MICHIGAN
BAR JOURNAL
JUNE 2023

Social Security Law

- The state of Social Security
- Through a looking glass (darkly)
- The basics: Cross-examining the vocational expert
- Representing disabled veterans before the Social Security Administration

The best-run law firms use Clio.

"We have been using Clio for six years. As our firm grows and our needs mature, Clio is right there with us.

– Billie Tarascio, Managing Member
Modern Law, Mesa, AZ

SBM
State Bar of Michigan

State Bar of Michigan members receive a 10% discount with Clio.

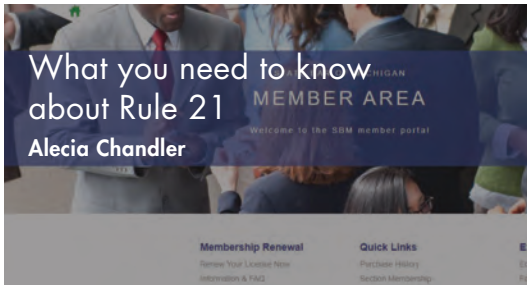
Clio is the world's leading practice management solution. Find out why over 150,000 lawyers trust Clio to better manage their law firm.

1-877-754-9153
clio.com/sbm

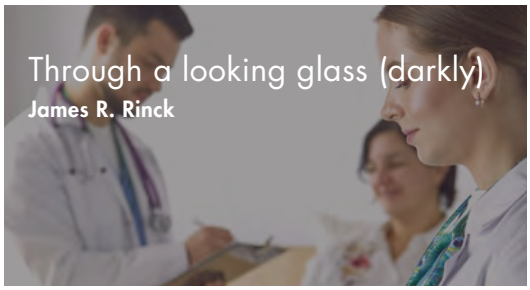
Clio®

MICHIGAN
BAR JOURNAL

JUNE 2023 | VOL. 102 | NO. 06

12 

16 

22 

26 

30 

OF INTEREST

08 IN BRIEF
09 NEWS & MOVES
10 IN MEMORIAM
34 MICHIGAN LAWYERS IN HISTORY
37 50-YEAR CELEBRATION RECAP

MICHIGAN
BAR JOURNAL

JUNE 2023 • VOL. 102 • NO. 06

OFFICIAL JOURNAL OF THE STATE BAR OF MICHIGAN
EXECUTIVE DIRECTOR: PETER CUNNINGHAM

MANAGING EDITOR
MIKE EIDELBES

ADVERTISING
STACY OZANICH

DIRECTOR OF COMMUNICATIONS
MARJORY RAYMER

LAYOUT ASSISTANCE
CIESA INC.

DESIGN & ART DIRECTION
SARAH BROWN

THEME ISSUE EDITOR
NEIL ANTHONY GIOVANATTI

CONTACT US
BARJOURNAL@MICHBAR.ORG

ADVERTISING
ADVERTISING@MICHBAR.ORG

READ ONLINE
MICHBAR.ORG/JOURNAL

The Michigan Bar Journal (ISSN 0164-3576) is published monthly except August for $60 per year in the United States and possessions and $70 per year for foreign subscriptions by the State Bar of Michigan, Michael Franck Building, 306 Townsend St., Lansing, MI 48933-2012. Periodicals postage paid at Lansing, MI and additional mailing offices. POSTMASTER: Send address changes to the Michigan Bar Journal, State Bar of Michigan, Michael Franck Building, 306 Townsend St., Lansing, MI 48933-2012.

COLUMNS

38 PLAIN LANGUAGE
Taking aim at multiword prepositions
Joseph Kimble

40 LAW PRACTICE SOLUTIONS
Professionalism and civility: You cannot have one without the other
Edward H. Pappas

44 LIBRARIES & LEGAL RESEARCH
Social Security shortfall in context
Daryl Thompson

46 PRACTICING WELLNESS
What lawyers can learn about wellness from the month of June
Victoria Vuletich Kane

NOTICES

48 ORDERS OF DISCIPLINE & DISABILITY
53 FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS
57 FROM THE MICHIGAN SUPREME COURT
62 CLASSIFIED

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

It took less than sixty seconds for a family law attorney to refer us a truck accident case. He simply called our office and made the referral. We did the rest.

When the case settled, we sent him a check for $315,000.

He said it takes ***"over 1,000 billable hours to earn that amount."***

Michigan allows fee sharing among attorneys with client consent and MRPC provisions, so you can refer your clients to our AV-Rated Personal Injury Law Firm. If we accept the case and win a recovery, we will pay you a referral fee. And, we confirm it in writing for you.

Don't make the mistake that will cost you thousands!

Has this happened to you? Someone asks if you know a good personal injury lawyer. You give a name and number and say ***"make sure to mention I referred you."***

Of course, the person may not give your name, or even say it was a lawyer referral. You may be losing a lot of money and not even know it.

Buckfire Law Honors Referral Fees

We use sophisticated intake software to attribute the source of our referrals, and referral fees are promptly paid in accordance with MRPC 1.5(e).

How to Refer Us Your Case

Referring us your case is fast and easy. You can:

1. Call us at **(313) 800-8386**
2. Go to **https://buckfirelaw.com/attorney-referral**
3. Scan the **QR Code** with your cell phone camera

Attorney Lawrence J. Buckfire is responsible for this ad: (313) 800-8386.

Refer Us These Injury Cases:

- Auto Accidents
- Truck Accidents
- Motorcycle Accidents
- No-Fault Insurance
- Dog Attacks
- Medical Malpractice
- Cerebral Palsy/Birth Injury
- Nursing Home Neglect
- Wrongful Death
- Police Misconduct
- Sexual Assault
- Defective Premises
- Poisonings
- Other Personal Injuries

SCAN TO REFER
Hold cell camera to the image

BUCKFIRE LAW FIRM

BuckfireLaw.com

SBM
State Bar of Michigan

2023 MEETINGS

BOARD OF COMMISSIONERS

JULY 21, 2023
SEPTEMBER 21, 2023

REPRESENTATIVE ASSEMBLY

SEPTEMBER 21, 2023

SBM
State Bar of Michigan

MEMBER SUSPENSIONS
FOR NONPAYMENT OF DUES

The list of active attorneys who are suspended for nonpayment of their State Bar of Michigan 2022-2023 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, 2023, and are ineligible to practice law in the state.

