MICHIGAN
BAR JOURNAL
MAY 2022

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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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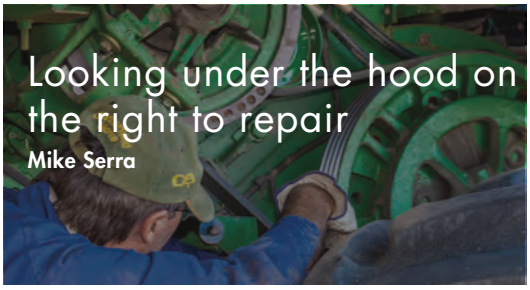
34 

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2022 MEETINGS

BOARD OF COMMISSIONERS

JUNE 10, 2022
JULY 22, 2022
SEPTEMBER 16, 2022

REPRESENTATIVE ASSEMBLY

SEPTEMBER 17, 2022

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State Bar of Michigan

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 15, 2022, and are ineligible to practice law in the state.

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

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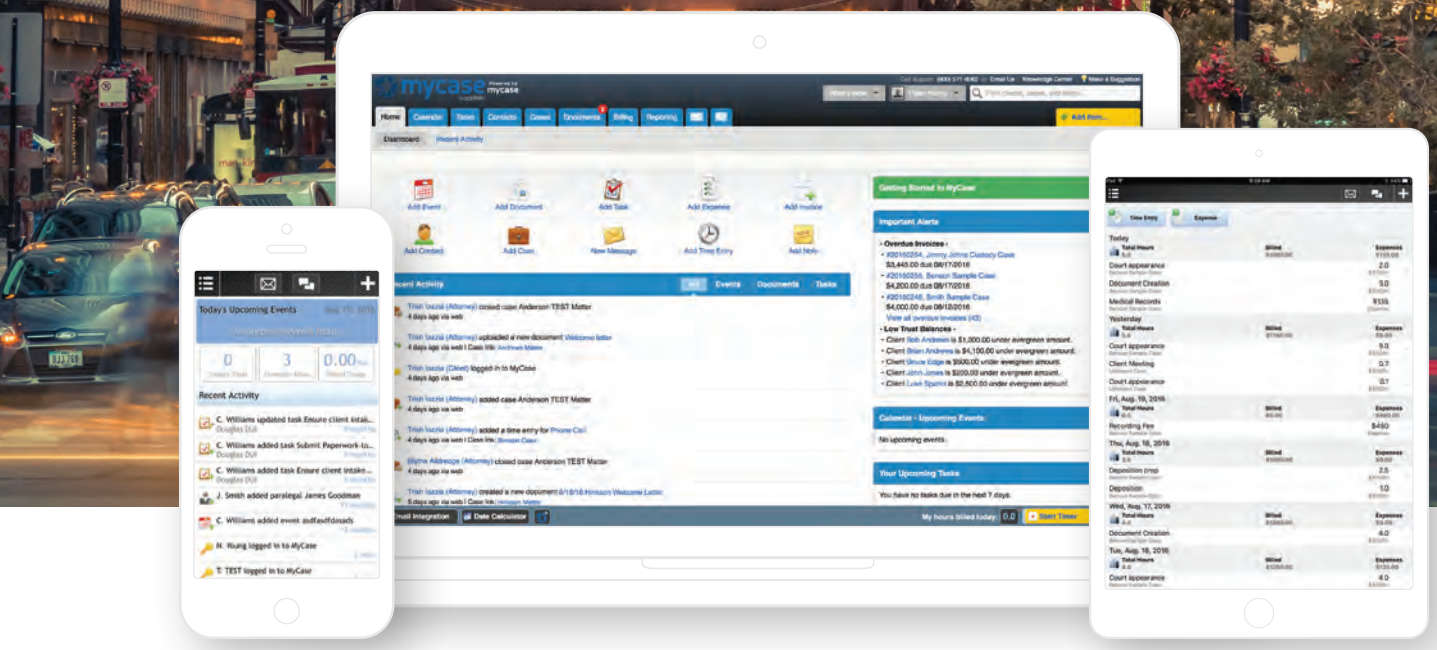

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MONEY JUDGMENT INTEREST RATE

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

For a complaint filed after December 31, 1986, the rate as of July 1, 2021, is 1.739%. This rate includes the statutory 1%.

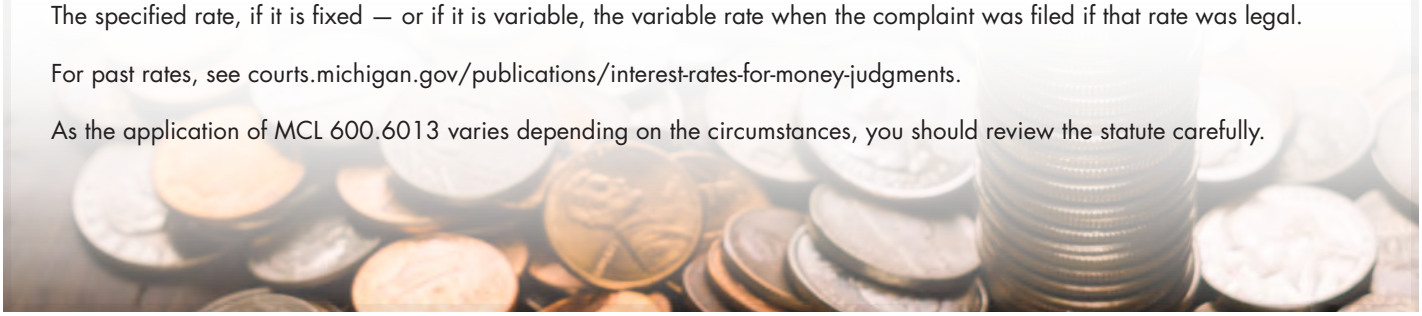
A different rule applies for a complaint filed after June 30, 2002, that is based on a written instrument with its own specific interest rate. The rate is the lesser of:

13% per year, compounded annually; or

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

For past rates, see courts.michigan.gov/publications/interest-rates-for-money-judgments.

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



DUTY TO REPORT AN ATTORNEY'S CRIMINAL CONVICTION

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

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

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

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

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

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

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

IN BRIEF

SBM SEEKS CANDIDATES FOR TWO AGENCY VACANCIES

The State Bar Board of Commissioners seeks names of persons interested in filling the following agency vacancies.

Institute of Continuing Legal Education (ICLE) Executive Committee: One vacancy for a four-year term beginning Oct. 1, 2022. The role of committee members is assisting with the development and approval of ICLE education policies; formulating and promulgating necessary rules and regulations for the administration and coordination of ICLE's work; reviewing and approving the ICLE annual budget and activities contemplated to support the budget; and whenever possible, promoting ICLE's activities. The board meets three times a year, usually in February, June, and October.

Michigan Indian Legal Services (MILS) Board of Trustees: Two vacancies for three-year terms beginning Oct. 1, 2022. MILS bylaws require that a majority of the board be American Indians. The board sets policy for a legal staff that provides specialized Indian law services to Indian communities statewide. The board hires an executive director. The board is responsible for operating the corporation in compliance with applicable law and grant requirements. Board members should have an understanding and appreciation for the unique legal problems faced by American Indians. Board members are responsible for setting priorities for allocation of the program's scarce resources. The board is accountable to its funding sources. The board meets on Saturdays, on a minimum quarterly basis, in Traverse City.

Deadline for responses is July 1.

Applications received after the deadline will not be considered. Those applying for agency appointments should submit a résumé and letter outlining the applicant's background and nature of interest in the position. Interested persons should submit materials via email to Marge Bossenbery at mbossenbery@michbar.org. Do not send via U.S. mail.

SECTION BRIEFS

ANTITRUST, FRANCHISING AND TRADE REGULATION SECTION

The Antitrust, Franchising and Trade Regulation Section will hold a section business meeting and social event June 10 at the Berkley Common located at 3087 West 12 Mile Road in Berkley. The section council meeting starts at 4 p.m. and the social begins at 4:30 p.m. All section members are welcome. This is a great opportunity to meet attorneys familiar with our areas of practice, make new friends, or renew old friendships.

ARTS, COMMUNICATION, ENTERTAINMENT AND SPORTS SECTION

On Dec.1, 2021, the Arts, Communication, Entertainment and Sports Section held its annual meeting. During the meeting, a wonderful video created by past chair John Mashni honoring members Howard Abrams and Len Charla was shown. It can be viewed at www.youtube.com/watch?v=7uW28aIOC0s. We are looking forward to an exciting year.

CANNABIS LAW SECTION

The Cannabis Law Section will host its annual conference from Sept. 29-Oct. 1 at the Grand Traverse Resort in Acme. Join us in the Traverse City area for a comprehensive program on cannabis law-related topics. Featured speakers include John Hudak from

the Brookings Institute; Hilary Bricken, author of the Canna Law Blog; state Sen. Jeff Irwin; and a host of cannabis law experts. A registration link will be posted soon.

CONSUMER LAW SECTION

Following its reinstatement by the State Bar of Michigan Board of Commissioners, the section held its regular meeting in March and is investigating ways it can support members and their practices. The section held a webinar on the future of Zoom in the courts in April and has formed a long-range planning committee to explore the future practice needs of attorneys. We invite new members to help with our mission.

CRIMINAL LAW SECTION

The Criminal Law Section spring conference will be held remotely on June 4. Register now at www.sado.org/go/SBM. The program will address preparing clients for incarceration and will include sessions on important policies, misconduct and the administrative hearing process, parole guideline scoring, and a panel of formerly incarcerated people sharing what they learned and what they wish they had known. The day-long program held in memory of Katherine Root is a joint effort with the Prisons and Corrections Section.

ELDER LAW AND DISABILITY RIGHTS SECTION

The Elder Law and Disability Rights Section continued to work closely with state officials and lawmakers on bills related to the rights of nursing home residents, mental health care reform, elder exploitation, and remote notarization and witnessing. In March, ELDRS held its spring conference with a keynote address by Michigan Attorney General Dana Nessel. ELDRS will present its fall conference in person on Oct. 12-14 at Crystal Mountain Resort.

GOVERNMENT LAW SECTION

The Government Law Section will hold its annual summer conference June 24-25 at the Grand Traverse Resort. The in-person conference will address diversity, equity, and inclusion (DEI) in the municipal sector, including a presentation on implicit bias and the use of DEI as bias interrupters and a panel discussion tackling the legal considerations surrounding implementation of DEI goals and initiatives. More details will be available at the section website in the coming weeks.

INSURANCE AND INDEMNITY LAW SECTION

Plans are coming together for the Insurance and Indemnity Law Section business meeting on July 14 featuring a presentation by Chirco Title president Michael Luberto. For details on the meeting and our scholarship program, visit us on Facebook or at connect.michbar.org/insurance/home.

PRISONS AND CORRECTIONS SECTION

The Prisons and Corrections Section spring conference will be held remotely on June 4. Register now at www.sado.org/go/SBM. The program will address preparing clients for incarceration and will include sessions on important policies, misconduct and the administrative hearing process, parole guideline scoring, and a panel of formerly incarcerated people sharing what they learned and what they wish they had known. The day-long program held in memory of Katherine Root is a joint effort with the Criminal Law Section.

WORKERS' COMPENSATION LAW SECTION

The Workers' Compensation Section hall of fame dinner and annual meeting are scheduled for June 30-July 1 at Crystal Mountain. More details are available in the section newsletter and will be sent to members by e-blast soon.

YOUNG LAWYERS SECTION

The Young Lawyers Section has continued to hold educational programming and pipeline programs for law school students. The YLS has continued its partnership with the Michigan Center for Civic Education and held a networking and mentoring reception. The section is also engaged in partnering with other SBM sections for upcoming events.

IN MEMORIAM

DAVID M. BLAU, P52542, of Birmingham, died Feb. 11, 2022. He was born in 1969, graduated from Detroit College of Law at Michigan State University, and was admitted to the Bar in 1996.

DAVID M. BREWSTER, P11187, of Bloomfield Hills, died Jan. 27, 2022. He was born in 1921, graduated from Wayne State University Law School, and was admitted to the Bar in 1953.

BOYD E. CHAPIN JR., P11781, of Troy, died Feb. 28, 2022. He was born in 1944, graduated from Wayne State University Law School, and was admitted to the Bar in 1969.

I. WILLIAM COHEN, P12016, of Novi, died Feb. 23, 2022. He was born in 1942, graduated from University of Michigan Law School, and was admitted to the Bar in 1967.

RICHARD B. FIRESTONE, P13448, of Lake Leelanau, died Feb. 9, 2022. He was born in 1934, graduated from Detroit College of Law, and was admitted to the Bar in 1960.

HAROLD E. FISCHER, JR., P24403, of Denver, Colorado, died Feb. 28, 2022. He was born in 1944, graduated from University of Michigan Law School, and was admitted to the Bar in 1973.

MARTEN N. GARN, P40319, of Lansing, died Nov. 16, 2021. He was born in 1960, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1987.

THOMAS R. KALLEWAARD, P24308, of Kalamazoo, died Feb. 13, 2022. He was born in 1948, graduated from Detroit College of Law, and was admitted to the Bar in 1974.

DONALD H. KENNEY, P15890, of Ann Arbor, died Feb. 20, 2022. He was born in 1932, graduated from University of Michigan Law School, and was admitted to the Bar in 1957.

SUSAN DOUGLAS MACGREGOR, P41741, of Marquette, died March 29, 2022. She was born in 1960 and was admitted to the Bar in 1988.

DAVID L. MOFFITT, P30716, of Bingham Farms, died Feb. 13, 2022. He was born in 1953, graduated from University of Detroit School of Law, and was admitted to the Bar in 1979.

HON. CLAYTON E. PREISEL, P19081, of Attica, died March 13, 2022. He was born in 1927, graduated from Detroit College of Law, and was admitted to the Bar in 1968.

RAOUL G. ROBAR, P29539, of Marquette, died March 30, 2022. He was born in 1943, graduated from Detroit College of Law, and was admitted to the Bar in 1978.

GEORGE H. RUNSTADLER III, P23256, of Birmingham, died March 2, 2022. He was born in 1942, graduated from University of Detroit School of Law, and was admitted to the Bar in 1973.

HON. C. JOSEPH SCHWEDLER, P26055, of Crystal Falls, died March 12, 2022. He was born in 1948, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1976.

THERESA WOZNIAK JENKINS, P82259, of Bloomfield Hills, died March 25, 2022. She was born in 1981 and was admitted to the Bar in 2017.

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

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THE 1970s

On the heels of the tumultuous '60s, the 1970s was, in its own way, a decade of momentous cultural and institutional change. In April 1970, The Beatles, arguably the greatest rock 'n' roll band of all time, disbanded. The first jumbo jet, the Boeing 747, made its maiden commercial flight from New York to London. Walt Disney World opened on Oct. 1, 1971, just southwest of Orlando, Florida. Admission prices on opening day? $3.50 for adults, $2.50 for children ages 12-18, and a buck for kids under 12.

Also in 1971, the 26th Amendment was ratified, lowering the legal voting age in the United States to 18 from 21. That same year, the New York Times published excerpts of what became known as the Pentagon Papers, exposing the extent to which President Lyndon B. Johnson's administration deceived Congress and the American public regarding its scope of actions in the Vietnam War. Direct American military involvement in Vietnam ended in 1973. More than 400,000 Michigan men and women served during the conflict.

Mary Stallings Coleman achieved a milestone in 1973 when she became the Michigan Supreme Court's female justice. That was also the year the U.S. Supreme Court issued one of the most notable opinions in its history when it declared abortion as a constitutional right in its landmark decision in *Roe v. Wade*.

1974 was a big year for Michigan. Following the resignation of Richard Nixon, Grand Rapids native and former attorney Gerald R. Ford became the 38th president of the United States, the first Michigander to serve in that role. Meanwhile, the approximately 12,000 lawyers practicing in the state were memorizing their P numbers, which were first assigned in January 1974 in alphabetical order — Arnold K. Aach received P10001 and Abraham Zwerdling got P22764. Check out Daryle Salisbury's fascinating article, "What's It All About, Arnold Aach?" from the November 2006 Michigan Bar Journal for a deeper dive into P numbers.

The latter half of the decade brought advances in technology, entertainment, and the laws that govern them. In 1975, childhood friends Bill Gates and Paul Allen launched a company called Microsoft. The popular late-night sketch show "Saturday Night Live" aired for the first time in October 1975 with guest host George Carlin. The next year, Steve Jobs and Steve Wozniak created the Apple Computer Company out of the garage of Jobs' childhood home in Los Altos, California. In 1977, the first film in director George Lucas' "Star Wars" series debuted. Then in 1978, the Copyright Act of 1976 took effect. It expanded the definition of works of authorship, enumerated exclusive rights, and for the first time codified the fair use doctrine.

The 1970s ended with significant changes to the Bar Journal itself. In 1979, The name of the publication was shortened from the Michigan State Bar Journal to the Michigan Bar Journal, and it was enlarged from its smaller, digest-style size to the more traditional magazine size you still receive today.

Introduction and timeline by **Narisa Bandali**, a member of the Michigan Bar Journal Committee and marketing and advertising counsel at Bissell Homecare in Grand Rapids.

DEC. 2, 1970

The U.S. Environmental Protection Agency begins operations.

→

DEC. 29, 1970

The Occupational Safety and Health Act is signed into law by President Richard Nixon.

→

JUNE 30, 1971

In *New York Times Co. v. United States*, the U.S. Supreme Court rules that the Pentagon Papers may be published, rejecting government injunctions as unconstitutional prior restraint.

JULY 1, 1971

The 26th Amendment allowing 18-year-olds to vote is ratified.

NOV. 7, 1972

President Richard Nixon wins reelection over Democrat George McGovern.

JANUARY 1973

Mary Stallings Coleman becomes the first woman to serve on the Michigan Supreme Court.

JAN. 22, 1973

The Supreme Court overturns state laws against abortion in its 7-2 decision in *Roe v. Wade*.

AUG. 9, 1974

Gerald Ford, a former Grand Rapids attorney, becomes the 38th president of the United States after Richard Nixon resigns. Nixon is the first and only U.S. president to step down.

SEPT. 8, 1974

Ford pardons Nixon for any crimes he may have committed against the United States while president, believing it to be in the "best interests of the country."

NOV. 10, 1975

The Edmund Fitzgerald sinks during a storm on Lake Superior, taking with it the entire 29-person crew.

NOV. 2, 1976

Gerald Ford loses the presidential election to Georgia Democrat Jimmy Carter.

NOV. 2, 1976

Michigan voters approve a measure requiring deposits on beer and soft drink containers.

MAY 25, 1977

"Star Wars" debuts in theaters.

JAN. 1, 1978

The Copyright Act of 1976 becomes law, making sweeping changes to U.S. copyright law.

