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- A primer on grievance confidentiality
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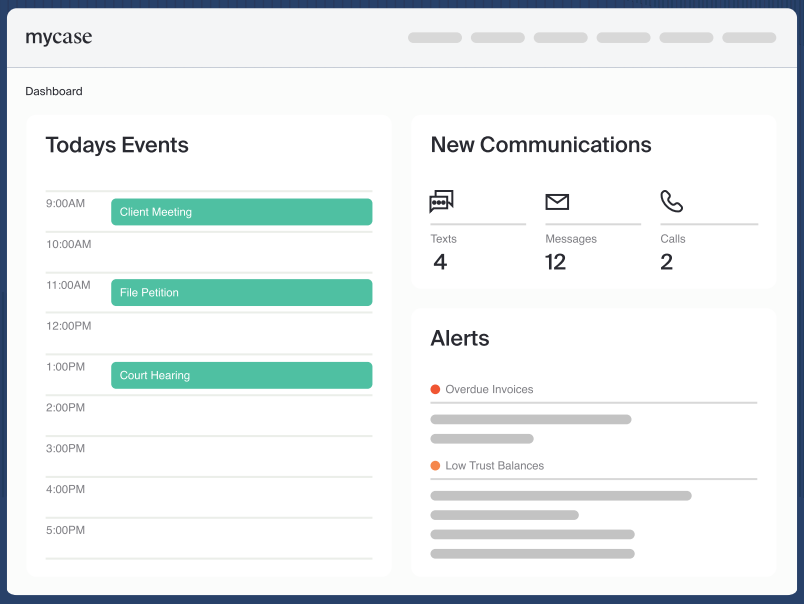

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MARCH 3, 2023 (IF NECESSARY)
APRIL 28, 2023
JUNE 9, 2023
JULY 21, 2023
SEPTEMBER 22, 2023

REPRESENTATIVE ASSEMBLY

APRIL 29, 2023
SEPTEMBER 23, 2023

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MEMBER SUSPENSIONS
FOR NONPAYMENT OF DUES

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

In accordance with Rule 4 of the Supreme Court's Rules Concerning the State Bar of Michigan, these attorneys are suspended from active membership effective Feb. 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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IN BRIEF

ALTERNATIVE DISPUTE RESOLUTION SECTION

The ADR Section recently hosted its annual conference, meeting, and awards ceremony. Section officers for 2022-2023 are Chair Ed Pappas, Chair-elect Jennifer Grieco, Secretary Larry Saylor, Treasurer James Darden III, and members at large Hon. Christopher Yates, Lisa Okasinki, and Nakisha Chaney. Congratulations to our award winners: Lee Hornberger (Distinguished Service); Belinda Dulin (Nanci S. Klein Award); Greg Conyers (Diversity and Inclusion); Lisa Timmons (Hero of ADR); and Betty R. Widgeon (George N. Bashara Jr. Award).

ANTITRUST, FRANCHISING, AND TRADE REGULATION SECTION

The Antitrust, Franchising, and Trade Regulation Section is hosting a lunch and learn on Zoom on Dec. 1. The event's focus is "Hot Topics in Franchise Accounting" with speakers from the Plante Moran consumer goods practice including Lisa Plonka, Dean Feenstra, Matt Keigher, Dipti Vaishnav, Isaac Saint John, Kevin Corbeil, and Jamie Deibel. Please look for e-blasts to sign up.

APPELLATE PRACTICE SECTION

The section's annual meeting was held on Sept. 22, where members elected the following officers for 2022-2023: Chair Joe Richotte, Chair-elect Jonathan Koch, Secretary Beth Wittmann, and Treasurer Jacquelyn Klima. The section council thanks outgoing chair Stephanie Simon Morita for her years of service as an officer of the section and Ann Sherman for her service as the outgoing treasurer.

BUSINESS LAW SECTION

The section congratulates Mark High, recipient of the 2022 Stephen H. Schulman Outstanding Business Lawyer Award. Mark was honored during the section's annual meeting on Oct. 7. Join us at our next council meeting on Dec. 1. Learn about upcoming section events at connect.michbar.org/businesslaw/home.

CHILDREN'S LAW SECTION

The Children's Law Section held its annual meeting on Sept. 22. Terina Carte was elected chair and Josh Pease as chair-elect, and the section council welcomed Hon. Tina Yost Johnson and Steven Heisler as new members. Two scholarships were awarded in the amount of $2,500 each to third-year law students at Michigan State University and the University of Detroit Mercy.

ENVIRONMENTAL LAW SECTION

The section's annual meeting and program were held on Oct. 4. Welcome to Scott Sinkwitts, our 2022-2023 section chair! The annual joint conference is Nov. 9 at the Lansing Community College West Campus. Detailed event information and past event materials are available at connect.michbar.org/envlaw.

GOVERNMENT LAW SECTION

The Government Law Section recently elected its new officers and welcomed the addition of three new members to the council. The section is planning its upcoming winter seminar, which will be held on Feb. 17, 2023, and will address election-related issues affecting local governments. Registration information will be available in January. Please save the date; we hope to see you there!

LABOR AND EMPLOYMENT LAW SECTION

On Sept. 14, the section held a young lawyers' event at Bowlero in Royal Oak. We have been having one live event a month for several months. We hope to see you at the Dec. 8 holiday party at Birmingham Country Club, and the section's annual midwinter meeting is Jan. 20, 2023, at the Detroit Athletic Club. For more information on section activities, follow us on LinkedIn, Facebook, and Twitter.

LITIGATION SECTION

As part of its annual meeting, the Litigation Section elected the following members to its executive board for 2022: Chair Edward Perdue, Vice chair Joel Bryant, Secretary Anthony Kochis, and Treasurer Andrew Stevens. Elected as members at large to the section's governing council were James Lockwood, Nashara Peart, and Alexander S. Rusek.

REAL PROPERTY LAW SECTION

Please join us for Real Estate Outlook 2023 on Nov. 10 at the Detroit Athletic Club. Dr. Eric Scorsone, director of the MSU Extension Center for Local Government Finance and Policy, will provide insight into the current economic environment, its effect on Michigan's economy, and the potential opportunities it presents. Roundtable discussions on various topics with experienced attorneys will follow. Breakfast is scheduled for 7:30 a.m. with the program starting at 8 a.m. Register at na.eventscloud.com/ereg/index.php?eventid=715828&.

SOCIAL SECURITY SECTION

We welcome article submissions on topics of interest to the section for our next newsletter. Please submit articles to Elizabeth Yard at eyard@tanisschultz.com.

NEWS & MOVES

ARRIVALS AND PROMOTIONS

KEVIN S. BRADY has joined Collins Einhorn Farrell.

ANTHONY HUNTER has joined The Health Law Group in Maumee, Ohio.

ALYSSA C. KENNEDY has joined Plunkett Cooney.

ANDREA MCGREW has joined Warner Norcross & Judd.

AWARDS AND HONORS

MICHAEL S. BOGREN, a partner with Plunkett Cooney, has been selected by the Michigan Association of Municipal Attorneys to receive the organization's 2022 Distinguished Municipal Attorney Award.

MICHAEL FISHMAN, a founding firm partner with Fishman Stewart, has been recognized in the 2022 class of Leaders in the Law by Michigan Lawyers Weekly.

DEBRA A. GEROUX with Butzel has been recognized as one of Michigan Lawyers Weekly's 2022 honorees for Influential Women of Law.

JUSTIN J. HAKALA with Plunkett Cooney was recognized in the 2022 class of Go-To Lawyers for medical malpractice law by Michigan Lawyers Weekly.

MARK WASSINK, managing partner of Warner Norcross & Judd, has been recognized in the Grand Rapids 200 list by Grand Rapids Business.

LEADERSHIP

DAVID ANDERSON, a partner with Collins Einhorn Farrell, was elected as president-elect of the Professional Liability Defense Federation for 2022-23.

PRESENTATIONS, PUBLICATIONS AND EVENTS

BUTZEL was the presenting sponsor of the Original Equipment Suppliers Association 2022 Terms and Conditions Update on Sept. 28 at the MSU Management Education Center in Troy and virtually via Zoom.

BUTZEL, in partnership with the Michigan Defense Center and Macomb County, co-hosted the 2022 Michigan Defense Industry Arsenal of Innovation Annual Reception on Oct. 10 at the Army and Navy Club in Washington, D.C.

BETH S. GOTTHELF with Butzel moderated a panel program during the North American Space Summit on Oct. 4 in Traverse City.

The **INGHAM COUNTY BAR ASSOCIATION** hosts its 128th annual dinner at the MSU University Club at 6 p.m. on Nov. 10.

ALAN A. MAY with Kemp Klein has a new book, "The Journey." It has been selected for inclusion in the Detroit Jewish Book Fair, which runs from Nov. 1-13.

FROM THE PRESIDENT

JAMES W. HEATH

Respecting the rule of law

Some might argue that elections are the lifeblood of democracy because they allow us a regular opportunity to evaluate past decisions and to chart new courses as circumstances change. Political contests bring to the forefront the opposing views that live within our society. The battle of ideas culminates at the ballot box where "'We the people"' have the honor, privilege, and duty to cast our ballot and ultimately decide the important issues of our day. Our elected leaders (including Bar presidents, for that matter) rotate in and out, but our society is built on a fundamental truth that rises above even the most intense disagreement.

The rule of law is the foundation of our democracy, no matter who emerges victorious at the ballot box. A civil society can and will exist regardless of how ugly an election is, becomes, or was. A civil society exists because, under the rule of law, disputes should be settled according to the established law of the land. And all people, no matter their wealth or power, are subject to those laws.

Rule of law is the sword and shield of a civil society. As attorneys, we are and must be its first defenders. Indeed, rule of law is embedded within the oath all of us take before being admitted to the Bar.

"I will support the Constitution of the United States and the Constitution of the State of Michigan; I will maintain the respect due to courts of justice and judicial officers …"

Being an attorney is not just about arguing on behalf of clients, as popular culture may lead some to believe. Attorneys are uniquely obligated to do what is right and good — no matter what, even when it is not in our own self-interest. It is as much a vocation as it is a profession.

"We the people" need to recognize that the judicial branch is a sacred place designed to ensure that no matter how much we disagree, there is a fair and civil way for our differences to be resolved.

And it is why the words of Roberts P. Hudson, the very first president of the State Bar of Michigan, continue to ring true today and why it is one of my favorite quotes: ''No organization of lawyers can long survive which has not for its primary object the protection of the public.''

As our world has become more polarized, it is all the more important that we actively work to increase general understanding

and awareness of the rule of law and its importance. As a general concept, most people have an understanding of rule of law in the same way they have a basic understanding of fairness and justice.

However, the hyper-politicized world in which we live has, in ways subtle and overt, flamed confusion about the rule of law. This new reality too often, although not exclusively, presents itself in the form of attacks on the judiciary.

Of course, judges can and do have different judicial philosophies — but in all cases, judges are required both ethically and by the Michigan Code of Judicial Conduct to be impartial. Judges hear both sides, interpret the law, and decide the case based solely on its merits.

It's quite simple really, but it is also easy to mischaracterize.

We see this in many ways. On the federal level, sometimes it's with simple adjectives — a Biden judge or a Trump judge, a "liberal" judge or a "conservative" judge. Sometimes it's with vague or direct allegations that a judge acted inappropriately simply for issuing a decision that is contrary to the critic's individual beliefs.

Let's be clear: No matter who appointed a judge and no matter the appointee's political affiliation, judges should always be described as and act as independent interpreters of the law. Even when a judge issues a ruling that is contrary to our personal belief system, the problem is with the law — not the person who weighed all the arguments, precedent, and legal doctrine to determine its applicability on a particular case.

Unlike their counterparts in the other two branches of government, a judge's job is not to be popular. A judge's job is to be fair and, like all attorneys, to support the rule of law — no matter what, even when it is not in their own self-interest.

"We the people" need to recognize that the judicial branch is a sacred place designed to ensure that no matter how much we disagree, there is a fair and civil way for our differences to be resolved.

A primer on grievance confidentiality

BY ROBERT E. EDICK

The legal profession traditionally has enjoyed the privilege of policing its own members. Michigan's legal profession, under the supervision of our Supreme Court, has policed its members since 1978 by means of the Attorney Grievance Commission (AGC).

As the Supreme Court's prosecution arm for attorney discipline, the AGC is obliged by court rule to handle most of its duties out of the public eye. Investigations by the commission's grievance administrator are deemed by MCR 9.126 to be "privileged from disclosure, confidential, and may not be made public." The intent of MCR 9.126 is to protect the reputation of attorneys who find themselves facing groundless charges of professional misconduct.[1]

From my time with the AGC, roughly 5% of the grievances filed with the commission end up in the spotlight of public proceedings in front of the Attorney Discipline Board (ADB). The others will be concluded in confidence, with the final disposition communicated by the commission to no one other than the complainant and the respondent-attorney.

Confidentiality attaches to a grievance from the moment it is filed with the grievance administrator, and it is supposed to remain in place forever unless and until the grievance administrator files a formal complaint with the ADB. Given the ease with which an accusation of professional misconduct can be made, the importance of confidentiality is obvious. It begins with the fact that anyone can file a grievance. Most grievances are filed by clients, but the existence of an attorney-client relationship is not a prerequisite to act as a complainant.

IN PERSPECTIVE

Moreover, the format of a grievance is uncomplicated. There are only three requirements: (1) it must be in writing; (2) it must describe the alleged misconduct, including the approximate time and place it took place; and (3) it must be signed by the complainant.[2] Unlike a grievant who files a request for investigation against a judge, a complainant who wants to file a grievance against an attorney does not have to verify on oath the truthfulness of the allegations.[3]

And even though most grievances are filed reasonably close in time to the alleged misconduct, that is not a requirement either. There is no statute of limitations for professional misconduct. The mere passage of time does not preclude a complainant from filing a grievance.[4]

Finally, and most significantly, complainants are absolutely immune under MCR 9.125 for statements and communications they transmit to the AGC. An attorney has no legal redress even for an untruthful grievance that may have been maliciously filed by a complainant in bad faith.[5] Absolute immunity is meant to allay any skepticism on the part of laypersons about the fairness of a system in which attorneys regulate attorneys. Without the shield of absolute immunity, would-be complainants who fear possible retaliation might be discouraged from filing grievances.

Granting absolute immunity to complainants helps encourage those who have some doubts about an attorney's conduct to submit the matter to the proper agency for determination. This encouragement is necessary, according to the American Bar Association, because "a profession that wants to retain the power to police its own members must be prepared to sacrifice to that cause."[6]

Figures reported by the AGC help illustrate the extent to which Michigan's legal profession is making that sacrifice. From 2012 through 2020, there were 20,998 grievance files opened; the grievance administrator dismissed 15,700 of them — that's roughly 75% of the grievances that did not warrant further investigation.[7] The grievance administrator has the discretion to reject a grievance either at the first step when it is filed (if it is determined to be facially insufficient)[8] or at the next step when the intake department reviews the answer submitted by the respondent-attorney.[9]

One must be cautious about drawing conclusions from the commission's raw data. There are many reasons why further investigation of a grievance may not be warranted. Prosecutorial discretion requires the grievance administrator look at all the circumstances, not just the apparent truthfulness of the complainant's allegations.

For example, a grievance alleging a simple fee dispute, no matter how truthful, is a likely candidate for dismissal. Fee disputes are supposed to be resolved by the courts, not by the attorney discipline system, so further investigation is pointless. Thus, without knowing the basis for the grievance administrator's exercise of discretion in a particular file, one cannot estimate with any accuracy how many of the dismissed grievances might have been untruthful or perhaps malicious.

Nonetheless, the rate at which grievances were dismissed during those nine years suggests that complainants are not afraid to come forward even in doubtful cases of misconduct. It shows that Michigan's attorney discipline system is functioning as envisioned by the ABA recommendations. The raw data also reflects the magnitude of the task the AGC faces in keeping confidential the many thousands of grievance files that have been opened during the 44 years of its existence. Maintaining the confidentiality of all files which come within Rule 9.126 is part of the commission's daily routine.[10]

To that end, the grievance administrator never confirms or denies the existence of a grievance. Specific details of pending investigations are not disclosed either to the complainant or the respondent-attorney. Subpoenas for confidential files are met with a motion to quash. Requests pursuant to the Freedom of Information Act MCL 15.231 *et seq.* are denied.[11]

Commission employment is at will. Both the grievance administrator and the deputy administrator are appointed by, and serve at the pleasure of, the Michigan Supreme Court. All employees, attorneys and non-attorneys alike, sign confidentiality agreements as a condition of employment. Strict compliance with MCR 9.126 is expected from everyone on the commission's staff.

Not so for a complainant. Nothing in the text of MCR 9.126 suggests that it imposes a duty of confidentiality on complainants. Furthermore, the court rule must be construed so as not to infringe on the complainant's constitutional right to engage in the free exercise of truthful speech.[12]

If a grievance is dismissed because it did not warrant further investigation, the complainant has a First Amendment right to publicly discuss and disagree with the grievance administrator's determination.

Preventing injuries to the reputation of attorneys is an insufficient reason to repress speech that would otherwise be free.[13] In any event, even though complainants are not bound by MCR 9.126, the risk of being sued gives them an incentive to comply with the rule in order not to forfeit their absolute immunity.

Absolute immunity from suit pursuant to MCR 9.125 only shields statements and communications transmitted solely to the AGC. It does not apply when complainants publicize their allegations of misconduct in another forum.[14] Faced with the prospect of having to defend their allegations in legal proceedings, complainants may decide that it is more prudent to keep the matter confidential.

Compared to a complainant, the leeway for a respondent-attorney regarding confidentiality is more limited. MCR 9.126 provides that at the respondent-attorney's option, "final disposition of a grievance not resulting in formal charges may be made public."

A respondent-attorney electing to waive the confidentiality of a grievance should keep two points in mind. First, if the final disposition of a grievance is being offered into evidence in civil litigation against a former client, the respondent-attorney must not mischaracterize its probative value. An exercise of prosecutorial discretion to dismiss a grievance is not a judicial act nor does it rise to the level of an adjudication. The doctrine of res judicata does not apply to dismissal of a grievance.[15]

Second, it is only the final disposition of the grievance that the respondent-attorney is allowed to make public under MCR 9.126. A respondent-attorney tempted to disclose other details about the grievance must take care not to breach the separate duty under MRPC 1.6 regarding confidences and secrets of a former client.

How should MCR 9.126 be construed when the person who filed the grievance is also an attorney? Is it a breach of confidentiality for a complainant-attorney to announce that a grievance has been filed with the AGC against another attorney? That type of disclosure arguably violates the spirit, if not the letter, of MCR 9.126.

Protecting the reputation of attorneys under investigation has been a longstanding concern of our discipline system. Confidentiality is a procedural device which acknowledges that an attorney's reputation is, in the memorable words of former U.S. Supreme Court Justice Benjamin Cardozo, "a plant of tender growth, and its bloom, once lost, is not easily restored."[16]

Cardozo's flowery metaphor captures an essential truth — namely, that the mere fact of an investigation threatens to become in the public's mind "a slur and a reproach."[17] Revealing that a grievance already has been or will be filed with the commission serves no purpose other than to publicly embarrass the respondent-attorney. That is especially true if the disclosure occurs before the grievance administrator has been able to review the allegations. At best, such disclosures are unprofessional.