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

STATE BAR OF MICHIGAN

BOARD OF COMMISSIONERS

James W. Heath, Detroit, President
Daniel D. Quick, Troy, President-Elect
Joseph P. McGill, Livonia, Vice President
Lisa J. Hamameh, Southfield, Secretary
Erika L. Bryant, Detroit, Treasurer
David C. Anderson, Southfield
Yolanda M. Bennett, Lansing
Kristina M. Bilowus, East Lansing
Aaron V. Burrell, Detroit
Hon. B. Chris Christenson, Flint
Thomas P. Clement, Lansing
Tanya Cripps-Serra, Detroit
Sherriee L. Detzler, Utica
Robert A. Easterly, Okemos
Hon. Kameshia D. Gant, Pontiac
Thomas H. Howlett, Bloomfield Hills
Suzanne C. Larsen, Marquette
James W. Low, Southfield
Gerard V. Mantese, Troy
Gerrow D. Mason, Marysville
Thomas P. Murray Jr., Grand Rapids
Valerie R. Newman, Detroit
Takura N. Nyamfukudza, Okemos
Nicholas M. Ohanesian, Grand Rapids
Hon. David A. Perkins, Detroit
Colemon L. Potts, Detroit
John W. Reiser III, Ann Arbor
Hon. Kristen D. Simmons, Lansing
Delphia T. Simpson, Ann Arbor
Matthew B. Van Dyk, Kalamazoo
Danielle Walton, Pontiac
Hon. Erane C. Washington, Ann Arbor
Mark A. Wisniewski, Detroit

AMERICAN BAR ASSOCIATION

321 North Clark Street, Chicago, IL 60610
312.988.5000

MICHIGAN DELEGATES

Dennis W. Archer, ABA Past President
Pamela Chapman Enslen, Section of Dispute Resolution
Carlos A. Escurel, State Bar Delegate
Julie I. Fershtman, State Bar Delegate
James W. Heath, State Bar Delegate
Amy S. Krieg, State Bar Young Lawyers Section
Sheldon G. Larky, State Bar Delegate
Hon. Denise Langford Morris, National Bar Association
Harold D. Pope III, State Bar Delegate
James W. Low, Oakland County Bar Association Delegate
Daniel D. Quick, State Bar Delegate
Thomas C. Rombach, State Bar Delegate
Reginald M. Turner Jr., ABA Past President
Janet K. Welch, NABE Delegate

REPRESENTATIVE ASSEMBLY OFFICERS

Gerrow D. Mason
Marysville, Chairperson
Yolanda M. Bennett
Lansing, Vice Chairperson
John W. Reiser III
Ann Arbor, Clerk

MICHIGAN STATE BAR FOUNDATION

Michael Franck Building, 306 Townsend St.
Lansing, MI 48933 517.346.6400

TRUSTEES

Craig H. Lubben, President
Julie I. Fershtman, Vice President
Richard K. Rappleye, Treasurer
Ronda L. Tate Truvillion, Secretary
Thomas R. Behm
Thomas W. Cranmer
Peter H. Ellsworth
W. Anthony Jenkins
Karen Leppanen Miller
Hon. William B. Murphy (retired)
Jonathan E. Osgood
Michael L. Pitt
Robert F. Riley
Hon. Victoria A. Roberts
Hon. Bridget M. McCormack, Ex Officio
James W. Heath, Ex Officio
Daniel D. Quick, Ex Officio
Jennifer S. Bentley, Executive Director

ATTORNEY GRIEVANCE COMMISSION

PNC Center
755 W. Big Beaver Rd., Ste. 2100
Troy, MI 48084 | 313.961.6585
Michael V. Goetz, Grievance Administrator

JUDICIAL TENURE COMMISSION

Cadillac Place
3034 W. Grand Blvd., 8th Floor, Ste. 450
Detroit, MI 48202 | 313.875.5110
Lynn A. Helland, Executive Director and General Counsel

ATTORNEY DISCIPLINE BOARD

333 W. Fort Street, Ste. 1700
Detroit, MI 48226 | 313.963.5553
Mark A. Armitage, Executive Director and General Counsel

IN BRIEF

SBM BOARD SEEKS APPLICANTS FOR AGENGY VACANCIES

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

Institute of Continuing Legal Education Executive Committee

One vacancy for a four-year term beginning Oct. 1, 2023. Committee members assist with the development and approval of ICLE education policies; formulate and promulgate necessary rules and regulations for the administration and coordination of the institute's work; review and approve the annual budget and activities contemplated to support the budget; and promote ICLE activities whenever possible. The board meets three times a year, usually in February, June, and October.

Michigan Indian Legal Services Board of Trustees

Two vacancies for three-year terms beginning Oct. 1, 2023. MILS bylaws require that a majority of the board be American Indians. The board sets policy for a legal staff that provides specialized Indian law services to Indian communities statewide. The board hires an executive director. The board is responsible for operating the corporation in compliance with applicable law and grant requirements. Board members should have an understanding and appreciation for the unique legal problems faced by American Indians. Board members are responsible for setting priorities for the allocation of the scarce resources of the program. The board is accountable to its funding sources. The board meets on Saturdays in Traverse City on a minimum quarterly basis.

The deadline for responses for the ICLE and MILS vacancies is WEDNESDAY, JULY 5.

Applications received after the deadline will not be considered. Applicants should submit a resume and a letter outlining their background and nature of interest in the position via email to Marge Bossenbery at mbossenbery@michbar.org. Please DO NOT send via U.S. mail.

APPELLATE PRACTICE SECTION

It is section election time. Section members may submit nominations for chair-elect, secretary, treasurer, and any of the six at-large seats on the council with terms expiring at September's annual meeting. For a candidate to be included in the Nominating Committee report, email richotte@butzel.com by Friday, July 14. Nominations may also be made from the floor at the annual meeting.

SOCIAL SECURITY LAW SECTION

The section's June seminar is set for Friday, June 23, from 9 a.m. to 5 p.m. at Aloft Detroit at The David Whitney. Speakers include David Camp, president of the National DDD Organization of Social Security Claimants' Representatives. A reception with hors d'oeuvres and cocktails follows the seminar, and the section has also reserved a block of tickets for that evening's Detroit Tigers-Minnesota Twins game at Comerica Park. More information can be found by clicking the link on the main page of the section website at connect.michbar.org/socsecurity/.

YOUNG LAWYERS SECTION

The Young Lawyers Section hosts its 14th Annual Summit from 8:30 a.m. to 6 p.m. on Saturday, June 24, at Little Caesars Arena in Detroit. The event is open to all State Bar of Michigan members. The summit offers a unique opportunity to connect with fellow legal professionals with a full slate of educational seminars, informational programming, social networking events, and a vendor expo. Secure your spot at the summit by visiting the link on the main page of the Young Lawyers Section website at connect.michbar.org/yls/.

NEWS & MOVES

ARRIVALS AND PROMOTIONS

NICHOLAS T. BADALAMENTI, **HANNAH R. BREFELD**, **VERONICA G. PRANGE**, and **CLIFFORD G. PREBAY** have joined Collins Einhorn Farrell.

FATIMA M. BOLYEA has joined Taft Stettinius & Hollister in Southfield as senior counsel.

DANIEL BROOKINS has joined the Grand Rapids office of Warner Norcross & Judd as an associate.

AARON L. DAVIS, **GARETT KOGER**, and **ASHLEY BARRETT** have joined the Lansing office of Butzel.

SCOTT J. DeWEERD has joined the Holland office of Warner Norcross & Judd.

MARY DOLL with Secrest Wardle was promoted to executive partner.

ANDREW M. HARRIS has joined Maddin Hauser as a shareholder.

AWARDS AND HONORS

ALEXANDER AYAR with Williams Williams Rattner & Plunkett was recognized as one of Michigan's Go-To Lawyers for business litigation by Michigan Lawyers Weekly.

MICHAEL L. GUTIERREZ with Butzel was recognized as one of Michigan's Go-To Lawyers for business litigation by Michigan Lawyers Weekly.

PATRICK C. LANNEN, a partner with Plunkett Cooney, was recognized as one of Michigan's Go-To Lawyers for business litigation by Michigan Lawyers Weekly.