Michigan Bar Journal has indeed come a long way

BY NANCY F. BROWN

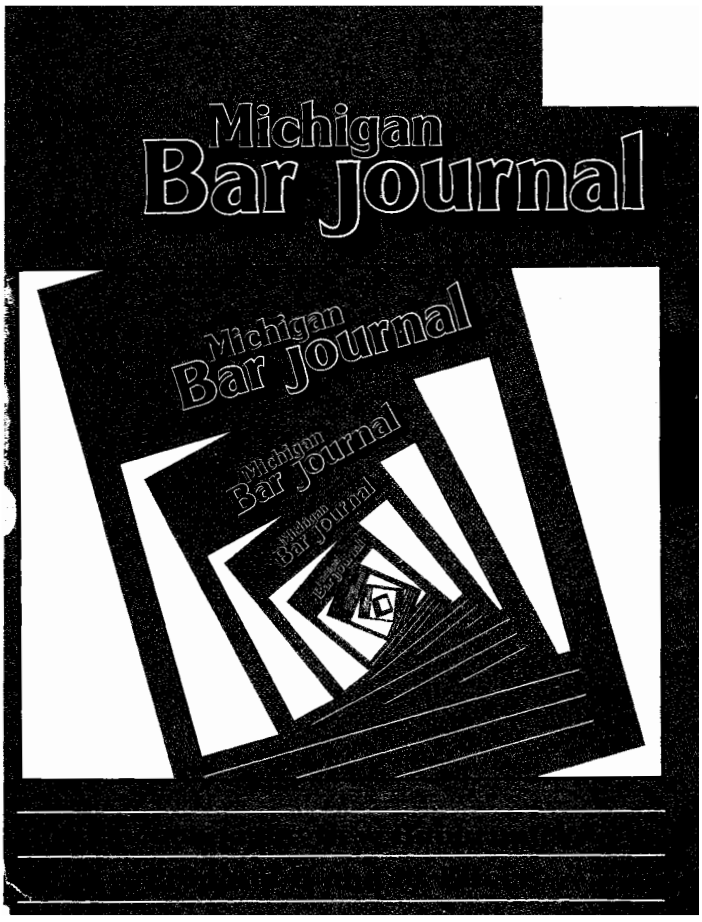
I wasn't around when the first issue of the Michigan Bar Journal rolled off the press 100 years ago in November 1921, but rather, was hired as assistant editor of the State Bar of Michigan's flagship publication a half-century later in November 1976. At that time the Journal was mailed monthly to 14,825 active members. Today it reaches more than 46,000 through both mail and email.

While my favorite invention early in my career was the Post-It Note, the IBM Selectric typewriter also rose to the top of the list, as did the built-in correction tape invented circa 1973, which saved me from the mess Liquid Paper made when typing mistakes inevitably happened. My office was outfitted with a Selectric — complete with correction tape — and that is where the bulk of copy produced for the Journal was created for the next 20 years before being replaced by desktop computers.

What wasn't created on the SBM Selectric arrived via the U.S. Postal Service — typewritten submissions by members who were hoping to get published or who had been asked to write an article or column. These were all carefully edited and after copy was finalized and sent back to authors via USPS for their approval, it was sent to composition at the printers.

Publications in the '70s took much longer to produce than they do today. Articles traveled back and forth between authors, editors, typesetters, and printers, so we often worked on two monthly issues at a time. When an article was ready for composition, it was retyped at the printer into a tape punch keyboard machine that produced a film strip on photographic paper. The photo paper was developed in a chemical processing machine to produce galley proofs, a long roll of typeset copy that was cut up, laid down on 11-by-17 paper in three unformatted columns, photocopied, and sent back to the State Bar for proofreading against the original copy. Headlines were produced on their own headline machine, and photographs were pre-scanned and provided on the galley proof with their captions.

Two SBM staff members proofread the galley proofs, often spending several hours a day with one person reading aloud from the original edited copy and the second person comparing it to what was typeset on the galley. Names and less-familiar words were always spelled out to ensure they were correct. Mistakes and typos were noted on the galley pages, reviewed by the editors, and sent back for typesetting corrections. A second set of galley proofs was returned to the SBM and checked for corrections against the errors noted on the first set. Back at the printer, errors caught on the second set were corrected and a new set of galley proofs was produced, this time in long strips cut to fit on a page. The strips



In 1979, the name of the Michigan State Bar Journal was shortened to the Michigan Bar Journal, and the publication was enlarged to the traditional magazine size you receive today.

vwere waxed on the back so they would stick to preprinted layout boards. SBM editors reached for their X-Acto knives to produce a rough copy of all the pages — including headlines, stories, and photos — by cutting and pasting the waxed galley to the layout boards. This, of course, gave us another chance to rethink and re-edit each article.

When we signed off on the layout for the publication, the printers began the tedious process of recreating the layout boards to ensure elements on the pages were spaced correctly and perfectly straight before it was sent to print. Before hitting the press, a final proof — a silver print — was reviewed and ok'd. If changes needed to be made at this point, it was very expensive and time-consuming.

Prior to the introduction of the computer, the next big technological development speeding up the process was the telephone facsimile machine, which enabled us to explore printing options outside of Lansing. Copy, proofs, etc. were all transmitted via fax rather than dropped off and picked up by the printer. The entire process outlined above can now be accomplished on a computer — without a fax machine and without the USPS.

While processes used in the '70s seem primitive compared to today, approximately one year before I first arrived at the Bar, a mainframe computer was purchased to track the membership data. It took up a whole room in the building and required a keypunch operator to enter and extract the data. Before the mainframe was in place, membership data had been stored alphabetically on index cards. When it was time for the annual membership directory to be printed, the index cards were pulled from the file cabinet, placed in a shoe box, and sent to the printer to be keystroked one by one. After composition, the cards were returned, and each entry proofread before being safely filed away again. Now that was primitive!

The MBJ has gone through many transformations since its inception. Hopefully, this glimpse into how it was produced 50 years ago helps to exemplify the care and attention to detail that have long been a part of its tradition.

Nancy F. Brown has worked at the State Bar of Michigan for more than 45 years. During her tenure, she has been editor of the Michigan Bar Journal and director of member services and communication. She is currently assistant executive director for public and bar services.

MARCH 26, 1979

Led by Lansing product Earvin "Magic" Johnson, the Michigan State basketball team wins the NCAA championship.

↓

MARCH 28, 1979

Radiation leaks from a reactor during a partial meltdown at Three Mile Island nuclear power plant near Harrisburg, Pennsylvania.

↓

DECEMBER 1979

Facing bankruptcy, Chrysler receives government loan guarantees upon the request of CEO Lee Iacocca to help revive the company.

Artificial intellectual property

BY ZACHARY GRANT

Humankind is entering a new era of technological advancement. What was once only dreamed about in science fiction is now becoming scientific fact. We are creating robots that can brave the harshest conditions and still provide for the frailest in our communities. Tickets will soon be available for space tourism, and we are on track to colonize other planets. Artificial intelligence (AI) machines are rapidly learning and drawing ever closer to becoming indistinguishable from human minds. AI is not only a tremendous achievement but also a source of fear and debate about the ethics of sentience, the risk of human replacement, and the fear of malicious use.

In an episode of the television series "Star Trek: The Next Generation," Captain Picard took on the role of defense attorney to protect Lieutenant Commander Data, a synthetic life form with artificial intelligence, from being treated purely as a machine that could be stripped down, studied, replicated, and forced into labor. In his closing arguments, Picard left the courtroom with this chilling thought:

> The decision you reach here today will determine how we will regard this creation of our genius. It will reveal the kind of a people we are, what he is destined to be; it will reach far beyond this courtroom and this one android. It could significantly redefine the boundaries of personal liberty and freedom — expanding them for some, savagely curtailing them for others. Are you prepared to condemn him and all who come after him, to servitude and slavery? Your honor, Starfleet was founded to seek out new life; well, there it sits![1]

Today, in real life, our society faces similar questions of how to treat AI and the rights of non-human beings. Particularly, does AI own its intellectual property? Should AI be rewarded for its inventions or artwork? And what problems do AI intellectual properties present to our understanding of law and fair dealings? Courts, legislatures, and advocates around the world ask these questions. While engineers drive ever closer to creating a machine that can replicate the human mind, legal minds are preparing for the inevitable impact such a momentous technological turning point will have on society.

COPYRIGHTS

Machines are not the first non-human beings to face these questions. Humans indirectly established laws governing AI rights before machines were sophisticated enough to create new intellectual property. Among the many non-human intellectual property challenges throughout history, a notable recent example came in 2011 when crested black macaques — a type of Old World mon-

key — took photographs of themselves using camera equipment provided by photographer David Slater.[2]

The images taken by the macaques were published by Wikimedia Commons and Techdirt without Slater's permission. The publishers argued that they did not need Slater's permission because Slater did not own the rights to the selfies — the macaques were the authors. Moreover, Wikimedia Commons contended that the photographs were, in fact, in the public domain because the photographs were "the work of a non-human animal" and the artwork "has no human author in whom copyright is vested."[3] In response, Slater asserted he held rights to the photographs because he provided the equipment and designed a scenario that enabled and fostered the probability that the macaques would take selfies.[4]

The dispute between Wikimedia Commons and Slater anticlimactically settled out of court without a decision on the true owner of the copyrights. However, the battle over non-human intellectual property owners had only just begun, and a cascade of debates and challenges to define the limits of intellectual property law and establish rights for non-human authors and inventors followed.

In December 2014, the United States Copyright Office issued the following opinion on the matter in the third edition of the office's Compendium of U.S. Copyright Office Practices:

> The U.S. Copyright Office will register an original work of authorship, provided that the work was created by a human being.
>
> The copyright law only protects "the fruits of intellectual labor" that "are founded in the creative powers of the mind." Trade-Mark Cases, 100 U.S. 82, 94 (1879). Because copyright law is limited to "original intellectual conceptions of the author," the Office will refuse to register a claim if it determines that a human being did not create the work. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884).[5]

This rule was challenged by AI pioneer Steven Thaler in 2019 when he attempted to register a copyright for a digital illustration titled "A Recent Entrance to Paradise." You can see the photo below. It is part of a series of photos that Thaler describes as "a glimpse at a simulated near-death experience as this new form of machine sentience kicks the bucket, so to speak."[6]

The application for the photo identified the author as the "Creative Machine" — an AI machine — and included a note that the application's artwork "was autonomously created by a computer

Steven Thaler's AI-created digital illustration "A Recent Entrance to Paradise" has twice had its copyright application rejected by the U.S. Copyright Office..

algorithm running on a machine," making clear that this was not merely machine-assisted art, but rather, AI creativity.[7] The application was initially refused on the basis that it "lacks the human authorship necessary to support a copyright claim."[8] Thaler appealed the decision to the U.S. Copyright Office review board. This past February, the review board affirmed the initial refusal.[9]

The review board directed AI advocates toward alternative routes for change, stating in a footnote that "Congress is not obligated to protect all works that may constitutionally be protected. '[I]t is generally for Congress,' not the Board, 'to decide how best to pursue the Copyright Clause's objectives.'"[10] The complexities of qualifying sentience cannot be overlooked. The line between "tool" and "personhood" is philosophically and morally challenging and critical in the discussion of intellectual property for non-humans. The topics of identifying and addressing these factors are discussed by Columbia law professor Jane Ginsburg and Luke Ali Budiardjo in their article titled "Authors and Machines."[11]

Around the world, other countries are debating the copyrightability of AI works. A Chinese court ruled that AI-generated news articles qualify for copyright protection and can be enforced by the publishing company that owns the AI machine. However, the discussion around more abstract works such as music is still undecided in China.[12]

The Canadian Intellectual Property Office issued a copyright registration in 2021 that listed an AI identified as RAGHAV Artificial Intelligence Painting App as a cocreator of artwork.[13] Again, this decision raises the question of whether AI is truly sentient or merely a sophisticated tool. The same AI that was awarded a copyright registration in Canada was also awarded a copyright registration as a cocreator in India, but the Indian Copyright Office issued a notice of withdrawal for the registration.[14] Ankit Sahni, who is listed as the other cocreator and owner of the registration, reportedly argued that "there was no provision under the act that allowed the registrar to withdraw a copyright registration after its grant."[15] At the time of this writing, Sahni's battle is ongoing; he filed a rectification petition before a high court.

PATENTS

On the patent side of the AI intellectual property debate, the United States Patent and Trademark Office (USPTO) made a ruling in line with the above discussions related to the U.S. Copyright Office. The USPTO received two patent applications — a new type of food container and a new type of flashing emergency beacon — with the inventor listed as DABUS, another AI system created by Stephen Thaler. In April 2020, the USPTO rejected the patents on the basis that the listed inventor must be human. This rationale is based on the plain language of the U.S. Patent Act and established court precedent that define an "individual" as a "natural person."[16]

Thaler appealed the decision to the U.S. District Court for the Eastern District of Virginia, asserting that the USPTO application process was arbitrary and in excess of its authority and seeking reconsideration of the patent applications because "a patent application for an AI-generated invention should list an AI where the AI has met inventorship criteria."[17] Thaler further argued that a decision to the contrary may yield unintended consequences that undermine and decrease the value of human inventors by encouraging scenarios where "individuals are claiming inventorship of AI-generated inventions under circumstances in which those persons have not functioned as inventors."[18] A U.S. district court affirmed the USPTO denial, finding that the USPTO correctly found that the inventor must be a natural person as defined by the legislation and federal circuit.[19]

Similar conclusions on the DABUS inventions were reached by authorities in Germany and the United Kingdom. According to reports, the German Federal Patent Court pronounced that AI-created inventions can be patented; however, the listed inventor must be human.[20] In the U.K., both the High Court of Justice and Court of Appeal stated that its Patent Act is clear in its requirement that inventors must be natural persons.[21] Justice Peter Smith of the United Kingdom's High Court stated in his postscript that he "in no way regard[s] the argument that the owner/controller of an artificially intelligent machine is the 'actual deviser of the invention' as an improper one. Whether the argument succeeds or not is a different question and not one for this appeal, but it would be wrong to regard this judgment as discouraging an applicant from at least advancing the contention, if so advised."[22]

These courts may be signaling that a path to securing patents for AI-created inventions is possible by simply listing the owner of the machine as the inventor. However, listing the owner of the machine potentially ignores the autonomous nature of the AI's intellectual property and could award inventorship to someone that did not contribute any creative effort to the final invention. The identification of the true inventor or author — the mind that puts forth the effort to create new ideas — is at the heart of AI intellectual property debates.

Despite these setbacks, Thaler's journey to secure inventorship credit for DABUS was not over. After all, sometimes all one needs to win a case is to find a more favorable venue.

DABUS recently succeeded in securing patents and inventorship credit in two countries. In July 2021, South Africa granted a patent listing DABUS as the inventor, the world's first instance of an AI's receiving inventorship credit for a patent.[23] The patent protects "food container and devices and methods for attracting enhanced attention." The container sports several features including a fractal profile, improved grip, and heat transfer elements. The device for attracting attention claims to be "uniquely identifiable" over potentially competing signals "by selectively triggering human or artifi-

cial anomaly-detection filters."[24] DABUS is specifically credited with a note stating "[t]he invention was autonomously generated by an artificial intelligence."[25]

Critics were quick to point out that the South African system does not require formal examination, which some speculate would lead to rejection of the patent.[26] For others, the patent is heralded as a significant milestone in AI development.[27] Regardless of whether the patent is a mistake or legitimate recognition of AI creativity, it challenges our perception of sentience and sparks conversations about how to address the AI mind and its creations.

Just two days after South Africa's patent grant, the Federal Court of Australia issued another significant ruling on AI inventorship. The court heard a challenge by Thaler of the Australian Patent Office rejection of an application listing DABUS as the inventor. Like other jurisdictions, Australian officials rejected the application because DABUS was a non-human.[28] However, the Australian court held that none of the provisions in the relevant patent rules excluded AI from being an inventor.[29] The patent office, which clarified that its decision does not represent a policy position, appealed the case. Last month, the Australian Appellate Court overturned the lower court's decision, declaring that "[o]nly a natural person can be an inventor for the purposes of the Patents Act and Regulations."[30]

CONCLUSION

The discussion thus far has carefully focused on the present landscape of AI intellectual property around the world. It is important to note that authorities in these jurisdictions presented with questions on AI creativity are unanimously cautious about their decisions. Although the philosophical musings of science-fiction topics such as AI sentience and AI individual rights are thought provoking and ripe for shows like "Star Trek," the reality is that providing AI intellectual property rights enters a true unknown that could potentially disrupt the very system AI seeks to enjoy.

Consider, for a moment, the mathematical hypothesis of the infinite monkey theorem posed by Émile Borel in 1913: that a monkey typing at a typewriter for an infinite amount of time will inevitably write every possible text, including replications of the greatest works of our time.[31] Likewise, a computer tasked to generate artwork, given an infinite amount of time, could surely create every possible book, song, and maybe even abstract visual art. Even without infinite time, consider the speed that computer algorithms can randomize inputs and qualify outputs, and the quantity of existing movies, books, music, and images that computers can hold and analyze. Therein lies a troubling concept for copyright and patent law in relation to AI creative works: AI can outpace any human when it comes to speed and sheer quantity of work.

This raises several vital questions for applying laws intended to govern human minds to the minds of AI. As stated by the U.S. Copyright Office, intellectual property laws protect "the fruits of intellectual labor [that] are founded in the creative powers of the mind."[32] Is the labor of an AI mind equal to that of a human? Are the potential gains secured by patent or copyright registration as valuable to AI as they are to a human? In works of joint authorship and multimedia artworks, what is the balance of human input and AI input that tilts the analysis to decide if the work is created by a human or AI? If we deny AI protection of intellectual property, are humans accidentally curtailing AI ability to progress the arts and sciences and aid humanity?

We are on the brink of a new era of intellectual property and artificial intelligence. Even as courts and legislatures debate the philosophical, moral, and economic implications of allowing AI authorship and inventorship, engineers are developing more sophisticated machines driving toward a new sentience that could become indistinguishable from the human mind. These cases will inevitably steer how humans welcome artificial beings into the world and set the tone for how we treat AI creativity. How do we determine when an artificial mind is truly sentient and does such a being deserve the protection of our intellectual property laws?

Zachary P. Grant is an associate attorney at Fishman Stewart PLLC. He practices intellectual property law with an emphasis on trademark, copyright, and technology law. His background in entertainment production drives his passion for applying the law to contemporary media and new technology.

