing a resource or a client's current name with opposing counsel in an informal manner improves the opportunity for a successful resolution of the dispute or, at a minimum, reduces the potential for a case to be unnecessarily sidetracked. Consider applicable jury instructions.

Many attorneys were motivated to become lawyers due to the opportunity to make a difference in the lives of others. Providing competent representation for transgender people can serve that desire.

Christine A. Yared has specialized in LGBTQ+ law, focused on employment law, family law, civil rights, and criminal law, for more than 33 years. She has taught at Grand Valley State University including LGBTQ+ law, constitutional law, gender studies, and diversity. Yared serves on the council for the State Bar of Michigan LGBTQA Law Section and is author of the nonfiction book "Private Love, Public School – Gay Teacher Under Fire."

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Sixth Circuit cases in the U.S. Supreme Court

2021 REVIEW AND 2022 PREVIEW

BY JUSTIN B. WEINER

Winter is an ideal time to look both back and forward at the U.S. Supreme Court. The October 2020 term is in the books, with the Court issuing the last of its opinions for that term this past summer. And the October 2021 term is in full swing, with the Court hearing arguments on a new slate of cases.

This article reviews the term that was and previews the current term, focusing on cases from the U.S. Court of Appeals for the Sixth Circuit. Our home circuit saw five cases from the October 2020 term go to the Supreme Court — all reversals. When this article was submitted for publication, another five Sixth Circuit cases were on the October 2021 term docket. These cases offer something for everyone: jurisdictional questions, the perennial Armed Career Criminal Act cases, administrative law matters, statutory interpretation issues, and habeas cases.

OCTOBER TERM 2020 DECISIONS

Brownback v. King, No. 19-546

Brownback addresses a question on judgments: Can a dismissal for lack of subject matter jurisdiction operate as a final judgment on the merits? Ordinarily, the answer is no, but *Brownback* addresses an exception to that rule.

To understand why, some background is required. *Brownback* involved the Federal Tort Claims Act, which waives sovereign immunity for claims of injury caused by federal employees acting within the scope of their employment. Federal courts have "exclusive jurisdiction" over such claims, but the statute cuts off liability for the federal employees themselves once the case against the government has been resolved — a "judgment in an action" against the government "shall constitute a complete bar to any action . . . against the employee of the government whose act or omission gave rise to the claim," and "this judgment must have been a final judgment on the merits to trigger the bar. …"

James King alleged that two members of a federal task force — Todd Allen and Douglas Brownback — mistook him for a fugitive and injured him in a violent encounter. King brought claims against the federal government as well as Allen and Brownback. The district court dismissed the claims. 28 USC 1346 creates jurisdiction only for claims where the government "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." On summary judgment, the district court found that the government would not have been liable under Michigan law ("where the act or omission occurred") and held that it lacked subject matter jurisdiction with respect to King's claims against the government. The district court dismissed the claims against the officers for other reasons.

Then things got weird, procedurally speaking. King appealed the district court's judgment only against the officers. The officers argued that the judgment bar blocked further action on the claim because there was a final (and now unappealable) "judgment in an action" against the government. The Sixth Circuit disagreed, holding that because the district court did not have subject matter jurisdiction over the claim against the government, there was no judgment on the merits that could bar King's claims against the officers.

The Supreme Court agreed that the district court's dismissal was for lack of jurisdiction but held that the judgment bar still applies. The Court acknowledged that "[o]rdinarily, a court cannot issue a

ruling on the merits 'when it has no jurisdiction' because 'to do so is, by very definition, for a court to act ultra vires.'" But in some circumstances, the subject matter jurisdiction inquiry merges with the merits. Section 1346 falls into that category of merits-driven jurisdictional inquiries by framing the jurisdictional question, in part, on whether "a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Hence, even though the district court dismissed King's claims for lack of subject matter jurisdiction, the dismissal was also a "judgment on the merits" sufficient to trigger the judgment bar. By failing to appeal that dismissal, King necessarily cut off his right to pursue claims against the government employees.

There are both narrow and broader lessons in *Brownback* holding. The narrow lesson is that if you bring a claim under the Federal Tort Claims Act against the government and government employees, be sure to appeal any loss against both parties. The broader lesson is that while we think of jurisdictional rulings as not being on the merits, that's not always so. Substance and context matter, and sometimes a jurisdictional inquiry includes the merits.

Niz-Chavez v. Garland, No. 19-863

Niz-Chavez is an immigration law case that exists because of a peculiar government practice. Immigration laws provide the executive branch discretion to "allow otherwise removable aliens to remain in the country." However, the statute imposes conditions on that discretion. One is that the alien must have been continuously present in the United States for at least 10 years. In 1996, Congress further conditioned the 10-year minimum: The clock stops counting when the alien has been served with "a notice to appear" for a removal hearing. The statute requires the notice to contain specific information including the nature of the charges, the consequences of failing to appear, and the date and time of the proceeding.

The government, however, is not always a well-oiled machine. For a time, the government omitted the date and time of the proceeding from notices to appear. The Supreme Court held in *Pereira v. Sessions,* 138 S. Ct. 2105 (2018) that these incomplete notices did not stop the 10-year clock. After *Pereira*, the government began sending the required information piecemeal, sending one notice with the charge, another with the date, etc. Some circuit courts rejected this approach, holding that the 10-year clock does not stop running until the government sends a single notice with all required information. In *Niz-Chavez,* the Sixth Circuit joined the other side of the split, holding that the clock stops running once the government supplies all necessary information, whether in one notice or several.

A divided Supreme Court reversed. A written notice means one notice, the Court held, so the clock does not stop running until the government serves a document containing all required information. The opinion of the Court (written by Justice Neil Gorsuch) and the dissent (written by Justice Brett Kavanaugh) are interesting studies in textualism. Both opinions rely on ordinary meaning and plain language and draw from the provision's text and structure but reach opposite conclusions. Practitioners with cases that turn on questions of statutory interpretation will do well to study both opinions, because together they gather a who's who of statutory interpretation citations and canons. Plus, 41 pages of analysis of a single article is a linguist's dream.

CIC Services, LLC v. IRS, No. 19-930

The Anti-Injunction Act prohibits lawsuits "for the purpose of restraining the assessment of any tax. …" Someone who wants to challenge a tax must pay it first. *CIC Services* applies the Anti-Injunction Act to unusual facts — the IRS promulgated a notice that required tax advisor companies to report certain transactions or pay a tax penalty if they failed to do so. CIC sued to invalidate the notice, arguing that it was promulgated without notice and comment in violation of the Administrative Procedures Act. The district court dismissed the suit, holding that the Anti-Injunction Act prohibited it. The Sixth Circuit affirmed, holding that the suit would restrain the tax penalty. To challenge the notice, CIC had to violate the reporting requirement, incur the penalty, pay the penalty, and then challenge it.

A unanimous Supreme Court reversed. The purpose of CIC's suit was to challenge the reporting requirement, not the tax penalty attached to violations of that requirement, and CIC had no tax liability to enjoin because it had not yet violated the notice. To be sure, the Court drew a line between CIC's suit (which had the purpose of overturning the notice) and suits targeting so-called regulatory taxes (taxes on certain behaviors.) The former targets a reporting requirement; the latter targets a tax. So, had the Internal Revenue Service (IRS) imposed a tax on microcaptive transactions themselves as opposed to requiring companies to report those transactions, that would be a regulatory tax the Anti-Injunction Act would bar. But by inserting a reporting requirement, the IRS gave CIC a target for a suit not shielded by the Anti-Injunction Act.

Borden v. United States, No. 19-5410

The Armed Career Criminal act, which provides sentencing enhancements for felons who commit crimes with firearms, makes perennial appearances in the Supreme Court. Rarely do those appearances end well for the act. *Borden* considered whether reckless conduct qualifies as a

violent felony under the act's elements clause, which defines "violent felony" to include an offense that involves "the use, attempted use, or threatened use of physical force against the person of another."

Borden had a prior conviction for reckless aggravated assault. The district court held that this conviction was a violent felony under the elements clause. The Sixth Circuit affirmed based on its prior precedent but noted that later decisions had been critical of that precedent. The Sixth Circuit panel also noted, however, that "[a]bsent an intervening decision by the Supreme Court or this court sitting en banc," it was bound by Sixth Circuit precedent.

If that was an invitation, the Supreme Court accepted it. A plurality of the Court held that recklessness is not the "use of physical force against the person of another . . . [and] the 'use of force' demands that the perpetrator direct his action at, or target, another individual." Because the use of force must be against another, the statute requires intentionally directed force to an individual. Reckless crimes do not meet that requirement.

The most interesting thing about *Borden* is the groupings of justices. Four justices formed the plurality. Justice Clarence Thomas joined the plurality's judgment but none of its reasoning. Instead, Thomas would have held that the use of force excludes reckless acts, an interpretation foreclosed by the Court's earlier opinion in *Voisine v. United States*. Finally, four justices formed a dissent that followed *Voisine* and disagreed that the words "against another" exclude reckless conduct. So, if you're keeping score at home, that's eight justices who follow *Voisine* and think use of force includes reckless conduct and five justices who think "against another" includes reckless conduct. Despite all of that, Borden wins!

Mays v. Hines, No. 20-507

Mays v. Hines is a habeas case. Over a dissent, the Sixth Circuit granted post-conviction relief to Anthony Hines. The Supreme Court summarily reversed. Hines's post-conviction counsel urged that his trial counsel should have pinned the murder on another man (an argument that trial counsel alluded to but did not forcefully make.) In state court post-conviction proceedings, the court determined that trial counsel was aware of the possible argument but found no prejudice to Hines because evidence of Hines's guilt was overwhelming. Emphasizing the deference due to the state court's finding and the evidence of Hines's guilt in the record, the Supreme Court reversed the Sixth Circuit's grant of post-conviction relief.

OCTOBER 2021 TERM

Five cases from the Sixth Circuit await decision from the Supreme Court as part of its current term.

Babcock v. Kijakazi involves rules concerning Social Security benefits. When a person retires, the Social Security Administration calculates the statutory benefits owed by the government. The statute reduces benefits if the person gets retirement benefits from a job for which the person did not take a deduction in his paycheck to fund Social Security. But there is an exception in the statute for payments "based wholly on service as a member of a uniformed service." The question presented in *Babcock* asks how that exception applies to "dual-status military technicians" — employees paid as civilians but required to maintain membership in the National Guard. In other words, is civilian work performed by workers required to hold a military rank "based wholly on service as a member of a uniformed service?" The Sixth Circuit held it was not. Oral arguments were held in the Supreme Court in October; questions from the justices revealed little about how the case will come out.

Cameron v. EMW Women's Surgical Center concerns a statute regulating abortions in Kentucky. The issue before the Supreme Court, however, is purely procedural. For two years, Kentucky's secretary of cabinet for health and family services defended a statute with attorneys from the Kentucky Attorney General's office representing the secretary. The Sixth Circuit upheld a permanent injunction against the statute and the secretary decided to stop litigating, but the attorney general did not. Relying on a Kentucky law, the attorney general moved to intervene. The Sixth Circuit denied the motion. A few days later, the Supreme Court decided *June Medical Services, L.L.C. v. Russo*. The attorney general filed a motion for rehearing based on *June*, but the Sixth Circuit rejected the filing. In the Supreme Court, the focus at oral argument was on the request for intervention, and the Court seems likely to permit it.

The Antiterrorism and Effective Death Penalty Act (AEDPA), was enacted in 1996. Twenty-five years on, it still generates novel questions of law. *Brown v. Davenport* will address such a question. To obtain reversal of a criminal conviction based on constitutional violation, the Supreme Court requires a defendant to establish that a constitutional violation was not harmless. In 1993, *Brecht v. Abrahamson* held that a habeas petitioner must meet a special requirement and demonstrate "actual prejudice" from a constitutional violation to obtain habeas relief from a state conviction. In 1996, Congress passed AEDPA, requiring state prisoners to prove that a state court's adjudication of a constitutional claim "was contrary to, or involved an unreasonable application of, clearly established Federal law. ..." A question remains regarding the interplay of *Brecht* with this provision: Must a prisoner prove that he suffered both "actual prejudice" and that the state court's finding of no "harmless error" violated clearly established federal law? That confluence of opinions and statutes generated a 2-1 split from the panel in the Sixth Circuit and an 8-7 vote refusing to hear the case

en banc. Oral arguments offered few clues on how the Supreme Court would untangle this knot.

Wooden v. United States involves . . . wait for it . . . the Armed Career Criminal Act. This time, the question is whether offenses committed sequentially in time but as part of a single criminal spree are "committed on occasions different from one another" for purposes of a sentencing enhancement. The Sixth Circuit answered yes. Briefing and oral argument suggest that this will be another exercise in statutory interpretation with the justices focused on the meaning of the word "occasion."

Finally, the Court in November granted certiorari in *Marietta Memorial Hospital v. Davita Inc.* The case will take the justices deep into the Byzantine world of Medicare reimbursement and its application to patients with a particular condition: end-stage renal disease. Many individuals receive health coverage from a mixture of both private insurers and Medicare. In the early 1980s, Congress determined insurers were denying coverage when they knew Medicare would cover a condition. To avoid this deliberate push from private to public coverage, Congress amended the Medicare Secondary Payers Act to curtail the practice. For certain periods, a private insurer is forbidden from taking into account an end-stage renal dialysis patient's Medicare coverage when determining its own coverage. *Marietta* involves a health care plan that provides uniform reimbursement for all dialysis treatments — according to the allegations, the reimbursement rates are particularly poor compared to the rest of the plan's benefits. The district court held that this was not the sort of discrimination prohibited by the Secondary Payers Act. The Sixth Circuit disagreed, holding that the Secondary Payers Act prohibits both direct and indirect discrimination of end-stage renal dialysis patients. In other words, even though the plan had not explicitly singled out individuals with end-stage renal dialysis for differential treatment, the plan had, through its rate setting for all dialysis patients, achieved the same effect.

Justin B. Weiner is a member of the State Bar of Michigan U.S. Courts Committee, which provides advice and recommendations concerning State Bar interaction with federal courts in Michigan and on practice of law in those courts. A partner at BSP Law in Troy, his practice focuses on complex business litigation with an emphasis on litigation concerning securities/finance and class actions. He also has an extensive background in litigation regarding intellectual property.