A system of self-regulation, credibly administered, helps support the independence of the legal profession from government domination. A credible system of self-regulation requires absolute immunity for complainants. Absolute immunity will necessarily increase the number of grievances involving doubtful matters. By drawing a veil of confidentiality across those doubtful matters, MCR 9.126 equitably balances the interests of the public and the legal profession.

Robert Edick, a legal ethics consultant based in Dearborn, served as deputy administrator of the Attorney Grievance Commission from 1996-2020.

ENDNOTES

1. *GA v Lawrence A. Baumgartner*, Case Nos 65-88-GA; 109-88-GA (ADB 1989), available at <http://data.adbmich.org/coveo/opinions/1992-07-21-91-91.pdf> [https://perma.cc/DV6R-VWNG]. All websites cited in this article were accessed October 1, 2022.
2. MCR 9.112(B)(1-3).
3. MCR 9.220(A).
4. *GA v Andrea J. Ferrara*, Case No 98-184-GA (ADB 2000), available at <https://milawyersweekly.com/fulltext-opinions/1990/01/01/grievance-administrator-v-ferrara/> [https://perma.cc/DM2J-P7LT] and ABA Model Rules for Lawyer Disciplinary Enforcement Rule 32 (Comment) <https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_32/> [https://perma.cc/MP69-KFK4].
5. *Kelley v Peet,* unpublished per curiam opinion of the Court of Appeals, issued February 25, 2016 (Docket No. 326669) (citing *Colista v Thomas*, 241 Mich App 529; 616 NW 2d 249 (2000)). See also *Rouch v Enquirer & News of Battle Creek*, 427 Mich 157; 398 NW 2d 245 (1987).
6. ABA Model Rules for Lawyer Disciplinary Enforcement Rule 12 (Comment), available at <https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_12/> [https://perma.cc/NMT6-RVCF].
7. *AGC Statistics,* Attorney Grievance Comm, available at <https://agcmi.org/reference/agc-statistics> [https://perma.cc/8GGX-EJWP].
8. MCR 9.112(C)(1)(a).
9. MCR 9.114(A)(1).
10. In addition to dismissed grievances, confidentiality applies to other files that are closed by the commission itself, as well as files in which the respondent-attorney was admonished or placed on contractual probation.
11. As the Supreme Court's prosecution arm, the commission is part of the judiciary and therefore not a "public body" as defined by MCL 15.232(h)(iv).
12. *RM v Supreme Court*, 185 NJ 208; 883 A 2d 369 (2005).
13. *Doe v Supreme Court of Florida*, 734 F Supp 981 (SD Fla, 1990) (citing *Landmark Communications, Inc v Virginia,*435 US 829; 98 S Ct 1535; 56 L Ed 2d 1 (1978)).
14. *Kelley v Peet* at p 7, fn 8.
15. *Lindros v Sanderson,* unpublished per curiam opinion of the Court of Appeals, issued September 2, 2003 (Docket No. 237568).
16. *People ex rel Karlin v Culkin*, 248 NY 465, 478; 162 NE 487 (1928).
17. *Id.*

Renew by November 30.

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A proposal to place professionalism and ethics at the forefront of a legal education

BY PHILLIP A. PUCILLO

The study of professional responsibility and legal ethics in American law schools has been marginalized for far too long. If the legal profession aspires to have lawyers in practice take professionalism and ethics seriously, would-be lawyers must be made to engage seriously with those subjects while in law school. This article discusses the problems inherent in the current structure and proposes a curricular reform that situates professionalism and ethics at the forefront of the educational program.

THE MANDATORY COURSE IN PROFESSIONAL RESPONSIBILITY

A firm commitment to professional responsibility and legal ethics is essential to maintaining the integrity of the practice of law and the legal profession. One would expect, therefore, that the American Bar Association Model Rules of Professional Conduct (MRPC)[1] and fundamental doctrines in the canon of professionalism and ethics — including conflicts of interest, the duty of confidentiality, and attorney-client privilege — would have a prominent place in the curriculum of every American law school. As it turns out, the typical law student has no meaningful exposure to these critical subjects until *after* completing their first year.

The initial experience comes in the form of a one-semester course mandated by the American Bar Association Standards and Rules of Procedure for the Approval of Law Schools.[2] The sad truth is that students tend to loathe that course, often profoundly.

Having taught at least one section of the mandatory course in professional responsibility in each of the past four academic years to more than 300 students in all, I can attest to the intensity of student sentiment on the matter. Every semester, I am struck by how quickly the students disengage from that course. Even those students I know from other courses to be active and engaged learners are generally unable to muster anything close to that same level of attention and enthusiasm for professional responsibility.

A principal reason for the aversion to the course in professional responsibility is that students find the material to be tedious. My anonymous evaluations from one particular semester are illustrative. The subject matter of the course was described as "boring," "very boring," "really boring," "highly boring," and "the MOST BORING TOPIC in the history of time." Other descriptions that same semester included "incredibly dull," "extremely dull," "very dry," and "drier than dry toast." I have observed nothing like these criticisms for any other course that I teach. Notably, civil procedure is among my regular courses.

In fairness to the students who leveled those criticisms, many topics in professional responsibility simply lack the conceptual rigor that one comes to expect from a law school course. The MRPC provisions on advertising and solicitation,[3] charging of fees for legal services,[4] and safekeeping of client property[5] — to cite just a few examples — are sufficiently straightforward that students can obtain a solid grasp of them without extended elucidation from a law professor in a classroom setting.

This is not to suggest that these topics are unimportant. They most certainly *are* important — as many lawyers realize upon finding themselves on the receiving end of a sanction for committing a violation. But students justifiably question the necessity of being compelled to learn such subjects in the context of a traditional classroom format. And students resent having to be in a classroom when their limited time could be applied to the pursuit of other commitments.

As to other commitments, a separate issue with the course in professional responsibility is that students typically become eligible to enroll in it only upon reaching the second year of law school. Second-year law students — and third-year law students, for that matter — have a predictable tendency to take on more coursework and cocurricular activities than they can effectively manage. It is just a matter of time before they are inun-

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dated. Yet, it is precisely at this point that the course in professional responsibility appears on their schedules.

With time in short supply, overwhelmed students naturally put to the side that which strikes them as the least challenging task to concentrate their energies on getting required hours in at an externship or a clinic, writing a brief or preparing for oral argument for a forthcoming moot court competition, fulfilling duties as a member of the staff of a law journal (which frequently requires the authoring of a substantial scholarly work), etc. The course in professional responsibility becomes an easy target for relegation when the going gets tough.

The consequence of this arrangement is that while the mandatory course exposes law students to professionalism and ethics, the learning atmosphere is compromised by significant disengagement and distraction.

THE MULTISTATE PROFESSIONAL RESPONSIBILITY EXAM

Most law students are exposed to an additional round of professional responsibility and legal ethics through the Multistate Professional Responsibility Exam (MPRE).[6] The MPRE, which is administered three times each year, consists of 60 multiple choice questions designed to "measure candidates' knowledge and understanding of established standards related to the professional conduct of lawyers."[7]

One would think that the process of preparing for and taking the MPRE — at least for most law students — would be an invaluable means of acquiring a firm grasp of the Model Rules of Professional Conduct and the basic doctrines related to professional ethics. However, for the same reasons students are largely disengaged and distracted when enrolled in the mandatory course on professional responsibility, they are also largely disengaged and distracted when preparing for the MPRE.

Based upon student feedback I have received over the years, the usual MPRE preparation consists of working through an online review course over a period of a few weeks (or even crammed into a few days) while pressed with the usual demands of upper-level coursework and cocurricular activities. Regrettably, the apathy of some students toward the MPRE is so strong that they don't adequately prepare at all, making it exceedingly likely that they will have to endure the time and expense of taking the exam more than once.

The contemporary framework American law schools employ for instruction in professional responsibility and legal ethics has led to a marginalization of those subjects.

The result is that even when achieving the immediate objective of obtaining a score that qualifies as passing in a chosen jurisdiction, few law students come away from the MPRE with a better understanding of the fundamentals of professionalism and ethics than when they started.

RECONSIDERING THE APPROACH TO PROFESSIONALISM AND ETHICS IN LAW SCHOOL

The contemporary framework American law schools employ for instruction in professional responsibility and legal ethics has led to a marginalization of those subjects. If ABA standards remain the same and law schools continue with an upper-level course in professional responsibility as the primary vehicle for instruction in professionalism and ethics, students will receive no significant exposure to these subjects until the second year of their legal education — at the earliest. By that point in the program, students are largely preoccupied with other academic and professional pursuits, making it easy to disengage from the study of the MRPC and related concepts when the time comes. Preparing for and taking the MPRE does little to make up for the learning the student did not experience in the mandatory course.

Because the topics of professionalism and ethics are presented to law students as afterthoughts, law students treat those subjects accordingly. But it need not be this way.

A NEW APPROACH TO INSTRUCTION IN PROFESSIONALISM AND ETHICS

Would-be lawyers will take the subjects of professional responsibility and legal ethics seriously as soon as ABA standards take them seriously. Such importance could be demonstrated by a change to ABA standards that places professionalism and ethics at the forefront of every law school educational program. This process would occur the moment students matriculate — when their zeal for learning the law is at its highest and they are unburdened by academic and provisional distractions bound to arise later in law school.

Specifically, students would be introduced to law school through an extended orientation program in which professionalism and ethics would be the first and *exclusive* academic focus. While a traditional classroom setting would be applied periodically, the less engaging provisions of the MRPC would be taught using interactive methods to make the experience more appealing.

For example, from already existing first-year sections, students could be subdivided into "firms" for the purpose of engaging in friendly competition against one another. The learning experience would promote so-

cial interaction to help students get to know one another at a time when they're actually interested in forming new relationships while facilitating their understanding of essential concepts such as the definition of a firm,[8] the responsibilities of partners and supervisory lawyers,[9] and the imputation of conflicts of interest.[10]

An obvious downside to this proposal is that it would require students to make the necessary arrangements to enroll in law school at a substantially earlier point in the summer than mid-August. Meanwhile, some faculty and administrators would be required to shift their focus from other matters to instruct and manage those students at that same point in the summer.

But the downside of requiring an earlier start — and the necessary commitment of time, resources, and personnel — seem worthwhile when considering the rather compelling benefits of focusing on professionalism and ethics at the outset. First and foremost, from the moment they begin their legal education, students would receive a loud and clear message that they are *already* members of a profession. They would understand that the time to begin thinking and acting like a professional subject to rules of conduct is not when they earn their degree, nor is it when they receive their first summer externship. It is as an incoming law student.

Along those lines, students would have an immediate appreciation for the commitment of the legal profession to the honesty and truthfulness of lawyers in practice. Specifically, when studying the Model Rules of Professional Conduct, students would be exposed to various prohibitions against conduct involving "dishonesty, fraud, deceit or misrepresentation,"[11] knowingly making false statements of fact,[12] or failing to disclose essential information in certain contexts.[13]

Related to this initial focus on professionalism and ethics, each student would receive instruction on the character and fitness process they will ultimately have to weather in order to become a licensed member of a state bar. Students would be instilled with a strong sense of how gravely an act of academic dishonesty or other misconduct might affect their legal careers, perhaps even to the point of preventing it before it happens. Moreover, students would be aware of how a discrepancy between an application for admission to law school and an application for membership in a state bar can complicate their own character and fitness process when the time comes.[14] This concern would prompt new students to review recently submitted law school applications and, if necessary, amend them to ensure the information is accurate and complete. This simple act would go a long way toward putting a student in a frame of mind that embraces honesty and candor.

This initial focus on professionalism and ethics would provide law students with an invaluable grounding in topics such as the duty of confidentiality and the attorney-client privilege even before undertaking contracts, torts, civil procedure, and other first-year subjects. Knowing that their students are familiar with the basics of professionalism and ethics, instructors could expound upon these topics as they arise during class discussion of cases and problems in the first year and beyond.

Finally, students acquiring a firm foundation in professionalism and ethics shortly after starting law school would be well-positioned to achieve a passing score on the MPRE even before the traditional first-year curriculum begins in earnest. Aside from giving students the confidence and satisfaction of attaining an important academic objective early in their legal educations, it would spare them from the burden of contending with the MPRE later in law school while navigating the demands of upper-level coursework and cocurricular activities in order to find the time to prepare.

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ENDNOTES

1. Adopted in 1983 by the American Bar Association's House of Delegates, the Model Rules of Professional Conduct presently "serve as models for the ethics rules of most jurisdictions," <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct> [https://perma.cc/7HJZ-2ALV]. All websites cited in this article were accessed October 5, 2022.
2. ABA Standard 303(a)(1), ABA Standards and Rules of Procedure for the Approval of Law Schools. Pursuant to this mandate, a law school must offer "one course of at least two credit hours in professional responsibility that includes substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members[.]"
3. MRPC 7.1 - 7.4.
4. MRPC 1.5.
5. MRPC 1.15.
6. *Multistate Professional Responsibility Examination*, NCBE, available at <https://www.ncbex.org/exams/mpre/> [https://perma.cc/U285-F26E]. According to this site, with the exceptions of Wisconsin and Puerto Rico, each state requires that a candidate achieve a passing score on the MPRE in order to obtain admission to the bar. However, Connecticut and New Jersey "accept successful completion of a law school course on professional responsibility in lieu of a passing score on the MPRE." For example, according to the New Jersey Board of Bar Examiners, a New Jersey applicant may satisfy that state's "ethics requirement" for admission to practice simply by "taking an approved ethics course in law school and receiving a grade of C or better," <https://www.njbarexams.org/browseform.action?sid=204003&ssid=1504003&applicationId=1> [https://perma.cc/S4S3-UL4A].
7. *Multistate Professional Responsibility Examination*.
8. MRPC 1.0(c).
9. MRPC 5.1 and MRPC 5.3.
10. MRPC 1.10.
11. MRPC 8.4(c).
12. MRPC 3.3(a)(1), MRPC 4.1(a), and MRPC 8.1(a).
13. MRPC 3.3(a)(2) and MRPC 8.1(b).
14. For this insight, I credit Connell Alsup, a member of the State Bar of Michigan's Standing Committee on Character and Fitness, who has graciously given of his time to speak on the character and fitness process to each of my professional responsibility sections over the past four years.

A duty to maintain good character and fitness

BY TIMOTHY A. DINAN

Practicing law is a privilege requiring a license and a continuing duty to conduct oneself personally and professionally according to the Michigan Rules of Professional Conduct.

A law license is initially granted to an applicant upon obtaining a law degree, taking and passing the Multistate Professional Responsibility Examination, taking and passing the bar examination, and successfully demonstrating good moral character and fitness to practice law. For some applicants, the greatest challenge is demonstrating character and fitness for practice because of past or current concerns.

Michigan lawyers suspended for 180 days or more after a finding of misconduct who wish to return to practice are required to demonstrate that they have followed the directives of the discipline order, possess the desire to return to practice, have the requisite proper attitude about their past conduct, and lived in an exemplary manner beyond reproach since the imposition of the suspension, among other requirements, before being reinstated to practice.[1] Essentially, they need to once again demonstrate good character and fitness after their misconduct.

These processes are not directly related but seek similar ends. Comparing the two highlights the importance of establishing and maintaining good character and the challenges of reestablishing it if a lawyer must be reinstated to practice.

APPLYING FOR AN INITIAL LAW LICENSE

The application and investigation processes are governed by Rule 15 of the Rules Concerning the State Bar of Michigan. All applicants must show good moral character in order to be licensed.[2] To demonstrate character and fitness, the applicant submits an

affidavit of personal history (APH), which triggers a confidential investigation conducted by the State Bar. It is a comprehensive disclosure of the applicant's personal, professional, academic, and employment history. It is akin to a background check to obtain a "secret" government clearance.[3]

Good moral character is defined by statute.[4] This broad definition allows the SBM to consider all characteristics of a person's background but focuses mostly on the "… *propensity of the person to serve the public in a licensed area in a fair, honest, and open manner.*"[5] (emphasis added)

The investigation scrutinizes past conduct that suggests an applicant could have problems representing future clients. The Bar considers criminal history, employment history, litigation history, and information from its investigative efforts as well as information derived from the disclosures on the APH. It considers personal conduct while enrolled in law school and will look back at conduct before college if it is relevant. It considers the recency of conduct relative to the time of applying to join the Bar.

The process is confidential, and the applicant's file and investigation materials are held confidentially.[6] Most applications are routine and require little scrutiny. Some applicants are required to provide more information based on disclosures made on their APH. These inquiries may only require a letter of explanation or clarification about a particular matter. Some responses to the APH require an applicant to appear at a district committee and possibly a standing committee hearing.[7] These hearings are also confidential.

The attorney licensing process is bifurcated. The State Bar handles the receipt and initial investigation of all new applicants,[8] while the Michigan Board of Law Examiners (BLE) is the agency within the Michigan Supreme Court that issues law licenses. It takes the investigatory findings and recommendations of the SBM, conducts its own review where warranted, and renders a final decision. Both entities have their own rules governing their processes.[9] Rights of due process for applicants are set forth in the BLE Rules, Statutes, and Policy Statements.[10]

If an applicant seeking to join the Bar is denied, the applicant must wait two years before reapplying. This period may be shortened or extended by the BLE depending upon the circumstances of the applicant's case. The only appeal beyond the BLE is a complaint for superintending control to the Supreme Court.[11]

RETURNING TO ACTIVE PRACTICE AFTER SUSPENSION

A petition for reinstatement must be completed by a suspended attorney (referred to as a petitioner) seeking relief in the format set forth in the court rules.[12]

MCR 9.123(B) directs the petitioner to follow the process set forth in MCR 9.124 to request a hearing on the matter. Concurrently, the

petitioner submits the petition to the Michigan Attorney Discipline Board (ADB) and the affidavit of personal history to the Attorney Grievance Commission (AGC) disclosing business, financial, and other pertinent information since the time of suspension. With that information, the AGC performs its due diligence investigation; it also takes a sworn statement from the petitioner.

Once that work is completed, the ADB panel is given a report regarding the petitioner's fitness for practice. Public notice is published in the Michigan Bar Journal announcing the filing of reinstatement petition, the date of the petitioner's hearing, and an invitation for the public to comment to the AGC on the standing of the petitioner as it relates to reinstatement.[13] The comments may be incorporated into the record.

At the hearing, the ADB panel considers the petitioner's request and reviews the information. The petitioner has the burden of proof to demonstrate that the elements set forth in MCR 9.123 are met.[14] The petitioner presents witnesses and relevant evidence regarding reinstatement. Since it is a public hearing, witnesses may testify at the hearing regarding why the petitioner should or should not be readmitted. This testimony may be offered in person or through letters of support. Members of the public and other attorneys may offer their own opinions unsolicited from the AGC or the petitioner.

The panel considers the report, the testimony, and other evidence. It then issues an order reinstating the lawyer or explaining why the petition has been denied. The appellate rights for both parties are provided in the court rules.[15] The process is not complete until all appeals have been exhausted.

Depending on the length of the suspension, a successful petitioner will be readmitted to the Bar. If the petitioner is successful but has been out of practice for more than three years, he or she must be recertified by the Board of Law Examiners.[16] An unsuccessful petitioner seeking recertification must wait one year before reapplying. MCR 9.124(E) allows for appeal of this decision to the ADB.[17]

Assuming the reinstatement petition is timely and properly filed, the practical problem is explaining why the suspended petitioner — who has been previously entrusted with a law license and taken an oath to practice in an ethical manner — can be safely reinstated to practice law. Unlike new applicants, a suspended lawyer already has experience in the day-to-day practice of law. It is assumed the lawyer knew or should have known his or her conduct violated the Michigan Rules of Professional Conduct or the Michigan Court Rules.