KENNETH R. MARCUS was elected as a member of the 2023 class of fellows of the American Health Law Association.

DEAN F. PACIFIC and **KELLY R. HOLLINGSWORTH**, partners with Warner Norcross & Judd, have been recognized by the Grand Rapids Bar Association and the Justice Foundation of West Michigan for their contributions to the practice of law and the cause of justice.

WARNER NORCROSS & JUDD has been recognized by BTI Consulting Group as one of the top 200 law firms in the nation for various areas of client service.

LEADERSHIP

MARK S. KOPSON with Plunkett Cooney was elected president-elect designate of the American Health Law Association and will assume the office on July 1.

MARK KELLEY SCHWARTZ with Driggers, Schultz & Herbst was appointed to serve on the Aviation Law Certification Committee of the Florida Bar.

NEW OFFICE

ROBERT M. GOLDMAN has opened a new practice, the Law Offices of Robert Goldman, in Birmingham.

MILLER JOHNSON is relocating its Detroit office to the Ally Detroit Center at 500 Woodward Avenue effective June 1.

PRESENTATIONS, PUBLICATIONS, AND EVENTS

The **INGHAM COUNTY BAR FOUNDATION** hosts its judges retirement banquet on Wednesday, June 28.

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

IN MEMORIAM

FERRIS L. ARNOLD, P36142, of Saginaw, died May 1, 2023. He was born in 1946, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1982.

BERNARD F. ASHE, P10272, of Latham, N.Y., died March 8, 2023. He was born in 1936 and graduated from Howard University School of Law.

NINA MARIE BACKON, P63047, of Houghton, died Sept. 4, 2022. She was born in 1975, graduated from University of Detroit Mercy School of Law, and was admitted to the Bar in 2001.

DAVID A. BOWER, P38004, of River Rouge, died May 1, 2023. He was born in 1948, graduated from University of Detroit School of Law, and was admitted to the Bar in 1985.

BRANDON S. BUCHANAN, P67499, of Detroit, died May 6, 2023. He was born in 1970, graduated from University of Detroit School of Law, and was admitted to the Bar in 2004.

RONALD REGINALD DIXON, P24649, of Clinton Township, died April 22, 2023. He was born in 1944, graduated from University of Detroit School of Law, and was admitted to the Bar in 1975.

WAYNE A. ERICKSON, P44057, of Menominee, died Dec. 4, 2022. He was born in 1947, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1990.

KARY C. FRANK, P34059, of Grand Rapids, died May 8, 2023. He was born in 1948, graduated from University of Arkansas School of Law, and was admitted to the Bar in 1982.

GREGG E. HERMAN, P31656, of Bingham Farms, died May 4, 2023. He was born in 1955, graduated from Detroit College of Law, and was admitted to the Bar in 1980.

JAMES S. HILBOLDT, P14954, of Kalamazoo, died March 21, 2023. He was born in 1929, graduated from University of Michigan Law School, and was admitted to the Bar in 1957.

ANNE ACCARDO HORVITZ, P35739, of Grand Rapids, died April 18, 2023. She was born in 1941, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1983.

NKRUMAH JOHNSON-WYNN, P38916, of Detroit, died April 30, 2023. She was born in 1960, graduated from Wayne State University Law School, and was admitted to the Bar in 1986.

STEPHEN L. KINSLEY, P15991, of Southfield, died March 18, 2023. He was born in 1940, graduated from Detroit College of Law, and was admitted to the Bar in 1968.

DALE T. McPHERSON, P44648, of Livonia, died Jan. 25, 2023. He was born in 1963, graduated from University of Michigan Law School, and was admitted to the Bar in 1991.

HON. STEPHEN B. MILLER, P23152, of Battle Creek, died Dec. 17, 2022. He was born in 1945, graduated from Wayne State University Law School, and was admitted to the Bar in 1973.

CHARLES L. NICHOLS, P30544, of Dearborn, died Dec. 27, 2022. He was born in 1943, graduated from Detroit College of Law, and was admitted to the Bar in 1979.

THOMAS W. PAYNE, P18736, of Bingham Farms, died March 13, 2023. He was born in 1930, graduated from University of Detroit School of Law, and was admitted to the Bar in 1953.

MARY T. SCHMITT SMITH, P30506, of Bloomfield Hills, died March 9, 2023. She was born in 1953, graduated from University of Detroit School of Law, and was admitted to the Bar in 1979.

THOMAS J. STROBL, P29794, of Bloomfield Hills, died April 20, 2023. He was born in 1942, graduated from Detroit College of Law, and was admitted to the Bar in 1979.

RICHARD D. THOMAS, P31382, of Canton, died Jan. 6, 2023. He was born in 1948, graduated from University of Oklahoma School of Law, and was admitted to the Bar in 1980.

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.

IMPORTANT NOTIFICATIONS

COMING SOON

Make sure your contact information is up-to-date at michbar.org/MemberArea

- Get information about **Rule 21** and the new requirements for Michigan attorneys
- Receive notifications regarding your **2023-2024 license renewal** (which begins in mid-September).

Want text alerts when it's time to renew your license?

To sign up, text sbmlicense to 41372

STATE BAR OF MICHIGAN

Michigan attorneys are required to keep a physical address and email address on file with the State Bar of Michigan to receive official communications. You can update your contact information and communication preferences at any time in your member profile after logging in to the Member Area.

What you need to know about Rule 21

BY ALECIA M. CHANDLER

Private practice attorneys in Michigan must make an interim administrator plan as part of this year's license renewal. The Michigan Supreme Court issued ADM 2020-15 adopting Rule 21: Mandatory Interim Administrator Planning in June 2022, the most significant rule change impacting Michigan attorneys in at least two decades. The new requirements take effect as part of annual license renewals in September 2023. However, there are steps that lawyers can — and should — take now.

THE REQUIREMENTS

Rule 21 applies only to "private practice attorneys." For purposes of this rule, private practice attorneys are those who provide legal services that require a Michigan law license to one or more clients. This includes all lawyers in a law firm of any size as well as solo practitioners.

Requirement 1: Designate an interim administrator

An interim administrator is called into service if the private practice attorney becomes unable to practice law temporarily or permanently. An interim administrator's duties include taking custody of client files and records; taking control of accounts; and notifying clients, courts, and opposing counsel that an interim administrator has been appointed. For a full list of duties, see ADM 2020-15.

Private practice attorneys have two options for designating an interim administrator:

- Designate an attorney or law firm to serve as an interim administrator. (The attorney named also must accept the designation in order to fulfill the requirements of Rule 21.)
- Enroll in the State Bar of Michigan's Interim Administrator Program.