ENDNOTES

1. 28 USC 2674
2. 28 USC 1346(b)
3. 28 USC 2676
4. *Brownback v King*, 141 S Ct 740, 747; 209 L Ed 2d 33 (2021).
5. *Id.* at 746-747.
6. *Id.* at 747.
7. *Id.*
8. *Id.* at 749.
9. *Id.*
10. *Niz-Chavez v Garland*, 141 S Ct 1474; 209 L Ed 2d 433 (2021).
11. 8 USC 1229b(b)(1).
12. 8 USC 1229(a).
13. *Niz-Chavez*, 141 S Ct at 1480.
14. For more on how the same interpretive method can yield different results, see Easterbrook, The Absence of Method in Statutory Interpretation, 84 U Chi L Rev 81 (2017), available at < https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/05%20Easterbrook_SYMP_IC.pdf> [https://perma.cc/GL89-LVS4]. All websites cited in this article were accessed January 11, 2022.
15. 6 USC 7241(a).
16. *CIC Services, LLC v IRS*, 925 F 3d 247, 258 (CA 6, 2019).
17. *CIC Services, LLC v IRS*, 141 S Ct 1582; 209 L Ed 2d 615 (2021).
18. 18 USC 924(e).
19. *Borden v United States*, 141 S Ct 1817; 210 L Ed 2d 63 (2021).
20. *United States v Borden*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, filed April 25, 2019 (Case No 18-5409).
21. *Borden*, 141 S Ct at 1825.
22. *Id.* at 1835.
23. *Id.* at 1837-57.
24. *Mays v Hines*, 141 S Ct 1145; 209 L Ed 2d 265 (2021).
25. *Id.* at 1149.
26. *Id.*
27. *Babcock v Comm'r of Social Security*, 959 F3d 210 (CA 6, 2020). Note that the case has been re-styled in the Supreme Court to make Kilolo Kijakazi, the Acting Commissioner of Social Security, the named respondent.
28. 42 USC 415(a)(7)(A)(III).
29. Transcript of Oral Argument at *Babcock v Kilakazi*, ____ US ____ (20__) (No 20-480), available at <https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-480_19m2.pdf> [https://perma.cc/3DVY-NNJY].
30. *EMW Women's Surgical Ctr v Friedlander*, 960 F3d 785 (CA 6, 2020). Note that the case has been re-styled in the Supreme Court to reflect the identity of the petitioner as Daniel Cameron, the Attorney General of Kentucky.
31. *EMW Women's Surgical Ctr v Friedlander*, unpublished order of the United States Court of Appeals for the Sixth Circuit, filed June 24, 2020 (No 19-5516).
32. *June Medical Servs LLC v Russo*, 140 S Ct 2103; 207 L Ed 2d 566 (2020).
33. Transcript of Oral Argument at *Cameron v EMW Women's Surgical Ctr*, ____ US ____ (20__) (No 20-601), available at <https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-601_6j37.pdf> [https://perma.cc/5CN5-C2ZX].
34. Pub L No 104-132; 110 Stat 1214.
35. *Davenport v MacLaren*, 964 F3d 448 (CA 6, 2020). Note that the case has been re-styled in the Supreme Court to make Mike Brown, the Acting Warden, the named petitioner, Brown v Davenport, 141 S Ct 1288; 209 L Ed 2d 21 (2021).
36. *Davenport v MacLaren*, 964 F3d at 458.
37. *Davenport v MacLaren*, 975 F3d 537 (CA 6, 2020) (denying rehearing en banc).
38. *United States v Wooden*, 945 F3d 498 (CA 6, 2020).
39. *Id.* at 505.
40. *Davita, Inc. v Marietta Memorial Hosp Employee Health Benefit Plan*, 978 F3d 326 (CA 6, 2020).
41. *Id.* at 334.
42. *Id.*
43. *Id.* at 347.
44. The parties seem to disagree about the meaning of the Sixth Circuit's holding. Petitioners say this was a "disparate impact"-type holding (i.e., it is discrimination to enact a policy that impacts one group more than another). Respondents appear to argue that the Sixth Circuit was inferring discriminatory intent from the plan's actions. How the Court interprets this (and whether it impacts the outcome of the case) remains to be seen.

BEST PRACTICES

Best practices for correcting retirement plan tax qualification issues

BY ED HAMMOND

Sponsoring a tax-qualified retirement plan is a key component for an employer to attract and retain employees. Such employee plans are governed by the following Internal Revenue Code sections:

- IRC 401(a): e.g., defined benefit pension, defined contribution, and 401(k) plans;
- IRC 403(b): tax sheltered annuity plans of tax-exempt and governmental employers;
- IRC 408(p): SIMPLE plans; and
- IRC 408(k): Simplified Employee Pension plans (SEPs) and related code sections.

Plan, code, and regulatory requirements are complex. Sponsors and plan administrators strive to comply, but invariably one or more problems arise whether it's late salary deferrals, improper exclusion of eligible employees, missed plan loan payments, benefit overpayments, or other issues. Understanding that most plan sponsors attempt to follow their plan document and the law, the complexities involved in doing so and knowing that revocation of a plan's tax qualification is draconian and adversely impacts innocent plan participants, the IRS has instituted for plan sponsors a system of correction programs known as the Employee Plans Compliance Resolution System (EPCRS).[1]

Best practices for correcting retirement plan tax qualification issues support using EPCRS, which allows for self-correction in numerous circumstances. Further, if a correction program is available but not used and the issue is discovered by the IRS on audit, it will usually seek full correction and a closing agreement as well as payment by the sponsor of a negotiated sanction at least equal to — but likely higher than — the fee payable in connection with an EPCRS voluntary compliance program (VCP) submission except when agreement is not reached or extreme abuses are involved; the IRS may still seek plan disqualification.[2] As to whether using VCP will trigger an audit, it is not impossible, but my experience is that the chances are remote. One stated goal of EPCRS is encouraging voluntary utilization and correction through the program. That goal would be seriously undercut if correction submissions triggered audits.

After a plan sponsor or administrator identifies a plan document failure (the plan document does not include required code provisions or was not timely amended for changes in the code); a plan operational failure (the plan has not been administered in accordance with the code or the plan's terms); a plan demographic failure (the plan does not satisfy code coverage or participation requirements); or an employer eligibility failure (for example, if an ineligible entity adopts a 403(b) plan),[3] analyzing whether an EPCRS program is available should occur by addressing the following questions.

WHAT TYPE OF RETIREMENT PLAN DOES THE EMPLOYER SPONSOR?

Identifying the type of tax-qualified retirement plan at issue is im-

"Best Practices" is a regular column of the Michigan Bar Journal, edited by Gerard V. Mantese and Theresamarie Mantese for the Michigan Bar Journal Committee. To contribute an article, contact Mr. Mantese at gmantese@manteselaw.com.

portant; it dictates whether the plan may be corrected under EPCRS.[4] For example, nonqualified 457(f) plans may not be corrected using EPCRS. Additionally, IRS correction options and guidance can be particular to a specific type of plan. For example, the EPCRS revenue procedure contains different provisions addressing the correction of 401(a) qualified retirement plans like pension plans and 401(k) plans, 403(b) plans, SIMPLE plans, and SEPs. Note that self-correction is not as universally available for SEPs and SIMPLEs.[5]

CAN THE ISSUE BE FIXED USING EPCRS?

Once the type of retirement plan is identified, the next question is which EPCRS correction program is available, if any. The two correction programs that may be voluntarily utilized by plan sponsors under EPCRS are the self-correction program (SCP) and VCP.[6] Note, however, that EPCRS is not available to correct failures relating to diversion or misuse of plan assets and is only available in limited circumstances for what it defines as "abusive tax avoidance transactions."[7]

CAN THE PLAN BE SELF-CORRECTED USING EPCRS?

SCP is available to correct insignificant and certain significant operational failures in many circumstances, even if the plan or its sponsor is under examination by the IRS.[8] Insignificant operational failures may be corrected under SCP at any time. To use SCP to correct significant operational failures, if eligible, correction must occur by the end of the third plan year following the year of the failure. SCP may also be used to fix a limited number of plan document failures; if available, the failures must also be corrected by the end of the third plan year following the year the failure occurred. To be eligible for SCP, the plan must be subject to formal or informal procedures designed to promote compliance, and those procedures must be followed. The standard for such procedures is not high, but it behooves plan sponsors and administrators to have a general framework for overseeing compliance. Generally, a plan subject to Section 401(a) will receive a favorable IRS determination letter.

Note that SCP is not available for egregious failures as defined by EPCRS.[9] If a safe harbor EPCRS correction method is not used, the sponsor must make sure it can support correction using EPCRS principles.[10] Plan sponsors and administrators should keep records of any correction using SCP in the event of a subsequent audit.

IF THE PLAN CANNOT BE SELF-CORRECTED UNDER EPCRS, SHOULD THE SPONSOR FILE A VCP SUBMISSION WITH THE IRS?

Provided the plan and its sponsor are not under examination by the IRS, operational and document failures that cannot be corrected using SCP generally may be corrected using VCP; so too may be plan demographic failures and employer eligibility failures.[11] VCP involves submitting the issue and proposed correction methodology to the IRS using applicable forms (see IRS Form 8950, Form 14568 and related forms 14568 A through I) and any required accompanying forms. The proper user fee must be paid via pay.gov. VCP filings are common, and the IRS has a team dedicated to addressing them.

The EPCRS revenue procedure sets forth several safe harbor correction methodologies, though plan sponsors are not bound to use them. A sponsor using VCP may offer and negotiate other correction methodologies with the IRS provided the proposal aligns with EPCRS correction principles[12] including but not limited to:

- The correction method should restore the plan to the position it would have been in if the failure had not occurred, including restoration of benefits for current and former participants and beneficiaries. Lost earnings, if any, must be calculated and credited.
- The correction should be reasonable and appropriate for the failure. To that point, the correction method should to the extent possible resemble one already provided for in the code, regulations, EPCRS, or other guidance of applicability.
- With limited exceptions, the correction method should keep plan assets in the plan.
- The correction method should not violate other applicable code requirements.
- Plan failures must be fully corrected (and the mere fact the correction is inconvenient or burdensome does not excuse plan sponsors from this requirement.) Importantly, however, EPCRS states that full correction may not be required in certain situations if it is unreasonable or not feasible. In such cases, the correction method adopted must not have significant adverse effects on participants and beneficiaries of the plan and must not discriminate in favor of highly compensated employees.[13]

In my experience, the IRS has been agreeable in negotiations involving reasonable correction proposals by plan sponsors.

IF THE PLAN SPONSOR CONSIDERING A VCP SUBMISSION IS UNCERTAIN ITS PROPOSED CORRECTION WILL BE ACCEPTED BY THE IRS, SHOULD A PRESUBMISSION CONFERENCE BE SCHEDULED?

The IRS offers anonymous, no-fee, VCP presubmission conference procedures for matters eligible for correction with respect to requested methods not described as safe harbor corrections in EPCRS, provided the plan sponsor is eligible and intends to submit to VCP. If there is uncertainty with a VCP submission and proposed correction, a presubmission conference is advisable.[14]

IF THE QUALIFICATION ISSUE IS NOT COVERED BY EPCRS AND HAS NOT BEEN DISCOVERED ON AUDIT, CAN A PLAN SPONSOR STILL GET A CLOSING LETTER FROM THE IRS?

In the event a qualified plan issue has been identified and cannot be addressed under EPCRS, the IRS has a voluntary closing agreement program (VCAP) for such situations. However, the agency will

not consider a VCAP request if the plan or its sponsor is under IRS examination or investigation when the request is submitted or has any matters or appeals before the tax court. VCAP is not available for abusive tax avoidance transactions or willful tax evasion. See Employee Plans Voluntary Closing Agreements at <https://www.irs.gov/retirement-plans/employee-plans-voluntary-closing-agreements> [https://perma.cc/7TJZ-7P54] for more information.[15]

Code qualification problems may not be the only plan issues. Often, retirement plan fiduciaries may have violated their ERISA duties. The U.S. Department of Labor has a separate program by which fiduciaries can correct specific breaches (e.g., late contribution of participant salary deferrals) known as the Voluntary Fiduciary Correction Program. See Fact Sheet: Voluntary Fiduciary Correction Program, Employee Benefits Security Admin, US Dep't of Labor (December 2018) <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/vfcp.pdf> [https://perma.cc/94DP-TNHF] for more information.

If available, plan sponsors and administrators should utilize EPCRS to address qualification issues. The EPCRS revenue procedure and related VCP submission forms are detailed and complex. Utilizing EPCRS should only be done with the help of an employee benefits attorney familiar with navigating and resolving plan issues via this method.

Ed Hammond is a member of Clark Hill, where he assists clients with all aspects of employee benefit matters including resolution of retirement plan issues by using IRS and U.S. Department of Labor correction programs. He also counsels clients on day-to-day plan compliance and assists them with IRS, DOL, and Pension Benefit Guaranty Corporation plan audits.

ENDNOTES

1. Rev Proc 2021-30 (the latest in a series of EPCRS revenue procedures), available at Updated IRS Corrections Principles and Changes to VCP Outlined in EPCRS Revenue Procedure 2021-30, IRS (November 4, 2021) < https://www.irs.gov/faqs/retirement-plans/updated-irs-correction-principles-and-changes-to-vcp-outlined-in-epcrs-revenue-procedure-2021-30> [https://perma.cc/M9N8-98Y5]. All websites cited in this article were accessed January 13, 2022.
2. *Id.* at Sections 13 and 14.
3. *Id.* at Section 5.01(2).
4. *Id.* at Section 1.
5. *Id.* at Section 4.01(c).
6. *Id.* at Section 4.
7. *Id.* at Sections 4.11 and 4.12.
8. *Id.* at Sections 4.01, 4.02, 7, 8 and 9.
9. *Id.* at Section 4.10.
10. *Id.* at Section 6.02(2).
11. *Id.* at Sections 4.01(2), 10, 11 and 12.
12. *Id.* at Section 6.
13. *Id.* at Section 6.02(5).
14. *Id.* at Section 10.01.
15. IRC 7121 and Treas Reg 301.7121-1.

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PLAIN LANGUAGE

Make your case in a minute

(WITH SOME HELP FROM ARISTOTLE)

BY MARK COONEY

There's no suspense in good legal writing. If we force readers to wander and bide, then we've wasted precious time — and a precious opportunity. I've long adhered to Bryan Garner's 90-second rule.[1] Whatever we're writing, we should make our position clear within 90 seconds. If we don't, we've missed the mark.

Easier said than done. Cases are often complicated, legally and factually. But here's a concrete strategy that can help.

YOUR NEW COCOUNSEL: ARISTOTLE

You may recall the deductive syllogism from your law-school days or undergraduate logic courses. If you were to Google "deductive syllogism," you'd likely bump into some variation of this example, commonly attributed to Aristotle:

- *Major premise*: All humans are mortal.
- *Minor premise*: Socrates is human.
- *Conclusion*: Therefore, Socrates is mortal.

In a legal syllogism, we think of the major premise as the controlling rule, the minor premise as the crucial fact, and the conclusion as the theoretical holding.[2] Applied to a realistic scenario, it might look like this:

- *Rule*: A trade secret is information that outsiders can't easily get through proper means.
- *Fact*: The information in XYZ's customer list is available online and in trade publications.
- *Conclusion*: Therefore, XYZ's customer list isn't a trade secret.

You can convert this syllogism to prose by adding a topic sentence and devoting a sentence to each component. (The rule or fact part, or both, might sometimes warrant a second sentence.) This approach can produce a quick but meaningful overview of almost any legal argument:

> XYZ Corporation alleges, incorrectly, that its customer list is a trade secret. The Uniform Trade Secrets Act defines "trade secret" as information that outsiders cannot "readily ascertain[ ] by proper means." But the names and contact information in XYZ's customer list are available to the public online and in trade publications. Thus, the list does not meet the Act's definition, and Fred Smith is entitled to summary judgment.