Another problem is the time it takes to go through the reinstatement process. It is a careful process that involves an investigation and a hearing, both of which take time. The hearing itself requires coordinating the scheduling of the petitioner, panelists, and AGC counsel. Even when reinstatement is granted, it takes time for the opinion to be published. If there is opposition to the action, the AGC can seek an appeal, which can add months to the matter.

COMMON ELEMENTS

Both processes require the applicant/petitioner to show good moral character and fitness, and both use the clear and convincing evidence rule to establish that standard.[18] Both processes scrutinize the conduct of the individual. These standards require that the applicant/petitioner demonstrate that they can be trusted with the legal affairs of others.

These processes also recognize a lawyer's ability to change and become a better person through contemplation and demonstrated action. Proving that real change has taken place is critical to success.

Both processes contemplate due process and are adversarial in nature. In a system of law rooted in the adversarial process, there is a better chance of revealing the facts through critical logic and thorough questioning.

In both hearings, the burden is on the applicant/petitioner. Both hearings require detailed preparation and careful contemplation by the applicant/petitioner and his or her counsel. It is not unusual to call expert witnesses to support claims of personal problems that required intervention.

CONTRASTING ELEMENTS

The attorney reinstatement process requires the petitioner to show exemplary conduct that is beyond reproach while on suspension.[19] This standard recognizes that the petitioner previously met the standards for admission to practice, has practiced law, and ought to be knowledgeable of the standards of conduct.[20] It focuses on how and why the petitioner violated the standards of practice and how he or she has addressed the underlying issues. It considers whether restitution was paid or why it has not been paid. It considers the petitioner's remorse and his or her insights since the time of the suspension. If the petitioner worked as a clerk in a law firm, the panel will want to ensure that the petitioner was obeying the discipline order regarding the limitations of a suspended lawyer.[21]

In the initial application, the petitioner must show current character and fitness. This standard allows the applicant to explain past conduct, demonstrate having learned from past mistakes, and show personal maturity and growth.

The applicant for entry into the Bar has a broader disclosure to make than an attorney returning to practice after discipline. The APH for bar applicants gathers more information. If the new applicant is older than the typical law student, there is more life experience for the applicant to disclose.

The confidential nature of the hearing is conducive to open dialogue. It gives SBM investigators and committee members a better chance to explore past conduct and give the applicant a chance to prove his or her current fitness.

The petitioner seeking relicensure has, relatively speaking, fewer items to disclose. However, there are pressures for relicensure including replacing lost income, restoring professional pride, and having the reinstatement take place in public. Some petitioners have vociferous opposition to their return to practice, while others underestimate the requirements of the hearing.

The time factors are different for applicants and petitioners. The SBM application process has some deadlines for submission of documents, but not necessarily for completing an investigation of an applicant. If a district committee meeting and a standing committee hearing are required, the hearing dates and other deadlines are soft. There is no enforcement mechanism if an application goes over any deadline set forth in the Rules Regarding the State Bar. Hearing delays arise and, if you are not working as a lawyer, every moment being unsure of your status seems interminable.

Petitioners have some support in the Michigan Court Rules in terms of AGC and ADB scheduling deadlines once a petition is filed; also, the AGC is required to publish an investigation report. Petitioners also have timelines for appeals set forth in the Michigan Court Rules.[22]

CONCLUSION

The relative ease or difficulty in an application to join the State Bar of Michigan or be reinstated as a lawyer is always fact intensive. Beyond being honest and forthright in the process, applicants/petitioners are ultimately required to answer for themselves and their conduct. The ancient Greek maxim "know thyself" is the key to preparation. The proofs needed to demonstrate good character or exemplary behavior lie with the applicant/petitioner. Applicants/petitioners who embrace their past and have found a way to learn from it do better in the process. Applicants/petitioners who challenge past findings or deny the conduct that led to discipline unnecessarily create a greater burden for themselves.

Both processes recognize our humanity by accounting for behaviors which may have been influenced by addiction or mental health issues. At its best, both processes give the applicant/petitioner the opportunity to document the changes in their lives so we can entrust them to the public to serve as attorneys.

In the end, we want lawyers who have the talent and ability to serve the public admitted and/or returned to practice. When new lawyers are admitted, we want a broad representation of the public. When suspended lawyers are returned to practice, it is not because it's a right, but because they have earned the trust of the public and their peers.

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ENDNOTES

1. MCR 9.123 and MCR 9.123(B) set forth the requirements to return to practice.
2. MCL 600.934.
3. National security eligibility determinations take into account a person's stability, trustworthiness, reliability, discretion, character, honesty, judgment, and unquestionable loyalty to the U.S according to *Security Executive Agency,* Nat'l Counterintelligence and Security Center, Office of the Director of Nat'l Intelligence <https://www.odni.gov/index.php/ncsc-how-we-work/ncsc-security-executive-agent/ncsc-policy> [https://perma.cc/8NWX-7WCN] (site accessed September 30, 2022).
4. MCL 338.41 through MCL 338.47. See also *Rules, Statutes, and Policy Statements*, Board of Law Examiners, Michigan Supreme Court (May 2022), Rules 1(B)-1 through 1(B)-4, available at <https://www.courts.michigan.gov/49b99b/siteassets/committees,-boards-special-initiatves/ble/ble_rules_statutes_policy_statements.pdf> [https://perma.cc/RH9M-5BH9] (site accessed September 30, 2022).
5. MCL 338.41(1).
6. MRPC 8.1, official comment.
7. *Rules, Statutes, and Policy Statements*, Rule 5.
8. Attorneys licensed in other jurisdictions are investigated by the National Counsel of Bar Examiners when seeking admission or reciprocity.
9. See generally Rules Concerning the State Bar (Rule 15) and Rules for the Board of Law Examiners.
10. *Rules, Statutes, and Policy Statements*.
11. Rule (2)(C)-3, *Rules, Statutes, and Policy Statements* and MCL 7.303 (B).
12. MCR 9.123.
13. MCR 9.124(B)(2)(a).
14. MCR 9.123(B).
15. MCR 9.124(E).
16. MCR 9.123(C).
17. MCR 9.124(D).
18. [E]vidence that 'produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct, and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.' *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995), quoting *In re Jobes*, 108 NJ 394, 407-408; 529 A2d 434 (1987).
19. MCR 9.123(B)(5).
20. *In Re Grimes*, 414 Mich 483, 494; 326 NW2d 380 (1982): "The rules of professional conduct adopted by this Court evidence a commitment to high standards and behavior beyond reproach. We cannot stress too strongly the responsibility of members of the bar to carry out their activities, both public and private, with circumspection."
21. MCR 9.119 (D) and (E).
22. MCR 9.118.

Professionalism in tribal jurisdictions

BY MATTHEW L.M. FLETCHER

American Indian law is an important area of law. There are 12 federally recognized Indian tribes in the state of Michigan.[1] Indian tribes throughout the United States do business in Michigan. Indian tribal governments and corporations employ hundreds of thousands of non-Indians and received billions in federal pandemic relief. Indian gaming generated nearly $40 billion in revenues nationally last year. Still, many lawyers ignore the field or claim ignorance about the basic precepts of federal Indian law.

This article will canvass several themes of professionalism in tribal practice, drawing from this author's tribal law experience over the last few decades. Many lawyers undervalue — and even disrespect — tribal governance. This lack of professionalism has significant costs to tribal governments, tribal business, and their business partners.

SKEPTICISM OF INHERENT TRIBAL POWERS AS INCIVILITY

As I was completing my final law school exams in 1997, the United States Supreme Court issued a decision devastating the prospects of tribal governments and tribal justice systems to regulate the activities of nonmembers in Indian country in *Strate v. A-1 Contractors*.[2] That case involved a car wreck on an Indian reservation in North Dakota. The plaintiff was a non-Indian woman who married into a large Native family. The defendant was a nonmember-owned company. In a unanimous and casually cruel opinion by Justice Ruth Bader Ginsburg, the Court held that since both parties were nonmembers, the tribe and its justice system

Photo courtesty of Nottawaseppi Huron Band of Potawatomi (NHBP) Indians Communications Department
NHBP Indians attend a traditional tribal ceremony.

were "strangers" to the accident and rejected tribal court jurisdiction over the claim.

Later, I took my first job out of law school with the Pascua Yaqui Tribe of Arizona. At that time, Pascua had little common law. A large part of my job as in-house counsel was negotiating contracts on behalf of tribal procurement with outside vendors, hoping to steer any conflicts to tribal court. I "negotiated" dozens of contracts with the tribe's business partners, but they were hardly negotiations. Vendors rarely consented to tribal court jurisdiction or tribal law as the governing law. Some of this had to do with the tribe's bargaining power, but much of it had to do with *Strate*. Counsel representing the vendors argued to me that the Court had eliminated tribal jurisdiction over nonmembers. That's not what the Court said — nonmembers could still consent in writing — but counsel for nonmembers also knew if they didn't consent, they lost nothing. From their point of view, *Strate* gave nonmembers license to roam unfettered. My tribal client could either allow nonmember vendors onto the reservation to do as they wished or exclude itself from business. At that time, my client had little choice but to accede to these prejudices.

A few years later, it got worse. The Court issued another tribal jurisdiction decision in 2001 in *Nevada v. Hicks*, rejecting a tribal court's authority to exercise jurisdiction under 42 USC 1983 over state officials.[3] Once again, the decision was unanimous. This time, there was a concurring opinion by Justice David H. Souter roundly condemning tribal laws and tribal courts. Justice Souter wrote that tribal law was "unusually difficult for an outsider to sort out."[4] He described tribal law as "frequently unwritten," the product of "customs, traditions, and practices … handed down orally or by example from one generation to another."[5] This was the second Supreme Court writing in four years disrespecting and gutting tribal powers over nonmembers — both written by two different justices supposedly to the center-left of the Court.

As a tribal practitioner, Justice Souter's description of tribal law was news to me. In 2001, I was working in house for the Suquamish Tribe on Puget Sound in Washington. My experience working with the Pascua and Suquamish (and in between, the Hoopa Valley Tribe in northern California) was completely different from the story Justice Souter told. These tribes took their cultures, customs, and traditions very seriously. In child welfare cases, property rights cases, and other cases involving *only tribal members*, tribal custom law that could be difficult for outsiders to understand might apply. But in relations with nonmembers, tribal law was written down — and in English. Where tribal law was silent, we looked to state commercial law and state court procedures for guidance, usually adopting blackletter law from the Restatements of Law. The last thing my tribal clients wanted was for tribal customs and traditions to interfere with the business dealings critical to funding basic tribal governmental services like health care, public safety, and child welfare.

Following that decision, when I worked with counsel for my tribal clients' business partners and vendors, they were often radicalized by *Strate* and Justice Souter's concurrence in *Hicks*. From their perspective, not only was tribal power over nonmembers unnecessary to tribal governance but was dangerous to nonmembers. The Supreme Court said so. Evidence to the contrary often was irrelevant. Outside counsel became far more aggressive with me.

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A short while after *Hicks*, I returned home to work in-house for my own tribe, the Grand Traverse Band of Ottawa and Chippewa Indians in Peshawbestown. One attorney representing a vendor demanded that I provide him a hard copy of every tribal council resolution and ordinance and every single tribal court decision before he would even talk to me. A county attorney told me he could not discuss an agreement to plow snow at a tribal elder's complex because, in his words, *Hicks* had overruled *Worcester v. Georgia*, an 1832 decision acknowledging tribal sovereignty and treaty rights over Indian lands.[6] Yet another attorney, this time representing a tribal member in an employment suit against the tribe in a tribal forum, told me he would win a $1,000,000

judgment against the tribe as soon as he got the case moved to state court, where he believed the law was fair. Ultimately, each of those attorneys walked back their demands, but not before I wasted an enormous amount of time educating my friends on the other side.

IGNORANCE OF TRIBAL LAW AS COUNSEL'S LACK OF DILIGENCE

These uncivil incidents were relatively unusual; after all, most of the work of in-house counsel is not in dealing with nonmembers but with the tribal client. Still, these incidents evidence a lack of diligence on the part of counsel for my client's legal adversaries. It is a lawyer's job to learn the law on behalf of their client, not to demand legal research from opposing counsel, misrepresent precedent, or fail to research basic tribal jurisdiction and sovereign immunity questions.

A recurring theme in the Supreme Court's decisions on tribal powers and jurisdiction is concern for nonmembers being unfairly victimized by confusion around tribal laws. Justice Souter's worry for "outsiders" being subjected to tribal laws was just one example. As I drove in a moving van with my father from Ann Arbor to Tucson, Arizona, to start my legal career at Pascua, the Supreme Court issued a decision affirming tribal sovereign immunity in *Kiowa Tribe v. Manufacturing Technologies, Inc.*[7] I was excited to see the Court actually rule in favor of tribal immunity, but Justice Anthony Kennedy's majority opinion ridiculed the notion of tribal immunity, asserting that it developed "almost by accident."[8] Worse, he argued that Congress should abrogate tribal immunity in part because "[i]n this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims."[9] Ultimately, as my friend Prof. Bill Wood pointed out years later, tribal immunity was no accident.[10]

Michigan's 12 federally recognized Indian tribes: 1. Bay Mills Chippewa Indian Community | 2. The Grand Traverse Band of Ottawa and Chippewa Indians | 3. Hannahville Indian Community | 4. Nottawaseppi Huron Band of Potawatomi Indians | 5. Keweenaw Bay Indian Community | 6. Lac Vieux Desert Band of Lake Superior Chippewa Indians | 7. Little River Band of Ottawa Indians | 8. Little Traverse Bay Bands of Odawa Indians | 9. Pokagon Band of Potawatomi Indians | 10. Saginaw Chippewa Indian Tribe | 11. Sault Ste. Marie Tribe of Chippewa Indians | 12. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Gun Lake Tribe)

Moreover, after careful consideration and multiple contentious hearings, Congress decided not to undo tribal immunity, which the Court acknowledged 16 years later in *Michigan v. Bay Mills Indian Community*.[11] The Court's signaling of disdain and skepticism of tribal immunity feeds practitioners' attitudes about tribal economic development. Throughout my career as in-house counsel, attorneys for my tribal clients' business partners sometimes insisted that my client abrogate its immunity entirely before they would even talk about a contract. These attorneys advised me that it was best to drop sovereign immunity or no one would ever do business with the tribe. These attorneys either talked their own clients out of a business partner by insisting on a complete tribal waiver or eventually walked back their initial demands, tails between their legs, when they learned about the possibility of a contract-based limited waiver of tribal immunity. These attorneys wasted everyone's time and money.

But many lawyers continued to engage me and my client in good faith. In the early 2000s, my client and the other Michigan tribes were negotiating with the state government over taxes[12] in light of a groundbreaking court rule cocreated by tribal and state court judges in the 1990s.[13] The Michigan tribal courts and Michigan Supreme Court had agreed on a reciprocal court rule in which tribal and state courts would grant comity to each other's judgments, awards, and other orders so long as the other court system would do the same.[14] The resulting state court rule formed the basis for a provision in Michigan's tribal-state tax agreements a decade later where the state agreed to litigate tax disputes in the tribal courts.[15] Michigan probably is the only state government to consent to tribal court jurisdiction. The state's attorneys zealously advocated for their client but did so in respect for the sovereign prerogatives of Michigan's tribal nations. Once again, my

lived experience as a tribal law practitioner was the polar opposite of the way the U.S. Supreme Court saw tribal law and courts.

OBSERVATIONS AS A TRIBAL JUDGE

Congress has been supportive of tribal self-determination for about the last half century, but in the last decade or so Congress recognized more tribal authority over nonmembers, primarily through the Violence Against Women Reauthorization Acts of 2013 and 2022.[16] The Supreme Court's aggressive rhetoric skeptical of tribal powers has waned somewhat as well with the Court even recently acknowledging tribal powers over nonmembers in limited contexts.[17]

From my perspective as a tribal judge, I have seen tribal governmental powers litigated extensively. In 2013, I served as a special judge for the Lac du Flambeau Band of Lake Superior Chippewa Indians in Wisconsin. The tribe's economic development arm, known in Indian law circles as an economic development corporation (EDC), brought suit in tribal court against its business partners (and their counsel) over a large casino development deal gone bad. The EDC hoped to short circuit federal or state court claims, but the transaction documents included a forum selection clause allowing for Wisconsin federal or state jurisdiction, with Wisconsin law controlling. The nonmember defendants in tribal court moved to dismiss, primarily relying on the forum selection clause.

Interestingly, Wisconsin law was fairly liberal on the interpretation of forum selection clauses, allowing for parties to select a forum other than the one(s) delineated in the transaction documents so long as the clause did not explicitly prohibit an additional forum (in this case, the tribal court forum). Since the transaction documents ordered me as judge to apply Wisconsin law, I did so, and applied the more liberal rule from *Lake of the Torches Economic Development Corporation v. Saybrook Tax Exempt Investors, LLC*.[18] In short, I declined to dismiss the action on the pleadings. It all came down to use of passive voice (legal writing students pay heed) in very hastily drafted transaction documents. Perhaps with more development of the record, it would come to pass that the EDC really intended for the forum selection clause to exclude tribal courts, but it was far from obvious based on the text of the transaction documents alone.

The nonmember companies then sued in federal court to enjoin the tribal parties from invoking tribal jurisdiction. They prevailed, with the district court casually denigrating the tribal judge as a "blogger" who once published a law review article critical of federal courts.[19] The federal courts chose not to follow Wisconsin law on forum selection clauses, instead choosing to apply their own precedent, leading to the opposite outcome I reached.[20] So be it.

Following that litigation from afar, I was surprised to see my name in the district court and appellate opinions.[21] How odd. Later, I learned the nonmember companies, perhaps emboldened by the district court judge, used me and my writings in what appears to be an effort to denigrate the fairness of the tribal justice system.[22] No party challenged my professionalism in tribal court but in federal court, tactics seemingly differ.[23] After all, Justice Souter's concurrence in *Hicks* gave attorneys license to do so.

That said, I think there has been a gradual shift in attitudes about tribal powers. In 2018, serving on the Nottawaseppi Huron Band of the Potawatomi Supreme Court, my colleagues and I decided *Spurr v. Spurr*, a case involving the power of the tribal court to issue a protection order against a nonmember who lived 100 miles from the reservation.[24] We invoked a federal statute granting full faith and credit to tribal civil protection orders against nonmember harassers.[25] The nonmember brought suit in federal court to challenge the order and, implicitly, the authority of Congress to recognize tribal powers; this was exactly the kind of case the Supreme Court was likely to review with an eye toward undercutting tribal powers. But instead, after the U.S. Court of Appeals for the Sixth Circuit affirmed tribal powers, the Supreme Court declined the nonmember's petition for certiorari.[26] Perhaps a corner had been turned.