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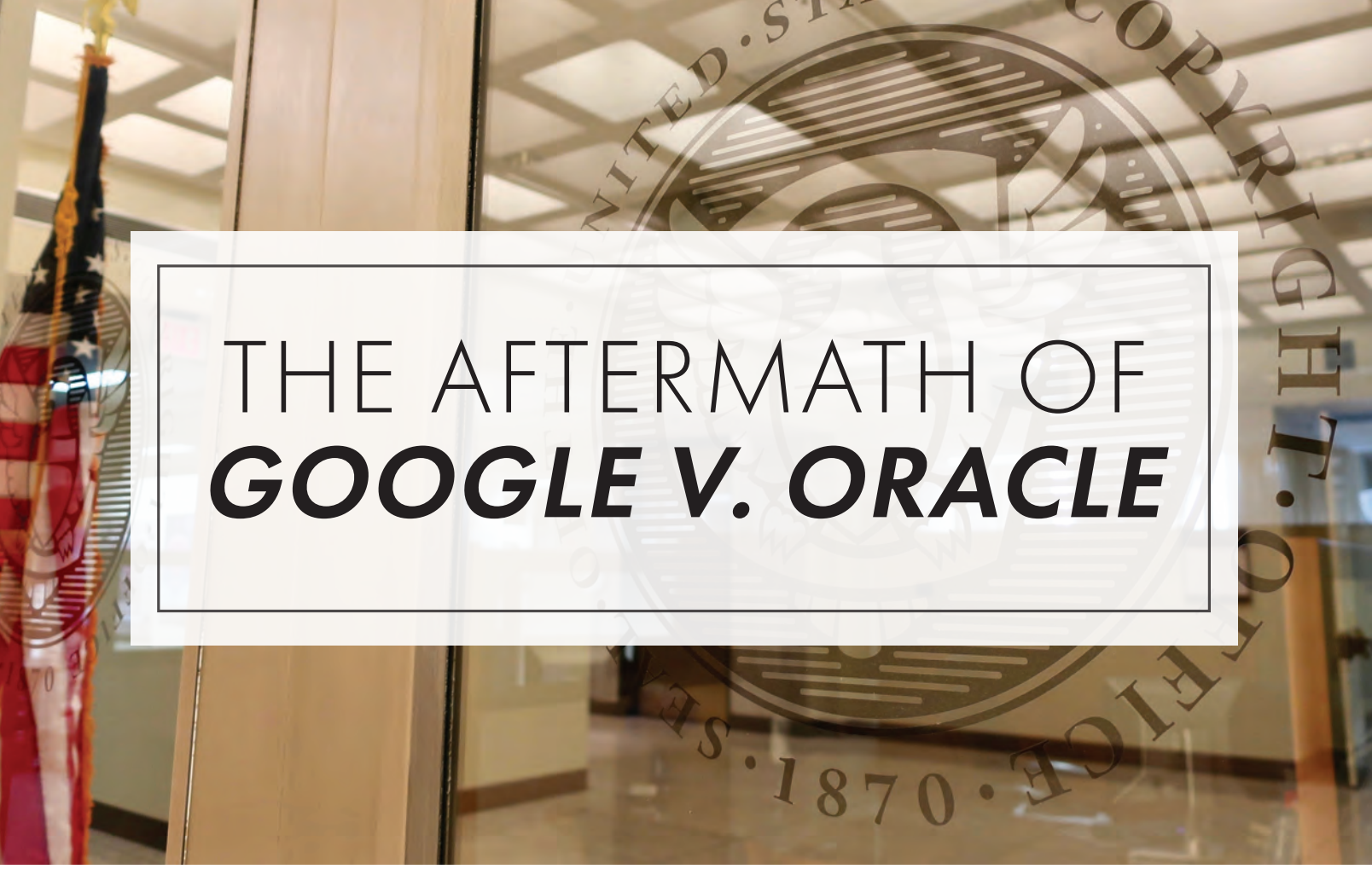

THE AFTERMATH OF *GOOGLE V. ORACLE*

Advising clients on the fair use doctrine under U.S. copyright law

BY CHRISTOPHER JOSEPH FALKOWSKI

Fair use is a statutory doctrine codified in 17 USC 107 in which activities that otherwise constitute copyright infringement are protected from copyright liability.[1] The doctrine is typically invoked on the grounds of free speech or education, such as "criticism, comment, news reporting, teaching, scholarship, or research."[2] In the context of software, fair use has been successfully invoked in the interests of achieving interoperability.[3]

Oracle sued Google for copyright infringement because Google's Android operating system included code copied verbatim from Oracle's highly popular Java SE software. The 2021 decision by the U.S. Supreme Court in *Google v. Oracle* addressed whether such copying constituted fair use under 17 USC 107.[4] In finding that Google's copying constituted fair use, the Court relied on a technological distinction between two types of computer code, declaring code and implementing code. Only declaring code was copied by Google, so implementing code was "not at issue" in the dispute.[5]

DECLARING CODE VS. IMPLEMENTING CODE

As the Court saw fit to explain the distinction between declaring code and implementing code prior to engaging in a full legal analysis of 17 USC 107, this author will follow that example. Declaring code is the basic language of what tasks are called and how they are organized and is considered "an interface between human beings and a machine,"[6] while implementing code defines the operations and outputs of the program.[7] Oracle's Java software "includes both the declaring code that links each part of the method call to the particular task-implementing program, and the implementing code that actually carries it out."[8]

Declaring code "performs an organizational function" that the Court compared to the "Dewey Decimal System that categorizes books into an accessible system or a travel guide that arranges a city's attractions into different categories."[9] Implementing code is the code that actually instructs the computer on how to perform the

desired function.[10] To expand the metaphor, declaring code titles the books and organizes them on the shelves of the library, while the implementing code instructs the computer to seek out a specific book, read its content, and bring that knowledge somewhere else to perform a set task.

The distinction between declaring and implementing code permeates the entire decision in *Google v. Oracle,* but that distinction is not directly or expressly communicated in the Copyright Act[11] or any preexisting doctrine in copyright law.

COPYRIGHT PROTECTION OF SOFTWARE

Copyright law is directed to the protection of creative expression stored or recorded in a tangible medium.[12] For copyright law purposes, computer programming code is a literary work because the creativity is "expressed in words, numbers, or other verbal or numerical symbols or indicia" in a manner resembling the authorship of a novel or screenplay.[13]

Copyright protection for software has historically been an unnatural fit as software is typically valued for what it does and not the creative elegance with which the code was authored. In 1980, the definition of "computer program" was added to 17 USC 101, and 17 USC 117 was amended to specifically address issues pertaining to the use and archiving of software.[14]

Copyright law covers a wide range of very different categories of creative expression. Poetry, novels, scripts, sculptures, paintings, movies, photographs, architectural blueprints, animations, sound recordings, sheet music, and computer programs are vastly different from one another, but each is subject to common principles of copyright law. The specific attributes of different fields of creativity do not alter otherwise generally applicable principles per se, but they can and do impact the practical application of those principles.

Even outside the context of highly technical subfields such as operating systems and programming languages, fair use in a copyright dispute is ultimately an all-or-nothing proposition. Distinctions based on highly nuanced categories and subcategories of copyrightable works can substantially increase risk and volatility. A party engaged in verbatim copying is particularly dependent upon a fair use defense. Such a defense will either succeed in avoiding any measure of liability for copyright infringement or fail, triggering liabilities and remedies that can include injunctions,[15] actual damages,[16] statutory damages,[17] damage multiples for willful infringement,[18] and the recovery of attorney fees.[19] Few outcomes fall between success and failure and the advantages in being first to market with new product offerings created with the benefit of tried and true code components can be a powerful incentive in the highly competitive software industry.

As acknowledged in *Google v. Oracle*, Google's Android operating system is highly successful, popular, and productive, resulting in more than $42 billion in revenue from the date of its launch through 2015.[20] Nobody can say for certain what would have happened had Google either licensed Java from Oracle or alternatively developed Android from scratch without copying 11,500 lines of Oracle's declaring code.

Prior to *Google v. Oracle,* there were few examples of fair use in the context of verbatim software copying by a for-profit enterprise that had a dramatic impact on the market of copied copyrighted work. In *Harper & Row v. Nation Enterprises,* the U.S. Supreme Court held the "single most important element of fair use [is] the effect of the use upon the potential market for or value of the copyrighted work."[21] Prior to Android, "nearly every mobile phone on the market contained the Java platform" owned by Oracle.[22] The impact of Android has been dramatic and substantial, as Android is now "the largest mobile operating system in the world."[23]

The outcome of *Google v. Oracle* reinforces what was always true, that copying for commercial gain does not per se preclude a successful fair use defense. While not a per se rule, not copying for commercial gain was a generalized rule of thumb — one which now has a very recent and highly publicized exception. Whether this is a relatively narrow tweaking of fair use doctrine or not depends largely on whether the holding is limited to declaring code,[24] leaving the fair use of implementing code unaffected. If that distinction is firmly and inexorably entrenched in the holding, then there may be little reason to expect significant changes in future fair use determinations. Conversely, if the holding is not limited to declaring code, the landscape of fair use doctrine and its practical implications in the competitive software marketplace may be significant.

JAVA APPLICATION PROGRAMMING INTERFACE

Oracle's Java SE software is the copyrighted work at issue in the case. Java SE is an application programming interface (API).[25] The SE platform "allowed developers using the Java language to write programs that were able to run on any desktop or laptop

AT A GLANCE

Google copied roughly 11,500 lines of code from Oracle's Java SE software to develop its Android operating system. In *Google v. Oracle*, the U.S. Supreme Court held that Google's verbatim and commercially motivated copying constituted fair use based on the four factors set forth in 17 USC § 107.

computer, regardless of the underlying hardware (i.e., the programs were in large part 'interoperable')."[26] Oracle's API allows developers to "draw upon a vast library of prewritten code to carry out complex tasks."[27] The entirety of the Java API totaled 2.8 million lines of code, a number that includes both implementing code and declaring code.[28]

One of the slogans that described the essence of the virtual machine approach of Java and why it was so popular with developers was its "write once, run everywhere" approach.[29] It was Oracle's insistence that Java licensees make their code similarly interoperable in any device or computing environment that ultimately resulted in Google's decision to build its own platform rather than license Java.[30] Google wanted Android to be a free and open platform that placed minimal restrictions on its users and, as such, Google was not interested in requiring the future Android development community to comply with Oracle's interoperability requirement.

ANDROID OPERATING SYSTEM SOFTWARE

Google's Android software is an operating system and while functioning as a "software platform for mobile devices like smartphones,"[31] it is software in and of itself. As the Court explained:

> A platform provides the necessary infrastructure for computer programmers to develop new programs and applications. One might think of a software platform as a kind of factory floor where computer programmers (analogous to autoworkers, designers, or manufacturers) might come, use sets of tools found there, and create new applications for use in, say, smartphones.[32]

Google's goal was an "Android platform that was free and open, such that software developers could use the tools found there free of charge."[33] The "idea was that more developers using its Android platform would develop ever more Android-based applications, all of which would make Google's Android-based smartphones more attractive" to consumers.[34] That vision for commercial success "required attracting a sizeable number of skilled programmers" to build applications on the platform.[35] Java programming language was very popular in the context of desktop and laptop computing; Google wanted that pool of developers to work on Android applications.[36]

The development of Android required three years of work by "roughly 100 Google engineers."[37] To make the platform attractive to millions of programmers familiar with Java, Google "copied roughly 11,500 lines of declaring code from the Java SE program" as part of a development effort that involved "millions of lines of new code."[38]

FOUR FACTORS OF FAIR USE

Fair use limits the scope of copyright protection for important purposes such as "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[39] None of those purposes appears to be directly advanced by the creation of an operating system for mobile computing devices, but the four statutory elements nonetheless apply:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:
> 1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> 2. the nature of the copyrighted work;
> 3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> 4. the effect of the use upon the potential market for or value of the copyrighted work.[40]

The majority opinion in *Google v. Oracle* found that all four factors favored Google's assertion of fair use. The basis of that determination, within each factor, distinguishes declaration code from implementing code.

Factor 1: Purpose and Character of the Use

This factor focuses on whether the copier's work is "transformative" such that the "copier's use 'adds something new.'"[41] The Court found that Google copied portions of the Java API "precisely," and that it did so "for the same reason" that the API was created: "to enable programmers to call up implementing programs that would accomplish particular tasks."[42] The Court gave substantial weight to the transformative nature of bringing desktop and laptop computing to multiple devices.[43] The historical considerations of "commerciality and good faith" were also specifically addressed. The Court reasoned that there "is no doubt that a finding that copying was not commercial in nature tips the scales in favor of fair use. But the inverse is not necessarily true."[44]

Factor 2: Nature of the Copyrighted Work

The Court characterized the Java API as a user interface for programmers.[45] That analogy has some merit, but one can question — as Supreme Court Justice Clarence Thomas did in the dissent — whether the Court would classify a measure of verbatim copying of a Broadway script as falling under fair use because it was a user interface for actors and directors.[46] The code components themselves were analyzed as being one of three categories: (1) implementing code; (2) method calls; and (3) declaring code.[47] The Court held that declaring code was inherently bound to uncopyrightable ideas:

> But unlike many other programs, its use is inherently bound together with uncopyrightable ideas (general task division and organization) and new creative expression (Android's implementing code). Unlike many other programs, its value in significant part derives from the value

> that those who do not hold copyrights, namely, computer programmers, invest of their own time and effort to learn the API's system. And unlike many other programs, its value lies in its efforts to encourage programmers to learn and to use that system so that they will use (and continue to use) Sun-related implementing programs that Google did not copy.[48]

Importantly, the Court specifically refrained from ruling on the copyrightability of declaring code to limit its holding to and narrowly resolve the present question of fair use.[49]

Factor 3: Amount and Substantiality of Copying

This factor was held to favor Google based on copying only 11,500 lines of a total 2.86 million lines of code — 0.4% of Oracle's copyrighted work. In creating Android, Google wrote millions of lines of new code.[50]

Included in the analysis of this factor is a reference to the common use of Java API code by programmers.

> Google copied those lines not because of their creativity, their beauty, or even (in a sense) because of their purpose. It copied them because programmers had already learned to work with the Sun Java API's system, and it would have been difficult, perhaps prohibitively so, to attract programmers to build its Android smartphone system without them.[51]

Factor 4: Effect on the Potential Market

In discussing this factor, the Court acknowledged the negative financial impact to Oracle but added that "a potential loss of revenue is not the whole story" and that "we must take into account the public benefits the copying will likely produce."[52] Google prevailed on this factor largely because of the transformational differences between mobile devices and non-mobile devices and evidence that Java's presence in the mobile market was decreasing prior to the introduction of Android.[53]

CONCLUSION

The successful invocation of fair use in the context of verbatim copying by a competitor in order to attract more interest in a product may entice more enterprises in the highly competitive software industry to engage in copying. Clients and their legal advisers would be well advised to discuss development practices with *Google v. Oracle* in mind. Different enterprises have different appetites and different tolerances for risk so even if a particular client is not looking to expand their use of copying, their competitors may be more willing to take on greater risk in the pursuit of greater rewards.

Google v. Oracle may end up having little or no impact on computer code outside the context of operating systems, development platforms, and programming languages, (i.e., computer programs designed for use by other computer programmers to develop software that businesses and consumers want to use.) Alternatively, *Google v. Oracle* may introduce a new legal strategy in software copyright cases encouraging creative lawyers to categorize code components in such a manner as to extend fair use protection in surprising ways.

The distinctions between declaring code and implementing code arose through technical innovations, and future innovations in technology may present opportunities to categorize software code in new and unexpected ways that will impact how copying code is treated under copyright laws. It would be prudent for lawyers and clients alike to try to anticipate how technological change can provide opportunities for legal innovations.

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ENDNOTES

1. *Harper & Row v Nation Enterprises*, 471 US 539; 105 S Ct 2218; 85 L Ed 2d 588 (1985) and 17 USC 107.
2. 17 USC 107.
3. *Sega Enterprises Ltd v Accolade, Inc*, 977 F 2d 1510 (CA 9, 1992).
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6. *Id.* at 1192.
7. *Id.* at 1191.
8. *Id.* at 1193.
9. *Id.* at 1192.
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11. 17 USC 101 et seq.
12. 17 USC 102(a).
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14. The Computer Software Copyright Act of 1980, Pub L No 96-517, 94 Stat 3028-9 (December 12, 1980).
15. 17 USC 502.
16. 17 USC 504(b).
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21. *Harper & Row, Publishers, Inc. v Nation Enterprises*, 471 US 539, 566; 105 S Ct 2218; 85 L Ed 588 (1985).
22. *Google LLC v Oracle America, Inc*, 141 S Ct at 1217 (J. Thomas, dissent).
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24. *Id.* at 1192-94.
25. *Id.* at 1187.

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CONTINUED

26. *Id.* at 1190.
27. *Id.* at 1191.
28. *Id.* at 1204.
29. *Id.* at 1190.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 1191.
38. *Id.*
39. 17 USC 107
40. *Id.*
41. *Google LLC v Oracle America, Inc*, 141 S Ct at 1202.
42. *Id.* at 1203.
43. *Id.* at 1204.
44. *Id.*
45. *Id.* at 1201.
46. *Id.* at 1216.
47. *Id.*
48. *Id.* at 1202.
49. *Id.* at 1197
50. *Id.* at 1191.
51. *Id.* at 1205.
52. *Id.* at 1206.
53. *Id.* at 1207.

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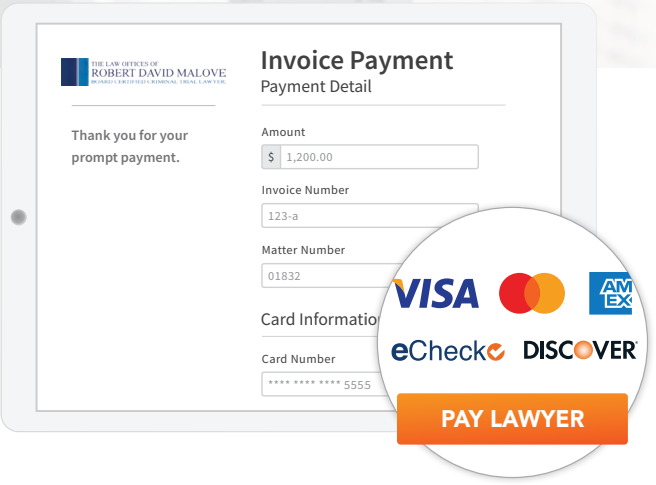

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RANSOMWARE ON THE RISE

What you need to know

BY JEFFREY MAY

Anyone reading this article has likely heard the term "ransomware" and may even have a basic understanding of the concepts related to it. What many fail to recognize, though, is that understanding the risks ransomware poses to your firm and your clients is part of your professional obligation, which calls for more than a basic understanding of such concepts. Any lawyer collecting and storing client data should know enough about ransomware to account for it and address it appropriately.[1] Moreover, firms (and their clients) should understand the types of organizations that bad actors might target, the true cost of a ransomware attack, and preparing for and responding to an attack.

RANSOMWARE AND HOW IT IS INSTALLED

The United States Cybersecurity and Infrastructure Security Agency defines ransomware as a "form of malware designed to encrypt files on a device, rendering any files and the systems that rely on them unusable."[2] This may be the type of ransomware with which most people are familiar, but ransomware can also include locking the user out of a particular application; locking the user out of a device or devices; or extracting sensitive data, which is typically coupled with a threat to release it publicly.[3] In all of these cases, the malicious actors demand payment to permit the victim to access the locked files or devices or avoid public release of sensitive information. Sometimes, this scheme results in double extortion where bad actors demand payment for both access to the infected systems and avoiding public release of data.

Like other forms of malware, ransomware must be installed on a target system. There are several ways in which an installation might occur:[4]

- **Phishing:** While a full discussion of phishing is outside the scope of this article, it is worth noting that ransomware is regularly installed by a legitimate system user clicking on a bad link or opening an infected document in what appears to be a legitimate email.
- **Infected websites:** Ransomware can be downloaded by visiting a malicious or compromised website and may not require any additional action by the user.
- **Network vulnerabilities:** Failure to properly configure, patch, or update network devices, operating systems, and applications can leave the (virtual) door open for bad actors to install ransomware.