This short overview takes all of 30 seconds to read. Yet the reader still gets a concrete sense that the customer list fails to meet the statutory definition — and why. The judicial reader would surely expect a different perspective from XYZ's attorney. But the reader would at least, we hope, be predisposed in our client's favor.

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

LOW CAL, HIGH PROTEIN

For all but the most implausible arguments, the syllogism produces an almost irresistible logical momentum. Note how the paragraph above persuaded you with facially neutral language. You saw no intensifiers (empty, pushy words like *clearly* and *obviously*). You felt no adversarial tone. And at just four sentences, it persuaded without length. These quick overviews grab — but don't tax — readers.

If you're concerned that this four-sentence model is *too* succinct (as it might seem, for instance, in a brief's introduction section), then you might fill in a bit around the edges. But do so with care to avoid blunting your core message. In the example below, I've underlined our original syllogism to help you spot it:

> XYZ Corporation alleges that Fred Smith, its former employee, misappropriated a trade secret by printing off its customer list for use at his new business. To succeed, XYZ must prove that its customer list is, in fact, a trade secret. It cannot.
>
> The Uniform Trade Secrets Act defines "trade secret" as information that outsiders cannot "readily ascertain[ ] by proper means." Here, it is undisputed that the names and contact information in XYZ's customer list are available to the public. Anybody can find this information, with ease, by checking websites or trade publications. Because outsiders can readily acquire the information through these lawful means, the customer list does not meet the Act's definition, and Smith is entitled to summary judgment.

Notice that this beefed-up version is still all meat — no fat. It doesn't bog down in procedural details, such as unhelpful document titles and dates. It doesn't distract with unnecessary party-reference parentheticals. It gets to it. Many lawyers are too tied to conventions to be this direct. A direct style will set you apart and win readers.

In fact, you may have noticed that I didn't even cite, though the act title appears. The raw citation can wait. Remember, this is just an overview of the substance to follow. It isn't the substance. You'll cite plenty when you get to the document's body. But if you fear the citation gods' wrath, at least cite in a footnote to avoid halting your momentum. This overview should *flow*, not stammer.

DIGGING DEEP

The syllogism is also at the heart of Bryan Garner's deep-issue technique, which uses multiple sentences to construct a formal question presented.[3] Garner instructs litigants to follow the deductive-syllogism structure but flip the conclusion sentence to a question:[4]

> The Uniform Trade Secrets Act defines "trade secret" as information that outsiders cannot "readily ascertain[ ] by proper means." XYZ Corporation's customer list contains contact information that the public can find in trade publications and on websites. Is the customer list a trade secret?

As the old saying goes, sometimes to ask the question is to have the answer. And that's the impact that our fictional appellate lawyer hopes for here. Note again that brevity is your ally. This was just 44 words, well below Garner's 75-word readability ceiling.[5] I've envisioned an appellate brief for this technique, but Garner advocates using these syllogism-based issue statements for trial-level motions and briefs too.[6]

LOCATION, LOCATION, LOCATION

The best location for these syllogism-based overviews depends on the document. But no matter the document, your architectural decisions should reflect your first goal: reach the reader within 90 seconds — make an indelible first impression.

In an opinion letter, office memo, or court opinion, our original four- or five-sentence version might appear at the outset, perhaps beneath an "Overview," "Introduction," or "Quick Summary" heading.

In a court brief, a syllogism-based overview — perhaps in the slightly beefed-up style we built earlier — can produce a succinct, meaningful introduction section. If you're the moving party, keep your motion document down to its bare minimum. Your reader should be able to read your motion and the supporting brief's introduction section within 90 seconds. It might look something like what you see in Appendix A, depending on the court and jurisdiction.

You can modify this approach for multiple-issue motions and briefs. In the motion document, use a numbered or bulleted vertical list after the word *because*. And for the brief's introduction section, consider helpful subheadings above each overview. Shorten each overview to our four- or five-sentence model.

For appellate briefs — and longer briefs supporting or opposing dispositive motions — you might use the four- or five-sentence model for thesis (road-map) paragraphs beneath your main argument headings. And for appellate lawyers who are Garner disciples, these syllogisms would appear in your appellate brief's questions presented, grabbing your reader at the outset.

Of course, if your brief is short or you otherwise fear undue repetition, you might skip the overview in one place or another. Let your experience and instincts — and Aristotle — guide you.

Appendix A

[case caption]

Fred Smith's Motion for Summary Judgment

Defendant Fred Smith moves for summary judgment under Fed. R. Civ. P. 56 because XYZ Corporation cannot prove the trade-secret element of its misappropriation-of-trade-secrets claim.

[signature block]

[case caption]

Brief Supporting Fred Smith's Motion for Summary Judgment

Introduction

XYZ Corporation alleges that Fred Smith, its former employee, misappropriated a trade secret by printing off its customer list for use at his new business. To succeed, XYZ must prove that its customer list is, in fact, a trade secret. It cannot.

The Uniform Trade Secrets Act defines "trade secret" as information that outsiders cannot "readily ascertain[ ] by proper means." Here, it is undisputed that the names and contact information in XYZ's customer list are available to the public. Anybody can find this information, with ease, by checking websites or trade publications. Because outsiders can readily acquire the information through these lawful means, the customer list does not meet the Act's definition, and Smith is entitled to summary judgment.

Statement of Facts

[etc.]

Mark Cooney is a professor at WMU–Cooley Law School, where he chairs the legal-writing department. He is editor in chief of *The Scribes Journal of Legal Writing* and author of *Sketches on Legal Style*. He was co-recipient (with Joseph Kimble) of the 2018 ClearMark Award for legal drafting and is a past chair of the SBM Appellate Practice Section.

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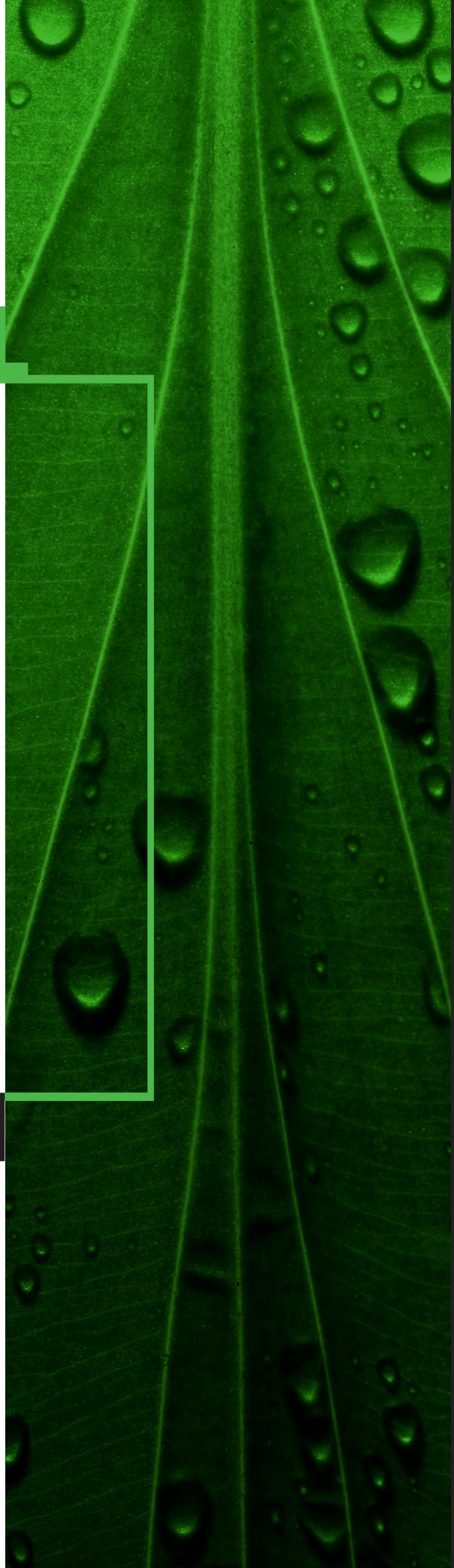

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ETHICAL PERSPECTIVE

Addressing the gray areas

BY ROBINJIT K. EAGLESON

What is ethics? At the nucleus of legal ethics are the principles that govern the conduct of members of the legal profession (attorneys and judges alike) that they are expected to observe throughout their legal career. Or, as so eloquently stated by Chief Justice John Marshall, "The fundamental aim of legal ethics is to maintain the honour and dignity of the law profession, to secure a spirit of friendly cooperation between the bench and the bar in promotion of highest standards of justice, to establish honourable and fair dealings of the counsel with his client."[1]

At times, it seems simple enough to live up to this standard of honor and dignity. However, there are times when it is not so clear, especially when the issue falls into the gray area. That is where the State Bar of Michigan Judicial Ethics Committee and the SBM Standing Committee on Professional Ethics assist members with application of the Rules of Professional Conduct through ethics opinions.

The Standing Committee on Professional Ethics recognized that, especially in light of remote work, Michigan lawyers need guidance on how to ethically interact with attorneys who are not licensed in the state. In response, it published ethics opinion RI-382.[2] The State Bar of Michigan Ethics Helpline routinely receives calls from attorneys inquiring about specific conduct that would require reporting potential unauthorized practice of law or asking whether their own conduct would constitute the unauthorized practice of law. Michigan attorneys have a duty to report known unauthorized practice of law activity under MRPC 5.5. Whether specific conduct actually constitutes the unauthorized practice of law is determined by the legislature and courts. RI-382 provides guidance on identifying and reporting the unauthorized practice of law, referral relationships, employment of and joint firm ownership with out-of-state attorneys, assisting an out-of-state attorney with a Michigan matter, and negotiating with out-of-state attorneys.

The Judicial Ethics Committee recently reviewed a topic that falls into the grey area in judicial ethics, specifically regarding referral fees when on the bench. A number of judges have asked whether they can accept a referral fee earned prior to assuming the bench and inquired about requirements regarding notification and disqualification. Part of this inquiry was answered in ethics opinion CI-1079, but the committee recently published JI-150 to update the analysis. It provides additional clarity by including current judicial canons, ethics opinions, and changes regarding when referral fees are earned. Specifically, JI-150 provides guidance for when judges may accept referral fees earned prior to assuming the bench — if they disqualify themselves from all matters involving the firm or lawyer to which the case was referred until final payment is made, with limited exceptions.

The Professional Ethics Committee and Judicial Ethics Committee provide advice in the form of nonbinding written ethics opinions, and requests for these opinions may be made by any attorney. Information on how to request an ethics opinion can be found at How to Request an Ethics Opinion on the SBM website <https://www.michbar.org/generalinfo/ethics/request> [https://perma.cc/7J86-ZAQW].

Judicial and attorney ethics opinions are researched and drafted by the committee. As a way to encourage members to seek guidance and facilitate open deliberations on the issues, requests for written ethics opinions — including the identity of the inquirer, identifying facts, and draft opinions — are confidential pursuant to Rule 6 under the rules of both committees.

There is no denying that the practice of law is becoming increasingly complex with the

"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.

increased use of technology and other advances. Navigating the world of ethics can seem daunting at times, but ethical rules set the foundation for professionals and the profession in a modern, culturally complex society. It is important to develop frameworks to ensure we are making consistent decisions that are aligned with the core of the practice of law. To accomplish this, SBM members must be aware of the Rules of Professional Conduct and how to apply them. The simplest way to do that is through the ethics opinions written by the attorneys and judges who face 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.

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Where's the beef, turkey, butter, cheese, or other animal ingredient?

CURRENT LABELING ISSUES FOR PLANT-BASED PRODUCTS

BY VIRGINIA C. THOMAS

Plant-based food products that provide alternatives to those traditionally made from animals are a fast-growing part of our food industry. Consider the humble burger: A recent forecast expects a $241-million North American plant-based burger market by 2030 with the United States and Canada as market leaders. A compound annual growth rate of more than 22% is predicted for 2020-2030.[1]

U.S. consumers' preference for beef products over plant-based products remains strong, according to a 2021 study commissioned by the Cattlemen's Beef Promotion and Research Board.[2] However, the study suggests that competitive pricing of plant-based alternatives coupled with greater health and environmental appeal to younger individuals may offer healthy competition in the marketplace.[3]

FEDERAL AND STATE LABELING LAWS

The U.S. Department of Agriculture (USDA) regulates the production and labeling of meat and poultry products under the Meat Inspection Act.[4] The U.S. Food and Drug Administration (FDA), part of the U.S. Department of Health and Human Services (HHS), does the same for plant-based food products under the Federal Food, Drug, and Cosmetic Act.[5] Both authorities must ensure that labeling for products under their control is truthful and not misleading to consumers. To help with this task, they prescribe regulatory definitions and standards of identity (SOI) which specify mandatory and optional ingredients for food products. SOI also may include a method of production. The goal is to "promote honesty and fair dealing in the interest of consumers."[6] To illustrate, the USDA's current SOI for hamburger is as follows:

> "Hamburger" shall consist of chopped fresh and/or frozen beef with or without the addition of beef fat as such and/or seasoning, shall not contain more than 30 percent fat, and shall not contain added water, phosphates, binders, or extenders. Beef cheek meat (trimmed beef cheeks) may be used in the preparation of hamburger only in accordance with the conditions prescribed in paragraph (a) of this section.[7]

The FDA has been seeking to modernize and update existing SOI horizontally (i.e., across categories of standardized foods.) In 2019, the agency created a public forum for gathering and sharing information that would lead to "flexibility for the development of healthier foods … and facilitate innovation."[8] It may take some time to evaluate the more than 5,200 comments received in response to the agency's notice.[9] More recently, the FDA reopened the comment period for a rule proposed in 2005 that would establish general principles that the FDA and USDA would use in establishing

new food standards or reevaluating existing ones.[10] Meanwhile, at least a dozen major beef-producing states have proposed or enacted legislation restricting how plant-based or cell-cultured meat alternatives may be labeled.[11] Among them are Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, and Wyoming.[12] This course of legislation generally would prohibit the use of words like "burger" or "milk" to describe products not derived from harvested production livestock or poultry even if the labels also clearly label the product as "vegan," "vegetarian," "plant-based," or "meat substitute."

CHALLENGES IN THE COURTS

Plant-based food advocates are not acquiescing to heightened labeling restrictions imposed by the states. The Plant Based Foods Association (PBFA), a trade association with more than 200 corporate members, responded by issuing recommended labeling standards for plant-based milk (2018) and plant-based meat (2019).[13] The PBFA and other industry advocates have also lent support to legal challenges inspired by new state labeling restrictions affecting plant-based products.

Federal lawsuits have been filed (and some have been resolved) in multiple states.[14] Plaintiff claims share a common theme — that new restrictive labeling laws compromise their First Amendment right to free speech and favor the meat industry. Defendants argue that the laws are intended to protect consumers from being misled by inaccurate labeling. So far, a mix of plaintiffs and defendants have prevailed in court.