Even more recently, I have had the privilege of serving on tribal appellate cases involving nonmember defendants challenging tribal court jurisdiction. The first, *Rincon Band of Luiseño Indians v. Donius*, decided in 2020, affirmed the power of the tribe to inspect nonmember-owned property it suspected of being the source of pollution.[27] Serving on the *Rincon* court with me were retired federal court judges James Ware and Arthur J. Gajarsa. The second, *Cabazon Band of Mission Indians v. Lexington Insurance Company*, decided in 2022, affirmed the jurisdiction of the tribal court over a suit brought by the tribe against its insurance company over COVID 19-related business losses.[28] On the *Cabazon* tribal appellate court with me were Kevin K. Washburn, dean of the University of Iowa Law School, and Alexander Tallchief Skibine, professor at the University of Utah School of Law. In both cases, counsel for both sides exuded professionalism. Both cases are pending in federal court so I cannot speak further on them. However, my curiosity as to their outcomes is piqued, of course.

In 2011, I proposed to the membership of the American Law Institute a restatement project on federal Indian law. The first comment from the audience was not positive. The commentator asked how there could be a restatement of blackletter law when "the embers of sovereignty have long since grown cold."[29] I was told to expect skepticism from some members of the institute. Being used to questions like that from my days as in-house counsel for Indian tribes, I answered and we moved on. It was the last time anyone asked a question like that during the entire project, which we just completed.[30] The law is the law. Tribal sovereignty is a real thing. Professionals realizing that learn and react appropriately.

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ENDNOTES

1. Bissett and Heinen, *Tribal Law Resources and American Indian Law Research Guides*, 98 Mich B J 52 (2019).
2. *Strate v A-1 Contractors*, 520 US 438, 439; 117 S Ct 1404; 137 L Ed 2d 661(1997).
3. *Nevada v Hicks*, 533 US 353; 121 S Ct 2304; 150 L Ed 2d 398 (2001).
4. *Id.* at 385 (Souter, J., concurring).
5. *Id.* at 384-85 (Souter, J., concurring) (quoting Melton, *Indigenous Justice Systems and Tribal Society*, 79 Judicature 126, 130-131 (1995)).
6. *Worchester v State of Georgia*, 31 US 515; 8 L Ed 483 (1832).
7. *New Hampshire v Maine*, 532 US 742, 751; 121 S Ct 1808; 149 L Ed 2d 968 (1998).
8. *Id.* at 756.
9. *Id.* at 758.
10. Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 Am UL Rev 1587 (2013), available at <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1894&context=aulr> [https://perma.cc/7K93-9XY5]. All websites cited in this article were accessed October 1, 2022.
11. *Michigan v Bay Mills Indian Community*, 572 US 782, 801-02; 134 S Ct 2024; 188 L Ed 2d 1071 (2014).
12. See generally Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreement*, 82 U Det Mercy L Rev 1 (2004).
13. MCR 2.615.
14. See generally Cavanagh, *Michigan's Story: State and Tribal Courts Try to Do the Right Thing*, 76 U Det Mercy L Rev 709 (1998).
15. *Id.* at 39-40.
16. Congress' recognition of tribal powers are codified mostly in 25 USC 1304 (criminal jurisdiction over non-Indians for certain crimes) and 18 USC 265(e) (civil protection orders against nonmembers).
17. *United States v Cooley*, 141 S Ct 1638; 210 L Ed 2d 1 (2021).
18. *Lake of the Torches Economic Development Corporation v Saybrook Tax Exempt Investors, LLC*, order of the Court of the Lac Du Flambeau Band of Lake Superior Chippewa Indians – Lac Du Flambeau Reservation, issued August 27, 2013 (No. 13 CV 115), available at <https://turtletalk.files.wordpress.com/2013/05/lake-of-the-torches-v-saybrook-tax-exempt-investors.pdf> [https://perma.cc/MQ7A-8LJA].
19. *Stifel, Nicolaus & Company v Lac du Flambeau Band of Lake Superior Chippewa Indians*, unpublished opinion of the United States District Court for the Western District of Wisconsin, signed May 16, 2014 (No. 13-CV-372-WMC), aff'd by *Stifel, Nicolaus & Company v Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F3d 184 (CA 7, 2015).
20. *Altheimer & Gray v Sioux Manufacturing Corp*, 983 F2d 803 (CA 7, 1993).
21. The circuit court merely referenced my then-professional affiliation with Michigan State University College of Law, *Stifel, Nicolaus & Company*, 807 F3d at 192.
22. Brief of Appellees at 13, *Stifel, Nicolaus & Company*, 807 F3d 184 (CA 7, 2015) (quoting extensively from Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U Colo L Rev 973, 976 (2010)).
23. See generally Leeds, *[dis]Respecting the Role of Tribal Courts?*, 42 Human Rights 20 (2017), available at <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2016-17-vol-42/vol-42-no-3/dis-respecting-the-role-of-tribal-courts/> [https://perma.cc/ELS4-72K7].
24. *Spurr v Spurr*, opinion of the Supreme Court for the Nottawaseppi Huron Band of the Potawatomi, issued January 25, 2018 (No. 17-287-App), available at <https://nhbp-nsn.gov/wp-content/uploads/2018/07/Spurr-v.-Spurr-17-287-APP_Opinion-of-the-Supreme-Court-for-the-NHBP.pdf> [https://perma.cc/ZCR3-2G4W].
25. 18 USC 1165.
26. *Spurr v Pope*, 936 F3d 478 (CA 6 2019), cert denied, *Spurr v Pope*, 140 S Ct 850; 205 L Ed 2d 465 (2020).
27. *Rincon Band of Luiseño Indians v Donius*, opinion of the Court of Appeals for the Rincon Band of Luiseño Indians, filed April 2, 2020 (Case No. AP-0205-19), available at <https://secureservercdn.net/45.40.155.190/y3t.b1a.myftpupload.com/wp-content/uploads/2021/02/2020.04.02-Donius-v.-Rincon-Band-Court-of-Appeals-Opinion.pdf> [https://perma.cc/U8M6-8XV6].
28. *Cabazon Band of Mission Indians v Lexington Ins Co*, order and opinion of the Cabazon Reservation Court of Appeals, issued November 12, 2021 (No. CBMI 2020-0103), available at <https://turtletalk.files.wordpress.com/2021/11/final-opinion-cbmi-2020-0103-1.pdf> [https://perma.cc/3LNG-RFXE].
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MSBF AT 75

2.

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Michigan State Bar Foundation celebrates diamond anniversary

The Michigan State Bar Foundation (MSBF) marked its 75th anniversary on Sept. 15 with a reception at the Detroit Athletic Club that brought together the foundation's fellows, board of directors, legal aid professionals, supporters, MSBF staff, and members of the legal community.

Speakers at the event included Ed Pappas, MSBF board president from 2018-2022; Hon. Victoria Roberts, chair of the MSBF Fellows program; former Supreme Court Chief Justice Marilyn Kelly; and MSBF Executive Director Jennifer Bentley.

5. SBM President James Heath is joined by MSBF fellow Kaitlin Brown and MSBF Board of Directors Vice-President Julie Fershtman.

6. Fellows Brian Einhorn, Tom Cranmer, and Tom Behm with MSBF Board President Craig Lubben.

In his opening remarks, Pappas welcomed guests and thanked them for attending the foundation's first in-person event following the height of the COVID-19 pandemic. Pappas also announced his retirement from the MSBF board after a nine-year tenure, though he will continue to be a fellows officer and participate on the Access to Justice Campaign steering committee. He introduced incoming officers for 2022-2023: Craig Lubben, Julie Fershtman, Richard Rappleye, and Ronda Tate Truvillion.

Roberts told the gathering that supporting legal aid was "a priceless undertaking" and emphasized the responsibility lawyers have to help Michigan's low-income residents. She also shared ways the legal community can support civil legal aid efforts through programs like the Banking on Justice and Access to Justice campaigns. Roberts introduced the new MSBF fellows for 2022, who were nominated and accepted for their professional excellence and dedication to serving their communities, and thanked Pappas for his leadership.

Kelly described the history of the founding of Michigan Legal Help 25 years ago and the leadership of former MSBF Director Linda Rexer. She called Michigan Legal Help "a spectacular resource" and a "game changer," discussed the program's impact on self-represented litigants, and reiterated her confidence in the foundation and its future efforts.

Among the guests were Norman Otto Stockmeyer, one of the founders of MSBF Fellows program, and former Detroit mayor and Michigan Supreme Court Justice Dennis Archer. The outgoing and incoming State Bar of Michigan presidents, Dana Warnez and James Heath, were on hand. The event also featured music from the Detroit Cass Technical High School Jazz Band.

The Michigan State Bar Foundation plans to continue its mission to provide leadership, education, and partnership to improve access to justice for all and extends its gratitude to all who attended its anniversary celebration. To learn more about the foundation's work, visit www.msbf.org or read the organization's 75th anniversary special report at www.msbf.org/msbf-75-special-edition/.

1. Linda Rexer, the longtime former MSBF executive director, with current Executive Director Jennifer Bentley | 2. MSBF fellows Angela Tripp, Ann Routt, Ashley Lowe, Jill Nylander, and Emily Calabrese. | 3. Fellow Steve Howell, MSBF Board Treasurer Richard Rappleye, and former MSBF Board President Ed Pappas. | 4. MSBF Fellows program Chair Hon. Victoria Roberts is flanked by fellows Laura Musachio and Kimberly Ward.

ETHICAL PERSPECTIVE

Embrace the right to a second opinion

BY ALECIA M. CHANDLER

A close family member is diagnosed with a non-life-threatening but life-altering medical condition. There are few treatment options, all with different side effects and rates of success. The doctor recommends a treatment, but family members fear making the wrong decision. The family trusts the doctor, but there is a lot at stake. They decide to get a second opinion.

Second opinions are standard in medical practices, so why not in the legal realm?

FACT: LAWYERS ARE HUMAN

Lawyers often hold their client's metaphorical life in their hands. The outcome of a case could lead to financial ruin, losing custody of a child, eviction from a home, or life in prison, to name a few. Even cases that don't seem life altering to the lawyer or a similar outside perspective can have a huge impact on a client. This should not be taken lightly by any lawyer.

As advisors, lawyers guide clients and assist them in making decisions that are in their best interest. However, lawyers are human and, though some may disagree, lawyers are not always right and do not know everything. Therefore, if a client is uncomfortable with recommendations made by their lawyer or simply wishes to hear a different perspective or find other options, the client is entitled to a second opinion. Some lawyers mistakenly believe that they cannot review a case currently handled by another attorney in fear of violating MRPC 4.2, but this is an improper reading of the rule. The rule prohibits *opposing counsel* from communicating with a party represented by counsel. MRPC 4.2 states:

> (a) In representing a client, a lawyer shall not communicate about the subject of the representation with a person whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

When a client comes in for a second opinion, the advising lawyer is not representing a client. They are communicating with a potential client. In fact, some of the rules encourage a second opinion. MRPC 1.8(a)(2) and the new MRPC 1.19[1] provide that a lawyer must give a client an opportunity to have independent counsel review an agreement between the lawyer and client.

A REAL-LIFE EXAMPLE

In practice, I represented a client in a contentious divorce with a lot at stake. The client's employer provided profit sharing and ongoing bonuses which amounted to millions of dollars in future income. Because I am not a tax practitioner, I included in my fee agreement that tax advice was not included, so we consulted with a tax professional. However, there were a few alternatives regarding allocating marital assets in relation to the future income that I discussed in detail with the client and provided him with my recommendation. The client and I were on very good terms and while he trusted me, I could sense hesitation as the wrong decision could cost him millions in the long run.

I suggested that he get a second opinion. He was reluctant — he didn't want me to think he was second guessing my legal opinion — but I reminded him that it was his life and his future at stake. He is the client, and my job is to ensure that he is fully informed and can make a decision based upon all evidence and information. I told him I would not at all be offended and believed that it was the best course of action to ensure that our attorney-client relationship was on solid footing.

The next step was selecting an attorney to review the materials limited to the financial division of marital property. I advised the client that I would prepare the materials and he could meet with counsel of his choice to review. However, the client asked that I participate in the meeting and asked me to suggest attorneys to provide the review. I was leery of giving names, but after some thought, I determined that it was not a conflict of interest, and we were both on the same side. I provided names of the best local attorneys who handled high-stakes divorces that were not in conflict with the opposing party. However, I encouraged the client to review all three attorneys and select one without any additional input from me.

"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.

Once the client selected the attorney, I prepared the materials. The client and attorney entered into a limited-scope fee agreement. The client and I agreed that I would not provide the attorney with my proposed course of action; I would allow him to reach his own conclusions. We met with the attorney, who provided his advised course of action and later committed it to writing. Fortunately for me, his advice was the same as mine. However, even if it were different, the client was well informed in accordance with MRPC 1.4 and could not later claim that I did not provide competent representation under MRPC 1.1.[2]

Some lawyers are afraid of clients getting a second opinion for fear of losing them, but showing a client the willingness to take the risk to ensure they have all the pertinent information to make an informed decision will only strengthen the attorney-client relationship. If the lawyer and client disagree or the client is unsure, the lawyer should focus more on maintaining a positive working relationship with the client, which may prevent a future grievance or malpractice claim.

CONCLUSION

The practice of law is not a science. Options presented by lawyers are based on experience whereas decisions made by clients are subjective and based on the information they receive. A person receiving a medical diagnosis that could impact their life significantly may wish to obtain a second opinion regarding their options. The same holds true in the legal field. When a client faces a legal matter, a second opinion may be worthwhile. Lawyers should embrace the idea of their client requesting and/or obtaining a second opinion. A fully informed client not only strengthens the trust between the lawyer and client but can prevent a breakdown in the attorney-client relationship that could later result in a grievance or malpractice claim.

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

ENDNOTES

1. New MRPC 1.19 took effect Sept. 1, 2022, pursuant to Administrative Order No. 2021-17 (2021), available at <https://www.michbar.org/journal/Details/From-the-Michigan-Supreme-Court-September-2022?ArticleID=4502> [https:/perma.cc/KEB3-LG82] (website accessed October 7, 2022).
2. I did not charge for my time in preparing for or attending the consultation. My client called when he got the bill and asked why the bill reflected $0 for those services as he expected to pay me for my time. I declined payment because I believe it was the right thing to do.

PLAIN LANGUAGE

How to draft a bad contract (Part 3)

BY MARK COHEN

Many experts have written on how to draft a good contract.[1] In the final installment of this series, I'll again approach the issue from the opposite end by explaining how to draft a bad one.[2]

CUT AND PASTE FROM THE INTERNET

One way that lawyers create bad contracts is by copying provisions from the internet (I did a Google search for "sample contract for sale of goods" and got 40.8 million results). Because law practice is so hectic, it's tempting to use this shortcut. We find a template that we like and use it over and over. Here's one that I see a lot:

> In any dispute arising out of this Agreement, the parties will submit to binding arbitration using the rules of the American Arbitration Association (AAA).

This makes your contract more bad for several reasons. First, it does not specify that the parties must use the AAA; it states only that they must use the AAA's rules. Second, it does not specify which AAA rules will apply; the AAA has many sets of rules for various types of disputes. Third, the lawyer using this language may not realize that the AAA's rules can be just as complex as the rules of procedure that the lawyer hoped to avoid by including an arbitration provision in the first place. Finally, the lawyer may be unfamiliar with the AAA's fee structure. In disputes involving small businesses or small amounts of money, it may not make sense to use the AAA.

DON'T INCLUDE A NONASSIGNMENT PROVISION

Generally, nothing prevents a party from assigning its interest in a contract to some other person or entity. A bad contract recognizes that your client really doesn't care too much about who it does business with and will therefore omit a nonassignment clause. If your client's local supplier assigns its interest in a contract to a supplier in North Korea, why should your client care? It's easy to get admitted to practice in North Korea. If you must include a nonassignment clause, leave a little wiggle room by not requiring written consent. Here's an example:

> No party may assign its interest in this Agreement without the consent of the other party.

BE REDUNDANT

If a provision is good enough to include in a contract, it is good enough to include more than once. One way to do this is to insert an attorney-fees clause into each paragraph that might result in litigation if a party fails to comply with the obligations set forth in that paragraph. For example, you could include an attorney-fees clause in the confidentiality provision, in the noncompetition provision, and in the provision on nonpayment and late payment. This will make your contract longer, thereby impressing your client, counsel for the opposing party, and any judge who may ultimately read it. Do *not* use one simple provision such as this:

> In any litigation arising out of this Agreement, the prevailing party is entitled to its actual attorney fees, expenses, and costs.

BE VAGUE ABOUT WHAT CONSTITUTES EFFECTIVE NOTICE

Many contracts require a party to give written notice to the other party for certain matters. A bad contract must be vague about when

"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.

written notice is effective. Here is a vague notice provision that you may use:

> Wherever this Agreement requires a party to give written notice to the other, the party giving notice shall send the notice to the other party by certified mail, return receipt requested.

Do you see the beauty of this? Is the notice effective when sent or when it is received? Is it effective if the recipient does not claim the certified letter and sign the receipt? And what address should the party giving notice send the notice to?

USE A SMALL FONT

You want your contract to be thorough, but you worry that some may find a lengthy document intimidating. The solution? Use a smaller font. The standard in the legal profession is a 12-point font, but you could surely cut down on the number of pages by using a 6-point font. This will improve the badness of your contract by making it far more difficult for people to read. And it may give you a chance later to research and brief whether using a small font makes a provision unenforceable under the doctrine of procedural unconscionability.[3]

USE LEGALESE[4]

You slogged through three years of law school, possibly incurring a sizable debt in the process, and throughout that time you read volumes of decisions written by men long since dead concerning disputes arising out of documents written by men long since dead governing transactions long since forgotten. What was the point of that if you can't use their writing style? A detailed explanation of how to use legalese to draft bad contracts is beyond this article's scope, but here are a few tips on how to make your contract more bad by using legalese:

Use long sentences

Example:

> No person has been or is authorized to give any information whatsoever or make any representations whatsoever other than those contained in or incorporated by reference in this document, and, if given or made, such information or representation must not be relied upon as having been authorized. (47 words)

Do not use something like this:

> You should rely only on the information contained in this document. We have not authorized anyone to give you different information. (21 words)

Use passive voice whenever possible

In the active voice, the subject of the sentence performs the action. In the passive voice, the subject is acted on (or is sometimes missing altogether). The active voice requires fewer words and tracks how people think. It also unambiguously shows who has made a promise, who has a legal duty, or who has the right to act. It should therefore be avoided.

Passive:

> This contract may be terminated at any time by either party on 30 days' written notice to the other party. (20 words)

Active:

> Either party may terminate this contract on 30 days' written notice to the other party. (15 words)

Never use personal pronouns

Personal pronouns speak to the reader and help avoid abstractions. We can't have that in a bad contract.

Without personal pronouns:

> Unless otherwise inconsistent with this Agreement or not possible, INSPECTOR agrees to perform the inspection in accordance with the current Standards of Practice of the International Association of Certified Home Inspectors posted at www.nachi.org/sop.htm. Although INSPECTOR agrees to follow InterNACHI's Standards of Practice, CLIENT understands that these standards contain limitations, exceptions, and exclusions.

With personal pronouns:

> Unless otherwise noted in this Agreement or not possible, we will perform the inspection in accordance with the current Standards of Practice of the International Association of Certified Home Inspectors ("InterNACHI") posted at www.nachi.org/sop.htm. You understand that these standards contain limitations.

If it might otherwise be unclear, the (good) contract can identify who "you" and "we" are.