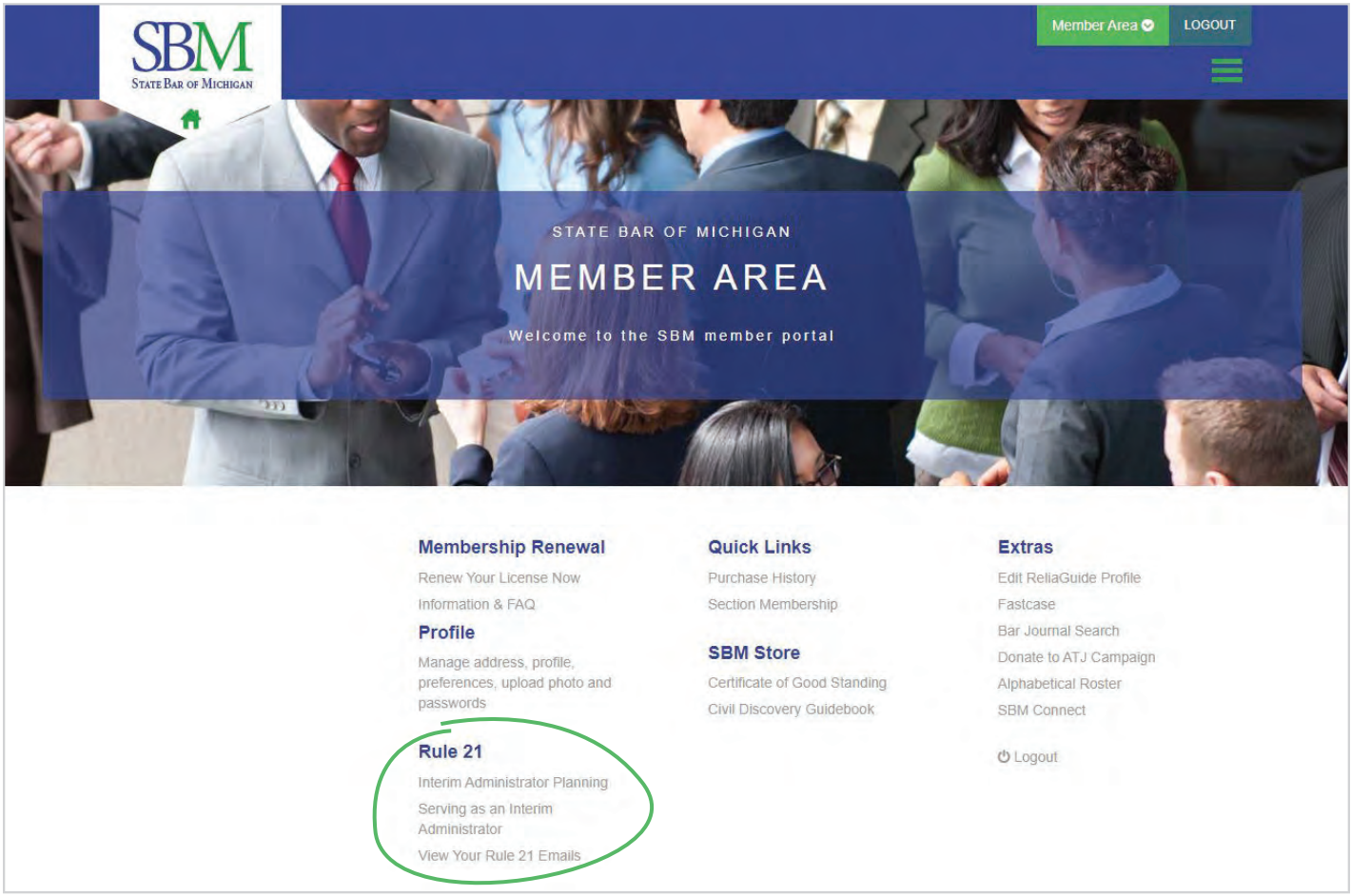
An interim administrator must be an attorney in good standing or a law firm with at least one Michigan attorney in good standing other than the attorney for whom they would serve as interim administrator.

For attorneys in a law firm with multiple attorneys, their designated interim administrator would typically be another attorney at their firm or their firm. The same attorney can (but is not required to) serve as designated interim administrator for everyone in their firm, except themselves.

Private practice attorneys can choose to designate their own interim administrator at no cost. However, the nominated attorney must accept the designation to fulfill the requirements of Rule 21, which requires verification. If the nominated attorney does not accept the designation, the private practice attorney is in violation of the rule. Alternatively, private practice attorneys can choose to simply enroll in the State Bar of Michigan's Interim Administrator Program. The cost is $60 annually, which is payable during license renewal. Under this option, the State Bar of Michigan will place or act as interim administrator so the private practice attorney does not have to independently make any additional agreements or arrangements. In most instances, even a designated interim administrator would need to be officially appointed by the circuit court when a private practice attorney becomes unable to practice law. (There is an exception when the designated interim administrator is an attorney at the same firm as the affected attorney.)

RULE 21 FAST FACT

All attorneys will see a new question during license renewal asking if they are a private practice attorney. For those that are, the site will walk them through the additional requirements. Those that are not have no additional requirements and will renew their license as usual.



Private practice attorneys can update their records to comply with the new requirements under Rule 21 by logging into the online Member Area at michbar.org/MemberArea.

At the time of appointment as an acting interim administrator, the attorney would need to obtain and retain professional liability insurance which provides insurance coverage for the actions taken as interim administrator.

Requirement 2: Name a person with knowledge

Beyond designating an interim administrator, private practice attorneys also must name a "person with knowledge" as part of Rule 21's new requirements. A person with knowledge is someone who knows where the actual and virtual keys to the office are located. This means they can help the interim administrator physically access the office and files (including any passwords needed to review electronic files).

The person with knowledge does not have to be an attorney. In fact, the person with knowledge in many cases might be a family member or office manager, or in some instances perhaps the designated interim administrator serves in both capacities.

The person with knowledge should be someone who is willing to assist an interim administrator by providing the necessary information if for any reason the private practice attorney becomes unable to practice law.

Private practice attorneys will have to provide the person with knowledge's name, phone number, and email address. However, the person with knowledge does not have to confirm their acceptance of the role like interim administrators do.

STEPS TO TAKE NOW

Michigan attorneys are required to fulfill any requirements of Rule 21 as part of their license renewal for 2023-2024, which begins in September. However, private practice attorneys are encouraged

RULE 21 FAST FACT

You can change your designated interim administrator and person with knowledge at any time at michbar.org/MemberArea.

to make their interim administrator plan prior to license renewal to ensure there are no issues that could affect their licensure.

Especially if an attorney plans to designate their own interim administrator, they should contact the attorney or firm they plan to nominate and work out the specifics of their agreement.

All attorneys also have the ability to fulfill the requirements of Rule 21 now by logging into the Member Area of the State Bar of Michigan's website at michbar.org/MemberArea. This is the same area where attorneys who are nominated to be designated interim administrators will go to confirm or deny their willingness to serve.

Simply click on "Interim Administrator Planning" at michbar.org/MemberArea and the online site will walk you through fulfilling of the requirements. By updating your State Bar of Michigan membership to include Rule 21 requirements now when license renewal comes around in September you will be able to simply confirm your previous selections remain accurate. (In future years, you also will have the option to simply confirm your previous selections.)

Attorneys who are not in private practice also can go to the site to update their records and confirm that Rule 21 is not applicable to them.

Those who plan to enroll in the State Bar of Michigan's Interim Administrator Program, which officially launches Sept. 1, 2023, also can indicate that intention now. Doing so will update your status so that you no longer get reminder emails regarding the need to fulfill Rule 21 requirements.