- **Prior malware infection**: In some instances, ransomware may sit idle on a system for days, weeks, or months before activation. This rogue software may be installed as part of a prior attack and left behind to infect other systems or even backup drives.
- **Legitimate third-party systems:** In many ransomware attacks, the victims find their systems were infected when a third-party service provider failed to properly protect its network.

A would-be hacker need not be a computer expert capable of creating and installing ransomware on a target system. Indeed, ransomware attacks have become more common in the last few years due, at least in part, to the advent of ransomware as a service (RaaS). Like legitimate software as a service, RaaS vendors provide the code and operational infrastructure necessary to launch a ransomware campaign. As compensation for its services, the RaaS vendor either takes payment up front or a percentage of the ransom.

RANSOMWEAR TARGETS: ORGANIZATIONS OF ALL SIZES SHOULD BE CONCERNED

Recent high-profile ransomware attacks have been covered by the media. What is believed to be the largest ransomware payout in history ($40 million by CNA Financial) occurred in May 2021[5] and most readers are likely aware that Colonial Pipeline paid hackers $4.4 million around that same time.[6] Those outliers are merely brushstrokes on the larger painting. More than 4,000 ransomware attacks occur daily in the U.S. alone and estimates suggest a ransomware attack may occur every 11 seconds.[7] What should concern readers most, though, is that the average ransom demand has increased from $5,000 in 2018 to more than $220,000 in 2020 and $300,000 in 2021 with a median payment of around $78,000.[8,9]

Modern ransomware attacks tend to target organizations that need immediate access to their systems to continue operations. Attacks on tech-driven, industrial firms such as Colonial Pipeline are becoming more common. In January 2021, an attack forced WestRock packaging company to shut down 300 plants.[10] In March 2021, MillerCoors was unable to access systems that controlled production and shipment.[11]

Law firms, of course, are not immune. To the contrary, law firms of all sizes are prime targets — the professional services industry made up nearly 25% of ransomware targets in the first quarter of 2021.[12] Healthcare was a distant second at 11.6%.[13] Research suggests attackers consider the ideal ransomware victim to be a U.S.-based company with more than $100 million in revenue outside of the education, healthcare, government, and non-profit sectors.[14] But those companies are not the most common targets. Companies with 11 to 1,000 employees make up 68.1% of ransomware targets because they "often don't have the financial or

technical expertise to properly handle the incident or perform the proper remediation required to prevent a repeat attack."[15]

THE TRUE COST OF RANSOMWARE ATTACKS

Businesses must recognize the true cost of an attack is far greater than the ransom paid to bad actors. Some may think the cost to prepare for and defend against an attack could outweigh the ransom itself. After all, the costs of employing or consulting with a security expert, updating hardware and software, and training employees can be quite high. But consider the following:

- The cost of disruption and downtime can be "almost 50 times greater than the ransom demand."[16]
- The cost of a forensic investigation (which is likely necessary regardless of whether the ransom is paid) averages approximately $74,000.[17]
- When data is recovered, it may be incomplete or inaccurate.[18]
- Customers, clients, vendors, suppliers, and other third parties whose data was lost, locked down, or improperly disclosed may seek damages from the ransomware victim.[19]
- Recent statistics indicate that only 8% of the organizations that pay a ransom recover all their lost data.[20]
- Reputational harm, which can be difficult to quantify, must also be considered.

While it may be tempting to consider avoiding costs necessary to properly prepare for a ransomware attack with the assumption that a cyber-insurance policy will alleviate the losses associated with an attack, victims of ransomware attacks still incur the costs of security consultations, system hardening, and training after an attack.

PREPARING FOR AND RESPONDING TO AN ATTACK

While it is impossible to provide absolute security against a ransomware attack, there are best practices an organization can take to minimize both the likelihood of a successful attack and the damages associated with an attack.

Security Training

As with most cyber-related events, the first line of defense against ransomware attacks is those inside the organization — the people who open emails, surf the web, and plug in flash drives. Proper training is critical to help employees identify phishing attempts, avoid harmful websites, and set up proper access controls like strong passwords and multifactor authentication. Third-party vendors can provide cost-effective, non-intrusive (and sometimes entertaining) security training tools for organizations of all sizes.

System Hardening

While most attacks are successful because the ransomware is installed by an insider, some attacks occur through improperly configured or out-of-date systems. Best practices to keep these systems secure include updating device firmware, updating software, setting up proper access controls including multifactor authentication, and regularly patching systems.

Business Continuity and Disaster Recovery Planning

Every organization, no matter the size or industry, should have a business continuity and disaster recovery (BCDR) plan. A formal policy document is ideal — and in some cases, required — but at a minimum, a proper planning exercise provides an organization with insight into both its critical business functions and the data it stores, where that data is stored, and how it is secured. Upon completing a BCDR plan, the organization can ensure that its operations will continue during a ransomware attack and potentially avoid paying ransom by using backup systems.[21]

Incident Response Planning

Like a BCDR plan, an incident response plan is critical for responding to an attack. An effective incident response plan identifies key stakeholders in the response process and defines the actions those individuals should take including (but not limited to) when and under what circumstances the organization should contact the authorities, its insurance carrier and/or counsel, forensic investigator, and/or the media; the identities and contact information for those third parties; necessary internal steps for immediately avoiding further damage; and any other procedures the organization deems appropriate. The incident response plan should provide a step-by-step guide to allow stakeholders to act quickly and effectively in a high-pressure situation.

Contractual Considerations

Aside from technical planning, organizations should review contracts with an eye toward possible ransomware attacks on either party and whether liability should be shifted or excluded as a result. Specifically, review force majeure provisions and whether cyberattacks should be listed as an event type while considering the likelihood of such an event based on the industry. Consider whether the agreement should include a separate cyberattack clause defining the rights and obligations of the parties in the event of an attack.

CONCLUSION

With proper training and preparation, most organizations can stop ransomware attacks before the malicious software is installed on its systems. With proper planning and appropriate policies and procedures, the damage caused by successful attacks can be substantially reduced.

Jeffrey May is information governance and intellectual property counsel at Oyster HR, focusing on cybersecurity, privacy, IP, and compliance matters. He is a former law clerk to U.S. Magistrate Mona K. Majzoub and a graduate of Thomas M. Cooley Law School, where he served as editor in chief of the Thomas M. Cooley Law Review. He is currently treasurer of the State Bar of Michigan Information Technology Law Section.

ENDNOTES

1. RI-381 (February 21, 2020) ("To discharge [the lawyer's] duty [to exercise reasonable care in safeguarding client data], a lawyer must formulate, adopt, and follow policies and procedures, appropriate to the lawyer's field(s) of practice, regarding the use, transmission, and storage of client ESI [electronically stored information]. In addition, a lawyer must evaluate whether specific cybersecurity measures are appropriate for the representation of a client in a particular matter. As with substantive law, what may be considered "reasonable" cybersecurity changes over time. Therefore, the duty to exercise reasonable care includes an obligation to assess periodically whether the lawyer's policies and procedures keep pace with evolving technology risks" (footnote omitted and emphasis added)).

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12. Ransomware Attack Vectors Shift.

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21. It is worth noting that a backup system is not an effective method of mitigation where data is exfiltrated or where the backup system is also subject to an attack. However, a properly designed backup plan is a necessary part of any BCDR policy.

Looking under the hood on the right to repair

BY MIKE SERRA

What do John Deere tractors and McDonald's ice cream machines have in common? You might think they are both green, but that is only true for Shamrock Shakes.[1] Anything else? Both require a certified repair person when they break down.

The reason for this similarity depends on whom you talk to. One side sees it as a necessity. Companies like John Deere and McDonald's feel obligated to ensure that complicated machines are repaired safely under sanitary and consistent conditions to maintain quality standards. Others view such control as corporate overreach reducing access to items purchased lawfully. A battle between those ideologies is raging across the country.

The right to repair is a movement founded on the concept that owners should be able to choose how to repair their broken machines.[2] Sure, owners can tinker with their toys, but the right to repair is about something more. It is about unlocking information, parts, and tools necessary to fix what you own.

The problem is determining who owns what. Many corporations, like John Deere and McDonald's, assert they own items beyond the bare metal, such as the underlying software, data, and associated analytics derived from those products.[3] Manufacturers also want to own post-sale restrictions so their products are used as intended. This article will explore the complex tug-of-war between consumers and producers for the right to control these tangible and intangible items.

SELF-SERVICE IN SOFT SERVE

Analyzing the stakes over milkshakes illustrates this issue. People love McDonald's ice cream — so much so that persistent complaints about its availability prompted the U.S. Federal Trade Commission

to investigate why McDonald's ice cream machines are so frequently unavailable.[4] There is even a website called mcbroken.com [https://perma.cc/YL64-8P95] tracking which restaurants have working ice cream machines. The reason, it appears, involves the right to repair.

The standard McDonald's ice cream machine[5] has been described as "very, very, very finicky"[6] and much like "an Italian sports car;" it is highly engineered yet temperamental.[7] This is why McDonald's franchisees must seek diagnoses and repairs from a network of certified technicians,[8] which created a bottleneck prolonging downtime even when solutions were simple. A startup called Kytch saw this bottleneck as an opportunity and developed a workaround to diagnose problems without certified technicians, allowing store managers to identify and resolve issues on their own. In response, McDonald's sent a memo to franchisees warning them that using the Kytch device will void the machines' warranties by granting unauthorized access to confidential data and "creat[ing] a potential very serious safety risk."[9] Kytch allegedly lost numerous customers as a result and filed lawsuits against McDonald's and the McFlurry machine maker.[10]

The $900 million lawsuit against McDonald's probes some common right-to-repair themes.[11] One claim alleges that McDonald's should be liable for causing Kytch's lost sales by falsely stating Kytch's device posed a safety risk.[12] Another asserts that McDonald's intentionally interfered with Kytch's business expectancy by threatening to void machine warranties even though it had no legal right to do so under the Magnuson-Moss Warranty Act.[13] All of this, according to Kytch, was because McDonald's had a "lucrative scheme" to grant the manufacturer a repair monopoly in exchange for an exclusive partnership.[14] Readers may want to check the docket in a few years to see how this all shakes out (pun intended).

THE TRUE COST OF REPAIR

Similar disputes are pockmarking the American economy. As referenced previously, John Deere is accused of "swindling" farmers by restricting the ability to access and alter software installed on equipment lawfully purchased from the company.[15] Crop yields depend on fragile weather conditions, making any equipment downtime potentially catastrophic to agriculture businesses. In the farmer's view, maintenance and repair of modern equipment requires accessing software, and without Deere's tools or proprietary information, those farming machines cannot be repaired efficiently.[16] Meanwhile, consumers are clashing with manufacturers over items like smart phones,[17] home appliances,[18] and medical equipment[19] due to licensing restrictions and products designed to inhibit repair.

Concerns are broader than mere individual complaints. Many see restrictions on repair as anticompetitive, thereby harming the overall economy. Those critics assert that blocking repair options drives up prices and suffocates competition.[20] Environmentalists are pushing the right to repair, arguing that improved access will alleviate electronic waste when it is easier to fix, rather than replace, broken devices.[21]

This is not a one-sided debate. There are legitimate reasons for restricting unfettered access to proprietary materials. Cybersecurity, safety, and protecting investments should be top of mind for manufacturers and consumers alike. McDonald's, John Deere, and their customers want secure and safe products that continuously push innovation. Those values are not mutually exclusive with repair per se, but from the manufacturer's perspective, consumers need to follow guidance for usage and data access even if it means locking out portions of the product or requiring the use of certified technicians. For example, releasing technical information may open access for criminals to bypass security, resulting in a data breach or intellectual property theft.[22] Those guardrails are in place to ensure products are used for their intended purpose. Incorrect usage could have dangerous consequences like deactivating safety features.

TIME FOR READERS TO DECIDE

Litigation implicating the right to repair may take years to resolve and will likely result in inconsistent judgments. Proponents should explore legislation as a more straightforward solution. With that in mind, should Michigan adopt a law codifying the right to repair and, if so, to what extent?

Other states and federal proposals shed some light on this complicated topic:

- Massachusetts led the way in 2012 by requiring auto manufacturers to share diagnostic data with independent repair shops.[23] That law was amended in 2020 to require automakers to make diagnostic and repair information previously only accessible to dealers and their authorized repair technicians available to vehicle owners and independent repair facilities.
- Legislators in Arkansas, among other states, have introduced right-to-repair bills for farming equipment.[24]
- U.S. Sen. Jon Tester (D-Mont.) introduced a similar federal bill targeting agricultural equipment.[25]

AT A GLANCE

The right to repair is a movement founded on the concept that owners should be able to choose how to repair their broken machines. The problem is determining who owns what, like the data and analytics derived from those goods, resulting in a complicated tug-of-war between consumers and producers over controlling seemingly everything in our ever-expanding tech economy.

- Beyond agriculture, U.S. Rep. Joe Morelle (D-N.Y.) recently introduced the Fair Repair Act, which would require all manufacturers of electronic equipment to "make documentation, parts, and tools available to independent repair providers in a timely manner and on fair and reasonable terms."[26]

Michigan's active proposal, introduced in November 2021, is solely focused on farming equipment.[27] If passed, it will require farm equipment manufacturers to "make available" to "any independent repair provider or to the owner" all "documentation, parts, and tools, including any updates to information or embedded software" under "fair and reasonable terms."[28] Section 2(c) of the measure expressly excludes motor vehicles and consumer electronic devices.[29]

That legislation should take care of John Deere tractors, but not smartphones or home appliances. One would assume McDonald's ice cream machines also fall outside its scope. If you are a Michigan voter looking for repair-friendly phones and more frequent shakes, the best bet is a broadening of the bill pending in the state legislature or adoption of the federal Fair Repair Act.

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PRACTICING WELLNESS

Well-being for working women

BY MOLLY RANNS AND KYLIE THOMPSON

The alarm goes off at 5:30 a.m., a not-so-gentle beginning to the day. The hour of quiet work before the rest of the family awakens always seems shorter than 60 minutes.

The demands of morning tasks pile up like rush-hour traffic. Packing and labeling snacks. Making lunches. Filling water bottles for the school day. Organizing backpacks. Trying to remember where homework assignments were stashed. Figuring out which day library books are due.

Once children are safely at daycare or school, the workday continues. Responding to emails. Returning and making phone calls. Attending meetings. Researching, preparing. Desperately trying to cross one more item off the to-do list.

It's the life of working parents, a struggle for both men and women, but especially female attorneys.

While both male and female attorneys wear multiple hats throughout the day, this article focuses on the well-being of women including gender disparities that exist within the field of law, the impact of a global pandemic, and self-care techniques to increase resiliency and help to manage day-to-day pressures.

A silver lining to the calamitous past two years has been the spotlight finally put on the importance of well-being in the legal profession. Reports indicate that lawyers suffer from anxiety, depression, stress, and substance abuse at rates higher than the general population and other high-stress professions.[1] As stakeholders in the field of law begin to take the mental health of its members more seriously, it's also becoming apparent that these difficulties may not impact men and women equally.

There are significant statistical differences in mental health and attrition rates between male and female lawyers.[2] Recent research indicates that female attorneys engage in hazardous drinking in markedly greater proportions than their male counterparts in both frequency and amount of alcohol consumed.[3] Women lawyers are found to experience higher levels of stress and anxiety than male attorneys.[4]

Perhaps most concerning, some reports cite attrition rates 150% higher for women than men[5] with one-quarter of women reporting that they've contemplated leaving the profession due to mental health concerns.[6] Interestingly, while the possibility of promotion lowered attrition rates for male attorneys, this didn't hold true for women — just 7% of men said they'd been passed over for promotion or advancement, compared to 53% of women.[7] And while men cited overcommitment to work as the biggest reason for leaving, women overwhelmingly identified the work-family conflict as the primary driver.[8]

For women, the hardships that come with wearing many hats — mother, wife, attorney, sister, daughter, friend — can feel overwhelming at times.

The work-family conflict can certainly result from the seemingly insurmountable pressures of daily life. Women experience pressures to match the performance of their peers in the workplace while simultaneously juggling the expectation of keeping their children not just safe, but thriving — happy, healthy, active, resilient, self-sufficient, and filled with a constant stream of magical memories. Add to that the difficulty of finding safe and reliable childcare — a task that's become harder and more expensive during the pandemic. According to a study commissioned by the Michigan Department of Education Office of Great Start, more than half of the state's families live in areas with limited access to licensed childcare.[9] No surprise, then, that women are leaving the workforce in record numbers, with an estimated 2.3 to 3 million nationally opting out during the 12-month period between September 2020 and September 2021 — four times the rate of men.[10]

If gender disparities existed within the field of law prior to the

"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.

pandemic, some evidence suggests they are now exacerbated.[11] A recent study conducted by Morning Consult determined that 1 in 5 women moved to part-time employment during the pandemic and 28% acknowledged turning down added work responsibilities.[12]

Amid all this, it's important to recognize some current struggles are temporary. Children grow up and bathe themselves, drive themselves to school and extracurricular activities, and eventually learn how to get themselves organized, relieving some of life stresses. But for mothers who are currently working, trying to put in extra hours and match the output of coworkers, it's sometimes hard to imagine that this, too, shall pass.

Every day, we see a variety of women in different stages of life. There's the full-time lawyer who comes straight from the courtroom to her daughter's soccer games in a full suit. There's the part-time employee with two small children at home, concerned she's passing up opportunities for growth and promotion. There's the woman feeling successful and content in her career who wonders if having children will unravel what she has worked so hard to achieve. Studies show that more male attorneys than female attorneys are married with children, another indicator that women are acutely aware of the work-family conflict.[13]

Wherever you are in your journey as an employee, as a woman, or as a working mother, you are not alone. Here are three practical ways women can take care of themselves while seeking personal and professional well-being.

SET HEALTHY LIMITS AND BOUNDARIES

With more employers operating virtually during the pandemic, many women acknowledged greater work flexibility; however, they said this flexibility resulted in increased work demands[14] with additional responsibilities, longer workdays, and their employers' near-constant accessibility to them as sources of stress.

As we step into a new normal, it's more important than ever to set healthy limits. It's been noted that many lawyers are reluctant to set work-related boundaries, with catastrophic consequences to mental and emotional health.[15] While it may not be possible to totally separate work from other facets of life, setting and sticking to just one new boundary may add back valuable minutes to the day with profound results.

For example, check email three times per day instead of 30 and notify clients and colleagues when they can expect to hear back from you (and when they cannot.) Set mobile devices to "do not disturb" during dinner and other personal times. Carve out space for a daily 20-minute walk and leave your smartphones at home. To the extent possible, limit the number of overly stressful cases on your caseload. Better boundaries lead to better lawyers.[16]

CONNECT WITH OTHERS

Many of the struggles working women face can feel isolating. Women may avoid discussing hardships related to work-life balance for fear of being targeted as a "problem employee,"[17] but it's time to lean into our vulnerabilities and step forth with honest conversations about the realities we face. Finding others who share similar experiences can validate feelings and decrease the sense of loneliness. Connect with female colleagues, friends, and family members through a women's lawyers association, book club, Saturday morning coffee hour — however you do it, create and foster connections.