Use superfluous words

Never use one word when several will do. More words mean longer contracts, and longer contracts justify higher fees and impress other lawyers. Be honest. When another lawyer sends you a 50-page residential lease, you feel kind of bad that your standard residential lease is only 9 pages. Is it possible that you left out 41

pages of important legal provisions that would better protect your client? That drafter must be a *really good* lawyer.

Here are some examples of simple words that can be replaced with superfluous words:

Simple	Superfluous
If	*In the event that*
Although	*Despite the fact that*
Because	*Owing to the fact that*

You can also use a thesaurus to find synonyms to increase your word count. Some of my favorite examples are:

- rest, residue, and remainder
- remise, release, sell, and quitclaim
- due and payable
- indemnify and hold harmless
- sell, convey, assign, transfer, and deliver

Use unnecessary, legalistic words

Aforementioned and *hereinafter* are always good, but you should also strive to incorporate as much Latin as possible when drafting a bad contract. I took four years of high-school Latin, and all I remember is *Quantum marmota monax si marmota esset lignum possit?*[5] Fortunately, the internet offers abundant resources to help you discover Latin phrases to incorporate into your contracts.[6]

If you can't work Latin into a contract, at least try to get a few foreign phrases in. *Force majeure* is a good one. It's shorter (and therefore more understandable) than *extraordinary events* or *circumstances beyond the parties' control*.

USE HYPERFORMAL SIGNATURE BLOCKS

Now that you have prepared the baddest contract ever, the parties must sign it to show that they agree to its terms. A bad contract must include a formal signature section to make sure the parties know that the 47-page monstrosity they're signing (with **W I T N E S S E T H** emblazoned across the first page) is an important legal document rather than a less important communication, like a note to little Wendy's teacher explaining that her bunny ate her homework. I recommend something like this:

> IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

This is particularly bad when there is no date and year above the signatures. Also, I like the reference to seals because few people or organizations use seals these days.

Do *not* do this:

> John Jones (Date)
>
> Suzy Smith (Date)

CONCLUSION

Most students emerge from law school with a basic understanding of how to draft a bad contract. After all, they've been reading legalese for three years and are petrified that if they omit a word, litigation will result. But after years of practice and litigating disputes arising out of poorly drafted documents, some lawyers forget that the profession depends on a steady supply of poorly drafted documents. They begin to advocate for plain English. Soon they begin to be annoyed by passive voice. Then *sell, convey, assign, transfer, and deliver* becomes simply *sell*. At that point, it's all over.

A good managing partner will stage an intervention and insist that the lawyer enter an appropriate 12-step program. Sometimes you've got to be cruel to be kind.[7] While treatment can cure good drafting, the best approach is to prevent the problem in the first place. Law schools and the bar must do more to educate lawyers on how to draft bad contracts. We owe it to the profession and our clients.

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Mark Cohen has 39 years of experience as a lawyer. He earned a B.A.in economics at Whitman College, a law degree at the University of Colorado, and an LL.M. in agricultural law from the University of Arkansas, where he also taught advanced legal writing. He has served as an Air Force JAG, prosecutor and municipal judge, and he spent six years on the advisory board of The Colorado Lawyer, including one as chair. Cohen's practice focuses on business and real-estate litigation. He is a frequent speaker on contracts, easements, the benefits of plain English, and piercing the corporate veil.

ENDNOTES

1. E.g., Adams, *A Manual of Style for Contract Drafting (4th Ed)* (Chicago: ABA, 2018), Burnham, *Drafting and Analyzing Contracts: A Guide to the Practical Application of the Principles of Contract Law (4th Ed)* (Durham: Carolina Academic Press, 2016), and Garner, *Garner's Guidelines for Drafting and Editing Contracts* (St. Paul: West Academic Publishing, 2019).
2. For an article that does something similar, see McDonald, *The Ten Worst Faults in Drafting Contracts*, 11 Scribes J Legal Writing 25 (2007).
3. See *DR Horton, Inc v Green*, 120 Nev 549, 556; 96 P3d 1159 (2004) (refusing to enforce an arbitration clause that, among other things, was written "in an extremely small font").
4. Some examples in this section are taken from *A Plain English Handbook: How to create clear SEC disclosure documents*, US Securities & Exchange Comm, available at <https://www.sec.gov/pdf/handbook.pdf> [https://perma.cc/8PTM-JUGT] (site accessed October 7, 2022).
5. How much wood could a woodchuck chuck if a woodchuck could chuck wood?
6. An excellent resource is *List of Latin legal terms*, Wikipedia <https://en.wikipedia.org/wiki/List_of_Latin_legal_terms> [https://perma.cc/NTW8-75DZ] (site accessed October 7, 2022).
7. Nick Lowe, "Cruel to Be Kind," on *Labour of Lust* (Columbia Records, 1979).

50 YEAR CELEBRATION

Congratulations to our 1970, 1971, and 1972 50-year honorees! We look forward to celebrating our 1973 honorees on May 25, 2023, at St. John's Resort in Plymouth.

BEST PRACTICES

Best practices for preliminary injunction motions

BY DANIEL D. QUICK

Ah, the adrenaline rush of a preliminary injunction. The panicked client phone call; the rapid preparation of a complaint and a motion; the urgency of a response and the recognition that, practically speaking, a case might be won or lost in very short order.

There is no doubting the relative speed with which one must move to obtain preliminary injunctive relief; if one wants to preserve the status quo, briskness is required. And that same fear of irreparable harm which drives preliminary injunction analysis also drives client anxiety. The potential loss of a trade secret or key customers at the hands of a departing employee, for example, often spurs an inexorable push for extraordinary haste. No less haste and hurry are required of the responding party, which often must swiftly marshal the facts and law, file a brief, and attempt to stave off a quick win for the movant.

In this crucible, opportunities for missteps abound. A few best practices can reduce anxiety and allow for the best chance of victory.

RESPECT THE NATURE OF THE MOTION

Not every aggrieved party — even where the harm is perceived as grave — qualifies for a preliminary injunction. But it is an extraordinary remedy, not an impossible one. The law comports with common sense in that both recognize that a focused request for relief which seeks to avoid a clear wrong can present a cognizable motion. One way of thinking about it is this: absent an injunction, can a court unring the bell and deliver justice? If not, you have the makings of a good motion, and many judges are mindful of the headaches which can be prevented if a disputed act is enjoined. But if your case is not the right case to get this relief, don't just roll the dice. It will be a bad loss right out of the gate which could undermine your client in the eyes of the court and embolden your adversary. Thus, client and lawyer must always consider whether other options exist, such as an initial cease and desist letter (which might give rise to a negotiated resolution) or pursuing expedited discovery rather than immediately filing a motion in order to present the best possible argument to the court.

BE HONEST WITH YOURSELF AND THE CLIENT

Any lawyer filing an injunction motion should warn their client of the risks and the very high burden. And a good lawyer will (tactfully) cross-examine their own client to make sure the facts are right and the defenses anticipated. This is no time for sloppiness, inaccuracies, or mischaracterizations. Once a judge concludes the movant isn't wearing the white hat or playing fast and loose with the facts, all is lost. Additionally, because emotions can be high and time short, clients sometimes don't tell a lawyer all the facts, which sets them up for trouble later in the case.

EXPLAIN IT PLAINLY AND MAKE IT SIMPLE

Often, an aggrieved party will attempt to spill their proverbial guts in the injunction motion, telling the court more than it needs to know and more than it can possibly digest. While a best practice for any motion, this is a particularly good time to focus on the key issues; leave out the detritus, distractions, and personal attacks; and explain clearly why the court should give you the extraordinary relief you require.

Bonus tip: consider using a verified complaint to support the factual bases for the motion, which will make motion preparation easier and help you think through carefully how the facts support the legal claims and relief sought.

YOU HAVE TO PROVE IRREPARABLE HARM

Of course you do, but this is the sine qua non of the motion and must be persuasively argued. Do not make the mistake of thinking

"Best Practices" is a regular column of the Michigan Bar Journal, edited by Georger Strander for the Michigan Bar Journal Committee. To contribute an article, contact Mr. Strander at gstrander@ingham.org.

the righteousness of your cause somehow satisfies this element. A strong showing of irreparable harm can make up for potential defenses on liability; a weak irreparable harm argument can cause the motion to be denied no matter how meritorious the underlying claim. Try your best to find an on-point case supporting a finding of irreparable harm in something akin to your case rather than relying on boilerplate statements.

DO NOT OVERREACH ON THE REMEDY SOUGHT

The more you ask for, the more opportunities to lose. Think carefully about what is essential relief to obtain and ask for that, not your client's fantasy scenario. If you sense judicial hesitation, be ready to adjust and narrow the scope of what you request. Non-competes are particularly good examples of this because judges can be loath to toss a violating employee out of work; if the judge is wobbling, consider whether half a loaf is better than none.

DO NOT SELL SHORT THE ARGUMENTS OF THE NON-MOVANT

Drinking your client's Kool-Aid is dangerous. You must anticipate and take seriously the defenses of the other side and consider the scope of what is at stake beyond this particular case. For example, is your contract subject to attack such that a loss also puts at risk other contracts with the same provisions? You must also anticipate the counternarrative; there is always another side of the story. For example, in a non-compete case, the employer's counsel must understand the circumstances of the employee's departure in order to anticipate their story that your client has unclean hands.

CONSIDER YOUR FORUM AND KNOW YOUR JUDGE

Once again — and always good advice — judges can have particular proclivities when it comes to preliminary injunctions. In terms of forum, there may be a significant difference between legal standards and practices in different states that are worth considering if you have options. And while federal courts are sometimes presumed to be more exacting in the proofs necessary to obtain an injunction, if there is solid case law in that circuit or district endorsing issuance of an injunction, it might make the difference.

DO NOT DIE ON THAT HILL

Getting a preliminary injunction is not easy, so if you don't win, don't give up. The judge may be very sympathetic to your client but hung up on irreparable harm; you can still win for your client. Perhaps the other side bamboozled the court to win the injunction motion; you can make sure those chickens come home to roost and swing momentum later in the case. If the injunction is granted, consider whether the ruling was tenuous enough such that the court might reconsider and either dissolve the injunction or narrow the relief. And don't forget about the security obligations; a convincing argument can force the moving party to question whether they really want to pony up the funds. Lastly, win or lose, the initial skirmish will often permit the parties to talk settlement and the judge might suggest facilitation even before ruling on the motion; the injunctive sword of Damocles can help persuade both sides to settle.

HAVE A PLAN B

It's all well and good to be fired up to file a motion, but what if you lose? You must anticipate what this would look like, because often in the injunction hearing itself you will have an opportunity to set the table going forward in a fashion that helps your cause, even though you lose the motion. For the non-movant, you must anticipate a potential defeat and how you can counterattack or otherwise minimize the harm done by the injunction. Show up to the hearing with arguments as to what you need and why even if the court is inclined to issue some version of an injunction.

IF RESPONDING, TAKE IT SERIOUSLY, DON'T MAKE IT WORSE, AND CONSIDER PEACE WITH HONOR

It may be surprising, but I've seen responding parties be almost blasé about a preliminary injunction motion. Sure, the other side has the burden, but using a lot of hyperbole and boilerplate case citations may tempt disaster. You cannot just assume a victory.

I've also seen respondents shoot themselves in the foot. For example, an injunction was filed to prevent a contested business transaction from closing and while the motion was pending, the defendant closed on the deal. The judge did not take that kindly and granted an injunction freezing all proceeds; the defendant never regained momentum in the case.

At the other end of the spectrum, if a lawsuit and motion are filed and your client is firmly in harm's way, find a way to settle. The movant likely knows that even the strongest case is no guarantee of obtaining an injunction; use that uncertainty to negotiate a livable injunction or perhaps a complete resolution.

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LIBRARIES & LEGAL RESEARCH

Practice makes professionalism

BY VIRGINIA C. THOMAS

"I know it when I see it."

—Former U.S. Supreme Court Justice Potter Stewart[1]

I must admit, former U.S. Supreme Court Justice Potter Stewart's famous words from his concurring opinion in *Jacobellis v. Ohio* bounced around in my head as I tried to put pen to paper for this column. Professionalism is a cornerstone of the legal … profession. It is, at once, a simple and complex concept. Lawyers understand what it means and incorporate it as the overarching principle of their practices. But trying to articulate what professionalism means is another thing altogether.

The State Bar of Michigan Strategic Plan 2017-2023 includes professionalism among its five core values.[2] From my reading, these values focus on public service not only in the practice of law, but in the sense of sharing our knowledge and skills for the benefit of others. In that vein, I would like to share three stories that show what professionalism looks like when lawyers give back to their communities.

THE U.S. CONSTITUTION ON A BUS TO D.C.

In early July, attorney Wanda Mayes[3] called our law library to ask if we had copies of the handy pocket-sized version of the U.S. Constitution that she remembered from her days as a Wayne State University law student. She needed about 50, explaining that she was organizing a cultural and educational bus tour of Washington, D.C., for youngsters from the New Grace Missionary Baptist Church later that month. Her goal was to teach them about the Bill of Rights and, particularly, the Fourth Amendment. Having a copy of the U.S. Constitution for each person on the tour would support group discussions and provide the opportunity to read further on their own.

We contacted our vendor representative[4] who granted permission to give Mayes the 52 copies we had on hand. It was meant to be!

Upon returning, Mayes summarized highlights from the trip. On the bus, the young travelers watched "The Central Park Five," a documentary about the case of five Black and Latino teenagers wrongly convicted of raping a white woman in New York's Central Park in 1989.[5] They played games like Black Card Revoked and #CULTURETAGS to break the ice and shared some lighthearted cultural fun. And, yes, they read the Fourth Amendment aloud and explored its meaning. Their conversations considered questions such as how to interact with police appropriately if they were ever questioned, detained, or arrested.

"Now," Mayes noted, "they know how to get a lawyer."

While in D.C., the group visited the Washington Monument, the National Museum of African American History and Culture, Arlington National Cemetery, the U.S. Capitol (where they met Sen. Debbie Stabenow), the White House, the Wharf, and other historic places.

The young travelers' excitement and level of engagement told Mayes that the journey was time well spent. She wishes this experience could be available to all young people. I agree. Everyone should be so fortunate as the New Grace youngsters, who were offered an opportunity to explore what it means to be a human being in our culture at this time.

Professionalism in a nutshell: Show up, be on time, be engaged, and be prepared. Listen twice as much as you speak. You have two ears and one mouth for a reason.

ATTORNEYS FOR ANIMALS: VOICES TO THE VOICELESS

Bee Friedlander and her husband, Don Garlit, both attorneys, have used their legal advocacy skills to advance animal welfare for decades. Both earned law degrees from Ohio State University Law School in the 1970s — part of "The Paper Chase" generation,[6] as they tell it. Though they shared a deep interest in social justice issues including animal welfare, neither had animal law practice or advocacy on their radars; Friedlander developed a successful civil law practice, while Garlit chose a career path within the automotive industry.

Friedlander and Garlit credit canine companions Susie and Erika for inspiring their deep appreciation of animals. Still, Friedlander had not considered combining her concern for animal welfare with the practice of law until she spotted a call in the Michigan Bar

Journal for attorneys "interested in or … currently practicing in the area of animal rights."[7] Friedlander and Garlit responded to the invitation from a fellow attorney, the late Wanda Nash, to help form an informational network.

The rest is history.

Friedlander and Garlit joined Nash as founding members of Attorneys for Animals (AFA),[8] a non-profit organization whose members put their legal skills to work to promote the welfare of animals. For example, AFA members inform and guide state and local government officials, many of whom are not lawyers, on animal-related issues and assist with drafting new laws and improving the effectiveness (and humaneness) of existing ones.

Said Garlit: "Legislators are pretty receptive to someone who can talk about legal issues in a calm way."[9]

In their roles with AFA, Friedlander and Garlit frequently draw upon their knowledge of legal systems, processes, and research. They also rely on their experience with negotiations, conflict resolution, and collaborations to build coalitions among animal welfare organizations and harness the power of diverse interests for a stronger voice. For example, during the Michigan Legislature's current session, Friedlander, who is the current AFA president, submitted a statement to the House Regulatory Reform Committee in support of HB 4881 and HB 4882. These substantially similar bills would, in part, require research facilities to offer dogs and cats no longer needed for research to an animal control shelter or animal welfare organization for the purpose of adopting them to permanent homes.

Friedlander and Garlit believe much more work must be done. They look forward to helping mentor the next generation of lawyers who share their passion for animal welfare.

Professionalism in a nutshell: Being an attorney guides a person in what you do — even outside the practice of law.

MAY IT PLEASE THE COURT

For most of us, required oral arguments during the first year of law school were our first up-close and personal encounters with representing clients in court. Despite the weak knees, clammy palms, and jangled nerves, it's a wonderful learning opportunity for every law student.

"For many 1L students, this is the most memorable experience from their first year of law school," said Kristin Theut, Wayne State University law professor and the school's legal research and writing director.[10]

That said, the experience would not be possible without the generosity of law school alumni and other members of the legal community who volunteer to serve as judges for student arguments. This is no small service. Volunteer judges must prepare by reading student briefs or bench briefs prepared by their professors, formulate questions, and dedicate time to be fully present in the moment as the students argue their cases.

Their participation is deeply appreciated by the students.

"The judges asked questions, but they were kind and listened to my answers," said Wayne Law professor Lynn Sholander about her own 1L oral argument. "They were also encouraging during the feedback session, noting high points and low points without being condescending. I appreciated the opportunity to have that experience with real-world practitioners."[11]

That appreciation is also shared by professors, who agreed that they value the insights gained from observing the volunteer judges engaging with their students.

Professionalism in a nutshell: Maintaining your obligation to represent clients vigorously and ethically while always demonstrating respect and civility toward the court and all parties involved.

CONCLUSION

These stories are a testament to the fact that professionalism is at the very heart of our legal community. It inspires, it advocates, it informs, it reaches out to mentor new members who aspire to a life in the law. And it's all for the good.

Virginia C. Thomas is a librarian IV at Wayne State University.

ENDNOTES

1. *Jacobellis v Ohio*, 378 US 184, 197; 84 S Ct 1676; 12 L Ed 2d 793 (1964).
2. *Strategic Plan 2017-2023*, SBM, available at <https://www.michbar.org/generalinfo/StrategicPlan>_[https://perma.cc/S4J4-EBUT]. The statement of core values, which guides the SBM in achieving its mission, includes justice, service, professionalism, diversity and inclusion, and innovation. All websites cited in this article were accessed October 7, 2022.
3. Mayes is a labor mediator for the State of Michigan, see *Wanda Mayes Recognized for her Work in Labor Law*, 24-7 Press Release (August 8, 2022) <https://www.24-7pressrelease.com/press-release/493359/wanda-mayes-recognized-for-her-work-in-labor-law> [https://perma.cc/R7Y4-6LW4].
4. The pamphlets were provided by LexisNexis.
5. *The Central Park Five* (2012), directed by Ken Burns, Sarah Burns, David McMahon.
6. *The Paper Chase* (1973), directed by James Bridges.
7. *Animal Rightists Sought*, 69 Mich B J 634 (1990).
8. Attorneys for Animals is now in its 27th year of service. See *Who We Are*, Attorneys for Animals, available at <https://attorneysforanimals.org/who-we-are> [https://perma.cc/6X8S-A8QE]. Its members were instrumental in establishing the Animal Law Section of the Michigan Bar in 1995. Currently, Friedlander serves as AFA president and Garlit is its treasurer.
9. Telephone interview with Don Garlit and Bee Friedlander (September 8, 2022).
10. Email from Kristin Theut to Virginia Thomas (September 14, 2022).
11. *Id.*

PRACTICING WELLNESS

Embrace ease to improve your career experience

BY KARISSA WALLACE

"Ease" is not a word that describes most of my career, but I now use it as a tool to achieve my career goals. This article describes my journey to give new meaning to ease, and why I embrace ease as an acceptable and desired part of my career.