A special note for attorneys in law firms: If your law firm participates in consolidated billing, your administrator will be able to provide information regarding your designated interim administrator and person with knowledge, which then you will confirm (or change, if needed) during license renewal.

For more information on consolidated billing, email SBMfinance@michbar.org.

BEYOND RULE 21

Lawyers are not invincible, and a good succession plan can protect clients, the law firm and its assets, and the integrity of the judicial system. Fulfilling the requirements of Rule 21 is a good start, but Michigan attorneys are encouraged to create a comprehensive succession plan.

The Michigan Supreme Court order allows for private practice attorneys and their designated interim administrator to set their own terms of engagement. Developing a written outline of interim administrator duties and compensation is recommended. You might also consider showing your designated interim administrator your office systems, introducing them to staff, and informing family members. Just like drafting a comprehensive trust to ensure protection of your assets, a comprehensive succession plan should be created to protect your interest in your firm. Moreover, ensuring good business practices will allow the interim administrator to more effectively assist in a time of need.

The State Bar of Michigan offers many resources to help you comply with Rule 21 as well as to create a comprehensive succession plan, including:

- Michbar.org/Rule21: A website with more information about Rule 21 including frequently asked questions
- Succession planning guidebook: Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death can help you develop your own comprehensive succession plan. It provides checklists and other tools for creating an interim administrator agreement and winding up a law firm.
- Contact us: If you have questions, please email iap@michbar.org or call (517) 346-6355.

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

The state of Social Security

BY KERRY SPENCER AND CRYSTAL BUI

Kilolo Kijakazi, the acting commissioner of the Social Security Administration (SSA), recently stated, "[T]here are few, if any, federal agencies that positively impact the lives of the American people to the extent that the [SSA] does … SSA's programs touch the lives of almost every person in the nation."[1]

Social Security offers more than retirement benefits. The Old Age, Survivors, and Disability Insurance (OASDI) program provides monthly benefits to nearly 66 million retired workers, disabled workers and their families, and survivors of deceased workers.[2] Another program, the Supplemental Security Income (SSI) benefits program, provides a safety net for the most vulnerable people in our country such as disabled adults and elderly beneficiaries who do not qualify for retirement benefits.

Social Security is financed through a dedicated payroll tax. In 2023, employers and employees each pay 6.2% of wages up to the maximum of $160,200, while the self-employed pay 12.4%.[3] An estimated 87% of the population aged 65 and over received benefits in 2022. Approximately 183 million people in the U.S. will work in OASDI-covered employment in 2023, and 90% of persons aged 21-to-64 who worked in OASDI-covered employment in 2022 can count on monthly cash benefits if they suffer a severe disability that lasts at least 12 months or is expected to result in death.[4]

Every American will inevitably deal with Social Security at a point in time either for themselves or their loved ones. Most attorneys who practice in this area of law primarily help claimants[5] obtain and keep disability benefits. The SSA estimates that about 1 in 4 of today's 20-year-olds will become disabled before reaching age 67.[6] Social Security is a consideration in financial planning, special-needs planning for a loved one such as a disabled adult child, or in the case of a worker's divorce or death. Simply put, Social Security can help people in all stages of life.

Many hot-button issues are being debated in the world of Social Security disability law, and staying abreast of these issues is a challenge for practitioners in the field. This article highlights some of the key issues from potential legislative changes on the horizon to practical considerations.

SOCIAL SECURITY BENEFIT INCREASES FOR 2023

According to the SSA, approximately 70 million Americans saw an 8.7% increase in their Social Security and SSI payments this year

due to a cost-of-living adjustment (COLA) as measured by the U.S. Department of Labor Consumer Price Index.[7] Starting in January of this year, the average payment increased by more than $140 per month. When the cost of living increases due to inflation and the higher cost of services, the COLA is adjusted "to ensure that the purchasing power of Social Security and Supplemental Security Income benefits is not eroded by inflation."[8]

Another positive note for 2023 is that Medicare premiums on average decreased as benefits increased.[9] Beneficiaries in 2023 have some "breathing room," according to Kijakazi.[10]

WHAT'S COOKING IN CONGRESS

Since the mailing of monthly checks began in 1940, the Social Security Administration has never failed to make benefit payments. The House of Representatives Social Security Subcommittee held a hearing in April which discussed solutions for funding Social Security in the future. According to the most recent projections from the SSA Board of Trustees, the program's trust funds are expected to be depleted by 2034.[11] At that point, other sources of income would only be able to cover around 80% of future benefits. Some of the solutions for dealing with the projected shortfall include increasing taxes for wealthy Americans, raising the payroll tax, reducing benefits for high earners, and increasing the full retirement age.[12] Social Security and Medicare eligibility changes and spending caps were contemplated by House Republicans, who wanted to use the debt-limit deadline to obtain concessions from Democrats. With the House under Republican control, it will be interesting to see what unfolds.

Sen. Rick Scott (R-FL) released a proposal that would allow all federal programs — including Social Security and Medicare — to expire if not reauthorized every five years.[13] Though Senate Minority Leader Mitch McConnell (R-KY) has said unequivocally that this proposal "will not be part of a Republican Senate majority agenda," House and Senate GOP leaders have suggested they might refuse to raise the federal debt limit next year until President Joe Biden agrees to other, more modest changes in both programs.[14] In the past, Republicans have suggested making strategic benefit cuts such as raising the retirement age or privatizing Social Security. In January, House Speaker Kevin McCarthy (R-CA) said in an interview that he wanted to take cuts to Medicare and Social Security off the table in talks with Democrats over the debt ceiling even though Republicans still wanted commitments on spending cuts generally. The White House was skeptical of McCarthy's claims, saying Republicans have wanted to cut earned benefits for years.[15]

The leading Democratic proposal in Congress for Social Security reform is the Social Security 2100: A Sacred Trust Act, which would be the program's first expansion in 50 years. It would increase the average benefit checks by about 2%, which would be offset through a payroll tax on wages above $400,000. The bill, long championed by Rep. John Larson (D-CT) and introduced with nearly 200 co-sponsors, was set for a markup by the Ways and Means Committee but ultimately, no vote was held.[16]

Another Social Security bill sponsored by Rep. Rodney Davis (R-IL) earned enough bipartisan support to bypass markup and be fast tracked for a vote.[17] Davis's bill, the Social Security Fairness

Act, would repeal the Windfall Elimination Provision (WEP) and the Government Pension Offset (GPO), which prevent public servants in states with special pension plans from getting Social Security benefits.[18] The House Ways and Means Committee approved the Social Security Fairness Act in September 2022[19] and while the proposed legislation has 31 bipartisan cosponsors in the Senate, it has had difficulty passing due to its price tag.[20] The bill was reintroduced to the Senate on March 1 by Sen. Sherrod Brown (D-OH) and Sen. Susan Collins (R-ME).[21]

POLICY CONSIDERATIONS IN ADDRESSING FUNDING SHORTFALLS

Funding shortfalls for the Social Security program in the long run remains a serious concern for those in the workforce, especially younger workers. Proposals ranging from cutting benefits to gradually increasing the full retirement age to 70 years of age have been floated,[22] but have been criticized as discriminatory and unrealistic. College-educated workers can probably stay employed until age 70, according to Alicia Munnell, director of the Center for Retirement Research at Boston College, but "[l]ower-education groups and racial minorities just do not have that many healthy years of life expectancy that they could do it."[23] Teresa Ghilarducci, a labor economist and professor at The New School, also notes that living longer and being able to work longer are not the same things.[24]

In addition to the uncertainty over how Congress will address funding shortfalls in the future, Americans in general are financially unprepared in the event of a disability. According to former U.S. Secretary of Labor Marty Walsh, many Americans do not have retirement savings, and many of those workers are approaching the ends of their working careers.[25] The convergence of future changes to Social Security and personal savings shortfalls could have devastating consequences for individuals who find themselves financially strapped and dependent on Social Security for most of their retirement income or in the event of disability.