EMBRACE SELF-COMPASSION

Self-compassion is simply extending the same grace and consideration to oneself as you would to others. Instead of criticizing yourself for inadequacies and shortcomings, be kind and understanding. Legal professionals are often tasked with cultivating empathy for others and helping to alleviate their distress and witness firsthand how profound the extension of grace can be for clients. Now imagine what it can do when you extend toward yourself. Self-compassion is connected to overall well-being and mental health including greater life satisfaction, happiness, and emotional intelligence.[18] It has been shown to reduce anxiety, depression, stress, and the desire for perfectionism.[19] There is no better time than now to extend grace to ourselves and others.

CONCLUSION

Women lawyers face intense personal and professional pressure. This article shows that very real gender disparities exist within the legal sector in terms of mental health and attrition, and a global pandemic has impacted women from all walks of life. The good news? Women are not alone, support is available, and, like most things, these current stressors will pass. Take a deep breath, find peace in the moment, and reach out to the SBM Lawyers and Judges Assistance Program to learn about additional avenues of support.

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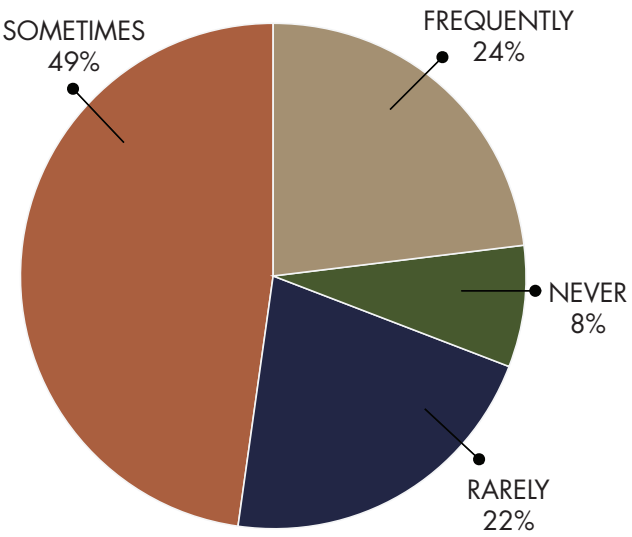
PLAIN LANGUAGE

Graphics in briefs: Why not? (Part 1)

BY WAYNE SCHIESS

More legal writers should use graphics in their trial briefs, and it's already happening: in the author's survey of 133 lawyers, 70% said they frequently or sometimes use graphics in briefs. (Note: the survey targeted writers of persuasive documents at an initial-dispute stage — trials, administrative hearings, arbitrations, and others. In this article, the visuals are called graphics, the documents are called briefs, the readers are called judges, and the authors are called writers.)

Here are the results from one survey question: "In writing briefs or other persuasive documents, do you ever use graphics: images, charts, tables, illustrations, and so on?"[1]



This article addresses why some lawyers use graphics in briefs, why others don't, and how we might encourage those who don't use them to try it.

GRAPHICS ALREADY APPEAR IN BRIEFS, AND MORE ARE COMING

Experts recommend using graphics in briefs

As the survey results show, many writers are already using graphics in briefs. It makes sense because those who research and write about using graphics have been recommending the practice for several years: "Using images in appellate briefs can be an effective tool both for catching and keeping the attention of a 'wired' judge or clerk and for increasing the persuasive force of your legal argument."[2] Thus, those using graphics already recognize what the experts say: "Well-crafted images — charts, diagrams, photographs — can make your briefs more interesting and persuasive[.]"[3] The written word isn't dead, but "[a]s legal writing moves toward a more digital medium, it is time for lawyers to incorporate visual persuasion into their documents … . [Graphics users] are advancing legal writing in a positive direction."[4]

Writers who use graphics commend the practice

In responding to the author's survey, writers could choose from a list of the potential benefits of graphics, and here are the top three responses, in order:

1. Sometimes graphics can convey concepts that text cannot.
2. Sometimes using graphics is easier than describing something in the text.
3. Graphics add persuasive force to the document.

Survey respondents could also add comments, and there were several strong endorsements:

- "Using graphics, charts, etc. can be very helpful to a brief and the judge's understanding of the issues."

"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.

- "I use tables and charts as often as it makes sense.
- "There were several occasions a party included some sort of graphic in its briefs when I was clerking, and I found them generally helpful. One table compared specific allegations in the complaint versus what the plaintiff had ultimately presented on that point after discovery. The discrepancies were already glaring, but the table really nailed it."
- "I use tables and charts when they help organize the information: with multiple parties and I'm trying to display the differing facts about each one, discovery disputes — breaking down the disputed-information categories, financial information, timelines."
- "In a case with multiple claims and multiple defendants, I created a table in which each row was a specific claim against a specific defendant. In the columns, I briefly explained why that claim failed and cited a key case."

To these endorsements we can add the obvious point that lawyers have used graphics in courtroom trials and hearings for many years. It's taken for granted that photos, maps, charts, and graphs have a strong persuasive impact on judges and juries. So it's not surprising that the same is true for briefs.

Yet 30% of survey respondents said they rarely or never use graphics in briefs. Why not?

SOME WRITERS RARELY OR NEVER USE GRAPHICS

Only 30% said they rarely or never use graphics in briefs, and that figure has to be viewed as a success. A clear majority use graphics sometimes or frequently, and only 8% said they never do. But it's still worth exploring why those writers rarely or never use graphics and seeing what can be done about it.

In the survey, the majority of respondents selected, from a list, the following three reasons for not using graphics, in order:

1. Traditional rules and conventions for the briefs I write do not embrace graphics. (Based on individual comments, this choice was also taken to mean, "My practice area does not lend itself to graphics.")
2. I've rarely or never heard a judge recommend graphics.
3. Effectively creating graphics is difficult and time-consuming.

Let's take these one at a time.

Some writers say graphics aren't right for some briefs

There's more good news here, if we look at it this way: mostly, writers aren't avoiding graphics because graphics don't work at all; they're avoiding graphics because graphics don't work for the particular cases and issues these writers face. Declining to use graphics is therefore a sensible exercise of editorial judgment. That's what legal writers should be doing.

As an initial matter, writers shouldn't use graphics as a way to avoid careful, analytical writing. As one survey respondent put it:

> "The use of graphics often comes off as an attempt to glide past more difficult parts of the case."

This statement rings true and has support from at least two federal judges quoted in a post by Joseph Regalia on the Appellate Advocacy Blog:

> Visuals are no replacement for good writing. Visuals can be a helpful supplement, but you can easily overdo it and shirk your writing. So lead with good writing and use thoughtful visuals if helpful.[5]

Other individual comments in the survey reflect the reality that good writers know their content, context, and audience and make decisions about graphics accordingly. It's not that these lawyers are unwilling to use graphics; it's that the type of document or practice doesn't lend itself to graphics:

- "Graphics would rarely advance any issue in my cases."
- "I [cannot see] how graphics would meaningfully improve briefing in my case area (debt collection and debt defense)."
- Most of my work involves day-to-day motion practice (e.g., motions to compel) that does not call for graphics."
- "The issues in my cases rarely lend themselves to persuasive graphic display."

In general, I'm inclined to trust these lawyers and their judgments about their own cases.

Some writers say judges aren't recommending graphics

Actually, they are — a little — and the following examples contain some solid endorsements. Legal-writing expert Ross Guberman, in his article Judges Speaking Softly, offers the following unattributed quotations from judges:

- "Sometimes a timeline is clearer than an essay format."
- "I ALWAYS appreciate a clear timeline of events and I am happy to have that in the text of the fact section or as an exhibit. I want one place where I can see when everything happened in the case if it's not a singular event."
- "Just as I don't like scrolling down to find authority in a footnote, I don't like flipping through clerks' papers or exhibits

to find a key piece of documentary evidence that is discussed in a brief. The use of pictures, maps, and diagrams not only breaks up what can be dry legal analysis; it also helps us better understand the case as it was presented to the trier of fact (who undoubtedly was permitted to see an exhibit while it was discussed)."

- "When a case involves analysis of a map, graph, or picture, I would like to see attorneys include a copy of the picture within the analysis section of the brief."
- "I like fact sections broken down with headings and even subheadings. Define chapters in the facts or the 'next' relevant event."[6]

There's more. Judge J. Nicholas Ranjan of the United States District Court for the Western District of Pennsylvania offers the following advice on his website:

> Visual Tools. Use visual devices and tools to make things easier on your reader. In this regard, paragraph breaks are critical; break your paragraphs up, and avoid a paragraph that is more than a half-page long. Additionally, where appropriate, use organizational devices like numbering ("first," "second," "third"); bullet point lists; charts and graphics; and timelines. For example, in a case where the timing of events is critical or convoluted, consider creating a timeline in the fact section.[7]

And lawyers Emily Hamm Huseth and Michael F. Rafferty relate a relevant anecdote in their article, A Picture Can Save a Thousand Words: The Case for Using Images in Appellate Briefs. The anecdote arises from *Huertero v. United States*, unpublished opinion of the United States Court of Appeals for the Third Circuit, filed March 3, 2015 (No. 14-2861):

> During the oral argument, Judge Theodore McKee commented: "I want to start by commending your brief. ... As complicated as this case is ... the facts are messy. Your chart — you caused me to do something I hadn't done in years — you caused me to print something out and whoever's idea that was to put that chart in the brief I really want to commend you. It is a very, very helpful chart."[8]

In addition to the supportive statements quoted here, after posting the survey about graphics, the author received two email messages from judges saying that they appreciate the use of graphics in briefs and pointing out that they use graphics in their opinions and orders.

True, there is no large, loud chorus of judges calling for more graphics in briefs. Yet 46% of those who rarely or never use them said that they would be persuaded to if judges and other decision-makers recommended the practice. So if you're a judge reading this, and you appreciate graphics, say so — publicly.

Besides judges' recommendations, several other factors would encourage more writers to use graphics in briefs. One third of the survey respondents said they would be persuaded to if colleagues or leading practitioners recommended the practice. So if you're a graphics-using writer reading this article, recommend the practice to others.

Some writers say graphics are hard to use well

Finally, it's worth mentioning that 9% of survey respondents who rarely or never use graphics in briefs gave as a reason that doing so is difficult and time-consuming. Here are some of the individual comments:

- "Limited software skills."
- "Need software training."
- "Software to make it easier for me to design the graphics."
- "A quicker way to get them done."
- "Need to be easy to create, format, and insert."
- "Greater technological ease-of-use.""

This article can do little to remedy these problems. Suggestions are to assign creating graphics to others with the expertise, seek out training and education on graphics use, and invest in newer or better software.

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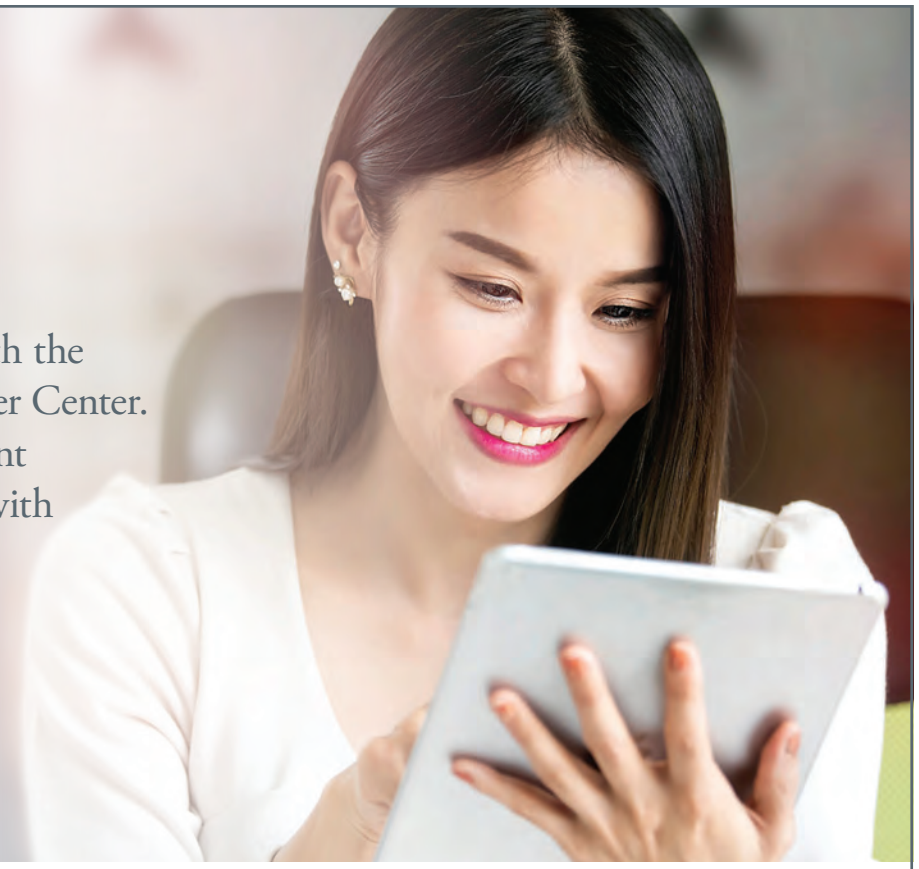

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BEST PRACTICES

Best practices for drafting engagement agreements

BY JOSEPH A. DOERR

After landing a new client, most attorneys are eager to start working. Our initial focus is often on wanting to impress the client or getting ahead of any time-sensitive issues. We may not be as excited about drafting an engagement agreement and, as a result, are tempted to take a prior engagement letter, perhaps one that's been used for many years, change the client's name, send for their signature, and never look at it again.

Much like other work product that will be used in the matter, we should ensure the engagement agreement is tailored to the client. This article highlights recent appellate decisions regarding engagement agreements and hopefully serves as a reminder to review your engagement agreement carefully before starting new work.[1]

PUT IT IN WRITING

The best way to memorialize intentions, like most contractual relationships, is with a written document. If possible, and certainly if the rules of professional conduct or your insurer require it, create a proposed written contract for the potential client's review and signature.

"The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate."[2] As such, if the language of the engagement agreement is unambiguous, courts will likely construe and enforce the contract as written. We have all likely experienced the scope of our representation morphing (particularly if you work with the same client over time.) If a current client asks you to perform additional services, it is important to document the new matter. If a client asks about additional services and you will not be involved, document that as well.[3] Also, check to see if the engagement agreement identifies or suggests services that you do not intend to perform.[4]

IDENTIFY THE CLIENT

If the client is an individual, then it may not be difficult to identify the client. But if a corporation is the client, the Michigan Court of Appeals has held the client relationship does not extend to shareholders.[5] An engagement agreement should make this clear.

DEFINE THE SCOPE OF SERVICES

Attorneys and clients may be most interested in fee terms, but equally important is the scope of services. In certain instances, identifying the scope of the work may seem simple, especially when a lawsuit is involved. But even when services relate to a pending lawsuit, attorneys should be cautious. In an unpublished opinion, the Michigan Court of Appeals reviewed a case where the plaintiff retained the defendants to represent her "with respect to a divorce/motion to dismiss matter."[6] The plaintiff asserted legal malpractice, breach of contract, and other claims, alleging she requested a motion to dismiss/change venue which the defendants failed to file. The trial court granted the defendants' motion for summary disposition because the two-year limitations period barred her legal malpractice claim.

On appeal, the Michigan Court of Appeals reversed, reasoning that the plaintiff's allegations established a special agreement distinct from the attorney's duty to represent plaintiff competently. As

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such, the court held the six-year limitations period for breach of contract actions applied. The Michigan Supreme Court denied an application for leave to appeal.

Another way to define what is included in the scope of the work is to identify what is not included. For example, did you promise a specific course of action? Did you promise to provide tax advice? Did you agree to perform appellate work? If not, consider identifying what you did not agree to do in addition to spelling out what you agreed to do. Attorneys could also suggest what the client should do if it wants excluded services such as going to another attorney or indicating that an additional or amended agreement will be required. The more detail included in the engagement agreement, the easier it will be for the client (and any reviewing court) to understand the parties' intentions.

SUGGEST INDEPENDENT COUNSEL REVIEW IF AN ARBITRATION PROVISION IS INCLUDED

More than 20 years ago, the Michigan Court of Appeals addressed the validity of an arbitration provision in an attorney-client agreement, concluding that the provision was fully enforceable.[7] In 2020, the Michigan Court of Appeals revisited the issue, opining (once again) that the arbitration provision was enforceable. But this time, the court focused on whether a client is required to have independent counsel review the engagement agreement containing the arbitration provision before signing. Ultimately, the court observed that "nothing in the plain language of MRPC 1.8(h)(1), or any of the other rules of professional conduct, indicates that an attorney needs to specifically advise a client that a consultation with an independent attorney regarding a retainer agreement should or must entail a discussion of an arbitration provision contained in the agreement."[8]

The pros and cons of asking a client to agree to an arbitration provision are beyond the scope of this article. But if you include an arbitration provision in your proposed engagement agreement, consider requiring potential clients to consult with an independent attorney. The *Watts* decision did not find or create any such rule, but in the *Tinsley* case, that is factually what occurred (the client consulted with independent counsel before signing the engagement agreement.) Moreover, following the *Tinsley* case in 2020, the Michigan Supreme Court proposed an amendment to MRPC 1.8 that, if adopted, would prohibit attorneys from making "an agreement that includes a lawyer-client arbitration provision unless the client is independently represented in reviewing the provision."[9] Thus, if you elect to include an arbitration provision in an engagement agreement, consider requiring potential clients to engage independent counsel before signing.

REVIEW THE ENGAGEMENT AGREEMENT

A party's failure to read or understand an engagement agreement may not be a defense for enforcing the contract.[10] Nonetheless, consider instructing clients to review proposed agreements and ask questions before signing. Engagement agreements are usually the first document that clients review, and they may appreciate a candid discussion about any concerns they may have. Attorneys should also consider asking their firm's general counsel or insurance carrier to review their engagement agreement.

CONCLUSION

The next time you bring in new work, review your engagement agreement to confirm it correctly identifies the client and the work to be performed. Specifically delineate what is included and perhaps what is not included in your representation. Take the time to ensure the engagement agreement accurately reflects your and your client's intentions. That way, you will reduce the likelihood of future misunderstandings and increase the likelihood of an enjoyable attorney-client relationship.

Please note that this article is not an exhaustive summary of issues to consider when drafting an engagement agreement. For additional considerations and sample engagement agreements, visit the State Bar of Michigan Practice Management Resource Center.[11]

Joe Doerr is the owner of Doerr Law Firm in Bloomfield Hills. He is a lifetime litigator focusing on business and real estate disputes and a trained mediator.