EASE IS NOT THE ANTITHESIS TO HARD WORK

My deep dive on ease started when I heard actor Denzel Washington give a speech that illustrated common thoughts on ease:

> "Without commitment, you'll never start. Without consistency you'll never finish. Ease is a greater threat to progress than hardship."[1]

Ease is often conceptualized as giving little to no effort. Dictionary.com defines "ease" as freedom from labor, lack of difficulty, pain, or discomfort. With that definition, it's understandable why we can view ease as a threat to success. Most accomplishments require hard work.

As I went deeper into my career transformation journey, I leaned on alternative definitions of ease[2] such as:

- freedom from anxiety; a quiet state of mind
- to mitigate, lighten, or lessen
- to become less painful or burdensome

I began to realize that ease doesn't mean an absence of effort or pressure. It's not the antithesis of hard work or hardships. I began to understand that ease had less to do with external challenges and more to do with my internal experiences with those challenges.

EASE IS THE ABSENCE OF INTERNAL RESISTANCE

Several months later, I heard a podcast that offered a thought-provoking perspective on stress. To paraphrase, stress was defined as wanting your present situation to be something it's not. The discussion emphasized the importance of accepting the present moment as it is; acceptance doesn't mean giving up, but to stop resisting reality so you can act based on the present moment. This insight was at the core of developing my new relationship with ease.

My new relationship with ease started with small, but powerful, perspective shifts. The first shift was moving my focus from what was true to what was helpful. It was true that I was in a high-pressure, high-stress role and needed more resources and support. But focusing on what I lacked was not helpful. What did help was accepting the reality of my situation and deciding how to respond rather than react. Initially, my job didn't change, but the way I felt and thought about it did. As a result of those new thoughts and feelings, I adopted new behaviors. Those behaviors became the catalyst for people and circumstances to shift around me, which created more opportunities for ease.

As the ease continued to flow, I had a moment of clarity: I had unintentionally contributed to the stress I was experiencing. My negative thoughts and feelings poured gasoline on the stressful situations, creating even more feelings of uneasiness. This new awareness led me to develop a personal definition of ease as "the absence of internal resistance to external circumstances." Research supports this, finding that "feeling stressed and feeling overwhelmed seem to be related to our perception of how we are coping with our current situation and our ability to handle the accompanying emotions."[3]

"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.

IT'S OK TO WANT MORE EASE

When I first started embracing ease, I felt like I wasn't working hard enough even though I had evidence showing this was objectively untrue. I realized that I had internalized the concept of ease as the antithesis of work. If that didn't change, I would never feel like I was contributing enough unless I was struggling. When I heard that "ease is a greater threat to progress than hardship," it made me feel like suffering is a better path to progress. But that's not what science shows.

My relationship with ease started with small, but powerful, perspective shifts. The first shift was moving my focus from what was true to what was helpful. Focusing on what I lacked was not helpful.

Neuroscientists have proven that stress and anxiety significantly reduce your abilities to perform tasks.[4] Your brain goes into survival mode and diverts resources away from your memory, logic, and critical thinking functions. When your stress goes up, your performance and accuracy skills go down. Chronic stress can rewire your brain, making it more reactive to external pressures and less likely to return to normal after the stressful situation is over.[5]

Ease is a powerful antidote to stress. Ease can disrupt negative thought and emotion patterns. It can interrupt the automatic fight-or-flight stress response and allow you to reconnect with the parts of the brain associated with critical thinking. For those in careers that are often stressful and require deep thought (ahem … lawyers), ease is not optional. It's indispensable if you want to perform at the highest level without burning out. Hard work is necessary. Suffering is not.

PUTTING EASE IN ACTION

Ease starts as an inside job. You can't control what happens around you, but you can control what happens within you. Consider what ease looks like to you and decide whether you want more ease. Which behaviors of yours are preventing you from accessing more ease? What thoughts, feelings, or beliefs can you reframe to allow for more ease into your career?

My clients often come to me feeling overwhelmed with constant thoughts that "there is not enough time." Unfortunately, time stress is socially acceptable — how many times have you heard someone say, "There aren't enough hours in the day"? As a result, most of us have automatic negative thoughts and feelings about time.

While optimizing performance behaviors like getting organized, setting realistic goals, and prioritizing helps, your behavior modifications start with your thoughts, emotions, and beliefs. To soften the resistance that leads to lack of ease, you must also reframe your thoughts ("I have enough time to do what is important"), relate differently to your emotions (overwhelm is an emotional reaction that you can choose to act on or not), and address counterproductive beliefs ("urgent" doesn't always mean "immediate").

Today, I still work hard but rarely find myself suffering. Although there are still many aspects of my current role that I cannot control, I have learned to foster better thoughts and emotions within me. Once I developed a better understanding of and relationship with ease, my high-paced and high-stress career became easier and, at the same time, I was able to accomplish more. I'm confident that embracing ease can do the same for you.

Karissa Wallace is an executive coach and practices corporate law in Detroit. Connect with her on LinkedIn or by email at Karissa@MissionMastered.com.

ENDNOTES

1. *Denzel Washington 2017 NAACP Image Awards Speech*, Speakola (February 11, 2017), available at <https://speakola.com/arts/denzel-washington-naacp-image-awards-2017> [https://perma.cc/Z47N-8AHJ]. All websites cited in this article were accessed October 7, 2022.
2. *"ease,"* Dictionary.com <https://www.dictionary.com/browse/ease> [https://perma.cc/YK5R-HUEJ].
3 Brown, *Atlas of the Heart: Mapping Meaningful Connection and the Language of Human Experience* (New York: Random House, 2021).
4. *Protect Your Brain From Stress*, Harvard Health Publishing, Harvard Medical School (February 15, 2021) <https://www.health.harvard.edu/mind-and-mood/protect-your-brain-from-stress> [https://perma.cc/5EDG-PKD5].
5. *Id.*

LAW PRACTICE SOLUTIONS

Lawyer training shouldn't be one size fits all

BY HEIDI K. BROWN

We talk about athletes being in the zone when they hit their stride in performance and competition. The type of training that enables individual athletes to tap into peak zones varies from person to person and sport to sport. Coaches and trainers recognize that individual athletes bring different strengths, talents, dispositions, life experiences, confidence levels, physiques, and motivational drivers to their sport and tailor training accordingly.

A one-size-fits-all training approach just wouldn't work to get the most out of each athlete and cultivate them to fulfill their true potential. Like the athletic arena, the legal profession is performance driven. Yet legal training tends to reinforce a mostly uniform training model — the same general content and paradigms we've been drilling into law students and new lawyers for decades. Our current approach overlooks the reality that, like athletes, each of us learns, recovers from mistakes, processes stress, and flourishes differently.

Let's borrow a few pages from athletic coaches' playbooks. Let's consider how we can adjust legal training so every individual can soar. As a start, let's explore three zones familiar to many athletes: the individual zone of optimal functioning (IZOF), the eustress zone, and flow.

WHAT IS YOUR LAWYERING IZOF?

For decades, sports psychologists have studied the relationship between emotions and athletic performance. Athletes and their coaches realize that various combinations and degrees of positive and negative emotions can both enhance and hinder performance. The optimal tenor, mixture, and intensity of emotions for peak performance in sports training and competition depends on the person. In the 1970s, a Soviet sports psychologist named Dr. Yuri Hanin determined that individual athletes have a personalized state of emotional and physiological "arousal" — a condition of alertness and preparedness for movement and exertion — at which they perform at their best. He called this state the individual zone of optimal functioning.

INDIVIDUAL ZONE, NOT THE ONE-SIZE-FITS-ALL ZONE

Hanin's early research focused on anxiety — specifically, the link between individual athletes' optimal anxiety levels and their performances in sports training and competition. Later, Hanin and his colleagues broadened their inquiry by analyzing four categories of emotions and their respective effects on performance:

- Positive emotions that can be optimal for performance, such as purposefulness and resoluteness.
- Positive emotions that can be suboptimal for performance, such as easygoingness and satisfaction.
- Negative emotions that can be optimal for performance, such as tenseness and dissatisfaction.
- Negative emotions that can be suboptimal for performance, such as distress and fear.

Hanin and his colleagues determined that whether a particular emotion is constructive or destructive depended on the athlete. Importantly,

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.

when individual athletes became knowledgeable about their unique zones of optimal physiological and emotional arousal and consciously strived to operate within those states, they delivered peak performance. Outside such zones, performance declined. Great athletes, with the help of their coaches, study and get to know their IZOF.

Lawyers, like athletes, bear a lot of pressure to deliver peak performance in high-stakes scenarios. Emotion, along with logical reasoning and credibility, comprise Aristotle's three pillars of persuasion. But often it seems we dismiss the role of emotion in legal training. It's time we create space in legal training to talk realistically about emotions; study how different shades of positive and negative emotions can optimize or hinder our learning and performance; and consider environments, scenarios, interpersonal dynamics, and tasks in which we individually deliver our best work. Lawyers should get to know their IZOF.

WHAT'S YOUR EUSTRESS ZONE?

Another concept we should incorporate into legal training is the eustress zone. In the 1970s, Dr. Hans Selye, a pioneer in stress research, introduced the concept of eustress. The "eu" in the word comes from the ancient Greek for "good, well, pleasant, or true." Selye distinguished among stress, eustress, and distress. Eustress is a way station between stress and distress, a zone where we purposefully engage with stressors we know we are equipped to handle. In sports training, eustress is the zone where athletes intentionally step into temporary states of discomfort, pushing their brains and bodies knowing they have the coping skills to ride out the rise and fall of physiological and emotional arousal.

Instead of automatically leaping from stress to distress, athletes activate strengths they have honed, choosing to linger in eustress, building additional stamina to handle future challenges. Later, in performance moments when they encounter similar physiological and emotional responses to new stressors, they trust their training and deliver.

As lawyers, we can invest time learning how to toggle into a state of eustress — good stress — instead of blindly catapulting from stress to distress. Like IZOF, engaging the eustress zone requires self-study. We can observe the natural rise and fall of physical and emotional sensations triggered by inevitable stress, develop healthy coping routines, and practice activating stress management techniques to stay in the eustress zone. Ultimately, in moments of lawyering performance, we trust our training and deliver quality work.

WHAT'S YOUR FLOW ZONE?

Psychologist Dr. Mihaly Csikszentmihalyi coined the term "flow" to describe the state in which people are so involved in an activity that nothing else seems to matter. He said flow can happen when "our body or mind is stretched to its limits in a voluntary effort to accomplish something difficult and worthwhile." For athletes, flow is that zone in training or performance when everything just seems to click — a basketball player sinking one three-point shot after another, a gymnast nailing a floor routine, a marathoner hitting that runner's high. But flow is not reserved for athletes. As lawyers, we can access and cultivate flow in our work.

Dr. Csikszentmihalyi and his colleagues compiled a list of nine components characterizing flow states for athletes, which likewise can apply to lawyers:

- A balance between a given challenge and our skill level.
- A clear goal for an activity or training session.
- A sense of control over the interim steps needed to accomplish the task.
- Unambiguous and immediate feedback, either self-generated or external.
- An ability to tune out the world and concentrate on the task at hand.
- A melting away of boundaries between action and awareness.
- A loss of self-consciousness or self-judgment.
- Transformation of time.
- An autotelic experience, one where the activity is enjoyable without need for an external reward.

Maybe flow happens for you when you're delivering an oral argument or an opening statement in the courtroom. Perhaps you hit flow when you're negotiating, putting a deal together, or figuring out a creative solution to a tough legal quandary.

Legal writing is my flow state. I lose all sense of time and space. Challenge and skill settle into equipoise. When I eventually look up from my laptop, I'm disoriented. My hair is wild. I'm famished and exhilarated.

Everyone deserves a flow state.

Flow can infuse meaning, purpose, and zest into our lawyering lives. But the circumstances and conditions that facilitate flow differ wildly for each of us. We can't force or fake flow. To cultivate it, we must identify the particular activities, challenge levels, requisite skills, and environmental surroundings that get us into our individual groove. Flow is the opposite of one size fits all.

ACCESSING IZOF, EUSTRESS, AND FLOW

How can we tap into our lawyering IZOF, eustress zones, and flow states?

First, let's carve out a place in legal education and training to highlight the individuality of our strengths, interests, and learning styles.

Second, let's enhance our emotional literacy. Let's honor the role that emotion inevitably plays in our day-to-day lawyering and professional development. Let's investigate and study how different emotions affect our confidence, cognitive clarity, and communication skills.

Third, let's improve our emotional self-regulation. Let's learn how to engage with constructive emotions and reframe suboptimal ones. Let's get better at toggling ourselves into our IZOF and lingering in our eustress zone.

Fourth, let's find and facilitate flow states. Let's amp up skills training so we can meet rigorous challenges. Let's curate environmental circumstances that allow us to concentrate, everything in us to click, and our best work to emerge like athletes in the zone.

CONCLUSION

Author Caroline Williams wrote that "[we] are not a brain on legs." Our intellect will only get us so far. Through greater appreciation and understanding of our emotional and physiological dimensions, we'll reach new performance heights as individuals and professionals.

This article originally appeared on the Attorney at Law Magazine website on Jan. 22, 2022, at https://attorneyatlawmagazine.com/athletic-performance-training-isnt-one-size-fits-all-lawyer-training-shouldnt-be-either.

Heidi K. Brown is a professor and director of legal writing at Brooklyn Law School. She is the author of *The Introverted Lawyer: A Seven-Step Journey Toward Authentically Empowered Advocacy, Untangling Fear in Lawyering: A Four-Step Journey Toward Powerful Advocacy,* and *The Flourishing Lawyer: A Multi-Dimensional Approach to Performance and Well-Being.*

Michigan's Statewide e-Filing Initiative

Sponsored by the State Court Adminstrative Office

The State Court Administrative Office is pleased to announce that MiFILE will be implemented in nine new courts beginning on Nov. 17. All attorneys practicing in those courts will be required to e-file their documents using MiFILE per Michigan Court Rule 1.109(G)(3)(f). You will need a MiFILE account to e-file, e-serve, and receive electronic notifications.

To register your account, visit the MiFILE website at mifile.courts.michigan.gov, click the "Sign Up" button, and complete the required fields. For assistance, watch the MiFILE tutorial "How to Register for a New Account" at www.youtube.com/watch?v=A34WAl476gE. Attorneys are highly recommended to attend training before using MiFILE. Training webinar dates and times are listed at mifile.info/training/.

IMPORTANT:

When setting up your MiFILE account, you must use the MiFILE email address you registered with the State Bar of Michigan. If you did not register a MiFILE email address with the State Bar, use your primary email address instead. If you don't want to use your primary email address in MiFILE, register a MiFILE email address with the State Bar. Failing to use an email address registered with the State Bar may impact e-service because MiFILE uses the State Bar files for managing attorney information.

MiFILE will be implemented in the following courts:

- 10th District Court (Calhoun County)
- 40th District Court (Macomb County, St. Clair Shores)
- 41B District Court (Macomb County, Clinton Township)
- 51st District Court (Oakland County, Waterford)
- 54B District Court (Ingham County, East Lansing)
- 98-1 District Court (Gogebic County)
- Calhoun County Probate Court
- Gogebic County Probate Court
- Missaukee County Probate Court

The State Bar of Michigan Alternative Dispute Resolution Section Announces 2022 Award Winners

The Alternative Dispute Resolution Section of the State Bar of Michigan is proud to announce that the following individuals are the recipients of the ADR Section's major awards in 2022. The award recipients were honored at the ADR Annual Conference Awards Ceremony held on October 1.

GREGORY CONYERS

Is the recipient of the **Diversity and Inclusion Award.** Greg serves as the Director of Diversity of the State Bar of Michigan. In that role, he has been promoting diversity in the Bar and ADR for over a decade and championing DEI since before it was mainstreamed.

LEE HORNBERGER

Is the recipient of the **Distinguished Service Award**. A former Chair of the ADR Section, Lee has been instrumental in keeping neutrals up to date on relevant law through his yearly case reviews at the Annual Conference and is a regular contributor to Section webinars. In his time since serving as Chair, he has tirelessly promoted the inclusion of women and people of color in the ADR community.

BELINDA DULIN

Is the recipient of the **Nanci S. Klein Award.** Belinda is the Executive Director of the Dispute Resolution Center for Washtenaw and Livingston Counties. She is instrumental in efforts to increase the use of restorative justice practices and principles as part of local efforts to reform the criminal legal system. She also chairs the social justice committee of the Michigan Community Mediation Association.

BETTY R. WIDGEON

Is the recipient of the **George N. Bashara Jr. Award.** As the Immediate Past Chair of the ADR Section, Betty has continued her tremendous work on behalf of the dispute resolution community here in Michigan, while increasing her national recognition as a neutral par excellence.

LISA TIMMONS

Is the recipient of the **Hero of ADR Award.** Lisa is the Executive Director of the Mediation Tribunal Association. She moderated and helped create the "Diversifying the Practice of ADR" presentation at the ADR Section Annual Conference in 2021. She serves on the ADR Section Council and contributes her time to activities that promote the diversification of the legal community.

For more information about the Alternative Dispute Resolution Section of the State Bar of Michigan visit https://connect.michbar.org/adr/home.

SBM State Bar of Michigan | ALTERNATIVE DISPUTE RESOLUTION SECTION

IN MEMORIAM

RICHARD A. CAMPBELL, P11561, of Leland, N.C., died July 29, 2022. He was born in 1933, graduated from Wayne State University Law School, and was admitted to the Bar in 1965.

LOUIS P. CECCHINI, P11749, of Montgomery, Texas, died Sept. 27, 2022. He was born in 1936, graduated from Wayne State University Law School, and was admitted to the Bar in 1966.

THOMAS S. MCLEOD, P39313, of Westland, died April 17, 2021. He was born in 1953, graduated from University of Detroit School of Law, and was admitted to the Bar in 1986.

JOHN F. MERTZ, P25200, of Lansing, died June 19, 2022. He was born in 1949, graduated from Wayne State University Law School, and was admitted to the Bar in 1975.

DONALD E. OVERBEEK, P18569, of Scotts, died Sept. 10, 2022. He was born in 1928, graduated from University of Michigan Law School, and was admitted to the Bar in 1966.

ROBIN R. RAUSCH, P36165, of Birmingham, died April 8, 2022. She was born in 1956 and was admitted to the Bar in 1984.

ALAN VIETH STUART, P73180, of Lansing, died Sept. 16, 2022. He was born in 1939, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 2009.

MICHAEL J. TRAGER, P23802, of Allen Park, died Sept. 16, 2022. He was born in 1944, graduated from Detroit College of Law, and was admitted to the Bar in 1974.

HON. DEBORAH G. TYNER, P33227, of Bingham Farms, died Sept. 7, 2022. She was born in 1956, graduated from Wayne State University Law School, and was admitted to the Bar in 1981.