REOPENING SSA OFFICES AFTER COVID: CUSTOMER SERVICE AND PROCESSING ISSUES

Another issue the Social Security Administration faces is reopening SSA offices and serving the public in the aftermath of the COVID-19 pandemic. More than three years after COVID-19 caused the SSA to close its 1,200-plus local offices across the country, most Michigan field offices quietly reopened on April 7, 2022.[26] However, in a recent press release, Kijakazi strongly encouraged the public to use online services or schedule appointments in advance rather than walking into an office without an appointment.[27] Field offices have nonetheless been inundated with claims.

Even before COVID-19, the SSA faced a funding and service shortfall. Over the last decade, the SSA's operating budget fell 13% while beneficiaries served increased by 21%. Congressional budget cuts have resulted in reduced staffing and poor customer service.[28]

Along with the pent-up demand created by the long shutdown, the SSA has dealt with service delays on its toll-free phone number, a backlog of in-person appointments, and lengthier processing times for disability decisions. Recognizing the enormous challenges facing the SSA, President Biden's budget requested a $1.4 billion increase for the agency for fiscal year 2023.[29]

Kijakazi, the SSA acting commissioner, said, "We are analyzing factors that are contributing to the backlog. It is a combination of complex issues including challenges to hiring in the tight labor market, historically high attrition in the state offices, increasing medical evidence that must be reviewed, and shortages of physicians to conduct outside medical exams and review cases."[30]

The magnitude of these challenges is daunting when one considers the SSA's expansive reach. The agency is headquartered in Baltimore, Maryland, and has more than 1,300 offices nationwide — in addition to its field offices, the SSA also operates hearing offices and state disability determination services. The field offices serve as the SSA's first and primary contact point with the public, handling administrative tasks including initial intake and processing disability applications.[31]

Underfunding and staffing challenges at field offices have resulted in processing delays and a backlog of nearly one million disability applications. The average wait time for an initial decision is now seven months, more than double what it was in 2019.[32]

Combined, these issues present serious challenges to disabled claimants in precarious financial situations. Attorneys who practice in this area frequently field calls from claimants asking about the status of their applications; in turn, attorneys can only offer limited assistance when a claimant's file is queued for processing. The question then becomes what claimants and their representatives can do to keep their cases from being unnecessarily delayed.

RECOGNIZING AND ADDRESSSING ISSUES TO AVOID UNNECESSARY DELAYS IN CLAIMS PROCESSING

Coverage issues

Recognizing and addressing potential OASDI coverage issues before a case begins or when a client first files an application for benefits is helpful. For instance, one potential issue that can arise is whether a worker has attained the minimum number of credits required to be insured and eligible (i.e., whether a worker has obtained insured status) for disability insurance benefits under Title II of the Social Security Act. Insured status must be established for family members of workers and survivors of workers, and the requirements are different depending on the type of benefit an individual seeks.[33] The SSA compiles earnings records for every worker; if the process is to function efficiently, it is important that a worker's earnings summary accurately reflects their actual work history.

Coverage issue examples

Identity theft can complicate a person's application for benefits. Disability that has or is expected to last 12 or more months is required for disability insurance benefits,[34] and earnings reported under a Social Security number will appear in SSA records as the claimant's earnings. Thus, a claimant who is a victim of identity theft could be denied benefits based on records that show they were working during a period of disability.

Furthermore, under the SSI program — which is intended to cover disabled individuals who are of limited income and resources — a victim of identity theft could find themselves disqualified by unknown earnings under their name and Social Security number that put them over the income limits. Practitioners should encourage clients to setup a My Social Security account through the SSA website[35] prior to or at the outset of a claim to help avoid these problems. Using the website, claimants can review Social Security statements online, including current earnings history. Claimants can also access information on how to report errors,[36] allowing for any issues to be resolved and avoiding unnecessary delay in adjudicating claims.

Digital tools

In a post-COVID 19 world, video or telephone hearings have become the norm, with in-person appointments at once-bustling hearing offices now conducted only by appointment. For the public, services that were once commonly done in person at field offices — such as initial applications for benefits — can now be done online. Attorneys should encourage clients familiar with technology to use available self-service digital tools.

In December 2022, the SSA updated its homepage with a new design meant to be more user friendly to help visitors apply for benefits, appeal decisions, or check the status of their applications.[37] The objective is reducing the number of telephone calls and in-person office visits, thereby allowing field office staff to focus on serving individuals needing in-person assistance. Whether the changes achieve their intended purpose remains to be seen. One practitioner says his clients have been frustrated by the new procedure for signing up for a My Social Security account; the online instructions state that the SSA will send an authorization code to the registrant's home within two weeks, which the registrant needs to finish setting up their account, but the code does not work when it arrives.

In-person services will always be necessary for certain claimants, such as those with cognitive disabilities, language barriers, and people who lack access to or ability to use technology. Despite the SSA's emphasis on using online tools, in-person assistance at local offices is still the quickest way to add or fix information into the system.

CONCLUSION

Practitioners in this area of law can expect to face numerous and unique challenges in the coming decade. In addition to comprehensive legislative reform on the horizon, practitioners in the field will grapple with long wait times for claims processing and decision delays exacerbated by SSA staffing and funding constraints at the local level. Also, the Social Security benefit structure is complex and outdated rules and definitions used to determine disabilities fail to account for the realities of the modern labor market to the detriment of claimants.

Despite these challenges, or perhaps because of them, there is tremendous satisfaction in helping claimants successfully navigate the Social Security process. It is not uncommon for claimants and families to be in dire financial straits due to their medical conditions. The State Bar of Michigan Social Security Law Section is dedicated to helping practitioners improve their representation of claimants and stay abreast of changes in the field.

Kerry Spencer has practiced Social Security law for more than 30 years. She is founder and past chair of the SBM Social Security Law Section and co-author of the chapter titled "Social Security and Supplemental Security Income" in ICLE's "Advising Clients on Elder and Disability Law."

Crystal Bui practices in the areas of Social Security, tax-exempt organizations, and business transactions. In her Social Security practice, she primarily represents claimants in federal court.