THE MICHIGAN LANDSCAPE

The Food and Dairy Division of the Michigan Department of Agriculture and Rural Development has issued clear food-labeling requirements for products manufactured or sold in the state.[15] The food labeling guide outlines SOI considerations for "imitation" foods, generally. As it stands, the guide does not directly address labeling for plant-based products or meat or dairy alternatives.

However, pending 2021 HB 4982 would add specificity to Michigan's food laws by "impos[ing] new labeling requirements with respect to laboratory-grown meat."[16] In part, the bill states, "A person shall not label or identify as meat a laboratory-grown meat substitute."

The current bill is substantially similar to 2019 HB 4947, which was introduced but never advanced to the House floor. As of this writing, 2021 HB 4982 resides with the House Committee on Agriculture, which is where its predecessor died.

Virginia C. Thomas is director of the Arthur Neef Law Library at Wayne State University. She is a member of the SBM Access to Justice Initiative and serves on the ICLE Executive Committee.

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PRACTICING WELLNESS

Attorney impairment and ethical practice

BY THOMAS GRDEN

Before beginning my career as a therapist, I dealt cards in a local charity poker room to poker and blackjack players, often until 2 a.m. The learning curve was shallow, but the work demanded constant focus. Tempers flared when hundreds of dollars were at stake, and I know this because I had my fair share of lapses in attention. Yet no matter how high the stakes felt to me at the time, they were essentially penny slots compared to the pressure of providing therapy. I no longer have the luxury of lapses in focus, periods of inattention, or careless mistakes — the stakes have been raised from dividends to depression. Therapists are certainly not alone as a profession with no margin for error. Police officers and firefighters immediately come to mind as occupations that can't have an off day. Professions in which individual performance impacts the safety of others are known as safety sensitive,[1] and it shouldn't surprise you that attorneys also fall into this category.

As a self-regulating profession, it's imperative that attorneys have a low threshold for unethical behavior and practice hypersensitivity concerning their own potential impairment, a word that often conjures up images of practicing under the influence of drugs or alcohol. In reality, the most common source of impairment is also the most insidious: imperceptible deterioration of mental health. Unfortunately, the legal profession in the United States boasts some of the highest rates of depression, anxiety, and substance abuse when compared to other occupations that require a postgraduate education. A 2016 study found that levels of depression, anxiety, and stress among attorneys are significantly elevated. Research indicated that 28% reported experiencing mild or higher levels of depression, 19% reported experiencing mild or higher levels of anxiety, and 23% reported experiencing mild or higher levels of stress.[2] In terms of career prevalence, 61% reported concerns with anxiety at some point in their career and 46% reported concerns with depression. Approximately 1 in 5 reported problematic alcohol use.[3] A separate study found that, when controlling for profession, attorneys have the fifth-highest rate of suicide.[4] Research has also established a relationship between substance abuse, mental health, and attorney grievances. A conservative estimate of disciplinary cases related to substance abuse is about 27%,[5] though this number may be higher as not all state and county bar associations report on disciplinary cases. A 1992 study of California and New York discipline records found that 50% to 70% of disciplinary cases were connected to substance abuse.[6]

While no specific research exists regarding the effects of the COVID-19 pandemic on the legal profession, it has exacerbated the rates of substance abuse and mental health problems among the general population,[7] and it's likely that the legal profession is not immune. As the pandemic begins to slowly subside, many lawyers face a decision on whether to return to the office and risk illness or work from home, where there are no boundaries between work and home life. Isolation and loneliness (common side effects of working from home) are both risk factors for mental health and substance abuse problems. While many attorneys blurred the line between work and home life before the pandemic, the complete erasure of this line does lead to decreased resilience over time. This, in turn, can lead an individual toward unhealthy coping skills or an acute mental illness that impacts their ability to function. Adding to the aforementioned stressors is the obligation to report their peers, foisted upon their shoulders by MRPC 8.3. The pressure to

"Practicing Wellness" is a regular column of the Michigan Bar Journal presented by the State Bar of Michigan Lawyers and Judges Assistance Program. If you'd like to contribute a guest column, please email contactljap@michbar.org.

evaluate whether the decaying quality of work of a trusted colleague rises to the level of a grievable offense can be immense.

These stressors may manifest themselves visibly in a variety of ways, some of the most common being:

- Failing to meet deadlines, resulting in lost claims;
- Failing to adequately communicate with clients;
- Outbursts of temper in the courtroom;
- Unprofessional communication with opposing counsel; and
- Any behavior outside of normal duties that brings obloquy to the profession.[8]

There are preventative steps that can be taken to avoid serious impairment. The American Bar Association's Well-Being Pledge Campaign, which began in 2018, contains a seven-point framework to help guide firms and bar associations in their efforts to improve attorney wellness.[9] While the 204 signatories the ABA boasts are encouraging, the profession must guard against legal stakeholders who acknowledge the need for wellness while only paying lip service to the idea. Luckily, most that stand upon their soap boxes to preach the gospel of self-care do so out of an abundance of altruism and concern for the profession. However, if legal stakeholders cannot be convinced to embrace a culture of wellness out of concern for the profession, then perhaps an appeal to self-preservation is necessary. MRPC 5.1(a) – (c) outline the responsibilities of firm stakeholders, partners, or legal supervisors in response to lawyer impairment.

In addition to disciplinary consequences, ignoring lawyer well-being has the potential for financial consequences. Sick, stressed, overworked, or otherwise impaired attorneys are less efficient. They may experience lack of focus — a common symptom of depression, anxiety, and ADHD — or lack of motivation. An outward lack of motivation is a common symptom of depression but also may indicate severe anxiety; when an individual is too overwhelmed to act, it is sometimes referred to as having "analysis paralysis." Lack of wellness also impacts employee turnover, and firms would do well to consider the financial investments of incorporating a new hire into the firm.

Often ignored is the human capital cost in temporarily distributing a departed attorney's caseload among the remaining firm members. Poor conduct also carries a potential financial burden in increased malpractice insurance costs.[10] MCR 9.121(B) – (D) outline disciplinary reactions to lawyer impairment. Legal stakeholders must be willing to engage their subordinates in difficult conversations for the sake of their practices and the profession as a whole.

Most discussions surrounding attorney wellness and impairment are in the context of a systemic problem. The way the profession at large addresses mental health is a macrocosm of the pressures lawyers face individually. There is pressure to never show vulnerability. Ultimately, any impairment that affects an attorney's ability to contribute fully to the welfare of their client begins to encroach upon ethical behavior. If you recognize yourself or one of your colleagues beginning to show signs of impairment, reach out to the Lawyers and Judges Assistance Program to find out which resources are available to you.

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

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ORDERS OF DISCIPLINE & DISABILITY

REPRIMAND

Donna M. Beasley-Gibson, P72542, Mount Vernon, Washington, by the Attorney Discipline Board. Reprimand effective December 22, 2021.

The grievance administrator filed a Notice of Filing of Reciprocal Discipline pursuant to MCR 9.120(C), that attached a certified copy of an order reprimanding the respondent, entered by the Disciplinary Board of the Supreme Court of Washington on May 6, 2020, *In re Donna Marie Gibson, Lawyer, Bar No. 33583*, Case No. 20#00028.

An order regarding imposition of reciprocal discipline was issued and served on the respondent on October 22, 2021. The 21-day period referenced in MCR 9.120(C)(2)(b) expired without objection by either party and the respondent was deemed to be in default. Pursuant to MCR 9.120(C)(6), the Attorney Discipline Board imposed comparable discipline and ordered that the respondent be reprimanded. Costs were assessed in the amount of $750.

DISBARMENT AND RESTITUTION

Scott E. Combs, P37554, Plymouth, by the Attorney Discipline Board Tri-County Hearing Panel #7. Disbarment effective October 14, 2020.

After proceedings conducted pursuant to MCR 9.115, the hearing panel found that the respondent committed professional misconduct as charged in three counts of a four-count formal complaint filed against him by regularly misusing his IOLTA, and during his representation of two separate, unrelated clients.

Specifically, the panel found that the respondent took action on behalf of a client without authority to do so, in violation of MRPC 1.2(a) (Counts 2-3); failed to keep a client reasonably informed about the status of a matter, in violation of MRPC 1.4(a) (Counts 2-3); failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, in violation of MRPC 1.4(b) (Counts 2-3); engaged in a conflict of interest as a result of representing a client, when doing so may have been materially limited by respondent's own interest, in violation of MRPC 1.7(b)(1) and (2) (Counts 2-3); held funds other than client

or third-party funds in an IOLTA, in violation of MRPC 1.15(a)(3) (Counts 1-3); failed to promptly render to his client a full accounting of the settlement funds, upon his client's requests for the same, in violation of MRPC 1.15(b)(3) (Count 3); failed to keep his personal funds separate from client funds and/or disputed funds and failed to promptly distribute, and in particular to himself, all portions of the funds held in the IOLTA which were not in dispute, in violation of MRPC 1.15(c) (Counts 1-3); failed to safeguard the funds of clients, and/or disputed funds, in connection with a representation by failing to separate them from his own property, in violation of MRPC 1.15(d) (Counts 1-3); used an IOLTA as a personal and/or business checking account, and wrote checks and made electronic transfers directly from the IOLTA in payment of personal and/or business expenses, in violation of MRPC 1.15(c) and (d) (Counts 1-3); misappropriated his client's funds, in violation of MRPC 1.15(b)(3), (c), and (d) (Count 3); maintained on deposit in a client trust account his own funds in an amount more than reasonably necessary to pay financial institution charges or fees, or to obtain a waiver of service charges or fees, in violation of MRPC 1.15(f) (Counts 1-3); knowingly made a false statement of material fact to a tribunal and/or failed to correct a false statement of material fact made to the tribunal, in violation of MRPC 3.3(a)(1) (Counts 2-3); and, engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b) (Counts 1-3). The respondent was also found to have violated MCR 9.104(1)-(4) and MRPC 8.4(a) (Counts 1-3).

The panel ordered that the respondent's license to practice law be suspended for a period of three years and that he pay $19,725.10 in restitution to one of the clients.

The respondent timely filed a petition for review and requested an interim stay of 60 days to allow his new counsel sufficient time to prepare a complete petition for stay. The grievance administrator timely filed a cross-petition for review. On July 10, 2020, the Attorney Discipline Board entered an order granting, in part, the respondent's request for an interim stay. The board's order stayed the order of discipline on an interim basis and the respondent was given 14 days to supplement his request for a stay. After the respondent's supplement was filed, the board issued an order denying in part, and granting in part, the respondent's petition for stay of order of suspension and restitution, staying the panel's decision regarding restitution only and denying the respondent's motion for a stay of his three-year suspension.

The respondent filed a motion for reconsideration regarding the stay, which was denied. On October 13, 2020, the board entered an order granting a stay of the suspension of the respondent's license to practice law in Michigan *nunc pro tunc* from October 8, 2020, to October 13, 2020, ordering that the interim stay of the order of suspension be dissolved, and ordering the respondent's three-year suspension from the practice of law in Michigan to become effective October 14, 2020.

After proceedings conducted in accordance with MCR 9.118, the board issued an opinion and order on April 1, 2021, affirming the hearing panel's findings of misconduct, modifying the order of restitution (restitution was reduced to $19,252.10), and increasing the discipline imposed from a three-year suspension to disbarment. On April 29,

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

2021, the respondent filed a timely application for leave to appeal with the Michigan Supreme Court, pursuant to MCR 9.122. On August 3, 2021, the Court issued an order denying the respondent's application for leave to appeal. On August 24, 2021, the respondent filed a motion for reconsideration of the Court's August 3, 2021 order. On December 1, 2021, the Court denied the respondent's motion. Costs were assessed in the total amount of $11,934.87.

REPRIMAND (BY CONSENT)

Richard J. Corriveau, P25901, Northville, by the Attorney Discipline Board Tri-County Hearing Panel #27.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Discipline pursuant to MCR 9.115(F)(5) that was approved by the Attorney Grievance Commission and accepted by the hearing panel. Based upon the respondent's admissions as set forth in the parties' stipulation, the panel found that the respondent committed professional misconduct as a result of his dual contemporaneous representation of the father in a domestic relations matter and the son in a juvenile delinquency matter.

Specifically, and in accordance with the parties' stipulation, the panel found that the respondent represented a client where the representation may have been materially limited by his responsibilities to another client, in violation of MRPC 1.7(b).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be reprimanded. Costs were assessed in the amount of $853.25.

REPRIMAND

Leila L. Hale, P79801, Henderson, Nevada, by the Attorney Discipline Board. Reprimand effective December 22, 2021.

The grievance administrator filed a notice of filing of reciprocal discipline pursuant to MCR 9.120(C), that attached a certified copy of an order reprimanding the respondent, entered by the state of Nevada on January 28, 2000, *State Bar of Nevada v Leila Hale, Esq.*, Case Nos. OBC 17-0374; 17-0553; and a certified copy of a final judgment and order of reciprocal discipline entered by the state of Arizona on July 20, 2021, *In the Matter of a Member of the State Bar of Arizona, Leila L. Hale, Bar No. 03312*, Case No. PDJ 2021-9041.

An order regarding imposition of reciprocal discipline was issued and served on the respondent on October 22, 2021. The 21-day period referenced in MCR 9.120(C)(2)(b) expired without objection by either party and the respondent was deemed to be in default. Pursuant to MCR 9.120(C)(6), the Attorney Discipline Board imposed comparable discipline and ordered that the respondent be reprimanded. Costs were assessed in the amount of $750.

SUSPENSION (BY CONSENT)

Cyril C. Hall, P29121, Dearborn, by the Attorney Discipline Board Tri-County Hearing Panel #26. Suspension, 30 days, effective December 1, 2021.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Discipline and Waiver, in accordance with MCR 9.115(F)(5), which was approved

by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contained the respondent's admissions to the allegations that he committed professional misconduct as the result of his improper use of his IOLTA from June 1, 2017, through December 31, 2017.

Based upon the respondent's admissions as set forth in the stipulation of the parties, the panel found that the respondent held funds other than client or third-person funds (i.e., earned fees) in an IOLTA, in violation of MRPC 1.15(a)(3); failed to hold property of his clients or third persons separately from his own, in violation of MRPC 1.15(d); deposited his own funds into an IOLTA, (i.e., by keeping fees in the account after they became earned), in excess of an amount reasonably necessary to pay financial institution service charges or fees or to obtain a waiver of service charges or fees, in violation of MRPC 1.15(f); and as a partner in a firm, failed to make reasonable efforts to ensure that the firm had in effect measures giving reasonable assurance that a nonlawyer's conduct was compatible with the professional obligations of the lawyer, in violation of MRPC 5.3(a).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent's license to practice law in Michigan be suspended for 30 days, effective December 1, 2021, pursuant to the parties' agreement. Costs were assessed in the amount of $1,318.33.

REINSTATEMENT

On November 22, 2021, Tri-County Hearing Panel #26 entered an Order of Suspension (By Consent) that suspended the respondent's license to practice law in Michigan for 30 days, effective December 1, 2021. On December 23, 2021, the respondent, Cyril C. Hall, submitted an affidavit pursuant to MCR 9.123(A), stating that he has fully complied with all requirements of the panel's order. On January 4, 2022, the board was advised that the grievance administrator had no objection to the affidavit; and the board being otherwise advised;

NOW THEREFORE,

IT IS ORDERED that the respondent, Cyril C. Hall, is **REINSTATED** to the practice of law in Michigan effective January 4, 2022.