HON. MICHAEL A. WEIPERT, P35050, of Monroe, died March 3, 2022. He was born in 1956, graduated from Detroit College of Law, and was admitted to the Bar in 1983.

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.

ORDERS OF DISCIPLINE & DISABILITY

REPRIMAND WITH CONDITION (BY CONSENT)

Ethan D. Baker, P73588, Troy, by the Attorney Discipline Board Tri-County Hearing Panel #81. Reprimand, effective Sept. 29, 2022.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Discipline pursuant to MCR 9.115(F)(5) that was approved by the Attorney Grievance Commission and accepted by the hearing panel. Based upon the respondent's admissions and the stipulation of the parties, the panel found that the respondent committed professional misconduct by improperly using his IOLTA account held at JP Morgan Chase Bank from July-November 2018.

Specifically, and in accordance with the parties' stipulation, the panel found that the respondent held funds other than client or third-person funds in an IOLTA in violation of MRPC 1.15(a)(3); deposited his own funds into an IOLTA in an amount more than reasonably necessary to pay financial institution service charges or fees in violation of MRPC 1.15(f); and engaged in conduct that was in violation of the Rules of Professional Conduct in violation of MRPC 8.4(a).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be reprimanded and subject to a condition relevant to the established misconduct. Costs were assessed in the amount of $772.79.

REPRIMAND WITH CONDITIONS (BY CONSENT)

S. Garrett Beck, P27668, Petoskey, by the Attorney Discipline Board Emmet County Hearing Panel #1. Reprimand, effective Sept. 20, 2022.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Reprimand with Conditions pursuant to MCR 9.115(F)(5) that was approved by the Attorney Grievance Commission and accepted by the hearing panel. Based upon the respondent's plea of no contest as set forth in the parties' stipulation and in accordance with the parties' stipulation, the panel found that the respondent engaged in frivolous litigation as he asserted issues and brought proceedings that had no basis

in law or fact in violation of MRPC 3.1 (count 1); brought or defended a proceeding or issue for which there was no basis for doing so in violation of MRPC 3.1 (count 2); violated or attempted to violate the Rules of Professional Conduct in violation of MRPC 8.4(a) (counts 1-2); engaged in conduct that is prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1) (counts 1-2); 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) (counts 1-2).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be reprimanded and subject to conditions relevant to the established misconduct. Costs were assessed in the amount of $1,006.21.

REINSTATEMENT

On Aug. 2, 2022, the hearing panel issued an Order of Suspension with Conditions (By Consent), suspending the respondent from the practice of law in Michigan for 30 days effective Aug. 24, 2022. On Sept. 23, 2022, the respondent, Isaiah Lipsey, submitted an affidavit and an amended affidavit pursuant to MCR 9.123(A) showing that he has fully complied with all requirements of the Order of Suspension with Conditions (By Consent). On Sept. 23, 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, Isaiah Lipsey, is **REINSTATED** to the practice of law in Michigan effective Sept. 23, 2022.

DISBARMENT (BY CONSENT)

Jay A. Schwartz, P45268, Northville, by the Attorney Discipline Board Tri-County Hearing Panel #21. Disbarment, effective Nov. 17, 2021.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Disbarment which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contained the respondent's admission that he was convicted by jury verdict of one count of bribery conspiracy concerning programs receiving federal funds, a felony, in violation of 18 § USC 666(a)(2) and 18 § USC 371 and two counts of bribery concerning programs receiving federal funds, felonies, in violation of 18 § USC 666(a)(2) in *United States of America v. Jay A. Schwartz,* United States District Court, Eastern District of Michigan Case No. 3:19 cr 20451 RHC. In accordance with MCR 9.120(B)(1), the respondent's license to practice law in Michigan was automatically suspended effective Nov. 17, 2021, the date of his felony conviction.

Based on the respondent's convictions, admissions, and the parties' stipulation, the panel found that the respondent committed professional misconduct when he engaged in conduct that violated a criminal law of a

(CONTINUED)

state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615 in violation of MCR 9.104(5).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be disbarred from the practice of law in Michigan. Total costs were assessed in the amount of $1,252.84.

DISBARMENT (BY CONSENT)

Anthony J. Semaan, P37589, Livonia, by the Attorney Discipline Board Tri-County Hearing Panel #1. Disbarment, effective Sept. 20, 2022.[1]

The respondent and the grievance administrator filed a Stipulation for Consent Order of Discipline which was approved by the Attorney Grievance Commission and accepted

by the hearing panel. The stipulation contained the respondent's admission that he was convicted of embezzlement ($50,000 or more, but less than $100,000), a felony, in violation of MCL 750.1746 in *People of the State of Michigan v. Anthony Joseph Semaan,* Third Judicial Circuit Court, Case No. 21-00349801-FH. In accordance with MCR 9.120(B)(1), the respondent's license to practice law in Michigan was automatically suspended effective Nov. 2, 2021, the date of his felony conviction.

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

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be disbarred from the practice of law in Michigan. Total costs were assessed in the amount of $817.12.

1. The respondent has been continuously suspended from the practice of law in Michigan since Nov. 2, 2021. Please see Notice of Automatic Interim Suspension issued Nov. 9, 2021.

MONEY JUDGMENT INTEREST RATE

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

For a complaint filed after Dec. 31, 1986, the rate as of July 1, 2022, is 3.458%. 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.

MICHIGAN BAR JOURNAL

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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

MEMBER ANNOUNCEMENTS

When your office has something to celebrate, let the Michigan legal community know about it with a member announcement in the *Bar Journal* and michbar.org/newsandmoves for one month.

- Announce an office opening, relocation, or acquisition
- Welcome new hires or recognize a promotion
- Celebrate a firm award or anniversary
- Congratulate and thank a retiring colleague

Contact Stacy Ozanich for details
517-346-6315 | sozanich@michbar.org

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

[AMENDED] M Crim JI 4.11a
Evidence of Other Acts of Domestic Violence or Sexual Assault

(1) The prosecution has introduced evidence that the defendant may have committed an act of [~~of claimed acts of~~ domestic violence*/sexual assault*/*(identify general nature of crime found in MCL 28.722(s),(u) or (w)* ~~by the defendant~~ for which [he/she] is not on trial.

(2) Before you may consider such alleged acts as evidence against the defendant, you must first find that the defendant actually committed the act.

(3) If you find that the defendant did commit that act, you may consider it in deciding if the defendant committed the [offense/offenses] for which [he/she] is now on trial.

(4) You must not convict the defendant ~~here~~ in this case solely because you think [he/she] is guilty of other bad conduct. The evidence must convince you beyond a reasonable doubt that the defendant committed the alleged crime, or you must find [him/her] not guilty.

Use Note

* Domestic violence for purposes of this instruction is defined in MCL 768.27b(~~5~~ 6) (a) and (b). The meaning of "sexual assault" are those offenses under the Sex Offender Registration Act found at MCL 28.722(s), (u), or (w).

[AMENDED and COMBINED] M Crim JI 7.16
~~Duty to Retreat to Avoid~~ Conditions for Using Force or Deadly Force
~~M Crim JI 7.19~~
~~Nondeadly Aggressor Assaulted with Deadly Force~~

(1) [*Select (A) or (B) depending on the evidence and circumstances.*]

(A) A person can use [force/deadly force] in self-defense only where it is necessary to do so. If the defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the defendant honestly and reasonably believed [he/she] needed to use [force/deadly force] in self-defense.[1]

(B) A defendant who [assaults someone else with fists or a weapon that is not deadly/insults someone with words/trespasses on someone else's property/tries to take someone else's property in a nonviolent way] does not lose all right to self-defense. If someone else assaults [him/her] with deadly force, the defendant may act in self-defense, but only if [he/she] ~~retreats~~ retreated ~~if it is~~ where it would have been safe to do so.[1]

(2) However,[1] a person is never required to retreat under some circumstances: [He/She] does not need to retreat if [attacked in (his/her) own home/(he/she) reasonably believes that an attacker is about to use a deadly weapon/subjected to a sudden, fierce, and violent attack].[2]

(3) Further, a person is not required to retreat if he or she

(a) has not or is not engaged in the commission of a crime at the time the [force/deadly force] is used,

(b) has a legal right to be where he or she is at that time, and

[Select from the following according to whether the defendant used deadly force or nondeadly force:]

(c) has an honest and reasonable belief that the use of ~~[force/~~ deadly force~~]~~ is necessary to prevent imminent [death/great bodily harm/sexual assault] of [himself/herself] or another person.

or

(c) has an honest and reasonable belief that the use of force is necessary to prevent the imminent unlawful use of force ~~of~~ against [himself/herself] or another person.

Use Note

Use this instruction when requested where some evidence of self-defense has been introduced or elicited. Where there is evidence that, at the time that the defendant used force or deadly force, he or she was engaged in the commission of some other crime, the Committee on Model Criminal Jury Instructions believes that circumstances of the case may provide the court with a basis to instruct the jury that the defendant does not lose the right to self-defense if the commission of that other offense was not likely to lead to the other person's assaultive behavior. See *People v. Townes*, 391 Mich 578, 593; 218 NW2d 136 (1974). The committee expresses no opinion regarding the availability of self-defense where the other offense may lead to assaultive behavior by another.

1. Paragraph (1) and "However" should be given only if there is a dispute whether the defendant had a duty to retreat. See *People v. Richardson*, 490 Mich 115, 803 NW2d 302 (2011).

2. The court may read whatever alternatives may apply or adapt them to such other circumstances as may apply to the evidence presented at trial.

[NEW] M Crim JI 7.26
Parental Kidnapping — Defense of Protecting Child; Burden of Proof

(1) The defendant says that [he/she] is not guilty of parental kidnapping because [he/she] was acting to protect [*name child*] from an immediate and actual threat of physical or mental harm, abuse, or neglect. A person is not guilty of parental kidnapping when [he/she] proves this defense.

(2) Before considering the defense of protecting the child, you must be convinced beyond a reasonable doubt that the prosecutor proved the elements of parental kidnapping. If you are not, your verdict should simply be not guilty of that offense. If you are convinced that the defendant committed the offense, you should consider the defendant's claim that [he/she] was protecting the child from an immediate and actual threat of physical or mental harm, abuse, or neglect.

(3) In order to establish that [he/she] was acting to protect the child, the defendant must prove three elements by a preponderance of the evidence. A preponderance of the evidence means that [he/she] must prove that it is more likely than not that each of the elements is true.

(4) First, the defendant must prove that [*name child*] was in actual danger of physical or mental harm, abuse, or neglect.

(5) Second, the defendant must prove that the danger of physical or mental harm, abuse, or neglect to [*name child*] was immediate. That is, if the defendant failed to act [*name child*] would have been physically or mentally harmed or abused or suffered abuse very soon.

(6) Third, the defendant must prove that [his/her] actions were reasonably intended to prevent the danger of physical or mental harm, abuse, or neglect to [*name child*].

(7) You should consider these elements separately. If you find that the defendant has proved all three of these elements by a preponderance of the evidence, then you must find [him/her] not guilty of parental kidnapping. If the defendant has failed to prove any of these elements, the defense fails.

[NEW] M Crim JI 37.1b
Offering Commission, Gift, or Gratuity to Agent or Employee

(1) The defendant is charged with the crime of offering or promising a commission, gift, or gratuity to an agent or employee to influence how the agent or employee performs the employer's business. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*identify agent or employee*] was the agent or employee of [*name principal or employer*].

(3) Second, that the defendant

[select a or b]

(a) [gave/offered or promised] a [commission/gift/gratuity] to [*identify agent or employee*].

(b) offered to or promised that [he/she] would perform some act that would benefit [*identify agent or employee*] or another person.

(4) Third, that when the defendant [(gave/offered or promised) a (commission/gift/gratuity) to (*identify agent or employee*)/offered to or promised that (he/she) would perform some act or offer to perform some act that would benefit (*identify proposed donor*) or another person], the defendant did so with the intent to influence [*identify agent or employee*]'s actions regarding [*name principal or employer*]'s business.

[NEW] M Crim JI 37.2b
Accepting Commission, Gift, or Gratuity by Agent or Employee

(1) The defendant is charged with the crime of requesting or accepting a commission, gift, or gratuity as an agent or employee to perform his employer's business according to an agreement with some other person. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was the agent or employee of [*name principal or employer*].

(2) Second, that the defendant

[*select a, b, or c*]

(a) [requested/accepted] a [commission/gift/gratuity] from [*identify proposed donor*] for [himself/herself] or another person.

(b) [requested/accepted] a promise of a [commission/gift/gratuity] from [*identify proposed donor*] for [himself/herself] or another person.

(c) [requested/accepted] that [*identify proposed donor*] would perform some act or offer to perform some act that would benefit [himself/herself] or another person.

(4) Third, that when the defendant [requested/accepted] [(the commission/the gift/the gratuity) from (*identify proposed donor*)/the promise of a (commission/gift/gratuity) from (*identify proposed donor*)/that (*identify proposed donor*) would perform some act or offer to perform some act that would benefit defendant or another person], the defendant did so agreeing or understanding with [*identify proposed donor*] that [he/she] would [*describe conduct agreed upon between defendant and donor*] regarding [*name principal or employer*]'s business.

[AMENDED] M Crim JI 37.3b
Bribing Witnesses — Crime/Threat to Kill

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

(2) First, that [*name complainant*] was an individual who was testifying, or going to testify, or going to provide information at an ongoing or future official proceeding. An official proceeding is a proceeding heard by a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath.[1]

(3) Second, that the defendant [gave/offered to give/promised to give] anything of value to [*name complainant*].[2]

(4) Third, that when the defendant [gave/offered to give/promised to give] something of value to [*name complainant*], [he/she] intended to [discourage (*name complainant*) from attending the proceeding, testifying at the proceeding, or giving information at the proceeding/influence (*name complainant*)'s testimony at the proceeding/encourage (*name complainant*) to avoid legal process, withhold testimony, or testify falsely]. It does not matter whether the official proceeding took place, as long as the defendant knew or had reason to know that [*name complainant*] could be a witness or was going to provide information at the ongoing or future proceeding.

(5) Fourth, that the defendant's actions involved [committing or attempting to commit a crime/a threat to kill or injure a person/a threat to cause property damage].

[*Read the following bracketed material where the charge involves a threat.*]

[A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been meant as a true threat, and not, for example, idle talk, or a statement made in jest, or a solely political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage. It does not matter whether the defendant actually intended to carry out the threat or could carry out the threat.]

[AMENDED] M Crim JI 37.4
Intimidating Witnesses

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

(2) First, that [*name complainant*] was an individual who was testifying, or going to testify, or going to provide information at an ongoing or future official proceeding. An official proceeding is a proceeding heard by a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath.[1]

(3) Second, that the defendant [threatened/tried to intimidate] [*name complainant*].

[*Read the following bracketed material where the charge is that the defendant threatened the complainant.*]

[A threat is a written or spoken statement that shows an intent to injure or harm another person, or that person's property or family in some way. ~~No particular words are necessary, and it can be said or written in vague terms that do not state exactly what injury will occur. But it must be definite enough so that a person of ordinary intelligence would understand it as a threat.~~ A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been meant as a true threat, and not, for example, idle talk, or a statement made in jest, or a solely political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage. It does not matter whether the defendant actually intended to carry out the threat or could carry out the threat.]

(4) Third, that when the defendant [threatened/tried to intimidate] [*name complainant*], [he/she] intended to [discourage (*name complainant*) from attending the proceeding, testifying at the proceeding, or giving information at the proceeding/influence (*name complainant*)'s testimony at the proceeding/encourage (*name complainant*) to avoid legal process, withhold testimony, or testify falsely]. It does not matter whether the official proceeding took place, as long as the defendant knew or had reason to know that [*name complainant*] could be a witness or was going to provide information at the ongoing or future proceeding.

[AMENDED] M Crim JI 37.4a
Intimidating Witnesses — Criminal Case, Penalty More Than Ten Years

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

(2) First, that [*name complainant*] was an individual who was testifying, or going to testify, or going to provide information at an ongoing or future official proceeding. An official proceeding is a proceeding heard by a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath.[1]

(3) Second, that the defendant [threatened/tried to intimidate] [*name complainant*].

[*Read the following bracketed material where the charge is that the defendant threatened the complainant.*]

[A threat is a written or spoken statement that shows an intent to injure or harm another person, or that person's property or family in some way. ~~No particular words are necessary, and it can be said or written in vague terms that do not state exactly what injury will occur. But it must be definite enough so that a person of ordinary intelligence would understand it as a threat.~~ A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been meant as a true threat, and not, for example, idle talk, or a statement made in jest, or a solely political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage. It does not matter whether the defendant actually intended to carry out the threat or could carry out the threat.]

(4) Third, that when the defendant [threatened/tried to intimidate] [*name complainant*], [he/she] intended to [discourage (*name complainant*) from attending the proceeding, testifying at the proceeding, or giving information at the proceeding/influence (*name complainant*)'s testimony at the proceeding/encourage (*name complainant*) to avoid legal process, withhold testimony, or testify falsely]. It does not matter whether the official proceeding took place, as long as the defendant knew or had reason to know that [*name complainant*] could be a witness or was going to provide information at the ongoing or future proceeding.

(5) Fourth, that the official proceeding was a criminal case charging a crime with a maximum punishment of more than 10 years or life in prison.

[AMENDED] M Crim JI 37.4b
Intimidating Witnesses — Crime/Threat to Kill

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

(2) First, that [*name complainant*] was an individual who was testifying, or going to testify, or going to provide information at an ongoing or future official proceeding. An official proceeding is a proceeding heard by a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath.[1]

(3) Second, that the defendant [threatened/tried to intimidate] [*name complainant*].

[*Read the following bracketed material where the charge is that the defendant threatened the complainant.*]

[A threat is a written or spoken statement that shows an intent to injure or harm another person, or that person's property or family in some way. ~~No particular words are necessary, and it can be said or written in vague terms that do not state exactly what injury will occur. But it must be definite enough so that a person of ordinary intelligence would understand it as a threat~~ A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been meant as a true threat, and not, for example, idle talk, or a statement made in jest, or a solely political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage. It does not matter whether the defendant actually intended to carry out the threat or could carry out the threat.]

(4) Third, that when the defendant [threatened/tried to intimidate] [*name complainant*], [he/she] intended to [discourage (*name complainant*) from attending the proceeding, testifying at the proceeding, or giving information at the proceeding/influence (*name complainant*)'s testimony at the proceeding/encourage (*name complainant*) to avoid legal process, withhold testimony, or testify falsely]. It does not matter whether the official proceeding took place, as long as the defendant knew or had reason to know that [*name complainant*] could be a witness or was going to provide information at the ongoing or future proceeding.

(5) Fourth, that the defendant's actions involved [committing or attempting to commit a crime/a threat to kill or injure a person/a threat to cause property damage.]

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS (CONTINUED)

[AMENDED] M Crim JI 37.5b
Interfering with Witnesses — Crime/Threat to Kill

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

(2) First, that [*name complainant*] was an individual who was testifying, or going to testify, or going to provide information at an ongoing or future official proceeding. An official proceeding is a proceeding heard by a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath.[1]

(3) Second, that the defendant impeded, interfered with, prevented, or obstructed [*name complainant*] from attending, testifying, or providing information, or tried to impede, interfere with, prevent, or obstruct [*name complainant*]. It does not matter whether the official proceeding took place, as long as the defendant knew or had reason to know that [*name complainant*] could be a witness at the proceeding.