ENDNOTES

1. Kijakazi, *SSA is Dedicated to Helping the People We Serve*, Social Security Matters (Sept 12, 2022) <https://blog.ssa.gov/ssa-is-dedicated-to-helping-the-people-we-serve/> [https://perma.cc/F995-563Z]. All websites cited in this article were accessed April 29, 2023.
2. *Fact Sheet on the Old-Age, Survivors, and Disability Insurance Program*, Office of the Chief Actuary, Social Security Administration (January 24, 2023) <https://www.ssa.gov/OACT/FACTS/fs2022_12.pdf> [https://perma.cc/9N5G-S5MW].
3. *How is Social Security financed*, Social Security Administration <https://www.ssa.gov/news/press/factsheets/HowAreSocialSecurity.htm> [https://perma.cc/XV78-PUU4].
4. *Fact Sheet on the Old-Age, Survivors, and Disability Insurance Program*.
5. Claimant refers to an individual claiming a right under OASDI. It also refers to beneficiaries or other recipients whose benefit rights are the subject of a post-entitlement or post eligibility action, *Appointment of a Representative*, POMS GN 03910.001, Social Security Administration (March 17, 2023) <https://secure.ssa.gov/poms.nsf/lnx/0203910040> [https://perma.cc/7KX2-WQAF].
6. *Fact Sheet*, Social Security Administration <https://www.ssa.gov/news/press/factsheets/basicfact-alt.pdf> [https://perma.cc/2WAP-MBEV].
7. Wasik, *What To Expect From Social Security This Year ...* , Forbes (February 9, 2023) <https://www.forbes.com/sites/johnwasik/2023/02/09/what-to-expect-from-social-security-this-year/?sh=37df8643369f> [https://perma.cc/2WAJ-JED7].
8. *Cost-of-Living Adjustment (COLA) Information for 2023*, Social Security Administration <https://www.ssa.gov/cola/> [https://perma.cc/6MGE-F4ZC].
9. *What To Expect From Social Security This Year.*
10. *Id.*
11. *The 2023 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds* (March 2023), <https://www.ssa.gov/OACT/TR/2023/tr2023.pdf>.
12. *Hearing on Social Security Fundamentals: A Fact-Based Foundation*, United States

House Committee on Ways and Means (April 26, 2023), <https://waysandmeans.house.gov/event/hearing-on-social-security-fundamentals-a-fact-based-foundation/>.

13. Scott, *An 11 Point Plan to Rescue America: What Americans Must Do to Save This Country* (2022), p 38, available at <https://rescueamerica.com/wp-content/uploads/2022/02/RickScott-11-Point-Policy-Book.pdf> [https://perma.cc/53YT-ZJWW].

14. Tankersley, *Republicans, Eyeing Majority, Float Changes to Social Security and Medicare*, The New York Times (November 2, 2022) <https://www.nytimes.com/2022/11/02/us/politics/republicans-social-security-medicare.html>.

15. Neukam, *White House blasts McCarthy for comments on strengthening Social Security, Medicare*, The Hill (January 29, 2023) <https://thehill.com/homenews/administration/3835206-white-house-blasts-mccarthy-for-comments-on-strengthening-social-security-medicare/> [https://perma.cc/2FWV-DUYD].

16. Social Security Fairness Act, HR 82, 117th Congress (2021-22) and Press Release, *Larson Statement on the Ways and Means Markup of H.R. 82* (September 20, 2022) <https://larson.house.gov/media-center/press-releases/larson-statement-ways-and-means-markup-hr-82> [https://perma.cc/TZ9E-J5RK].

17. Social Security Fairness Act.

18. *Id.*

19. House Report No 117-482 on Social Security Fairness Act of 2021, 117th Congress (2021-22).

20. *Social Security Fairness Act reintroduced in the Senate*, NALC (March 9, 2023) <https://www.nalc.org/news/nalc-updates/social-security-fairness-act-reintroduced-in-senate> [https://perma.cc/59FB-GQYQ].

21. Social Security Fairness Act, SB 597, 118th Congress (2023-2024).

22. Konish, *As Social Security's full retirement age moves to 67, some experts say it should not go higher*, CNBC (February 13, 2023) <https://www.cnbc.com/2023/02/12/social-security-full-retirement-age-shouldnt-go-higher-experts-say.html> [https://perma.cc/T4E8-JDTY].

23. *Id.*

24. *Id.*

25. Konish, *'This is a crisis.' Why more workers need access to retirement savings*, CNBC (December 3, 2022) <https://www.cnbc.com/2022/12/02/why-more-workers-need-access-to-retirement-savings.html> [https://perma.cc/GFM8-V8JF].

26. Rein, *Social Security offices have been closed for most of the pandemic. That effort to protect public health has wounded some of the neediest Americans*, Washington Post (December 24, 2021) <https://www.washingtonpost.com/politics/social-security-coronavirus/2021/12/18/0e3b9508-4bc1-11ec-b73b-a00d6e559a6e_story.html> [https://perma.cc/54KQ-MLKA].

27. News Release, *Statement of Kilolo Kijakazi, Acting Commissioner: Social Security Administration to Resume In-Person Services at Local Social Security Offices*, Social Security Administration (April 4, 2022) <https://cammack.house.gov/sites/evo-subsites/cammack.house.gov/files/evo-media-document/SSAPressRelease.pdf> [https://perma.cc/C7VC-T36S].

28. Sachs, *Disability decision delays impacting Wisconsin's most vulnerable*, Fox6 (February 16, 2023) <https://www.fox6now.com/news/disability-decision-wisconsins-most-vulnerable> [https://perma.cc/6A5Q-GCTJ].

29. Miller, *Column: Funding cuts have put U.S. Social Security customer service in crisis mode*, Reuters (December 8, 2022) <https://www.reuters.com/world/us/funding-cuts-have-put-us-social-security-customer-service-crisis-mode-2022-12-08/> [https://perma.cc/4N3E-ASU4].

30. Rein, *Social Security offices critical to disability benefits hits breaking point*, Washington Post (December 5, 2022) <https://www.washingtonpost.com/politics/2022/12/05/social-security-disability-benefit-offices-backlog-breaking-point/> [https://perma.cc/L69F-T8HV].

31. *Social Security (Old-Age, Survivors, and Disability Insurance) Program Description and Legislative History*, Social Security Administration (2020) <https://www.ssa.gov/policy/docs/statcomps/supplement/2020/oasdi.html> [https://perma.cc/U9D6-K7C5].

32. Avery, *Wait Times for Disability Claims Are at an All-Time High. Here's How to Avoid Further Delays*, CNET (February 10, 2023) <https://www.cnet.com/personal-finance/social-security-disability-claims-wait-record-high-how-to-avoid-delays/> [https://perma.cc/85XK-EDLQ].

33. *Social Security (Old-Age, Survivors, and Disability Insurance) Program Description and Legislative History*.

34. 20 CFR 404.1509.

35. Available at <https://www.ssa.gov/myaccount/> [https://perma.cc/5UCE-K7V7].

36. Available at <https://www.ssa.gov/myaccount/statement.html> [https://perma.cc/2386-9NZ3].

37. Available at <www.ssa.gov/onlineservices> [https://perma.cc/6VDQ-KXUX].

MICHIGAN LEGAL MILESTONE

FRIDAY, AUGUST 25 | YATES TOWNSHIP HALL

6437 SOUTH NELSON ROAD, IDLEWILD, MI 49642

Join us in dedicating the 44th Michigan Legal Milestone honoring Percy Langster, America's first Black prosecutor.

In 1948, Percy Langster made political and legal history by becoming the nation's first Black prosecuting attorney when the people of Lake County, Michigan, elected him.

Join us in Lake County for this year's celebration and dedication ceremony!