REINSTATEMENT

Nathaniel Herdt, P68144, Milan, by the Attorney Discipline Board. Reinstated, effective December 15, 2021.

The petitioner's license to practice law in Michigan was suspended for 18 months effective July 1, 2019. On June 16, 2021, the petitioner filed a petition for reinstatement pursuant to MCR 9.123 and MCR 9.124, which was assigned to Tri-County Hearing Panel #2. After a hearing on the petition, the panel concluded that the petitioner satisfactorily established his eligibility for reinstatement and on November 23, 2021, issued an Order of Eligibility for Reinstatement. On December 9, 2021, the board received written confirmation that the petitioner paid his bar dues in accordance with Rules 2 and 3 of the Supreme Court Rules Concerning the State Bar of Michigan.

The board issued an Order of Reinstatement reinstating petitioner to the practice of law in Michigan, effective December 15, 2021.

DISBARMENT (BY CONSENT)

Brian J. Kolodziej, P76330, St. Clair Shores, by the Attorney Discipline Board Tri-County Hearing Panel #104. Disbarment, effective December 15, 2021.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Disbarment, in accordance with MCR 9.115(F)(5), which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contained the respondent's admission that he was convicted by a plea of nolo contendere to two counts of willful neglect of duty of a public officer, a misdemeanor, in violation of MCL 750.478, in a matter titled *People of the State of Michigan v Brian Joseph Kolodziej*, 76th District Court Case No. 20-1309-FY.

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

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

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be disbarred from the practice of law in Michigan. Total costs were assessed in the amount of $944.05.

SUSPENSION

Diane L. Marion, P33403, Belleville, by the Attorney Discipline Board Tri-County Hearing Panel #4. Suspension, one year, effective December 29, 2021.

After proceedings conducted pursuant to MCR 9.115, the panel found, by default, that the respondent committed professional misconduct while employed as an assistant U.S. attorney for the Eastern District of Michigan, when she misrepresented information and facts to the court regarding a case.

Based on the respondent's default and the evidence presented at the hearing, the panel found that the respondent knowingly made a false statement of material fact to a tribunal, in violation of MRPC 3.3(a)(1); engaged in conduct that was prejudicial to the administration of justice, in violation of MRPC 8.4(c), and MCR 9.104(1); and engaged in conduct that exposed the legal profession to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(3).

The panel ordered that the respondent's license to practice law be suspended for a period of one year. Costs were assessed in the amount of $1,649.46.

DISBARMENT AND RESTITUTION

Douglas A. McKinney, P35430, Auburn Hills, by the Attorney Discipline Board Tri-County Hearing Panel #51. Disbarment effective December 2, 2021.[1]

After proceedings conducted pursuant to MCR 9.115, the panel found, by default, that the respondent committed professional misconduct as charged in a seven-count formal complaint filed against the respondent in his continued representation of clients, filing of pleadings, and his appearance in multiple courts after the suspension of his license to practice law in Michigan; knowingly disobeyed an obligation under the rules of a tribunal by failing to comply with a court order to pay an arrearage of child support and court fines; and failed to answer seven requests for investigation.

Based on the administrator's argument, the exhibits, and the respondent's default, the panel found that, with respect to Count 1, the respondent knowingly disobeyed an obligation under the rules of a tribunal, in violation of MRPC 3.4(c); engaged in conduct which was in violation of the Rules of Professional Conduct, in violation of MRPC 8.4(a) and MCR 9.104(4); engaged in conduct that was prejudicial to the administration of justice, in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and engaged in conduct that was contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

With regard to Counts 2-3, the hearing panel found that the respondent practiced law, in violation of MCR 9.119(E)(1); held himself out as an attorney, in violation of MCR 9.119(E)(4); practiced law while not licensed to do so, in violation of MRPC 5.5(a); engaged in conduct which was in violation of the Rules of Professional Conduct, in violation of MRPC 8.4(a) and MCR 9.104(4); engaged in conduct which involved dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflected adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b); engaged in conduct that was prejudicial to the administration of justice, in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and engaged in conduct that was contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

With regard to Counts 4-5, the hearing panel found that the respondent engaged in the misconduct recited in Counts Two and Three above; that he had contact with clients, in violation of MCR 9.119(E)(2); and that he appeared as an attorney before a court or judge, in violation of MCR 9.119(E)(3).

As to Count 6, the hearing panel found that the respondent charged an illegal fee, in violation of MRPC 1.5(a); accepted a new retainer after being suspended from

the practice of law, in violation of MCR 9.119(D); practiced law, in violation of MCR 9.119(E)(1); had contact with clients, in violation of MCR 9.119(E)(2); appeared as an attorney before a court or judge, in violation of MCR 9.119(E)(3); held himself out as an attorney, in violation of MCR 9.119(E)(4); practiced law while not licensed to do so, in violation of MRPC 5.5(a); engaged in conduct which was in violation of the Rules of Professional Conduct, in violation of MRPC 8.4(a) and MCR 9.104(4); engaged in conduct which involved dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflected adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b); engaged in conduct that was prejudicial to the administration of justice, in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and engaged in conduct that was contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

As to Count 7, the hearing panel found that the respondent knowingly failed to timely respond to a lawful demand for information from a disciplinary authority, in violation of MRPC 8.1(a)(2); failed to timely answer a request for investigation, in violation of MCR 9.104(7) and MCR 9.113(A) and (B)(2); and engaged in conduct that violated the standards or rules of professional responsibility adopted by the Supreme Court, in violation of MCR 9.104(4) and MRPC 8.4(a).

The panel ordered that respondent be disbarred from the practice of law and pay restitution in the total amount of $500. Total costs were assessed in the amount of $2,011.67.

1. Respondent has been continuously suspended from the practice of law in Michigan since September 3, 2021. See Notice of Interim Suspension Pursuant to MCR 9.115(H)(1), dated September 3, 2021.

REINSTATEMENT

On August 6, 2020, Tri-County Hearing Panel #69 entered an order of suspension and restitution with condition that suspended the respondent's license to practice law in Michigan for 90 days effective August 28, 2020. The respondent filed a timely petition for review and petition for stay, which resulted in an automatic stay of the hearing panel's August 6, 2020, order in accordance with MCR 9.115(K). After review proceedings held in accordance with MCR 9.118, the board issued an order on April 27, 2021, that affirmed the hearing panel's order of suspension and restitution with condition in its entirety and ordered additional restitution. On May 25, 2021, the respondent filed a motion for reconsideration which resulted in an automatic stay of the board's order, pursuant to MCR 9.118(E). On August 24, 2021, the board issued an order denying the respondent's motion for reconsideration. As a result, the board's order of suspension and restitution with condition and ordering additional restitution became effective on September 22, 2021.

On December 29, 2021, the respondent, Gary D. Nitzkin, submitted an affidavit pursuant to MCR 9.123(A) stating that he has fully complied with all requirements of the board's order. No objection to the respondent's affidavit was received from the grievance administrator within the seven days set forth in MCR 9.123(A); and the board being otherwise advised;

NOW THEREFORE,

IT IS ORDERED that the respondent, Gary D. Nitzkin, is **REINSTATED** to the practice of law in Michigan effective January 6, 2022.

SUSPENSION WITH CONDITIONS (BY CONSENT)

Amy Lynn Panek, P80870, Mount Pleasant, by the Attorney Discipline Board Tri-Valley Hearing Panel #3. Suspension, three years, effective February 26, 2021.[1]

The respondent and the grievance administrator filed a Stipulation for Consent Order of a Three-Year Suspension with Conditions in accordance with MCR 9.115(F)(5), which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contained the respondent's admission that she was convicted of delivering a controlled substance (methamphetamine), a felony, in violation of MCL 333.7401(2)(b)(i), in *People of the State of Michigan v Amy Lynn Panek*, 49th Circuit Court Case No. 20-009909-FH.

Based on the respondent's admissions and the stipulation of the parties, the panel

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

found that the respondent engaged in conduct that violated a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615, in violation of MCR 9.104(5).

In accordance with the parties' stipulation, the panel ordered that the respondent's license to practice law be suspended for a period of three years and that she be subject to conditions relevant to the established misconduct. Total costs were assessed in the amount of $864.11.

1. Respondent has been continuously suspended from the practice of law in Michigan since December 18, 2020. Please see Notice of Automatic Interim Suspension issued January 27, 2021.

SUSPENSION

Charles PT Phoenix, P61096, Naples, Florida, by the Attorney Discipline Board Tri-County Hearing Panel #81. Suspension, two years, effective January 4, 2022.

The grievance administrator filed a notice of filing of reciprocal discipline pursuant to MCR 9.120(C) that attached a certified copy of an opinion and order suspending the respondent's license to practice law in Florida for two years entered by the Supreme Court of Florida on January 28, 2021, effective 30 days after issuance, in a matter titled *The Florida Bar v Charles Paul-Thomas Phoenix*, SC17-585. Upon receipt of the respondent's timely objection to the board's Order Regarding Imposition of Reciprocal Discipline and request for a hearing, this matter was assigned to Tri-County Hearing Panel #81, pursuant to MCR 9.120(C)(3), for disposition.

After considering the respondent's objection and request for hearing along with the administrator's response, the panel found that a hearing was not necessary because the respondent was afforded due process of law in the court of the original proceeding, and that the imposition of comparable discipline in Michigan would not be clearly inappropriate. Therefore, the panel ordered that the respondent's license to practice law in Michigan be suspended for two years, effective January 4, 2022. Costs were assessed in the amount of $1,518.50.

SUSPENSION AND RESTITUTION (WITH CONDITION)

Ronald G. Pierce, P77198, Hastings, by the Attorney Discipline Board Kent County Hearing Panel #4. Suspension, 180 days, effective December 2, 2021.[1]

After proceedings conducted pursuant to MCR 9.115, the panel found, by default, that the respondent committed professional misconduct as charged in a five-count formal complaint filed against the respondent that alleged that he committed professional misconduct in his representation of four separate clients in their criminal defense matters; failed to timely answer two requests for investigation; and completely failed to answer another request for investigation.

Based on the respondent's default and the evidence presented at the hearing, the panel found that, with respect to Counts 1-4, the respondent neglected his clients, in violation of MRPC 1.1(c); 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 their matter and failed to comply promptly with reasonable requests for information, in violation of MRPC 1.4(a); and failed to take reasonable steps to protect his clients' interests upon termination of representation, including a failure to refund any advance payment of fees that had not been earned, in violation of MRPC 1.16(d).

With respect to Count 5, the panel found that the respondent knowingly failed to respond to a lawful demand for information from a disciplinary authority, in violation of MRPC 8.1(a)(2); failed to answer a request for investigation in conformity with MCR 9.113(A)-(B)(2), in violation of MCR 9.104(7) and MRPC 8.1(a)(2); and engaged in conduct that violated the Michigan Rules of Professional Conduct, in violation of MRPC 8.4(a) and MCR 9.104(4).

As charged in the entire complaint, the panel found that the respondent engaged in conduct that was prejudicial to the proper administration of justice, in violation of MCR 9.104(1); engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and engaged in conduct that was contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

The panel ordered that the respondent's license to practice law be suspended for a period of 180 days, that he pay restitution in the total amount of $27,335, and that he be subject to a condition relevant to the established misconduct. Costs were assessed in the amount of $2,048.87.

1. Respondent has been continuously suspended from the practice of law in Michigan since August 26, 2021. See Notice of Interim Suspension Pursuant to MCR 9.115(H)(1), dated August 26, 2021.

DISBARMENT AND RESTITUTION

Christopher Allyn Sevick, P69506, Ann Arbor, by the Attorney Discipline Board Washtenaw County Hearing Panel #51. Disbarment effective January 7, 2022.[1]

After proceedings conducted pursuant to MCR 9.115, the panel found, by default, that the respondent committed professional misconduct as alleged in a multi-count formal complaint in relation to his representation of clients for whom he had been placed in a fiduciary relationship and a position of trust by the Washtenaw County Probate Court.

Based on the administrator's argument, the exhibits, and the respondent's default, the panel found that the respondent neglected legal matters entrusted to him by the court, in violation of MRPC 1.1(c) (Count 1); failed to seek the lawful objectives of his clients

through reasonably available means permitted by law, in violation of MRPC 1.2(a) (Count 1); failed to act with reasonable diligence and promptness in representing his clients, in violation of MRPC 1.3 (Count 1); failed to promptly pay or deliver any funds that the client was entitled to receive, in violation of MRPC 1.15(b)(3) (Count 3); failed to hold property of a client in connection with a representation separate from his own property, in violation of MRPC 1.15(d) (Count 3); failed to respond to a lawful demand for information, in violation of MRPC 8.1(a)(2) (Counts 2 and 4); 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) (Count 3); and failed to answer a request for investigation, in violation of MCR 9.104(7) and MCR 9.113(B) (Counts 2 and 4). The panel also found that the respondent violated MRPC 8.4(a) (Counts 1-4); MRPC 8.4(c) (Count 1); MCR 9.104(1) (Count 1); MCR 9.104(2) (Counts 1-4); MCR 9.104(3) (Counts 1-4); and, MCR 9.104(4) (Count 1).

The panel ordered that the respondent be disbarred from the practice of law and pay restitution in the total amount of $11,500. Total costs were assessed in the amount of $2,526.36.

1. The respondent has been continuously suspended from the practice of law in Michigan since July 28, 2021. See Notice of Interim Suspension Pursuant to MCR 9.115(H)(1), dated July 30, 2021.

SUSPENSION (BY CONSENT)

Michael H. Schuitema, P72718, Petoskey, by the Attorney Discipline Board Emmet County Hearing Panel #3. Suspension, 30 days, effective December 13, 2021.

The respondent and the grievance administrator filed an Amended Stipulation for Consent Order of 30-Day Suspension, in accordance with MCR 9.115(F)(5), which was approved by the Attorney Grievance Commission and accepted by a majority of the hearing panel. The stipulation contained the respondent's admission that he was convicted by guilty plea of failure to stop at the scene of a property damage accident, a misdemeanor, in violation of MCL 257.618, in a matter titled *People of the City of Petoskey v Michael H. Schuitema*, 90th District Court Case No. 20-0008-OT.

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

In accordance with the stipulation of the parties, the hearing panel majority ordered that the respondent's license to practice law in Michigan be suspended for 30 days. Costs were assessed in the amount of $750.

AUTOMATIC INTERIM SUSPENSION

Jay A. Schwartz, P45268, Farmington Hills, effective November 18, 2021.

On November 18, 2021, the respondent was convicted of three felonies: conspiracy to defraud the United States, in violation of 18 USC § 371; and two counts of bribery involving federal programs, in violation of 18 USC § 666(a)(2), in the matter titled *United States v Jay A. Schwartz*, US District Court, Eastern District of Michigan, Case No. 3:19-cr-20451-RHC-EAS-1. In accordance with MCR 9.120(B)(1), the respondent's license to practice law in Michigan was automatically suspended on the date of his felony conviction.