(4) Third, that the defendant intended to impede, interfere with, prevent, or obstruct [*name complainant*] from attending, testifying at or providing information at the official proceeding.

(5) Fourth, that the defendant's actions involved [committing or attempting to commit a crime/a threat to kill or injure a person/a threat to cause property damage.]

[*Read the following bracketed material where the charge is that the defendant threatened the complainant.*]

[A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been meant as a true threat, and not, for example, idle talk, or a statement made in jest, or a solely political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage. It does not matter whether the defendant actually intended to carry out the threat or could carry out the threat.]

[AMENDED] M Crim JI 37.6
Retaliating Against Witnesses

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

(2) First, that [*name complainant*] was a witness at an official proceeding. An official proceeding is a proceeding heard by a legislative, judicial, administrative, or other governmental agency or official that is authorized to hear evidence under oath.[1]

(3) Second, that the defendant retaliated, attempted to retaliate, or threatened to retaliate against [*name complainant*] for having been a witness. Retaliate means to commit or attempt to commit a crime against the witness, or to threaten to kill or injure any person, or to threaten to cause property damage.

[*Read the following bracketed material where the charge is that the defendant threatened the complainant.*]

[A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been meant as a true threat, and not, for example, idle talk, or a statement made in jest, or a solely political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage. It does not matter whether the defendant actually intended to carry out the threat or could carry out the threat.]

[AMENDED] M Crim JI 37.8b
Retaliating for Crime Report

(1) The defendant is charged with retaliating or attempting to retaliate against a person for reporting criminal conduct. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*name complainant*] reported or attempted to report that [*defendant/identify other person*] [*describe conduct to be reported*].[1]

(3) Second, that the defendant [committed or attempted to commit the crime of (*identify other crime that the defendant is alleged to have committed*) as I have previously described to you[2] against (*name complainant*)/threatened to kill or injure any person/threatened to cause property damage.]

[*Read the following bracketed material where the charge is that the defendant threatened the complainant.*]

[A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been meant as a true threat, and not, for example, idle talk, or a statement made in jest, or a solely political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage. It does not matter whether the

defendant actually intended to carry out the threat or could carry out the threat.]

(4) Third, that when the defendant [committed or attempted to commit the crime of (*identify other crime that the defendant committed*) against (*name complainant*)/threatened to kill or injure any person/threatened to cause property damage], [he/she] did so as retaliation for [*name complainant*]'s having reported or attempting to report the crime of [*identify crime*].

[AMENDED] M Crim JI 37.9a
Influencing Statements to Investigators by Threat or Intimidation

(1) [The defendant is charged with/You may also consider the less serious offense of] threatening or intimidating a person in order to influence that person's statement or presentation of evidence to a police investigator [not involving the commission or attempted commission of another crime/a threat to kill or injure any person/a threat to cause property damage.] To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant made a threat or said or did something to intimidate [*name witness*.]

[*Read the following bracketed material where the charge is that the defendant threatened the witness*.]

[A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been meant as a true threat, and not, for example, idle talk, or a statement made in jest, or a solely political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage. It does not matter whether the defendant actually intended to carry out the threat or could carry out the threat.]

(3) Second, that when the defendant made the threat or used intimidating words or conduct, [he/she] was attempting to influence what [*name witness*] would tell [a police investigator/officer (*name complainant*)] or whether [*name witness*] would give some evidence to [a police investigator/officer (*name complainant*)] who [may be/was] conducting a lawful investigation of the crime of [*identify crime*].

[(4) Third, that when threatening or intimidating [name witness], the defendant [committed or attempted to commit the crime of (*identify other crime that the defendant committed*) as I have previously described to you/threatened to kill or injure any person/threatened to cause property damage.]

[NEW] M Crim JI 40.5
Public Intoxication

(1) The defendant is charged with the crime of being intoxicated in public and causing a disturbance or endangering persons or property. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was in a place open to the public, [*state location*].

(3) Second, that the defendant was intoxicated. A person is intoxicated when he or she is mentally or physically impaired as a result of consuming an intoxicating substance, such as an alcoholic beverage.

(4) Third, that the defendant [directly endangered the safety of another person or of property/disrupted the peace and quiet of other persons present/interfered with the ability of other persons to perform actions or duties permitted by law].[1]

Use Note

See *People v. Mash,* 45 Mich App 459; 206 NW2d 767 (1973), and *People v. Weinberg,* 6 Mich App 345; 149 NW2d 248 (1967), for *public disturbance* language.

1. The court may read any of the alternatives that apply to the prosecutor's theory of the case that are supported by the evidence.

[NEW] M Crim JI 41.2
Using a Device to Eavesdrop on a Private Conversation

(1) The defendant is charged with the crime of using a device to eavesdrop on a private conversation. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*identify complainants*] were having a private conversation where the defendant was not a participant.

(3) Second, that the defendant [used a device/knowingly aided another person in using a device/knowingly employed or procured another person to use a device] to overhear, record, amplify, or transmit the private conversation between [*identify complainants*].

(4) Third, that defendant did not have the consent of all persons who were part of the private conversation to overhear, record, amplify, or transmit the conversation.

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FROM THE MICHIGAN SUPREME COURT

ADM File No. 2002-37 Amendment of Rule 1.109 of the Michigan Court Rules

On order of the Court, this is to advise that the amendment of Rule 1.109 of the Michigan Court Rules 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 also will be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 1.109 Court Records Defined; Document Defined; Filing Standards; Signatures; Electronic Filing and Service; Access

(A)-(F) [Unchanged.]

(G) Electronic Filing and Service.

(1)-(2) [Unchanged.]

(3) Scope and Applicability.

(a)-(c) [Unchanged.]

(d) Converting Paper Documents. The clerk of the court shall convert to electronic format certain~~any~~ documents filed on paper in accordance with the electronic filing implementation plans established by the State Court Administrative Office.

(e)-(l) [Unchanged.]

(4)-(7) [Unchanged.]

(H) [Unchanged.]

Staff Comment (ADM File No. 2002-37): The amendment of MCR 1.109 provides SCAO the flexibility to determine, when appropriate, when certain documents filed on paper do not need to be imported into the MiFILE document management system until bulk e-filing capability is available.

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 January 1, 2023, by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2002-37. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2002-37 Retention of Amendment of Rule 1.109 of the Michigan Court Rules

On order of the Court, notice and opportunity for comment having been provided, the April 13, 2022, amendment of Rule 1.109 of the Michigan Court Rules is retained.

ADM File No. 2016-10 Proposed Amendments of Rules 2.002 and 7.109 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering amendments of Rules 2.002 and 7.109 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 2.002 Waiver of Fees for Indigent Persons

(A) Applicability and Scope.

(1) [Unchanged.]

(2) Except as otherwise provided in subrule (I), for the purposes of this rule, "fees" applies only to fees required by MCL 600.857, MCL 600.880, MCL 600.880a, MCL 600.880b, MCL 600.880c, MCL 600.1027, MCL 600.1986, MCL 600.2529, MCL 600.5756, MCL 600.8371, MCL 600.8420, MCL 700.2517, MCL 700.5104, and MCL 722.717. It also includes the cost of preparing a transcript for appeal.

(3)-(5) [Unchanged.]

(B)-(L) [Unchanged.]

Rule 7.109 Record on Appeal

(A) [Unchanged.]

(B) Transcript.

(1) Appellant's Duties; Orders; Stipulations.

(a) The appellant is responsible for securing the filing of the transcript as provided in this rule. Unless otherwise provided by circuit court order or by subrule (e), or this subrule, the appellant shall order the full transcript of testimony and other proceedings in the trial court or agency. Under MCR 7.104(D)(2), a party must serve a copy of any request for transcript preparation on the opposing party and file a copy with the circuit court.

(b)-(d) [Unchanged.]

(e) If the court finds that the appellant from an agency decision is receiving public assistance, represented by a legal services program, or indigent as described in MCR 2.002(C), (D), or (F), the court must order transcripts prepared at public expense.

(C)-(I) [Unchanged.]

Staff Comment (ADM File No. 2016-10): The proposed amendments of MCR 2.002 and 7.109 would allow for waiver of appellate transcript fees for indigent individuals.

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 January 1, 2023, by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2016-10. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2020-33 Amendment of Rule 3.903 of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 3.903 of the Michigan Court Rules is adopted, effective January 1, 2023.

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

Rule 3.903 Definitions

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)-(18) [Unchanged.]

(19) "Party" includes ~~the~~

(a) ~~petitioner and juvenile~~ in a delinquency proceeding,~~;~~

(i) the petitioner and juvenile.

(b) ~~petitioner, child, respondent, and parent, guardian, or legal custodian~~ in a protective proceeding,~~.~~

(i) the petitioner, child, and respondent

(ii) the parent, guardian, or legal custodian.

(20)-(27) [Unchanged.]

(B)-(F) [Unchanged.]

Staff Comment (ADM File No. 2020-33): The amendment of MCR 3.903 clarifies the definition of a "party" in child protective proceedings.

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. 2021-13 Amendment of Rule 8.119 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

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

been provided, and consideration having been given to the comments received, the following amendment of Rule 8.119 of the Michigan Court Rules is adopted, effective January 1, 2023.

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

Rule 8.119 Court Records and Reports; Duties of Clerks

(A)-(B) [Unchanged.]

(C) Filing of Documents and Other Materials. The clerk of the court shall process and maintain documents filed with the court as prescribed by Michigan Court Rules and the Michigan Trial Court Records Management Standards and all filed documents must be file stamped in accordance with these standards. The clerk of the court may only reject documents submitted for filing that do not comply with MCR 1.109(D)(1) and (2), are not signed in accordance with MCR 1.109(E), or are not accompanied by a required filing fee or a request for fee waiver under MCR 2.002(B), unless already waived or suspended by court order. Documents prepared or issued by the court for placement in the case file are not subject to rejection by the clerk of the court and shall not be stamped filed but shall be recorded in the case history as required in subrule (D)(1)(a) and placed in the case file.

(D)-(L) [Unchanged.]

Staff Comment (ADM File No. 2021-13): The amendment of MCR 8.119 clarifies that a request for a fee waiver must be filed in accordance with MCR 2.002(B), which requires the request to be made on a form approved by the State Court Administrative Office.

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. 2021-16
Amendment of Rule 7.305 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 7.305 of the Michigan Court Rules is adopted, effective January 1, 2023.

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

Rule 7.305 Application for Leave to Appeal

(A)-(B) [Unchanged.]

(C) When to File.

(1) [Unchanged.]

(2) Application After Court of Appeals Decision. Except as provided in subrule (C)(4), the application must be filed within ~~28 days in termination of parental rights cases, within~~ 42 days in ~~other~~ civil cases, or within 56 days in criminal cases, after:

(a)-(d) [Unchanged.]

(3)-(7) [Unchanged.]

(D)-(I) [Unchanged.]

Staff Comment (ADM File No. 2021-16): The amendment of MCR 7.305 increases the 28-day time frame for filing an application for leave to appeal in cases where parental rights have been terminated.

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. 2021-17
Rescission of Administrative Order No. 1998-1 and Amendment of Rule 2.227 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, Administrative Order No. 1998-1 is rescinded and the amendment of MCR 2.227 of the Michigan Court Rules is adopted, effective January 1, 2023.

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

Rule 2.227 Transfer of Actions on Finding of Lack of Jurisdiction

(A) Transfer to Court Which Has Jurisdiction. Except as otherwise provided in this rule, w~~W~~hen the court in which a civil action is pending determines that it lacks jurisdiction of the subject matter of the action, but that some other Michigan court would have jurisdiction of the action, the court may order the action transferred to the other court in a place where venue would be proper. If the question of jurisdiction is raised by the court on its own initiative, the action may not be transferred until the parties are given notice and an opportunity to be heard on the jurisdictional issue.

(B) Transfers From Circuit Court to District Court.

(1) A circuit court may not transfer an action to district court under this rule based on the amount in controversy unless:

(a) the parties stipulate in good faith to the transfer and to an amount in controversy not greater than the applicable jurisdictional limit of the district court; or

(b) from the allegations of the complaint, it appears to a legal certainty that the amount in controversy is not greater than the applicable jurisdictional limit of the district court.

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

(ED) Procedure After Transfer.

(1) The action proceeds in the receiving court as if it had been originally filed there. If further pleadings are required or allowed, the time for filing them runs from the date the filing fee is paid under subrule (DC)(1). The receiving court may order the filing of new or amended pleadings. If part of the action remains pending in the transferring court, certified copies of the papers filed may be forwarded, with the cost to be paid by the plaintiff.

(2) [Unchanged.]

(3) A waiver of jury trial in the court in which the action was originally filed is ineffective after transfer. A party who had waived trial by jury may demand a jury trial after transfer by filing a demand and paying the applicable jury fee within 28 days after the filing fee is paid under subrule (DC)(1). A demand for a jury trial in the court in which the action was originally filed is preserved after transfer.

(E) [Relettered (F) but otherwise unchanged.]

Staff Comment (ADM File No. 2021-17): The rescission of Administrative Order No. 1998-1 and amendment of MCR 2.227 moves the relevant portion of the administrative order into court rule format and makes the rule consistent with the holding in *Krolczyk v Hyundai Motor America,* 507 Mich 966 (2021).

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. 2021-18
Amendment of Rule 3.943 of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 3.943 of the Michigan Court Rules is adopted, effective January 1, 2023.

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

Rule 3.943 Dispositional Hearing

(A)-(D) [Unchanged.]

(E) Dispositions.

(1)-(6) [Unchanged.]

(7) Mandatory Detention for Use of a Firearm.

(a)-(b) [Unchanged.]

(c) "Firearm" includes any weapon which will, is designed to, or may readily be converted to expel a projectile by action of an explosive~~means any weapon from which a dangerous projectile may be propelled by using explosives, gas, or air as a means of propulsion, except any smoothbore rifle or hand gun designed and manufactured exclusively for propelling BB's not exceeding .177 caliber by means of spring, gas, or air~~.

Staff Comment (ADM File No. 2021-18): The amendment of MCR 3.943 updates the definition of "firearm" in juvenile proceedings to be consistent with MCL 8.3t, which contains the definition referenced in the court rule's companion statute, MCL 712A.18g.

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. 2021-32
Proposed Amendment of Rule 6.112 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.112 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

Rule 6.112 The Information or Indictment

(A)-(E) [Unchanged.]

(F) Notice of Intent to Seek Enhanced Sentence. A notice of intent to seek an enhanced sentence pursuant to MCL 769.13 must list the prior convictions that may be relied upon for purposes of sentence enhancement. The notice must contain, if applicable, any mandatory minimum sentence required by law as a result of the sentence enhancement. The notice must be filed within 21 days after the defendant's arraignment on the information charging the underlying offense, or arraignment is waived or eliminated as allowed under MCR 6.113(E) within 21 days after the filing of the information charging the underlying offense.

(G)-(H) [Unchanged.]

Staff Comment (ADM File No. 2021-32): The proposed amendment of MCR 6.112 would require that the notice of intent to seek an enhanced sentence contain any mandatory minimum sentence required by law as a result of the enhancement.

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 January 1, 2023, by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2021-32. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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

On order of the Court, this is to advise that the Court is considering an amendment of Rule 5 of the Rules for the Board of Law Examiners. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 5 Admission Without Examination

(A) An applicant for admission without examination must

(1)-(6) [Unchanged.]

(7) Definitions. For purposes of this rule, the following definitions apply.

(a) "Full-time" is 21 or more hours per week.

(b) "Instructor" includes a clinical instructor. A clinical instructor is someone whose responsibilities include teaching and supervising law students in a clinic organized by an accredited law school.

(B)-(F) [Unchanged.]

Staff Comment (ADM File No. 2021-40): The proposed amendment of Rule 5 of the Rules for the Board of Law Examiners would define the terms "full-time" and "instructor" to clarify that clinical instructors may be admitted to the bar without examination.

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 January 1, 2023, 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. 2021-49
Proposed Amendment of Rule 2.002 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.002 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 2.002 Waiver of Fees for Indigent Persons

(A) Applicability and Scope.

(1)-(2) [Unchanged.]

(3) Waiver of filing fees for prisoners who are under the jurisdiction of the Michigan Department of Corrections is governed by MCL 600.2963 and as provided in this rule.

(3)-(5) [Renumbered (4)-(6) but otherwise unchanged.]

(B) Request for Waiver of Fees. A request to waive fees must accompany the documents the individual is filing with the court. If the request is being made by a prisoner under the jurisdiction of the Michigan Department of Corrections, the prisoner must also file a certified copy of their institutional account showing the current balance and a 12-month history of any deposits and withdrawals. The request must be on a form approved by the State Court Administrative Office entitled "Fee Waiver Request." Except as provided in subrule (K), no additional documentation may be required. The information contained on the form shall be nonpublic. The request must be verified in accordance with MCR 1.109(D)(3)(b) and may be signed either

(1)-(2) [Unchanged.]

(C)-(F) [Unchanged.]

(G) Order Regarding a Request to Waive Fees. A judge shall enter an order either granting or denying a request made under subrules (E) or (F) within three business days and such order shall be nonpublic. If required financial information is not provided in the waiver request, the judge may deny the waiver. An order denying shall indicate the reason for denial. The order granting a request must include a statement that the person for whom fees are waived is required to notify the court when the reason for waiver no longer exists.

(1) The clerk of the court shall send a copy of the order to the individual. Except as otherwise provided in this subrule, iIf the court denied the request, the clerk shall also send a notice that to preserve the filing date the individual must pay the fees within 14 days from the date the clerk sends notice of the order or the filing will be rejected. If the individual is a prisoner under the jurisdiction of the Michigan Department of Corrections, the clerk's notice shall indicate that the prisoner must pay the full or partial payment ordered by the court within 21 days from the date the clerk sends notice of the order or the filing will be rejected.

(2) De Novo Review of Fee Waiver Denials.

(a) Request for De Novo Review. Except as otherwise provided in this subrule, iIf the court denies a request for fee waiver, the individual may file a request for de novo review within 14 days of the notice denying the waiver. A prisoner under the jurisdiction of the Michigan Department of Corrections may file the de novo review request within 21 days of the notice denying the waiver. There is no motion fee for the request. A request for de novo review automatically stays the case or preserves the filing date until the review is decided. A de novo review must be held within 14 days of receiving the request.

(b)-(c) [Unchanged.]

(H)-(L) [Unchanged.]

Staff Comment (ADM File No. 2021-49): The proposed amendment of MCR 2.002 would provide procedural direction to courts regarding prisoner requests for fee waivers in civil actions.

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 January 1, 2023, by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2021-49. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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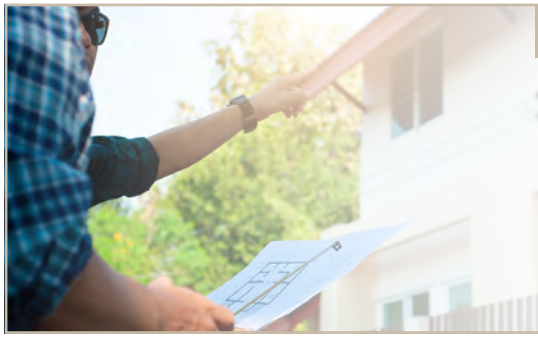

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