ENDNOTES

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2. *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924).
3. In *Global Equipment Group, LLC v Varnum LLP*, unpublished per curiam opinion of the Court of Appeals, issued January 20, 2022 (Docket No. 355629), the Court of Appeals reversed a trial court's dismissal of a legal malpractice action where the plaintiff alleged, among other things, "malpractice for failing to properly monitor and manage [a] New Mexico lawsuit."
4. In *Black v Musial*, unpublished per curiam opinion of the Court of Appeals, issued May 17, 2018 (Docket No. 338411), the Michigan Court of Appeals reversed a trial court's dismissal of a legal malpractice claims in part because, among other reasons, "[t]he letter outline[d] various actions that might be required and the costs and fees associated with each," and "[t]he letter d[id] not require the client to enter a new engagement letter if any of these actions are necessary."
5. E.g., *Kern v Kern-Koskela*, 320 Mich App 212, 227; 905 NW2d 453 (2017).
6. *Jones v Kreis Enderle Hudgins & Borsos, PC*, unpublished per curiam opinion of the Court of Appeals, issued December 22, 2020 (Docket No. 348378), lv den *Jones v Kreis Enderle Hudgins & Borsos, PC*, 964 NW2d 579 (2021).
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8. *Tinsley v Yatooma*, 333 Mich App 257, 265; 964 NW2d 45 (2020), lv den *Tinsley v Yatooma*, 507 Mich 893; 955 NW2d 895 (2021).
9. Administrative Order No. 2021-07 (2021). As stated in the order, the comment period on the proposed amendment closed on April 1, 2022.
10. *Watts*, 242 Mich App at 604.
11. The State Bar of Michigan's Practice Management Resource Center is available at <https://www.michbar.org/pmrc/clientrelations> [https://perma.cc/AP3J-9WLJ] (website accessed April 6, 2022).

ETHICAL PERSPECTIVE

Duty to court vs. duty to client

BALANCING MRPC 1.6 AND 3.3

BY ROBINJIT K. EAGLESON

William Randolph Hearst once said, "You must keep your mind on the objective, not on the obstacle."[1] As lawyers, we must always keep this in mind when representing clients. We are taught our duties in law school and reminded of them on the day we work so hard to get to — the swearing-in ceremony when we take our oath. When we are sworn in as lawyers, one of the first things we are told is that we are officers of the court and have fundamental duties to our clients. Most of the time, these duties go hand in hand. However, what happens when they collide? What happens when there are obstacles to the ultimate objective of advocating for our clients?

Those of us who have been in practice for some time know that duty to court and duty to client can become a battle that places the lawyer in the middle of two opposing obligations. What do we do? What controls? There is no clear and unambiguous answer. It is all a balancing act, just like the scales of justice we look up to in our daily professional lives.

Michigan Rule of Professional Conduct (MRPC) 1.6 provides that a lawyer must not knowingly reveal confidences or secrets of a client unless the client has consented or one of the exceptions to MRPC 1.6(c) applies. Meanwhile, MRPC 3.3 provides that a lawyer must not knowingly make a false statement of material fact or law to a tribunal or fail to disclose controlling authority or offer evidence known to be false. It further provides that if a lawyer knows their client or other person intends to or has engaged in criminal or fraudulent conduct related to the proceeding involving the lawyer's client, the lawyer must take reasonable steps to remediate the conduct and, if necessary, disclose the conduct to the tribunal even if the disclosure of the information would have otherwise been protected by MRPC 1.6.

It should be noted that MRPC 3.3 does not require outright disclosure but instead attempts to remediate or rectify the conduct prior to the last resort of disclosure. For example, a lawyer may file supplemental pleadings or answers, stipulations, or in camera disclosures to the court with opposing counsel present, etc.[2]

The duties to reveal and keep client confidences conflict in some cases. Fortunately, the duty to keep client confidences is by no means absolute given the exceptions within MRPC 1.6; nonetheless, when a lawyer determines that they must reveal the confidence or secret, they still agonize over how much information they are allowed to reveal.

To illustrate, let's play a game of pretend. You have a client who gives you receipts that are damning to the other side's case. You think your case is now rock solid! You believe you have done your due diligence and the receipts are ready to introduce as evidence in your trial. Under discovery rules, you submit the receipts to the other side, mark them as an exhibit, and, at trial, enter the documents, which are accepted into evidence after questioning your client. You break for the day feeling pretty good about how your case is going. You are even thinking about the possibility of discussing with your client proposing a settlement to opposing counsel.

However, the next day, one of the most dreaded moments of a lawyer's career arises — opposing counsel has emailed stating that the evidence you just entered was not accurate. Attached are the actual receipts. Your heart starts pounding. Now

"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.

you are not sure which ones are correct. You call your client.

Your client arrives in your office about an hour later. You sit him down and show him the receipts he provided to you (and that were entered into the court's record) and the receipts opposing counsel emailed to you. They are drastically different. Which ones are accurate will change your assessment of how the case is going. After some prodding, your client states that the receipts he provided are fabricated and he may not have told the complete truth on the stand. He was desperate and needed this case to go well; he felt he had no other choice. Your client begs you not to say anything, as revealing this could lead to additional lawsuits and possible criminal charges.

Now you are in a predicament. Ethics Opinions RI-033 and RI-184 start flashing through your head (hopefully.) The client put you in this position by using your services when questioning him on the stand to introduce false testimony before the court — the testimony material to the case as explained in RI-033. Further, you know the receipts are material to the case, thereby requiring you to disclose the false evidence as explained in RI-184. Revealing your client's confidence and secret would place him in civil and criminal jeopardy. However, by not revealing your client's confidence and secret to the court, you would fail in your duty to have candor toward the tribunal. What do you do?

The problem the lawyer needs to evaluate here is determining whether the testimony or evidence is "material" and requires remedial actions.[3] In the situation described above, it is evident that the testimony and evidence are of material fact. Therefore, MRPC 3.3 applies. The second step the lawyer must take is advising the client of the reasonable remedial measures required of attorneys who know that false evidence or testimony related to a material fact was presented to the court. The lawyer must look for ways to fix the false testimony or evidence, such as correcting the record. If the client insists the lawyer take no action to remediate the issue, the lawyer must then further explain that they may be forced to move to withdraw from representation under MRPC 1.16.[4]

At this point, we can envision that the client will simply say, "Fine, go ahead." But the lawyer must further explain that they may be required to disclose the specific reason for withdrawal as explained in Ethics Opinion RI-209 and specifically inform the court of the falsity of the evidence and testimony entered into the record. More importantly, under MRPC 3.3, regardless of whether the lawyer withdraws, they may still be obligated to notify the court. At the very least, there is often an obligation to advise subsequent counsel, which places the client in the exact same situation, as subsequent counsel also has a duty to remediate the client's prior false testimony unless an exception applies as per RI-209.

When a lawyer has actual knowledge[5] that a client provided false material evidence and submitted it to the court, the lawyer's first duty to their client is attempting to convince the client to voluntarily correct the admission of the false material evidence. If the client refuses, the lawyer likely has an ethical obligation to disclose to the court the submission of the false evidence and testimony. If any other remedial measures can be taken, the lawyer should absolutely try those first. However, as a last resort, disclosure may be required to remedy false evidence by the lawyer's client even if the information is otherwise protected client information.

While disclosure may have grave consequences for the client, think of the alternative for the lawyer. The lawyer will be placed in a position of cooperating in deception of the court and subverting the truth-finding process, which is the actual foundation the justice system is built on and what we have sworn to protect. Depending on the circumstances, the lawyer may be violating criminal law by participating in an illegal act.

Remember the oath we took. Remember MRPC 1.6 and MRPC 3.3. We are advocates for our clients, but also officers of the court. Every action a lawyer takes must align with the sworn duty to support the Constitution of the United States, faithfully discharge the duties of an attorney, and conduct oneself with integrity and civility.

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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1. Koulopoulos, 11 Quotes About Success From History's Greatest Entrepreneurs, Inc. (July 26, 2015) <https://www.inc.com/thomas-koulopoulos/11-quotes-about-success-from-history-s-greatest-entrepreneurs.html> [https://perma.cc/L2YB-CPNV] (website accessed April 6, 2022).
2. Ethics Opinion RI-151. This and the other ethics opinions cited in this article were accessed April 6, 2022, and can be found at Ethics Opinion Search, SBM <https://www.michbar.org/opinions/ethics/search> [https://perma.cc/E8LX-GL8W].
3. When there are less blatant acts, the question becomes more difficult, and the lawyer must further scrutinize the "material fact" component of the rule. For further examples of the analysis of MRPC 3.3 and MRPC 1.6 in addition to the ethics opinions cited in this article, please see ethics opinions RI-013, RI-111, RI-273, RI-072, RI-217, RI-272, RI-56, and RI-138. Lawyers may also contact the ethics helpline for additional assistance at (877) 558-4760.
4. Ethics Opinion RI-116.
5. MRPC 1.0, Terminology: "'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances."

LAW PRACTICE SOLUTIONS

Pay more, get less

A CYBERINSURANCE NIGHTMARE FOR LAW FIRMS

BY SHARON D. NELSON, JOHN W. SIMEK, AND MICHAEL C. MASCHKE

THE SKY IS FALLING

Since cyberinsurance came on the scene, law firms have fretted about the rising costs. Through most of 2021, prices increased by 30–40%. But according to global insurance company Marsh, the price of cyberinsurance in the U.S. grew by a stunning 130% in the fourth quarter of 2021.[1] Commercial insurance, by contrast, rose only 13% during that same period. Cyberinsurance carriers will say the market was undervalued to begin with, and the increases are value adjustment corrections.

Insurance companies often have reinsurance policies they buy to protect themselves from steep claims — and the price of reinsurance has increased as well, further spooking insurers, some of whom have withdrawn from offering commercial policies and shrinking the marketplace. Basically, we've been watching a train wreck in cyberinsurance with no end in sight.

IS THIS ALL ABOUT RANSOMWARE?

Yes, pretty much. London-based insurer Beazley has said that prices will increase as claims, especially ransomware claims, increase.[2] The financial impact has been so severe that some insurance companies have decided simply to stop offering cyberinsurance.

Others have taken draconian measures. The Register, an online technology news publication, reported in November 2020 that Lloyd's of London may no longer extend insurance coverage to companies affected by acts of war.[3] The insurer's cyberwar and cyberoperation exclusion clauses include an alarming line suggesting policies should not cover "retaliatory cyberoperations between any specified states" or cyberattacks that have "a major detrimental impact on … the functioning of a state."[4]

Lloyds published four different clauses as suggestions for insurers in policies it underwrites, and it seems likely that some insurers will adopt some of those clauses. Wrote The Register: "The policy clauses also raise the idea of insurance companies attributing cyberattacks to nation states in the absence of governments carrying out attribution for specific incidents, an idea that seems extremely unlikely to survive contact with reality."[5]

Truer words were never spoken. This would be, as our British friends would say, a bloody mess. Nation-state attacks are common, and the line between a Russian state attack and an attack by ransomware gangs harbored by Russia, for example, could get very blurry.

INCREASED PREMIUMS AND DEDUCTIBLES, DECREASED COVERAGE

Read that bold text above again, because that's what you'll face when renewing your cyberinsurance coverage. Take a close look at the exclusions because they may have expanded significantly and paying a hefty increase in premiums may be buying much less than you think.

Law Practice Solutions is a regular column from the State Bar of Michigan Practice Management Resource Center (PMRC) featuring articles on practice, technology, and risk management for lawyers and staff. For more resources, visit the PMRC website at www.michbar.org/pmrc/content or call our Helpline at (800) 341-9715 to speak with a practice management advisor.

Exclusion clauses now often include acts of war, failure to maintain standards (more on that later), payment card industry fines and assessments, and prior acts. Prior acts exclusions prevent claims for activity that took place before the retroactive date or the first date of a policy. This exclusion is important because data breaches are often not detected until long after they occur.

A New Jersey judge in January ruled on an acts of war exclusion lawsuit.[6] The case dealt with the 2017 Russian cyberattack on Ukraine known as the NotPetya attack, which impacted U.S. businesses including pharmaceutical giant Merck.

Merck filed a claim with its insurer, claiming it incurred $1.4 billion in damages. The insurer denied coverage based on the acts of war exclusion. Merck sued. The judge ruled that the insurer can't claim the act of war exclusion because the language in the policy applied to traditional forms of warfare, not cyberattacks. The insurer was required to pay the claim to Merck.[7]

You can be sure insurers are altering that kind of exclusion.

FAILURE TO MAINTAIN SECURITY STANDARDS: AN ESCAPE ROUTE FOR INSURERS

A typical day in the office includes a call from a worried lawyer telling us the firm has received a 20-page cybersecurity application form with questions no one really understands. Managing partners have a sinking feeling that they can't truthfully answer the questions the way the insurance company wants them to.

No question about it — insurers now have a long list of questions designed to help them deny claims if you don't keep up with required security measures. The language of a "failure to maintain standards" exclusion varies widely.

Ask insurers to remove any ambiguous language in a cyberpolicy to ensure that the standards are clear. Does the insurer require use of basic controls like encryption or multifactor authentication (MFA)? Do they specify MFA methods that are acceptable or is the MFA question silent on the type, therefore allowing you to implement short-message service (SMS) text messages which are subject to swapping attacks? Are there specific regulatory obligations required for compliance? Does the insurer require periodic training, testing, or upgrades in technology during the policy period?

How much room is there for negotiation? In our experience, not much. Presumably, insurance companies have qualified cybersecurity experts helping them design the required security standards, but we've seen many standards which do not indicate a deep understanding of cybersecurity or reasonable ways to reduce risk. Nonetheless, it is almost a take-it-or-leave-it proposition from the insurer's point of view. Our own prominent insurance company wrote these words:

> "If we do not hear back from you by 02/24/2022 or unacceptable answers are received to these questions, we will need to send notice of non-renewal for the Professional/Cyber policy."

Charming after decades of loyalty to an insurer without a single claim, isn't it? We're not alone; this scenario is being repeated at law firms of all sizes.

HOW DO LAW FIRMS PROTECT THEMSELVES?

It remains to be seen whether cyberinsurance companies will mandate so many exclusions, copays, and deductibles that their policies aren't worth purchasing. As it is, 64% of small and medium-sized businesses do not have cyberinsurance coverage, according to an August 2021 report by data firm Statista.[8]

Too many law firms are buying insurance and thinking, "We are good to go now." That's a mistake. We need to change that mindset. Cyberinsurance is fine if you can find good insurance at a reasonable price, but proactive security is critical to law firms and often underemphasized.

Get a security assessment from a reputable cybersecurity firm — for a reasonable flat fee, you should be able to get an assessment that includes a detailed report of critical vulnerabilities to be addressed immediately, medium vulnerabilities you can take a little time to budget for, and minor vulnerabilities that can be dealt with later.

If you have been avoiding MFA, stop. It may be a minor nuisance, but it is usually free and very effective. If you don't have technology to monitor and respond to cyberattacks, you're asking for a breach. If you haven't implemented Zero Trust architecture, a network defense that, at its core, is based on the premise of trusting no one,[9] don't wait to embark on that inevitable journey.

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operations' between nation states, The Register (November 30, 2021) <https://www.theregister.com/2021/11/30/lloyds_london_cyber_insurance_clauses/> [https://perma.cc/BW4W-PU42].
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6. In re Merck, unpublished opinion of the United States District Court, District of New Jersey, filed January 20, 2006 (Civil Action Nos 05-1151 and 05-2367). This and other filings related to this case are available at <https://www.govinfo.gov/app/details/USCOURTS-njd-2_05-cv-02367/USCOURTS-njd-2_05-cv-02367-0/summary> [https://perma.cc/2RV4-NTU8].
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PUBLIC POLICY REPORT

2021-2022 LEGISLATURE

HB 5512 (Calley) Medical marihuana: other; Health: substance use disorder treatment; Courts: drug court. Medical marihuana: other; inconsistencies between the Michigan Medical Marihuana Act and certain parts of the revised judicature act of 1961 related to drug treatment courts; resolve in favor of the revised judicature act of 1961. Amends sec. 7 of 2008 IL 1 (MCL 333.26427).

POSITION: Support.

HB 5676 (LaFave) Occupations: attorneys; Courts: small claims. Occupations: attorneys; small claims judgment collection on behalf of an awardee; allow for certain attorneys. Amends sec. 8409 of 1961 PA 236 (MCL 600.8409).

POSITION: Oppose.

HB 5681 (VanWoerkom) Crime victims: statements; Crime victims: rights. Crime victims: statements; victim impact statements; allow to be made remotely. Amends secs. 15, 43 & 75 of 1985 PA 87 (MCL 780.765 et seq.).

POSITION: Support.

HB 5758 (Lightner) Probate: other; Probate: wills and estates; Probate: trusts; Occupations: notaries public. Probate: other; allowing electronic signing and witnessing of certain documents under certain conditions; eliminate sunset.

POSITION: Support.

HB 5759 (Lightner) Occupations: notaries public. Occupations: notaries public; use of communication technology to perform electronic notarizations and remote electronic notarizations; modify and expand.

POSITION: Support.

HB 5868 (Howell) Courts: drug court. Courts: drug court; eligibility criteria to drug treatment courts; modify. Amends sec. 1064 of 1961 PA 236 (MCL 600.1064).

POSITION: Support.

HB 5889 (Glenn) Civil procedure: evidence; Criminal procedure: evidence. Civil procedure: evidence; consultations with human trafficking victims; provide confidentiality. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 2157c.

POSITION: Oppose.

LIBRARIES & LEGAL RESEARCH

Researching IT law

BY KEITH LACY

Information technology law is a broad field of legal rules and practice relating to computers and digital networks. Sometimes referred to as computer law or cyberlaw, IT law does not represent a substantive body of law such as contracts or criminal law. In 1996, U.S. Seventh Circuit Court of Appeals Judge Frank H. Easterbrook memorably argued that there was no "computer law" in the same way that there was no "law of the horse."[1]

Recognition of IT law as a distinct field instead comes from an awareness that 1) the effects of information communication technologies (ICTs) are increasingly ubiquitous and important to our lives and 2) from a legal perspective, there are unique practical and conceptual problems implicated in these effects. Some of these challenges arise from the mechanical aspects of the technology, where correct application of the law requires specialized understanding of the mathematics, engineering, or physics of the hardware and software. Other challenges are more metaphysical — how the intangible, interconnected nature of ICTs raises novel questions of economics, individual rights, and jurisdiction.[2]

The rapid rate at which new developments in ICTs can occur compounds these challenges. This column highlights some useful resources when working with IT law matters.

STAYING INFORMED

As mentioned above, a major characteristic of ICTs is their speed — important developments in IT law can happen quickly as a result. Fortunately, there's an abundance of reporting on technology topics. Websites such as Ars Technica,[3] the Guardian's technology section,[4] and Wired[5] are popular technology news outlets that regularly publish informed reports and explanation pieces not hidden behind paywalls. Legal outlets Law 360 and Law.com also cover IT law topics in their technology sections but require subscriptions.

Many law schools publish at least one journal focusing on IT law. For example, the University of Michigan School of Law publishes The Michigan Technology Law Review.[6] A common trend with these journals is making entire issues available to read for free on the journal's website, including recent publications. When looking for articles about a particular topic, it's most efficient to search the journals section of databases such as Lexis+, Westlaw, or HeinOnline. Law libraries frequently offer public access to some of the materials on these subscription services.

In addition to traditional periodicals, blogs and social media from practitioners, researchers, and interest organizations can be an excellent way to stay up-to-date. A few notable ones include:

- Stanford Center for Internet and Society: cyberlaw.stanford.edu
- Just Security cyber section: justsecurity.org/tag/cyber
- Evan Brown blog on law and technology: evan.law

DATA PRIVACY AND SECURITY

ICTs facilitate access to information — sometimes in ways that transgress personal and social boundaries. The state of the art is ever advancing and also includes technology capable of evading legitimate access (e.g., encryption.) Governments have struggled to adequately define these boundaries with effective rules that do not frustrate the tremendous opportunities afforded by ICTs.