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

REINSTATEMENT

On April 10, 2020, Tri-County Hearing Panel #1 issued an Order of Suspension (By Consent), suspending the respondent from the practice of law in Michigan for 179 days, effective May 2, 2020. On December 13, 2021, the respondent, James E. Stamman, submitted an affidavit pursuant to MCR 9.123(A), showing that he has fully complied with all requirements of the Order of Suspension. On December 16, 2021, the board was advised the grievance administrator has no objection to the affidavit; and the Board being otherwise advised;

NOW THEREFORE,

IT IS ORDERED that the respondent, James E. Stamman, is **REINSTATED** to the practice of law in Michigan effective December 16, 2021.

REPRIMAND (BY CONSENT)

John D. Tallman, P32312, Grand Rapids, by the Attorney Discipline Board Kent County Hearing Panel #1. Reprimand effective December 9, 2021.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Discipline and Waiver, pursuant to MCR 9.115(F)(5), that was approved by the Attorney Grievance Commission and accepted by the hearing panel. Based upon the respondent's admissions, the panel found that the respondent committed professional misconduct through improper use of his IOLTA.

Specifically, and in accordance with the parties' stipulation, the panel found that the respondent failed to hold property of clients or third persons in connection with a representation separate from the lawyer's own property, in violation of MRPC 1.15(d); deposited his own funds into an IOLTA in an amount more than reasonably necessary to pay financial institution service charges or fees, in violation of MRPC 1.15(f); and engaged in conduct in violation of the Rules of Professional Conduct, in violation of MRPC 8.4(a).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be reprimanded. Costs were assessed in the amount of $750.

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by May 1, 2022. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The Committee proposes a new instruction, M Crim JI 8.2, for aiding and abetting the crime of possession of a firearm at the time of committing a felony (aiding and abetting felony-firearm) because the primary aiding and abetting instruction, M Crim JI 8.1, is difficult to adapt in order to make it clear that simply aiding and abetting the underlying felony offense is insufficient to establish aiding and abetting the crime of felony-firearm. See *People v Moore*, 470 Mich 56 (2004). This instruction is entirely new.

[NEW] M Crim JI 8.2
Aiding and Abetting Felony Firearm

(1) In this case, the defendant is charged with committing the offense of possessing a firearm during the commission or attempted commission of a felony or intentionally assisting someone else in committing that offense.

(2) Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of that crime as an aider and abettor.

(3) To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(a) First, that the crime of possessing a firearm during the commission of a felony or attempted commission of a felony was actually committed, either by the defendant or someone else. It does not matter whether anyone else has been convicted of the crime.

(b) Second, that before or while the crime of possessing a firearm when committing or attempting to commit a felony was being committed, the defendant did something to assist in carrying, using, or possessing the firearm. It is not enough to find that the defendant did something to assist in the commission of the underlying crime. By words, acts, or deeds, the defendant must have procured, counseled, aided, or abetted another person to carry, use, or possess a firearm during the commission or attempted commission of a felony.

(c) Third, at that time the defendant must have intended that a firearm be carried, used, or possessed by another during the commission or attempted commission of a felony.

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by May 1, 2022. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The Committee proposes to amend jury instructions M Crim JI 13.6a (first-degree fleeing and eluding), M Crim JI 13.6b (second-degree fleeing and eluding), M Crim JI 13.6c (third-degree fleeing and eluding), and M Crim JI 13.6d (fourth-degree fleeing and eluding) to comport with the wording of an amendment to MCL 750.479a. Further, requirements that the prosecutor prove prior offenses for second- and third-degree fleeing and eluding are proposed to be eliminated. See *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000). Deletions are in strikethrough, and new language is underlined.

[AMENDED] M Crim JI 13.6a
Fleeing and Eluding in the First Degree

(1) The defendant is charged with the crime of fleeing and eluding in the first degree. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that a [police/conservation] officer was in uniform and was performing [his/her] lawful duties [and that any vehicle driven by the officer was ~~adequately marked~~ identified as a law enforcement vehicle].

(3) Second, that the defendant was driving a motor vehicle.

(4) Third, that the officer ordered that the defendant stop [his/her] vehicle.

(5) Fourth, that the defendant knew of the order.

(6) Fifth, that the defendant refused to obey the order by trying to flee or avoid being caught.

(7) Sixth, that the violation resulted in the death of another individual.

[AMENDED] M Crim JI 13.6b
Fleeing and Eluding in the Second Degree

(1) The defendant is charged with the crime of fleeing and eluding in the second degree. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that a [police/conservation] officer was in uniform and was performing [his/her] lawful duties [and that any vehicle driven by the officer was ~~adequately marked~~ identified as a law enforcement vehicle].

(3) Second, that the defendant was driving a motor vehicle.

(4) Third, that the officer ordered that the defendant stop [his/her] vehicle.

(5) Fourth, that the defendant knew of the order.

(6) Fifth, that the defendant refused to obey the order by trying to flee or avoid being caught.

[~~*Choose one or more of the following alternatives:*~~]

(7) Sixth, that the violation resulted in serious impairment of a body function* to an individual.

~~or~~

~~(8) Sixth, that the defendant has one or more prior convictions for first-, second-, or third-degree fleeing and eluding; attempted first-, second-, or third-degree fleeing and eluding; or fleeing and eluding under a current or former law of this state prohibiting substantially similar conduct.~~

~~or~~

~~(9) Sixth, that the defendant has any combination of two or more prior convictions for fourth-degree fleeing and eluding, attempted fourth-degree fleeing and eluding, or fleeing and eluding under a current or former law of this state prohibiting substantially similar conduct.~~

Use Note

*The statute, MCL 750.479a(9), incorporates the statutory definition of "serious impairment of body function" found at MCL 257.58c: "Serious impairment of a body function" includes, but is not limited to, 1 or more of the following:

(a) Loss of a limb or loss of use of a limb.

(b) Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger, or thumb.

(c) Loss of an eye or ear or loss of use of an eye or ear.

(d) Loss or substantial impairment of a bodily function.

(e) Serious visible disfigurement.

(f) A comatose state that lasts for more than 3 days.

(g) Measurable brain or mental impairment.

(h) A skull fracture or other serious bone fracture.

(i) Subdural hemorrhage or subdural hematoma.

(j) Loss of an organ.

[AMENDED] M Crim JI 13.6c
Fleeing and Eluding in the Third Degree

(1) The defendant is charged with the crime of fleeing and eluding in the third degree. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that a [police/conservation] officer was in uniform and was performing [his/her] lawful duties [and that any vehicle driven by the officer was ~~adequately marked~~ identified as a law enforcement vehicle].

(3) Second, that the defendant was driving a motor vehicle.

(4) Third, that the officer ordered that the defendant stop [his/her] vehicle.

(5) Fourth, that the defendant knew of the order.

(6) Fifth, that the defendant refused to obey the order by trying to flee or avoid being caught.

[*Choose one or ~~more~~ both of the following alternatives:*]

(7) Sixth, that the violation resulted in a collision or accident.

~~or~~

[(7)/(8)] [Sixth/Seventh], some portion of the violation took place in an area where the speed limit was 35 miles per hour or less [whether as posted or as a matter of law].

~~or~~

~~(9) Sixth, that the defendant has a prior conviction for fleeing and eluding in the fourth-degree, attempted fleeing and eluding in the fourth-degree, or fleeing and eluding under a current or former law of this state prohibiting substantially similar conduct.~~

[AMENDED] M Crim JI 13.6d
Fleeing and Eluding in the Fourth Degree

(1) The defendant is charged with the crime of fleeing and eluding in the fourth degree. 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 a [police/conservation] officer was in uniform and was performing [his/her] lawful duties [and that any vehicle driven by the officer was ~~adequately marked~~ identified as a law enforcement vehicle].

(3) Second, that the defendant was driving a motor vehicle.

(4) Third, that the officer ordered that the defendant stop [his/her] vehicle.

(5) Fourth, that the defendant knew of the order.

(6) Fifth, that the defendant refused to obey the order by trying to flee or avoid being caught.

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instructions, M Crim JI 37.12 (jury tampering), M Crim JI 37.13 (jury tampering through intimidation), and Crim JI 37.14 (retaliating against a juror), addressing crimes charged under MCL 750.120a. The instructions are effective Feb. 1, 2022.

[NEW] M Crim JI 37.12
Jury Tampering

(1) The defendant is charged with willfully influencing or attempting to influence jurors outside of courtroom proceedings. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

[*Select the option that applies:*][1]

(2) First, that [*identify juror or jurors*] [was a member/were members] of the group of potential jurors that could decide the case of [*state name of case*] in the [*identify court*].

[*Or*]

(2) First, that [*identify juror or jurors*] [was a member/were members] of the jury that could decide the case of [*state name of case*] in the [*identify court*].

(3) Second, that the defendant willfully and intentionally made an argument or used persuasion with [that juror/those jurors] other than as part of the proceedings being held in open court.

(4) Third, that when the defendant made an argument or used persuasion with [*identify juror or jurors*], [he/she] was attempting to influence [his/her/their] decision in the case where [he was/she was/they were] sitting as [a juror/jurors].

Use Note

1. The operative statute, MCL 750.120a(1), may include persons on either the jury venire or the petit jury that ultimately decides the case. See *People v Wood*, 506 Mich 116; 954 NW2d 494 (2020). Use the first option where the juror or jurors were on the jury venire but were not seated on the petit jury, and use the second option where the juror or jurors were on the petit jury.

[NEW] M Crim JI 37.13
Jury Tampering Through Intimidation

(1) The defendant is charged with willfully influencing or attempting to influence jurors outside of courtroom proceedings by using intimidation. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

[*Select the option that applies:*][1]

(2) First, that [*identify juror or jurors*] [was a member/were members] of the group of potential jurors that could decide the case of [*state name of case*] in the [*identify court*].

[*Or*]

(2) First, that [*identify juror or jurors*] [was a member/were members] of the jury that could decide the case of [*state name of case*] in the [*identify court*].

(3) Second, that the defendant willfully and intentionally communicated with [that juror/those jurors] other than as part of the proceedings being held in open court. To "communicate" means to interact by spoken or written words or by any conduct or behavior that would lead a reasonable person to believe that a message was being conveyed or expressed.

(4) Third, that when the defendant communicated with [*identify juror or jurors*], [he/she] was attempting to influence [his/her/their] decision in the case where [he was/she was/they were] sitting as [a juror/jurors].

(5) Fourth, that the defendant attempted to influence the decision of the [juror/jurors] by using intimidation. Using intimidation means that the defendant's conduct would lead a reasonable person to be placed in fear.

[*Use the following paragraphs where the prosecutor has charged the applicable aggravating element:*]

(6) Fifth, that the defendant attempted to influence the decision of the [juror/jurors] by using intimidation in a case involving the crime of [*state alleged crime in case*][2].

(6) Fifth, that when the defendant attempted to influence the decision of the [juror/jurors] by using intimidation, the defendant [committed or attempted to commit the crime of (*state other offense*) as I have previously described to you/threatened to kill or injure someone or to cause damage to property][3].

Use Note

1. The operative statute, MCL 750.120a, may include persons on either the jury venire or the petit jury that ultimately decides the case. See *People v Wood*, 506 Mich 116; 954 NW2d 494 (2020). Use the first option where the juror or jurors were on the jury venire but were not seated on the petit jury, and use the second option where the juror or jurors were on the petit jury.

2. MCL 750.120a(2)(b) provides that a person who uses intimidation to influence jurors in the trial of a criminal case where the maximum penalty is 10 years or more or life faces an enhanced penalty. Whether the charged offense at the trial had a penalty of 10 years or more or life is a matter of law, and the court should identify the crime itself for the jury to determine whether the defendant's conduct occurred during the trial for that charge.

3. MCL 750.120a(2)(c).

[NEW] M Crim JI 37.14
Retaliating Against a Juror

(1) The defendant is charged with retaliating against a juror for performing his or her duty. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*identify juror*] was a member of the jury that heard evidence to decide the case[1] of [*state name of case*] in the [*identify court*].

(3) Second, that the defendant retaliated, attempted to retaliate, or threatened to retaliate against that juror for performing [his/her] duty as a juror.

Retaliate means that, because of the juror's performance of [his/her] duty as a juror, the defendant:

[*Choose one or more according to the charges and evidence:*]

(a) threatened to kill any person or threatened to cause property damage.

(b) committed or attempted to commit the crime of [*identify other crime(s) alleged*], or a lesser offense, on which I have previously instructed you in Count [*identify appropriate count in the Information*].[2] It is not necessary, however, that the defendant be convicted of that crime.

Use Note

1. If a juror who was a sworn member of the panel but did not sit on the petit jury that heard the evidence at trial is retaliated against for some act in performance of his or her duty as a juror, this language may be modified to provide "was a member of the of the group of potential jurors from which the jury in [*state name of case*] in the [*identify court*] was selected." See *People v Wood*, 506 Mich 116; 954 NW2d 494 (2020).

2. If the crime committed or attempted as retaliation is not charged in a separate count, its elements and included offenses should be instructed on here.

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instructions, M Crim JI 38.2 (hindering prosecution of terrorism), M Crim JI 38.3 (soliciting material support for an act of terrorism), and Crim JI 38.3a (providing material support for an act of terrorism), addressing crimes charged under MCL 750.543h and 750.53k. The instructions are effective Feb. 1, 2022.

[NEW] M Crim JI 38.2
Hindering Prosecution of Terrorism

(1) The defendant is charged with the crime of hindering the prosecution of terrorism. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

[*Select the option that applies:*]

(2) First, that [*identify other person*] committed the crime of [*identify felony under Anti-Terrorism Act*]. For the crime of [*identify Anti-Terrorism Act felony*], the prosecutor must prove each of the following elements beyond a reasonable doubt: [*state elements of felony*]. It does not matter whether [*identify other person*] was convicted of the crime.

[*Or*]

(2) First, that [*identify other person alleged to have been a material witness*] was wanted as a material witness in connection with an act of terrorism.

An act of terrorism is a violent felony[1] that is dangerous to human life and that is intended to intimidate or coerce a civilian population or intended to influence or affect the conduct of government or a unit of government through intimidation or coercion. [*Identify violent felony crime*] is a violent felony. You must decide whether committing the crime was dangerous to human life and whether the defendant intended to intimidate or coerce a civilian population or intended to influence or affect the conduct of government or a unit of government through intimidation or coercion by committing this felony.

(3) Second, that the defendant knew or had reason to know that [*identify other person*] [committed the crime of (*identify felony Anti-Terrorism Act felony*)/was wanted as a material witness in connection with an act of terrorism].

(4) Third, that the defendant [harbored or concealed (*identify other person*)/warned (*identify other person*) that (he/she) was about to be discovered or apprehended/provided (*identify other person*) with money, transportation, a weapon, a disguise, false identification, or any other means of avoiding discovery or apprehension/by force, intimidation, or deception prevented or obstructed anyone from performing an act that might aid in the discovery, apprehension, or prosecution of (*identify other person*)/concealed, altered, or destroyed any physical evidence that might aid in the discovery, apprehension, or prosecution of (*identify other person*)/participated or aided in jury bribing, jury tampering, or witness intimidation in a trial of (*identify other person*)/participated or aided in an escape of (*identify other person*) from jail or prison].

(5) Fourth, that when the defendant [harbored or concealed (*identify other person*)/warned (*identify other person*) that (he/she) was about to be discovered or apprehended/provided (*identify other person*) with money, transportation, a weapon, a disguise, false identification, or any other means of avoiding discovery or apprehension/by force, intimidation, or deception prevented or obstructed anyone from performing an act that might aid in the discovery, apprehension, or prosecution of (*identify other person*)/concealed, altered, or destroyed any physical evidence that might aid in the discovery, apprehension, or prosecution of (*identify other person*)/participated or aided in jury bribing, jury tampering, or witness intimidation in a trial of (*identify other person*)/participated or aided in an escape of (*identify other person*) from jail or prison], [he/she] intended to avoid, prevent, hinder, or delay the discovery, apprehension, prosecution, trial, or sentencing of [*identify other person*].

Use Note

1. Under MCL 750.543b(a)(i), an act of terrorism requires that a person must have committed a "violent felony." The definitional statute, MCL 750.543b(h), provides that a "violent felony" is one that has an element of the use, attempted use, or threatened use of physical force against an individual, or of the use, attempted use, or threatened use of a harmful biological substance, a harmful biological device, a harmful chemical substance, a harmful chemical device, a harmful radioactive substance, a harmful radioactive device, an explosive device, or an incendiary device. Whether the crime is a "violent felony" appears to be a question of law for the court to decide.

[NEW] M Crim JI 38.3
Soliciting Material Support for an Act of Terrorism

(1) The defendant is charged with the crime of soliciting material support for an act of terrorism. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant intentionally raised, solicited, or collected material support or resources in the form of currency or other financial securities, financial services, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, including any related physical assets or intangible property, or expert services or expert assistance[1].

(3) Second, that when the defendant raised, solicited, or collected the material support or resources, [he/she] knew that the material support or resources would be used by a person or organization that engaged in or was about to engage in an act that would be a violent felony,[2] which was or would be dangerous to human life and was intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion. [*Identify violent felony crime*] is a violent felony. You must decide whether the crime [was/would have been] dangerous to human life and whether the defendant intended to intimidate or coerce a civilian population or intended to influence or affect the conduct of government or a unit of government through intimidation or coercion by committing this felony.

Use Note

1. The forms of material support listed here are found in MCL 750.543b(d). The court may select from those according to the evidence or may add other forms of material support according to the charges and the evidence.

2. The definition of a *violent felony* is found in MCL 750.543b(h).

[NEW] M Crim JI 38.3a
Providing Material Support for an Act of Terrorism

(1) The defendant is charged with the crime of providing material support for an act of terrorism. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant provided material support in the form of currency or other financial securities, financial services, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, including any related physical assets or intangible property, or expert services or expert assistance[1] to [(*identify person*)/another person].

(3) Second, that when the defendant provided material support to [(*identify person*)/another person], [he/she] knew that [(*identify person*)/the other person] would use that support or those resources at least in part to plan, prepare, carry out, facilitate, or avoid apprehension for committing an act of terrorism against the United States or its citizens, Michigan or its citizens, a political subdivision or agency of Michigan, or a local unit of government.

An act of terrorism is committing or attempting to commit the violent felony of [*identify crime*] [2] that was or would be dangerous to human life and was intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.[3] [*Identify violent felony crime*] is a violent felony. You must decide whether the crime [was/would have been] dangerous to human life and whether the defendant intended to intimidate or coerce a civilian population or intended to influence or affect the conduct of government or a unit of government through intimidation or coercion by committing this felony.

Use Note

1. The forms of material support listed here are found in MCL 750.543b(d). The court may select from those according to the evidence or may add other forms of material support according to the charges and the evidence.

2. The definition of a *violent felony* is found in MCL 750.543b(h).

3. MCL 750.543b(a) defines *act of terrorism*.

DUTY TO REPORT AN ATTORNEY'S CRIMINAL CONVICTION

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

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

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

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

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

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

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

FROM THE MICHIGAN SUPREME COURT

ADM File No. 2021-38
Adoption of Administrative Order No. 2022-1
Commission on Diversity, Equity, and Inclusion in the Michigan Judiciary

Administrative Order No. 2022-1 – Commission on Diversity, Equity, and Inclusion in the Michigan Judiciary

In January 2021, the Michigan Supreme Court and the State Court Administrative Office created a Diversity, Equity, and Inclusion Committee with the initial goal of exploring issues related to the demographics of the workforce that support our judiciary and training within the judicial branches. The Committee's work grew to include exploration of other topics that impact our communities. On October 1, 2021, the Committee presented a report to the Supreme Court that included a recommendation that the Court create an ongoing interdisciplinary commission to continue and build on the work that has been done to date. Therefore, on order of the Court, the Commission on Diversity, Equity, and Inclusion in the Michigan Judiciary is created, effective immediately.

I. Purpose

The purpose of the Commission on Diversity, Equity, and Inclusion in the Michigan Judiciary is to assess and work toward elimination of demographic and other disparities within the Michigan judiciary and justice system. The goals of the Commission include:

- Develop policies and standards to promote diversity, equity, and inclusion;
- Assist the judicial branch with elimination of disparities within the justice system;
- Increase participation of members from underrepresented communities in judicial branch leadership;
- Assist local courts with implementation of diversity, equity, and inclusion plans and processes; and
- Collaborate with other judicial branch commissions, governmental entities, and private partners to propose and implement policies aimed at achieving a more diverse, equitable, and inclusive justice system.

II. Duties

The Commission will assess the demographic and other disparities within the judicial branch and the justice system and develop, coordinate, and implement initiatives to achieve the previously described goals. Toward this end, the Commission is directed to work with an expert facilitator to develop a strategic plan to guide the initial work of the Commission.

III. Commission Leadership

A. Executive Team – The leadership, direction, and administrative support for the Commission's activities is provided collaboratively by the State Court Administrative Office and other Supreme Court staff, the State Bar of Michigan, and the Michigan State Bar Foundation. The co-chairs (or chair and vice chair) of the Commission, state court administrator, the executive director of the State Bar of Michigan, and the executive director of the Michigan State Bar Foundation, or their designees, constitute the executive team. Duties of the executive team include:

1. Preparing meeting agendas;

2. Providing data required for Commission deliberations;

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

4. Preparing a biennial report for the Supreme Court.

B. Co-Chairs or a Chair and Vice Chair – Either two co-chairs or a chair and vice chair will be appointed by the Court as leadership for the Commission. Individuals selected for these leadership positions shall serve two-year terms and may be reappointed.

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

2. After the initial selection, individuals selected for the (co)chairs/vice chair positions shall be chosen from the membership of the Commission upon recommendation of the executive team to the Supreme Court.

3. Duties of the chair(s) include:

a. Presiding at all meetings of the Commission;

b. Approving a draft agenda for Commission meetings; and

c. Serving as the official spokesperson of the Commission.

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

IV. Commission Membership

A. Membership shall be comprised of 24 members from the following groups:

1. A sitting justice of the Michigan Supreme Court;

2. The state court administrator, or designee;

3. The executive director of the State Bar of Michigan, or designee;

4. The executive director of the Michigan State Bar Foundation, or a designee;

5. One member each, recommended by the following:

a. The Michigan State Planning Body;

b. The Michigan Indigent Defense Commission;

c. The Justice for All Commission;

d. The Michigan Association of Counties;

e. The Prosecuting Attorneys Association of Michigan; and

f. The Association of Black Judges of Michigan;

g. The Board of Commissioners from the State Bar of Michigan.

6. One member each, appointed by the Supreme Court, from the following bodies/stakeholder groups as members:

a. The Michigan Court of Appeals;

b. The Michigan Judges Association (circuit court judge);

c. The Michigan District Judges Association;

d. The Michigan Probate Judges Association;

e. The Michigan Court Administrators Association;

f. An administrator or faculty member of a Michigan ABA-accredited law school;

g. Four members of various affinity and/or special purpose bar associations (as defined by the Commission's Executive Team);

h. Three community members with contacts with the justice system.

B. Appointments. With the exception of the members who will serve by virtue of their status (see Section IV.A.2 to IV.A.4), the Supreme Court shall appoint all members of the Commission.

1. Within 60 days of entry of this order, the groups identified in Section IV.A.5 shall submit the names of their initial recommended designees to the executive team for consideration.

2. The executive team will promptly establish a process to solicit and receive applications for membership for the initial appointment of groups identified in Section IV.A.6.

3. Within 120 days of entry of this order, the executive team will submit to the Court its recommendations for the initial Commission members described in subsection 1 and 2 above, and the Court will appoint the Commission members within 30 days thereafter.

4. After initial appointments are complete, the executive team will develop and implement a process for receiving future recommendations and applications and for making appointments and reappointments based on commitment to the purpose and goals of the Commission and to ensure diversity of membership.

C. Terms – With the exception of the appointments of a sitting Michigan Supreme Court justice, the State Bar of Michigan executive director, the Michigan State Bar Foundation executive director, and the state court administrator, members of the Commission will be appointed for three year terms and will be limited to serving two full terms. A member may be reappointed. Initial terms will commence on the date of appointment and may be less than three years to ensure that the terms are staggered with initial terms of one year, two years, and three years. All members appointed or reappointed following these inaugural terms will serve three-year terms. After initial appointment, all terms commence Jan.1 of each calendar year.

Justice Elizabeth M. Welch and Judge Cynthia D. Stephens are appointed to the Commission and shall serve as the initial co-chairs.

D. Vacancy – The executive team may declare a vacancy exists if a commissioner resigns from his or her position from the Commission or moves outside of Michigan or a commissioner does not attend two consecutive meetings without being ex-

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

cused by the chair or co-chairs. If the vacancy is from a group identified in Section IV.A.5, that group shall recommend for appointment another person to fill the vacancy. In the event of other vacancies on the Commission, the executive team will recommend to the Supreme Court appointment of a replacement member who will serve the remainder of the term of the former incumbent. After serving the remainder of the term, the new member may be reappointed for no more than two full consecutive terms.

V. Meetings, Committees, and Workgroups

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

B. The Commission may establish workgroups or subcommittees as needed to facilitate or accomplish the work of the Commission.

C. The executive team may invite individuals whose particular experience and perspective is needed or helpful to assist with the Commission's work, including participation in workgroups or subcommittees.

VI. Staffing and Administration

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

B. If funding is received by the Commission, the Michigan State Bar Foundation may serve as fiscal agent for the funds.

VII. Compensation

A. Members of the Commission will serve without compensation.

VIII. Reporting Requirement

A. The Commission will file a biennial report with the Supreme Court about its activities and progress during the previous 24-month period and its goals for the next 24 months. The biennial report will be available to the public on the Court's website.

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

WELCH, J. (*concurring*). I concur in the Court's decision to establish the Commission on Diversity, Equity, and Inclusion, and I write briefly to respond to the concerns raised by my dissenting colleague. As Justice VIVIANO notes, this Commission is being created upon the recommendation of the Committee on Diversity, Equity, and Inclusion (DEI Committee), which I joined as a cofacilitator after taking office.[1] Prior to recommending the creation of the Commission, the Committee spent hundreds of hours meeting and working with the State Court Administrative Office, the State Bar of Michigan, individual members of the bench and bar, various other stakeholders, and representatives of commissions created in other states. The recommendation to create the Commission is based not merely on the work completed over the last year, but also on decades of prior research and recommendations, including those of the 1987 Supreme Court Task Force on Gender Issues in the Courts, the 1987 Task Force on Racial/Ethnic Issues in the Courts, the 1996 State Bar of Michigan Task Force on Race/Ethnic and Gender Issues in the Courts and the Legal Profession, the National Consortium on Racial and Ethnic Fairness in the Courts (of which Michigan is a founding member), the National Center for State Courts, the Conference of Chief Justices, and the Conference of State Court Administrators. Leadership in these varied groups has been nonpartisan and includes judges of different ideologies from around the nation.

Over the decades, all of these bodies have called on state courts to do more and to take direct action to ensure that the courts, as institutions existing for the benefit of the people, reflect the people they serve. The 1987 task forces made numerous recommendations to address discrimination and gender bias in the court, and they specifically recommended that a "Standing Committee on Racial/Ethnic and Gender Issues in the Courts should be created by the Supreme Court" to monitor and implement the recommendations of those bodies and carry out many of the functions that we charge the Commission with today.[2] Shortly thereafter, this Court issued Administrative Order No. 1990-3, which directed "[t]hat judges, employees of the judicial system, attorneys and other court officers commit themselves to the elimination of racial, ethnic and gender discrimination in the Michigan judicial system" and "[t]hat the Michigan Judicial Institute continue its efforts to eliminate gender and racial/ethnic bias in the court environment through the education of judges, court administrators and others." Despite calls for change over 30 years ago, ongoing internal work, and the growing number of voices calling on the courts to take a lead on DEI issues, it was not until now that our Court has finally and publicly taken that next necessary step.

The purpose of the Commission is to gather information and work with stakeholders directly affected by our justice system. The DEI Committee focused on talent, retention, education, leadership, and

data. The Commission will continue this important work with its own strategic plan and focus areas. Undoubtedly, this work is not easy. There are varying viewpoints about how best to create a healthy work environment and how to best serve the public. But the wheel does not need to be reinvented here: For over 30 years private, nonprofit, and other public sector entities have identified best practices that build an inclusive work force and better serve customers, clients, and the public. The Conference of Chief Justices and the Conference of State Court Administrators currently have a national DEI effort underway that is led by Texas Chief Justice Nathan L. Hecht and includes team members from across the country. The DEI Committee's report has set forth the best practices of analogous bodies in other states and outlined challenges and mistakes that arose with similar efforts in other states. While many states have in fact been successful in their efforts, it is also wise to learn from the mistakes of others. Our order creates a collaborative body that will be well suited to closely study these issues and make recommendations for potential change.

I appreciate and share Justice VIVIANO's dedication to preserving the neutrality of judicial decision-making and ensuring equal treatment under the law. These are immutable qualities of a court that must be held sacred. However, I struggle to understand how creating a more inclusive and welcoming workplace or court system fails to achieve those goals. Further, as an advisory body, the Commission has no authority to tell judges how to resolve legal disputes that appear before our courts. If a proposed policy or procedure would "ignore the Constitution and laws of our state and nation" then the Court would refuse to adopt or implement such a recommendation.

This new Commission will assist the Court in recognizing its deficiencies and blind spots as an institution and an employer. It is only with this knowledge that we can begin visualizing and building a judiciary that is more reflective of and better situated to serve the people of Michigan. While the opportunity to embark on this path was missed a generation ago, I enthusiastically concur in our Court's decision to take the initial steps toward directly addressing diversity, equity, and inclusion concerns within our courts.