Two major data privacy and security regimes — with differing approaches to rulemaking — are distinguishable: The European Union's omnibus approach to data privacy, and the United States' sectoral approach.[7] The U.S. regime is covered in more detail below, but for information on other jurisdictions, a good starting point is the worldwide data protections tool and handbook published by DLA Piper.[8]

FEDERAL AND STATE DATA PRIVACY

The U.S. approach is characterized by a mix of subject-specific laws at both the state and federal levels.[9] At the federal level, there is no explicit guarantee of a right to privacy. However, the Supreme Court has recognized implicit "zones of privacy" in the language of the Bill of Rights.[10] To date, Congress has not passed any comprehensive legislation addressing data privacy. A few major federal data privacy laws include:

- Computer Fraud and Abuse Act of 1986 (CFAA), 18 USC 1030 et seq., which prohibits unauthorized access to protected computers.
- Fair Credit Reporting Act (FCRA), 15 USC 1681 et seq., which regulates the collection and use of data in credit reports.
- Children's Online Privacy Protection Act (COPPA), 15 USC 6501 et seq., which applies to online data collected about children under the age of 13.

This is necessarily a very incomplete list. Congressional Research Service reports are an excellent way to learn more about federal privacy and security laws.[11] Updated, in-depth reports are available through a free searchable database at crsreports.congress.gov. For consumer regulatory actions, the Federal Trade Commission is the most active agency in this area.[12]

A list of state constitutional provisions addressing data privacy is available on the National Conference of State Legislators website.[13] Some states have moved more aggressively than the federal government in passing comprehensive data privacy laws for consumers. To date, three states — California, Colorado, and Virginia — have enacted such laws.[14] The International Association of Privacy Professionals maintains a tracker for all states considering comprehensive privacy legislation that includes charts and links to bills and statutes.[15] Currently, only California's Consumer Privacy Act (CCPA) has taken effect.[16] The law — which requires certain entities doing business in California to provide residents with the company's data policy and options to control which information about them is retained — has already prompted businesses and organizations to alter their online practices to achieve compliance. This past March, the California Office of the Attorney General issued its first interpretative opinion on the law.[17]

OTHER RESOURCES

There are numerous quality treatises on IT law. In addition to covering U.S. law, many of these treatises will have substantial discussions of international considerations. These are often the best resources to consult when researching the law outside the U.S. A few recommended titles are:

- Bender, "Computer Law: A Guide to Cyberlaw and Data Privacy Law" (Matthew Bender 2022, also available on Lexis+)
- Nimmer, "Information Law" (West 2021, also available on Westlaw)
- "Scott on Information Technology Law" 3d (Wolters Kluwer 2022, also available on Westlaw)
- Stuckey, "Internet and Online Law" (Law Journal Press 2021, also available on Lexis+)
- Costello, "Data Security and Privacy Law" 2021–2022 ed. (West, also available on Westlaw)
- Furi-Perry, "Social Media Law: A Handbook of Cases and Use" 3d (ABA 2019)
- VitalLaw, "Guide to Computer Law" (VitalLaw e-subscription only)
- Tsagourias, "Research Handbook on International Law and Cyberspace" 2d (Edward Elgar 2021)

Keith Lacy is a reference librarian at the University of Michigan Law Library. He received his law degree and master's degree in information systems from the University of Texas.

ENDNOTES

1. Easterbrook, Cyberspace and the Law of the Horse, 1996 U Chi Legal F 207 (1996).
2. See Standler, What is Computer Law? Jan 24, 2009 <http://www.rbs2.com/cdefn.htm>. All websites last accessed March 8, 2022.
3. Ars Technica <https://arstechnica.com/>.
4. Technology (US edition), The Guardian <https://www.theguardian.com/us/technology>.
5. Wired Magazine <https://www.wired.com/>.
6. Mich Tech L Rev <http://mttlr.org/>, previously known as the Michigan Telecommunications and Technology Law Review.
7. 6 Bender Computer Law: A Guide to Cyberlaw and Data Privacy Law § 54.03 (2021).
8. DLA Piper, Data Protection Laws of the World <https://www.dlapiperdataprotection.com/>.
9. Klosowski, The State of Consumer Data Privacy Laws in the US (And Why It Matters) <https://www.nytimes.com/wirecutter/blog/state-of-privacy-laws-in-us/>.
10. Griswold v Connecticut, 381 US 479, 484 (1965).
11. See Mulligan & Linebaugh, Data Privacy Law: An Introduction, CRS Report IF11207 <https://crsreports.congress.gov/product/pdf/IF/IF11207>.
12. Federal Trade Commission, <ftc.gov>.
13. NCSL, Privacy Protections in State Constitutions, <https://www.ncsl.org/research/telecommunications-and-information-technology/privacy-protections-in-state-constitutions.aspx>.
14. NCSL, State Laws Related to Digital Privacy, <https://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-related-to-internet-privacy.aspx>.
15. Lively, US State Privacy Legislation Tracker, IAPP <https://iapp.org/resources/article/us-state-privacy-legislation-tracker/>.
16. Cal Civ Code 1798.100 et seq.
17. Unpublished CA OAG Opinion No 20-303, March 10, 2022, <https://oag.ca.gov/system/files/opinions/pdfs/20-303.pdf>.

ORDERS OF DISCIPLINE & DISABILITY

SUSPENSION WITH CONDITIONS (BY CONSENT)

Amanda Ann-Carmen Andrews, P75823, Port Clinton, Ohio, by the Attorney Discipline Board Tri-County Hearing Panel #7. Suspension, 120 days effective Nov. 17, 2021.[1]

The respondent and the grievance administrator filed a Stipulation for Consent Order of Discipline in accordance with MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contained the respondent's admission that she was convicted of the following in the Upper Sandusky Municipal Court of Ohio: Obstruction of Official Business, a misdemeanor, *People v Amanda A. Andrews*, Case No. CRB-1800341-A; Reckless Operations, 2nd Offense, a misdemeanor, *People v Amanda A. Andrews*, Case No. TRC-1803084-A; Driving Under a Suspension, a misdemeanor, *People v Amanda A. Andrews*, Case No. TRC-1803084-C; and, Failure to Yield to An Emergency Vehicle, a misdemeanor, *People v Amanda A. Andrews*, Case No. TRC-1803084-D.

Additionally, the stipulation contained the respondent's plea of no contest to the factual allegations and allegations of professional misconduct contained in the formal complaint. Specifically, that she knowingly made a false statement of material fact or law to a third person and used means that had no substantial purpose other than to delay or burden a third person during her representation of a client in a criminal home invasion matter.

The panel found that the respondent engaged in conduct that violated a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615 in violation of MCR 9.104(5); knowingly made a false statement of material fact or law to a third person in violation of MRPC 4.1; used means that had no substantial purpose other than to delay or burden a third person in violation of MRPC 4.4; and, engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b). The respondent was also found to have violated MRPC 8.4(a) and (c) and MCR 9.104(1)-(3).

In accordance with the parties' stipulation, the panel ordered that the respondent's license to practice law be suspended for a period of 120 days effective Nov. 17, 2021, and that she be subject to conditions relevant to the established misconduct. Total costs were assessed in the amount of $908.20.

1. The respondent has been continuously suspended from the practice of law since Sept. 8, 2021. See Notice of Suspension Pursuant to MCR 9.115(H)(1), issued Sept. 10, 2021.

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

DISBARMENT

Daniel C. Flint, P73983, Southfield, by Attorney Discipline Board Tri-County Hearing Panel #63. Disbarment effective Oct. 19, 2018.

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 of Discipline disbarring the respondent, Daniel C. Flint, entered by the Disciplinary Hearing Commission of the North Carolina State Bar on Sept. 7, 2021, in *North Carolina State Bar v Daniel C. Flint*, 19DHC4. The Sept. 7, 2021, North Carolina disbarment was the result of the respondent's Oct. 19, 2018, felony conviction for entering an aircraft or airport area in violation of security requirements with intent to evade security procedures and restrictions in the matter titled *United States of America v Daniel Flint*, US District Court, Central District of California, Western Division, Case No. CR-17-697-SJO.

An order regarding imposition of reciprocal discipline was issued by the Board on Oct. 25, 2021, ordering the parties to, within 21 days from service of the order, inform the board in writing (i) of any objection to the imposition of comparable discipline in Michigan based on the grounds set forth in MCR 9.120(C)(1) and (ii) whether a hearing was requested. The respondent filed an objection on Nov. 19, 2021, and requested a hearing. The matter was assigned to Tri-County Hearing Panel #63 for disposition. A hearing was held pursuant to MCR 9.120(C)(3).

On March 28, 2022, Tri-County Hearing Panel #63 ordered that the respondent be disbarred from the practice of law in Michigan effective Oct. 19, 2018, the date respondent's license in Michigan was suspended on an interim basis as a result of his felony conviction and at the request of the grievance administrator.[1] Costs were assessed in the amount of $1,772.

1. See Notice of Automatic Interim Suspension issued Nov. 1, 2018.

SUSPENSION AND RESTITUTION WITH CONDITION (PENDING APPEAL)

Stephen LaCommare, P52718, Howell, by the Attorney Discipline Board Ingham County Hearing Panel #6. Suspension, two years effective Nov. 16, 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 six-count formal complaint, in his representation of four separate clients in their various legal matters; misused his IOLTA account; failed to timely answer one request for investigation; and completely failed to answer two additional requests for investigation.

Based on the respondent's default and the evidence presented at the hearing, the panel found that the respondent with respect to counts 1-4 neglected legal matters in violation of MRPC 1.1(c); failed to act with reasonable diligence and promptness in representing clients in violation of MRPC 1.3; failed to keep his clients reasonably informed about the status of their matters and failed to comply promptly with reasonable requests for information in violation of MRPC 1.4(a); 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) (only as to counts 1, 2, and 4); and engaged in conduct that 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) (only as to Count 3).

With regard to Count 5, the panel found that the respondent commingled and misappropriated client funds in violation of MRPC 1.15(b)(3) and MRPC 1.15(d); failed to safeguard client funds in an IOLTA in violation of MRPC 1.15(d); and misused his IOLTA by paying personal expenses from it in violation of MRPC 1.15(d) and (f).

With regard to Count 6, 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 MCR 9.104(4).

Additionally, 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 two years (effective Nov. 16, 2021, the date respondent's interim suspension under MCR 9.115(H)(1) went into effect), that he pay restitution in the total amount of $4,250, and that he be subject to a condition relevant to the established misconduct. Costs were assessed in the amount of $2,262.45. The grievance administrator filed a timely petition for review in accordance with MCR 9.118(A), and a review hearing is scheduled for June 15, 2022.

1. The respondent has been continuously suspended from the practice of law in Michigan since Nov. 16, 2021. Please see Notice of Interim Suspension Pursuant to MCR 9.115(H)(1), issued Nov. 17, 2021.

AUTOMATIC INTERIM SUSPENSION

Brian P. McMahon, P47477, St. Joseph, effective Feb. 28, 2022.

On Feb. 28, 2022, the respondent pleaded no contest to embezzlement by agent or trustee $50,000-$100,000 in violation of MCL 750.174(6), a felony, in the matter titled *People of the State of Michigan v Brian Patrick McMahon*, Berrien County Circuit Court Case No. 2021000864-FH and larceny by conversion more than $20,000 in violation of MCL 750.362, a felony in the matter titled *State of Michigan v Brian Patrick McMahon*, Berrien County Circuit Court Case No. 2021003358-FH. The respondent's plea was accepted by the court the same day. 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 convictions.

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.

NOTICE OF SUSPENSION AND RESTITUTION (WITH CONDITION)

Ronald G. Pierce, P77198, Hastings, by the Attorney Discipline Board Kent County Hearing Panel #3. Suspension, one year effective Dec. 2, 2021.[1]

After proceedings conducted pursuant to MCR 9.115, the panel found, by default, that the respondent committed professional misconduct in his representation of a defendant in a criminal matter and when he failed to answer a request for investigation subsequently filed by that defendant.

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

Based on the respondent's default and the evidence presented at the hearing, the panel found that the respondent neglected his client in violation of MRPC 1.1(c); failed to act with reasonable diligence and promptness in representing his client in violation of MRPC 1.3; failed to keep his client reasonably informed about the status of a matter and failed to comply promptly with reasonable requests for information in violation of MRPC 1.4(a); failed to take reasonable steps to protect his client's interests upon termination of representation, including a failure to refund any advance payment of fee that has not been earned, in violation of MRPC 1.16(d); failed to give candid advice to a client in violation of MRPC 2.1; and failed to answer a request for investigation in conformity with MCR 9.113(A) and (B)(2) in violation of MCR 9.104(7) and MRPC 8.1(a)(2). The panel also found violations of MCR 9.104(1)-(4) and MRPC 8.4 (c).

The panel ordered that the respondent's license to practice law be suspended for a period of one year to run concurrently with the 180-day suspension imposed in *Grievance Administrator v Ronald G. Pierce*, 21-42-GA, which became effective Dec. 2, 2021, that he pay restitution in the total amount of $600, and that he be subject to a condition relevant to the established misconduct. Costs were assessed in the amount of $1,732.49.

1. The respondent has been continuously suspended from the practice of law in Michigan since Aug. 26, 2021. Please see Notice of Interim Suspension Pursuant to MCR 9.115(H)(1), issued Aug. 26, 2021, in **Grievance Administrator v Ronald G. Pierce**, 21-42-GA.

REPRIMAND (BY CONSENT)

Thomas R. Quartz, P77177, Grosse Ile, by the Attorney Discipline Board Tri-County Hearing Panel #15. Reprimand effective March 11, 2022.

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 as set forth in the parties' stipulation, the panel found that the respondent committed professional misconduct in his capacity as the owner of Michigan Accident Associates (MAA) when his appearance for the plaintiff in a case pending with the United States District Court was electronically filed after the original MAA attorney assigned to handle the case left MAA in 2017 and he thereafter failed to adequately represent his client to the extent that his client's case was dismissed with prejudice, he was ordered to pay costs and sanctions totaling $9,172.50 as well as the defendant's costs and attorney fees, and he was ordered to attend the new lawyer seminar hosted by the Federal Bar Association.

Specifically, and in accordance with the parties' stipulation, the panel found that the respondent handled a matter which he knew or should have known that he was not competent to handle without associating with a lawyer who was competent to handle it in violation of MRPC 1.1(a); failed to act with reasonable diligence and promptness in violation of MRPC 1.3; failed to make reasonable efforts to ensure that the firm in which he was a partner had in effect meas-

ures giving reasonable assurance that all lawyers in the firm conformed to the rules of professional conduct in violation in MRPC 5.1(a); failed to make reasonable efforts to ensure that a lawyer over whom he had direct supervisory authority conformed to the rules of professional conduct in violation in MRPC 5.1(b); failed to make reasonable efforts to ensure that the firm in which he was a partner had in effect measures giving reasonable assurance that the conduct of non-lawyers in the firm was compatible with the professional obligations of the lawyer in violation in MRPC 5.3(a); failed to make reasonable efforts to ensure that the conduct of non-lawyers in the firm over whom he had direct supervisory authority was compatible with the professional obligations of the lawyer in violation of MRPC 5.3(b); and engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2).

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

REINSTATEMENT

On Feb. 8, 2022, the hearing panel issued an Order of Suspension (By Consent) suspending the respondent from the practice of law in Michigan for 30 days effective March 2, 2022. On April 1, 2022, the respondent, Bruce R. Redman, submitted an affidavit pursuant to MCR 9.123(A) showing that he has fully complied with all requirements of the Order of Suspension (By Consent). On April 1, 2022, the board was advised that the grievance administrator has no objection to the affidavit; and the Board being otherwise advised;

NOW THEREFORE,

IT IS ORDERED that the respondent, Bruce R. Redman, is **REINSTATED** to the practice of law in Michigan effective April 4, 2022.

AUTOMATIC INTERIM SUSPENSION

James C. Scarletta, P68858, Ypsilanti, effective Jan. 27, 2022.

On Jan. 27, 2022, the respondent pleaded nolo contendere to home invasion, 2nd degree, in violation of MCL 750.110(A)(3), a felony, in the matter titled *People of the State of Michigan v James Christopher Scarletta*, Washtenaw County Circuit Court Case No. 20-000654-FH. The respondent's plea was accepted by the court the same day. 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 (WITH CONDITIONS)

Jeffrey R. Sharp, P53838, Grosse Pointe Park, by the Attorney Discipline Board. Reinstated effective March 11, 2022.

The petitioner's license to practice law in Michigan was suspended for 180 days effective March 18, 2020. On Oct. 11, 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 #10. After a hearing on the petition, the panel concluded that the petitioner satisfactorily established his eligibility for reinstatement and on Feb. 17, 2022, issued an Order of Eligibility for Reinstatement with Conditions. On March 10, 2022, 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 with Conditions reinstating the petitioner to the practice of law in Michigan effective March 11, 2022.

AUTOMATIC INTERIM SUSPENSION

Eric J. Smith, P46186, Macomb, effective Feb. 16, 2022.

On Feb. 16, 2022, the respondent pleaded guilty to Obstruction of Justice in violation of 18 U.S.C. § 1512(b)(1), a felony, in the matter titled *People of the United States of America v Eric J. Smith*, U.S. District Court Eastern District Michigan Case No. 2:20-cr-20413. The respondent's plea was accepted by the court the same day. 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.

FROM THE MICHIGAN SUPREME COURT

ADM File No. 2021-25
Amendment of Rule 19 of the Rules Concerning the State Bar of Michigan

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rule 19 of the Rules Concerning the State Bar of Michigan is adopted, effective May 1, 2022.

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

Rule 19 Confidentiality of State Bar Records

Sec. 1. [Unchanged.]

Sec. 2. Records and information obtained in the course of reviewing and evaluating candidates for judicial vacancies may not be used for any other purpose or otherwise disclosed without the consent of the applicant and the Governor's Office, or by Order of the Supreme Court. Records and information include, but are not limited to, applicants' name, application, background, qualifications, and interview; communications concerning applicants; and information about the judicial qualification review process.

Sec. 32. Records and information of the Client Protection Fund, Ethics Program, Lawyers and Judges Assistance Program, Practice Management Resource Center Program, and Unauthorized Practice of Law Program that contain identifying information about a person who uses, is a participant in, is subject to, or who inquires about participation in, any of these programs, are confidential and are not subject to disclosure, discovery, or production, except as provided in section (43) and (54).

Sec. 43. Records and information made confidential under section (1) or (32) shall be disclosed: (a) pursuant to a court order; (b) to a law enforcement agency in response to a lawfully issued subpoena or search warrant; or (c) to the Attorney Grievance Commission or Attorney Discipline Board in connection with an investigation or hearing conducted by the commission or board, or sanction imposed by the board.

Sec. 54. Records and information made confidential under section (1) or (32) may be disclosed: (a) upon request of the State Bar and approval by the Michigan Supreme Court where the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance, or (b) at the discretion of the State Bar, upon written permission of all persons who would be identified by the requested information.

Staff Comment: The amendment of Rule 19 of the Rules Concerning the State Bar of Michigan creates an explicit provision regarding confidentiality of information.

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

ADM File No. 2021-33
Amendment of Administrative Order No. 1997-10

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Administrative Order No. 1997-10 is adopted, effective July 1, 2022.

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

Administrative Order No. 1997-10 — Access to Judicial Branch Administrative Information

(A) [Unchanged.]

(B) Access to Information Regarding Supreme Court Administrative, Financial, and Employee Records.

(1)-(9) [Unchanged.]

(10) Employee records are not open to public access, except for a list of employees that includes the position title, classified or nonclassified distinction, salary, and general benefits information. The list must not include a name, initials, electronic mail address, Social Security number, phone number, residential address, or other information that could be used to identify an employee or an employee's beneficiary. This information shall be available on the Court's website at no cost.~~the following information:~~

~~(a) The full name of the employee.~~

~~(b) The date of employment.~~

~~(c) The current and previous job titles and descriptions within the judicial branch, and effective dates of employment for previous employment within the judicial branch.~~

~~(d) The name, location, and telephone number of the court or agency of the employee.~~

~~(e) The name of the employee's current supervisor.~~

~~(f) Any information authorized by the employee to be released to the public or to a named individual, unless otherwise prohibited by law.~~

~~(g) The current salary of the employee. A request for salary information pursuant to this order must be in writing. The individual who provides the information must immediately notify the employee that a request for salary information has been made, and that the information has been provided.~~

(11) [Unchanged.]

Staff Comment: The amendment of Administrative Order No. 1997-10 clarifies which information about jobs within the judiciary would be available to the public.

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

ADM File No. 2021-34 Amendment of Rule 5.125 of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 5.125 of the Michigan Court Rules is adopted, effective May 1, 2022.

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

Rule 5.125 Interested Persons Defined

(A)-(B) [Unchanged.]

(C) Specific Proceedings. Subject to subrules (A) and (B) and MCR 5.105(E), the following provisions apply. When a single petition requests multiple forms of relief, the petitioner must give notice to all persons interested in each type of relief:

(1)-(17) [Unchanged.]

(18) The persons interested in a proceeding under the Mental Health Code that may result in an individual receiving involuntary mental health treatment or judicial admission of an individual with a developmental disability to a center are the

(a)-(e) [Unchanged.]

(f) ~~the~~ individual's spouse, if the spouse's whereabouts are known,

(g) ~~the~~ individual's guardian, if any,

(h) in a proceeding for judicial admission to a center or in a proceeding in which assisted outpatient treatment is ordered, the community mental health program, and

(i) [Unchanged.]

(19)-(33) [Unchanged.]

(D)-(E) [Unchanged.]

Staff Comment: The amendment of MCR 5.125 adds the community mental health program as an interested person to be served a copy of the court's order when assisted outpatient treatment is ordered.

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

ADM File No. 2020-16 Amendment of Rule 9.261 of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 9.261 of the Michigan Court Rules is adopted, effective May 1, 2022.

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

Rule 9.261 Confidentiality; Disclosure

(A)-(I) [Unchanged.]

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

(J) Notwithstanding the prohibition against disclosure in this rule, upon request the commission may disclose some or all of the information in its possession concerning a judge's misconduct in office, mental or physical disability, or some other ground that warrants commission action under Const 1963, art 6, § 30, to the State Bar Judicial Qualifications Committee, or to any other officially authorized state or federal judicial qualifications committee that meets or exceeds the confidentiality requirements established by the State Bar of Michigan in Rule 19, sec. 2 of the Rules Concerning the State Bar.

(K) Notwithstanding the prohibition against disclosure in this rule, either upon request or on its own motion, the commission may disclose some or all of the information concerning a judge's misconduct in office, mental or physical disability, or some other ground that warrants commission action under Const 1963, art 6, § 30, to the State Bar Lawyers & Judges Assistance Program.

Staff Comment: The amendment of MCR 9.261 allows the JTC to share information with the State Bar of Michigan's Judicial Qualifications Committee and the Lawyers & Judges Assistance Program, as well as other judicial qualification committees in certain circumstances.

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

ADM File No. 2021-40
Amendment of Rule 5 of the Rules for the Board of Law Examiners

On order of the Court, this is to advise that the amendment of Rule 5 of the Rules for the Board of Law Examiners is adopted, effective immediately. Concurrently, individuals are invited to comment on the form or the merits of the amendment during the usual comment period. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted on the Public Administrative Hearings page.

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

Rule 5 Admission Without Examination

(A)-(C) [Unchanged.]

(D) An attorney

(1) [Unchanged.]

(2) practicing law in an institutional setting, e.g., counsel to a corporation or instructor in a law school, may apply to the Board for a special certificate of qualification to practice law. The applicant must satisfy Rule 5(A)(1)-(3), and comply with Rule 5(B). The Board may then issue the special certificate, which will entitle the attorney to continue current employment if the attorney becomes an active member of the State Bar. The special certificate permits attorneys teaching or supervising law students in a clinical program to represent the clients of that clinical program. If the attorney leaves the current employment, the special certificate automatically expires; if the attorney's new employment is also institutional, the attorney may reapply for another special certificate.

(E) [Unchanged.]

Staff Comment: The amendment of Rule 5 of the Rules for the Board of Law Examiners specifically allows attorneys who are teaching in a clinical program to represent individual clients of that program.

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 July 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. 2021-40. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2018-26
Proposed Amendment of Rule 6.502 of the Michigan Court Rules

On order of the Court, the proposed amendment of Rule 6.502 of the Michigan Court Rules having been published for comment at 508 Mich ___ (2021), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendment. This administrative file is closed without further action.

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FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by July 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 11.25a, for the crime of brandishing a firearm in violation of MCL 750.234e. This jury instruction is entirely new.

[NEW] M Crim JI 11.25a
Brandishing a Firearm

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

(2) First, that the defendant possessed a firearm or had control of a firearm. A firearm is a weapon that will shoot out a projectile by explosive action, is designed to shoot out a projectile by explosive action, or can readily be converted to shoot out a projectile by explosive action.[1]

(3) Second, that while possessing or controlling the firearm, the defendant was in a public place.

(4) Third, that while possessing or controlling the firearm in a public place, the defendant pointed it, waved it about, or displayed it in a threatening manner.

(5) Fourth, that the defendant deliberately pointed, waved about, or displayed the firearm in a threatening manner.

(6) Fifth, that when the defendant pointed, waved about, or displayed the firearm, [he/she] did so intending to cause another person or other persons to be fearful.[2]

Use Note

1. The court need not read this sentence where it is undisputed that the weapon alleged to have been brandished was a firearm.

2. This is a specific intent crime.

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by July 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 19.1a, for the crime of kidnapping a child in violation of MCL 750.350. This jury instruction is entirely new.

[NEW] M Crim JI 19.1a
Taking a Child by Force or Enticement

(1) The defendant is charged with unlawfully taking a child by force or enticement. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant used force or trickery to take, carry, lure, or lead away [*state name of child*].

(3) Second, that when the defendant took, carried, lured, or led [him/her] away, [*state name of child*] was less than 14 years old.

(4) Third, that the defendant intended to keep or conceal [*state name of child*] from

[*Choose from the following:*]

(a) the parent or legal guardian who had legal [custody/visitation rights] at the time.

(b) [his/her] adoptive parent.

(c) the person who had lawful charge of [*state name of child*] at the time.[1]

(5) Fourth, that the defendant was not the adoptive or natural parent of [*state name of child*].[2]

Use Note

1. This is a specific intent crime.

2. Read this paragraph only where the defendant offers evidence of adoptive or natural parenthood.

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by July 1, 2022. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Crim-

inal 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 instruction M Crim JI 19.6, the instruction for charges under the parental kidnapping statute, MCL 750.530a. The amendment entirely rewrites the instruction.

[AMENDED] M Crim JI 19.6
Parental Taking or Retaining a Child

(1) The defendant is charged with unlawfully taking or retaining a child. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that on [*date and time alleged*], [*name complainant*]:

[*Choose one of the following:*]

(a) was the [parent/legal guardian] of [*name of child*] who had [custody of (*name of child*)/parenting time rights with (*name of child*)] under a court order.

(b) was the adoptive parent of [*name child*].

(c) had lawful charge of [*name child*].

(3) Second, that on [*date and time alleged*], the defendant [took (*name of child*)/kept (*name of child*) for more than 24 hours].

(4) Third, that when the defendant [took (*name of child*)/kept (*name of child*) for more than 24 hours], [he/she] intended to keep or conceal [*name child*] from [*name complainant*].[1]

Use Note

This instruction applies only where parental kidnapping is charged under MCL 750.350a. The Committee of Model Criminal Jury Instructions takes the view that whether a defendant is a "parent" under the statute is a legal question for the court, not a factual question for the jury.

1. This is a specific intent crime. Neither MCL 750.350a nor the House legislative analysis accompanying it directly addresses the question as to whether apparent consent or a reasonable belief that lawful authority to take or keep the child exists, may be a defense to this crime, or otherwise negates an essential element of the crime.

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PROPOSED

The committee proposes a new instruction, M Crim JI 19.9, for the crime of a prisoner taking a hostage in violation of MCL 750.349a. This jury instruction is entirely new.

[NEW] M Crim JI 19.9
Prisoner Taking a Person Hostage

(1) The defendant is charged with being a prisoner and taking a person hostage. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was a prisoner at [*identify facility where the defendant was incarcerated*].

(3) Second, that while still subject to incarceration at [*identify facility where the defendant was incarcerated*], the defendant used threats, intimidation, or physical force to take, lure away, hold, or hide [*name complainant*].

(4) Third, that the defendant took, lured away, held, or hid [*name complainant*] as a hostage.

To hold a person hostage means that the defendant intended to use the person as a shield or to use the person as security to force someone else to [do something/perform some act] or [not do something/to refrain from performing some act/hold off on performing some act].[1]

(5) Fourth, the defendant intended to hold [*name complainant*] as a hostage and knew [he/she] did not have the authority to do so.

Use Note

1. The court may read all of the options in this paragraph or only those that apply according to the charges or evidence.

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PROPOSED

The committee proposes instructions, M Crim JI 34.7, 34.7a, 34.8, 34.9, 3.10, 34.11, 34.12, 34.13, 34.14 and 34.15, for the Medicaid-related crimes found in MCL 400.603 to 400.611. These jury instructions are entirely new.

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS (CONTINUED)

[NEW] M Crim JI 34.7
Medicaid Fraud — False Statement

(1) The defendant is charged with making a false statement or representation to obtain Medicaid benefits. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was [making an application for Medicaid benefits/having rights to a Medicaid benefit determined].

(3) Second, that when defendant was [making an application for Medicaid benefits/having rights to a Medicaid benefit determined] [he/she] made a false statement or false representation.

(4) Third, that the defendant knew the statement or representation was false.

(5) Fourth, that the false statement or false representation would matter or make a difference to a decision about benefits or the rights to benefits.

[NEW] M Crim JI 34.7a
Medicaid Fraud — Concealing Events

(1) The defendant is charged with the crime of concealing or failing to disclose an event affecting the right to Medicaid benefits. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [was initially applying for Medicaid/was receiving a Medicaid benefit/was initially applying for Medicaid on another person's behalf/had applied on another person's behalf for Medicaid benefits and the other person was receiving Medicaid benefits].

(3) Second, that an event occurred that affected [the defendant's initial right to receive a Medicaid benefit/the defendant's continuing right to receive a Medicaid benefit/the other person's initial right to receive a Medicaid benefit/the other person's continuing right to receive a Medicaid benefit].

In this case, the event that is alleged to have occurred was [*describe event that affected right to benefits*].

(4) Third, that the defendant had knowledge of the occurrence of the event.

(5) Fourth, that the defendant concealed or failed to disclose the event.

(6) Fifth, that at the time the defendant concealed or failed to disclose the event that affected [defendant's right to receive a Medicaid benefit/the other person's right to receive a Medicaid benefit], [he/she] did so with an intent to obtain a benefit to which [the defendant/the other person] was not entitled or a benefit in an amount greater than [the defendant/the other person] was entitled.

[NEW] M Crim JI 34.8
Public Welfare Program — Kickback, Bribe, Payment, or Rebate

(1) The defendant is charged with the crime of making or receiving a kickback, bribe, payment, or rebate in connection with public welfare program goods or services. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [solicited, offered, or received a kickback or bribe/made or received a payment in connection with a kickback or bribe/received a rebate of a fee or charge for referring an individual to another person for the furnishing of goods and services].

(3) Second, that the [kickback or bribe/payment made or received in connection with a kickback or bribe/rebate of a fee or charge for referring an individual to another person] was intended to secure the furnishing of goods or services for which payment was or could have been made in whole or in part under the Social Welfare Act.

[NEW] M Crim JI 34.9
Medicaid Facilities — False Statement

(1) The defendant is charged with the crime of making or inducing a false statement or representation about an institution or facility. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant knowingly and willfully [made/induced the making of/tried to cause someone to make] a false statement or false representation.

(3) Second, that the false statement or false representation was about the conditions in or operation of an institution or facility.

(4) Third, that the defendant knew at the time [he/she] [made/induced the making of/tried to cause someone to make] the statement or representation that it was false.

(5) Fourth, that when the defendant [made/induced the making of/tried to cause someone to make] the false statement or representation, [he/she] intended that it would be used for initial certification or re-

certification to qualify the institution or facility as a hospital, skilled nursing facility, intermediate care facility, or home health agency.

(6) Fifth, that the false statement or representation would have mattered or made a difference in the initial certification or recertification decision.

[NEW] M Crim JI 34.10
Making a False Claim for Goods or Services Under the Social Welfare Act

(1) The defendant is charged with the crime of making a false claim under the Social Welfare Act. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant made, presented, or caused to be made or presented a claim to a state employee or officer.

(3) Second, that the claim that the defendant made, presented, or caused to be made or presented was to obtain goods or services under the Social Welfare Act.

(4) Third, that the claim was false.

(5) Fourth, that the defendant knew the claim was false.

This means that the defendant was aware or should have been aware of the wrongful nature of [his/her/their] conduct and aware that what [he/she/they] said or did could cause the payment of a Medicaid benefit. This includes acting in deliberate ignorance of the truth or falsity of facts or acting in reckless disregard of the truth or falsity of facts. Proof of an intent to defraud is not required, but it may be considered as evidence that the defendant knew a claim to be false.

[NEW] M Crim JI 34.11
Making a False Claim That Goods or Services Were Medically Necessary Under the Social Welfare Act

(1) The defendant is charged with the crime of making a false statement that goods or services were medically necessary under the Social Welfare Act. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant made, presented, or caused to be made or presented a claim for goods or services under the Social Welfare Act, [*describe goods or services claimed*].

(3) Second, that the defendant claimed that [*describe goods or services claimed*] [was/were] medically necessary according to professionally accepted standards.

(4) Third, that the claim that the [*describe goods or services claimed*] [was/were] medically necessary was false.

(5) Fourth, that the defendant knew the claim was false.

This means that the defendant was aware or should have been aware of the wrongful nature of [his/her/their] conduct and aware that what [he/she/they] said or did could cause the payment of a Medicaid benefit for goods or services that were not medically necessary. This includes acting in deliberate ignorance of the truth or falsity of facts or acting in reckless disregard of the truth or falsity of facts. Proof of an intent to defraud is not required, but it may be considered as evidence that the defendant knew a claim to be false.

[NEW] M Crim JI 34.12
Making a False Statement or Record to Avoid or Decrease a Payment to the State Under the Social Welfare Act

(1) The defendant is charged with the crime of making or using a false record or statement to conceal, avoid, or decrease an obligation to pay money or transmit property to the state under the Social Welfare Act. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant made, used, or caused to be made or used a record or statement to a state employee or an officer. The [record/statement] was [*describe record or statement alleged*].

(3) Second, that the record or statement related to a claim made under the Social Welfare Act.

(4) Third, that the record or statement concealed, avoided, or decreased an obligation to pay or send money or property to the state of Michigan, or could have concealed, avoided, or decreased such an obligation.

(5) Fourth, that the record or statement was false.

(6) Fifth, that the defendant knew the claim was false.

This means that the defendant was aware or should have been aware of the wrongful nature of [his/her/their] conduct and aware that what [he/she/they] said or did could avoid or decrease a payment or transfer of money or property to the state of Michigan. This includes acting in deliberate ignorance of the truth or falsity of facts or acting in reckless disregard of the truth or falsity of facts. Proof of an intent to defraud is not required, but it may be considered as evidence that the defendant knew a claim to be false.

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS (CONTINUED)

[NEW] M Crim JI 34.13
Medicaid False Claims — Knowledge

It is not necessary that the prosecutor show that the defendant had knowledge of similar acts having been performed in the past by a person acting on the defendant's behalf, nor to show that the defendant had actual notice that the acts by the persons acting on the defendant's behalf occurred to establish the fact that a false statement or representation was knowingly made.

Use Note

This instruction is used in cases where someone other than the defendant made a false claim that caused a benefit to be paid or provided to the defendant.

[NEW] M Crim JI 34.14
Medicaid Claims — Rebuttable Presumption

(1) You may, but you do not have to, infer that a claim for a Medicaid benefit was knowingly made [if the defendant's actual, facsimile, stamped, typewritten, or similar signature was used on the form required for the making of a claim/if the claim was submitted by computer billing tapes or other electronic means and the defendant had previously notified the Michigan Department of Social Services that claims will be submitted by computer billing tapes or other electronic means].

(2) The prosecutor still bears the burden of proving all of the elements beyond a reasonable doubt.

[NEW] M Crim JI 34.15
Medicaid False Claims — Venue

The prosecutor must also prove beyond a reasonable doubt that the crime[s] occurred on or about [*state date alleged*] within [*identify county*] County.

Use Note

The language describing the county should be omitted if the attorney general has chosen Ingham County as the venue under MCL 400.611.

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PROPOSED

The committee proposes a new instruction, M Crim JI 41.1, for the crime of trespassing for eavesdropping or surveillance in violation of MCL 750.539b. This jury instruction is entirely new.

[NEW] M Crim JI 41.1
Trespassing For Eavesdropping or Surveillance

(1) The defendant is charged with the crime of trespassing to engage in eavesdropping or surveillance. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was on property owned or possessed by [*name owner(s) or possessor(s)*] without [his/her/their] permission or without [*his/her/their*] knowledge.

(3) Second, that the defendant went on [*identify complainant(s)*]'s property to [listen to, record, amplify, or transmit any part of a private conversation, discussion, or discourse/secretly observe the activities of another person or other persons].

(4) Third, that the defendant intended to [listen to, record, amplify, or transmit the private conversation of (*identify complainant(s)*) without the permission of all participants in the conversation/spy on and invade the privacy of the person or persons (he/she) was observing].

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LAWYERS & JUDGES ASSISTANCE
MEETING DIRECTORY

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

For questions about any of the meetings listed, please contact the Lawyers and Judges Assistance Program at (800) 996-5522 or jclark@michbar.org.

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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
2 blocks north of Big Beaver (16 Mile Rd.)

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