VIVIANO, J. (*dissenting*). I dissent from today's order establishing the Commission on Diversity, Equity, and Inclusion, a catchphrase that is politically fraught—and for that reason alone should be approached with extreme caution by the judicial branch. I am afraid that the Court has failed to accord this matter the careful deliberation it deserves. The Commission is the product of an internal committee on diversity, equity, and inclusion (the DEI Committee) that was itself instituted by the State Court Administrative Office (SCAO) without any input from or even notice to this Court. While the order creating the Commission sets forth an expansive purpose statement, it nowhere establishes the scope or meaning of the critical terms, "diversity," "equity," and "inclusion."[3] I am concerned that the Commission will endow these core concepts with meanings that will produce heated disputes and call into question the judiciary's neutrality. Because of these procedural and substantive flaws in the Court's order, I must respectfully dissent.

In January 2021, the DEI Committee was formed to examine the topics of diversity, equity, and inclusion. The origins of the DEI Committee remain a mystery to me, as a proposal to create it was never discussed by the Court and its existence went almost entirely unmentioned. Perhaps this furtive start would not be so troubling if the DEI Committee had been confined to research. But the DEI Committee already has affected the judiciary's functioning. It suggested reforms, which SCAO adopted, to the application and questionnaire we give to candidates seeking appointment as chief judges.[4] As the Committee's report states, "The questionnaire now requests information related to the candidate's experience and training in DEI [i.e., diversity, equity, and inclusion] and includes DEI as a competency to be evaluated as part of the selection criteria." SCAO, DEI Committee, *Final Report* (October 1, 2021), p 7. The questionnaire that was used in this past year's chief judge application process now deems as a core competency the "commitment to diversity, equity, and inclusion." Two of the 10 questions now involve "diversity, equity, and inclusion," including one that asks the applicant to describe how he or she has "demonstrate[d] alignment with the judiciary's commitment to diversity, equity, and inclusion[.]"

I am not sure how applicants are to answer this question, given that this Court has not established any guidance on just what our "commitment" entails. Indeed, as far as I know, we have never made such a "commitment" to a particular version of these values. Even today's order leaves for the future the determination of what it means for the courts to be diverse, equitable, and inclusive.[5] But it is no small thing to leave unstated the meaning of "diversity, equity, and inclusion." As noted above, this catchphrase occupies disputed terrain in our politically polarized society.[6] Our nation was founded upon and dedicated to the then radical principle that "all men are created equal." *The Declaration of Independence* (US, 1776). The authors of the Declaration meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere. [Basler, ed, 2 *Collected Works of Abraham Lincoln* (New Brunswick: Rutgers University Press, 1953), p 406.]

Equality therefore requires that the law accord all just and equal treatment. The "leading object" of a government founded upon this principle is "to elevate the condition of men—to lift artificial weights from all shoulders—to clear the paths of laudable pursuit for all—to afford all, an unfettered start, and a fair chance, in the race of life." [4 *Collected Works of Abraham Lincoln*, p 438.]

Thus, when the order the Court issues today proclaims an intent to "[i]ncrease participation of members from under-represented com-

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

munities" and to achieve an inclusive justice system, I am in full agreement—to the extent that we lift obstacles that prevent full and equal participation in our courts. All who come to our courts, in any capacity, should be afforded equal treatment under the law. To me, this means that in our judicial decision-making and our administration of the judiciary, we must pay no heed to race, ethnicity, gender, or other natural distinctions that have no bearing on the treatment we deserve as fellow humans or on our legal rights and obligations. Cf. *Grutter v Bollinger*, 539 US 306, 353 (2003) (Thomas, J., concurring in part, dissenting in part) ("The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."). This conception of equality and inclusion leaves ample room to cultivate a diversity of viewpoints and experiences that enriches the courts. See Posner, *Divergent Paths: The Academy and the Judiciary* (Cambridge: Harvard University Press, 2016), p 63 (stressing the importance of vocational diversity).

But to the extent that calls for diversity, equity, and inclusion encourage decision-making on the basis of race, gender, ethnicity, and other immutable characteristics in order to achieve outcomes favored by one faction or another, they pose a stark challenge to the core commitments to equality and viewpoint diversity. See Epstein, *The Civil Rights Juggernaut*, 2020 U Ill L Rev 1541, 1542 (2020) (noting that invocations of diversity and inclusion often are not calls to disregard race or "to make sure that individuals from all groups and all walks of life are included in modern social discourse"). For example, by requiring applicants for chief judge positions in our courts to affirm our "commitment" to diversity, equity, and inclusion, we have already indicated that those with differing conceptions of these terms will find it harder to succeed. The problems cut even deeper when invocations of diversity and inclusion run up against laws and standards that seek to banish considerations of race, gender, ethnicity, and other protected characteristics. This has been demonstrated by an early version of the standard proposed by the American Bar Association (ABA) for accreditation of law schools. That standard would demand that law schools "take effective actions that, in their totality, demonstrate progress in (1) Diversifying the student body, faculty, and staff; and (2) Creating an inclusive and equitable environment…." ABA Standards Committee, *Recommendations for Approval for Notice and Comment on Standard 206 Revisions* (November 4, 2021), Appendix A, available at <https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/nov21/21-nov-std-206-notice-and-comment-w-appendix.pdf> (accessed December 27, 2021). The ABA's proposed interpretations of the standard make clear just what diversity means and how close the schools must sail to the wind, so to speak: "The requirement of a constitutional provision or statute that purports to prohibit consideration of race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, or military status in admissions or employment decisions is not a justification for a school's non-compliance with Standard 206." *Id.* Under this standard, a school may be forced to violate the law or risk losing accreditation.[7] Does the majority's commitment involve a similar requirement to ignore the Constitution and laws of our state and nation?

The Florida Supreme Court recently addressed this tension between diversity initiatives and constitutional protections, amending its regulations of the profession to clarify that continuing legal education credits would not be awarded for any course that "uses quotas based on race, ethnicity, gender, religion, national origin, disability, or sexual orientation in the selection of course faculty or participants." *In re Amendment to Rule Regulating the Florida Bar 6-10.3*, ___ So 3d ___ (Fla, 2021) (Docket No. SC21-284); slip op at 1 (quotation marks and citation omitted). The rule came about in response to efforts by a section of the Florida Bar, following the lead of the ABA, to require quotas of various races, ethnicities, genders, and similar characteristics in its continuing legal education panel policy. *Id.* at ___; slip op at 2. The Florida Supreme Court stated that such requirements were "antithetical to basic American principles of nondiscrimination" and "depart from the American ideal of treating people as unique individuals, rather than as members of groups. Quotas are based on and foster stereotypes. And quotas are divisive." *Id.* at ___; slip op at 4 (quotation marks and citation omitted).

Such initiatives pose even starker risks when they are spearheaded by the judiciary. As judges, we have the ethical duty to "respect and observe the law" without partiality. Code of Judicial Conduct, Canon 2(B). And we must, "[w]ithout regard to a person's race, gender, or other protected personal characteristic, . . . treat every person fairly, with courtesy and respect." *Id.*[8] We must "be particularly cautious with regard to membership activities that discriminate, or appear to discriminate, on the basis of race, gender, or other protected personal characteristic." Code of Judicial Conduct, Canon 2(F). Moreover, we hear cases involving allegations of discrimination. If the Commission created today sets about to encourage the judiciary to consider these characteristics in any area under our purview, I fear that our ethics, fidelity to law, and impartiality will justly be called into question.

Chief Justice Roberts was right when he said that the "way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Community Schs v Seattle Sch Dist No 1*, 551 US 701, 748 (2007) (opinion of Roberts, C.J.). The way to be equitable, diverse, and inclusive is to stop taking ac-

count of race and other protected characteristics. I fear that the Commission may take the opposite view, one that would require attorneys and judges to violate their oaths of fidelity to the law and call into question the neutrality that is essential to the judiciary.[9] But this is always the danger when courts wade into hotly disputed social issues. By plunging ahead, I believe that this Court, and the Commission it creates today, will serve only to engender conflict and undermine the public's faith in the judicial branch as impartial arbiters. For these reasons, I respectfully dissent.

Zahra, J., joins the statement of Viviano, J.

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1. Chief justices of this Court have a long history of creating committees to work with the State Court Administrative Office (SCAO) and to study a variety of issues. In 2020, the chief justice instructed SCAO to launch the Diversity and Inclusion Committee to address internal hiring practices and trial court training. This work was addressed with the justices of this Court at least as early as September 2020 in connection with the proposed rescission and replacement of Administrative Order No. 1997-9. The Diversity and Inclusion Committee later became the Committee on Diversity, Equity, and Inclusion.

2. Michigan Supreme Court, "Final Report of the Michigan Supreme Court Task Force on Gender Issues in the Courts" (December 1989), p 140, available at <https://www.michbar.org/file/programs/eai/pdfs/regtf_1989_part1.pdf> (accessed December 27, 2021) [https://perma.cc/SB4M-LBV4]. See also Michigan Supreme Court, "Final Report of the Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts" (December 1989) <https://www.michbar.org/file/programs/eai/pdfs/regtf_1989_part2.pdf> (accessed December 27, 2021) [https://perma.cc/7F56-ECVZ]; Michigan Supreme Court, "Michigan Supreme Court Task Force on Gender Issues in the Courts: Conclusions and Recommendations" <https://www.michbar.org/file/programs/eai/pdfs/regtf_1989_part3.pdf> (accessed December 27, 2021) [https://perma.cc/UU78-6Y4J].

3. In setting forth a statement of the Commission's purpose, goals, and duties, the Court's order (in my view wisely) rejected the DEI Committee's suggestion that the Commission "should work with a facilitator to decide upon its mission and goals." Instead, the Court's order provides that "the Commission is directed to work with an expert facilitator to develop a strategic plan to guide the initial work of the Commission." One wonders why the Court is so sure that an outside consultant is needed at all for this purpose, what expertise such a person might have that would be of value (and is apparently lacking from the Commission as presently constituted), and whether the expenses incurred will be a worthwhile expenditure of taxpayer resources.

4. Apparently, the DEI Committee also assisted the Michigan Judicial Institute in updating its jury orientation video to include a new segment on unconscious bias. See LegalNews.com, "Juror Orientation Video Update Addresses Unconscious Bias", <http://legalnews.com/grandrapids/1506757/> (accessed January 3, 2022) [https://perma.cc/84A8-DC67].

5. And it is not apparent that the Commission will succeed in either defining these terms or implementing its definitions. As the DEI Committee report acknowledges, "[w]hile over 35 other states have DEI structures related to their courts, many are fairly new in their work, have faltered, or have had a less robust impact." "Final Report," p 11. Hardly a ringing endorsement for the creation of a new bureaucratic structure overseeing an as yet undetermined subject matter.

6. That this is so should hardly need saying. See, e.g., Voegeli, "Republics, Extended and Multicultural: Not All Majorities are Created Equal", Claremont Review of Books (Spring 2020), <https://claremontreviewofbooks.com/republics-extended-and-multicultural/> (accessed January 3, 2022) [https://perma.cc/62KQ-HMYG] (discussing the modern emphasis on diversity and equity and warning of its departure from the principles that form the structure of our government); Mitchell, "The Identity-Politics Death Grip", City Journal (Autumn 2017), <https://www.city-journal.org/html/identity-politics-death-grip-15500.html> (accessed January 3, 2022) [https://perma.cc/Z9UJ-9TV3] ("The irony of identity politics is that it does not see itself as political; it supposes that we live in a post-political age, that social justice can be managed by the state, and that those who oppose identity politics are the ones 'being political.' ").

7. The most recent version of the ABA standard, currently under consideration, has softened its language but not its aims. The new proposed standard requires "[c]oncrete actions towards creating an inclusive and equitable environment . . . ." "Recommendations for Standard 206 Revisions", Interpretation 206-3. The new standards do not require law schools to consider "race and ethnicity in employment and admissions" if the school is in a "jurisdiction[] that prohibit[s] [these] consideration[s] . . . ." "Id"., Interpretation 206-4. And all schools must include "underrepresented groups" among "faculty, staff, and students," all of whom likely will be forced to undergo "[d]iversity, equity, and inclusion education . . . ." "Id"., Interpretations 206-2 and 206-3. Whether a law school meets the standard is determined not simply "based on the totality of the law school's actions" but also, specifically, on "the results achieved." "Id"., Interpretation 206-3.

8. See also MCR 9.202(B)(1)(d) (providing that it is misconduct in office for a judge to "treat[] . . . a person unfairly or discourteously because of the person's race, gender, or other protected personal characteristic").

9. The oaths taken by lawyers and judges in Michigan both require the oath-takers to swear that they will support the constitutions of Michigan and the United States. See State Bar of Michigan, "Lawyer's Oath", available at <https://www.michbar.org/generalinfo/lawyersoath> (accessed December 27, 2021) [https://perma.cc/NX49-R2A2]. See also Const 1963, art 11, § 1.

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 April 1, 2022 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 filing a comment, please refer to ADM File No. 2019-28/2021-36. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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The United States District Court for the Eastern District of Michigan publishes proposed amendments and approved amendments to its local rules on its website at www.mied.uscourts.gov. Attorneys are encouraged to visit the court's website frequently for up-to-date information. A printer-friendly version of the local rules, which includes appendices approved by the court, can also be found on the website.

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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.

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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.
I-96 south service drive, just east of Telegraph
(This is both an AA and NA meeting.)

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

Houghton Lake
SECOND SATURDAY OF THE MONTH 1 PM
Lawyers and Judges AA Meeting
Houghton Lake Alano Club
2410 N. Markey Rd.
Contact Scott with questions (989) 246-1200

Lansing
THURSDAY 7 PM*
Central Methodist Church, 2nd Floor
Corner of Capitol and Ottawa Street

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

West Bloomfield Township
THURSDAY 7:30 PM*
Maplegrove
6773 W. Maple Rd.
Willingness Group, Room 21

GAMBLERS ANONYMOUS

For a list of meetings, visit
gamblersanonymous.org/mtgdirMI.html.

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

OTHER MEETINGS

Bloomfield Hills
THURSDAY & SUNDAY 8 PM
Manresa Stag
1390 Quarton Rd.

Detroit
TUESDAY 6 PM
St. Aloysius Church Office
1232 Washington Blvd.

Detroit
FRIDAY 12 PM
Detroit Metropolitan Bar Association
645 Griswold
3550 Penobscot Bldg., 13th Floor
Smart Detroit Global Board Room 2

Farmington Hills
TUESDAY 7 AM
Antioch Lutheran Church
33360 W. 13 Mile
Corner of 13 Mile and Farmington Rd., use back entrance, basement

Monroe
TUESDAY 12:05 PM
Professionals in Recovery
Human Potential Center
22 W. 2nd St.
Closed meeting; restricted to professionals who are addicted to drugs and/or alcohol

Rochester
FRIDAY 8 PM
Rochester Presbyterian Church
1385 S. Adams
South of Avon Rd.
Closed meeting; men's group

Troy
FRIDAY 6 PM
The Business & Professional (STAG)
Closed Meeting of Narcotics Anonymous
Pilgrim Congregational Church
3061 N. Adams
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