SCAN THE CODE TO REGISTER, OR VISIT
MICHBAR.ORG/MILESTONES FOR MORE INFORMATION

Through a looking glass (darkly)

BY JAMES R. RINCK

When is evidence not evidence? When you appear before the Social Security Administration (SSA). Let me explain …

Virtually everyone who reads this article will have taken a course on evidence or had a crash course in it over their years of practicing law. There are the basic federal rules of evidence which, for the most part, are followed by state rules of evidence. There are multiple rules against hearsay, rules for hearsay exceptions, and, of course, there is a whole raft of cases regarding admissible scientific or medical evidence. Those rules are consistently followed across virtually all fields of litigation.

At a Social Security hearing, however, you may hear an administrative law judge (ALJ) almost invariably begin with an opening statement that includes the words that "the usual rules of evidence do not apply." However, just how far the SSA is allowed to depart from the usual rules of evidence takes on almost "Alice in Wonderland"-like dimensions when you review the variations.

If you were practicing Social Security law before March 2017, the treating physician rule was a standard that all practitioners memorized. In my experience, there was a Maslow-esque[1] hierarchy of evidence: that is, evidence from treating physicians was given the most deference, followed by evidence from consultative physicians (those who typically have seen a plaintiff only once), and finally evidence from non-examining physicians or psychologists. Those in the last category were, and are, employed by the SSA at the initial determination and reconsideration stages of a Social Security claim. They review medical records and come up with decisions regarding a plaintiff's residual functional capacity (RFC). In the so-called olden days, one could reasonably look at those opinions as a floor as opposed to a ceiling. That is, ALJs would typically build upon those findings and then review and apply the evidence that came in at the hearing level. Frankly, most non-examining physicians got short shrift for good reason, especially since they could not have possibly reviewed all the evidence.

While *Jones v. Astrue* held that a treating physician's opinion literally could not be discredited by the opinion of a non-examining physician,[2] it does point to an evidentiary problem: how can Social Security now place so much weight upon non-examining physicians when they cannot possibly have reviewed all of the evidence?

To be complete, there is a fourth category of physician: the occasional medical expert who testifies at hearings. In the past, there were some local experts, meaning that one might have some knowledge or sense of how that doctor might be likely to testify. Now, however, they are like Forrest Gump's proverbial box of chocolates: you never know what you will get. I had a hearing where the medical expert who testified had been suspended from practicing medicine, and a case in which the proposed medical expert had taught at Harvard Medical School for decades. Unlike the battles of experts common in many personal injury cases, Social Security does not differentiate between experts; superior credentials are rarely (if ever) discussed by ALJs in their decisions — after reviewing thousands of such decisions, I cannot recall such a statement. Thus, practitioners must try to shape or question a medical expert as best as he or she can without being able to rely on an opinion from an obviously superior doctor prevailing over other medical opinions.

The seminal case in the U.S. Sixth Circuit Court of Appeals on this issue was *Gayheart v. Commissioner of Social Security*.[3] *Gayheart* emphatically reinforced the primacy of the treating physician and set forth several considerations that appear to survive the alleged extinction of the treating physician rule. Even if the treating physician rule is considered extinct (see below), *Gayheart* provides several guidelines that are seemingly useful with or without the treating physician rule. The Sixth Circuit remanded *Gayheart* while making several observations, including that the ALJ had given little weight to the opinion of a treating physician because that judge had simply described the findings as "inconsistent with other credible evidence" and the judge's failure to provide good reasons for not following that opinion hindered meaningful review of the case on appeal.[4]

Furthermore, *Wilson v. Commissioner of Social Security*[5] requires that the SSA follow its own procedural regulation to "give good reasons" for not giving weight to a treating physician in the context of a disability determination.[6] Even if an ALJ does not afford the treating physician's opinion controlling weight, it must be properly analyzed and take into account the seven specific factors set forth in the SSA rules.[7] Simply saying that the opinion is not consistent with the record is not enough. Those sorts of holdings, though seemingly logical and providing a framework for evaluating medical evidence, were the targets of the SSA's apparent effort to reduce the number of successful claims.

While the SSA also amended 20 CFR 404.1527 as part of its makeover, it really did not (and could not) eliminate the evidentiary considerations that existed before March 2017. Subsection (b) dutifully states that the SSA will "always consider the medical opinions in your case record together with the rest of the relevant evidence we receive."[8] Further, subsection (c)(1) states that a physician who actually has examined a plaintiff will generally receive more weight than a physician who has not done so, and (c)(2) adds that treating sources in general will be given more weight than consultative physicians or other sources.

So, what really has changed? Indeed, reading this portion of the regulations sounds like it echoes some of the principles set forth by *Gayheart*. And the new and allegedly improved section (d)(1) of 20 CFR 404.1527 maintains that the SSA essentially has the right to determine disability and, really, as ALJs often apply it, ignore statements of disability because that issue is the province of the SSA. Anyone practicing in this area will encounter clients who bring in letters from their doctors which simply state that their patients are disabled (or words to that effect) and clients are confounded about why they can't win their cases with those letters; the best practice is to tell them not to get such letters and let you handle the issue.

The new and allegedly improved section (d)(1) of 20 CFR 404.1527 maintains that the Social Security Administration essentially has the right to determine disability and, as administrative law judges often apply it, ignore statements of disability because that issue is the province of the SSA.

An overall review of the regulation demonstrates that very little really has changed regarding the proper consideration of evidence; however, one would not know that by reading the federal court briefs filed by the U.S. Attorney's Office on behalf of the SSA. Some federal magistrates and judges have taken those arguments seriously despite the very thin strands of evidentiary sinew connecting them. And some ALJs now treat non-examining physician opinions as the evidentiary mountaintop due to the alleged familiarity of such doctors with SSA rules and regulations. Naturally, the SSA never provides proof of that familiarity, and this assumption of superiority is propagated despite the gigantic flaw in its logic — that non-examining doctors could not have reviewed all the evidence, especially the most recent evidence. Really, outside of being more updated, the same flaw plagues medical experts at hearings, especially now since they all testify remotely and, thus, have never laid eyes upon the plaintiff at the hearing (and some of them turn out to have a questionable grasp of the record.)

So, what's a lawyer to do? Emphasizing the parts of *Gayheart* that impact how medical opinions must be treated is a good place

to start since the case has never been overruled. Among other things, *Gayheart* stands for the proposition that the plaintiff's ability to perform some activities is not sufficient to support a finding that such a person could perform work activities on a sustained basis.[9] Furthermore, *Gayheart* said that regarding review of a treating physician's opinion:

> "We therefore conclude that the ALJ's focus on isolated pieces of the record is an insufficient basis for giving [the treating physician's] opinions little weight under 20 CFR § 404.1527(c)."[10]

When an ALJ fails to afford good reasons for discounting the opinion of a claimant's treating physician, the Sixth Circuit has made clear that reversal and remand of a denial of benefits is warranted even though "substantial evidence otherwise supports the decision of the Commissioner."[11]

What is prevalent these days are ALJs discrediting treating opinions because there are some normal findings in their examinations. If you think about it, there are normal findings with persons who are near death, but I have seen psychological opinions ignored because a plaintiff seemed to be in touch with reality at office appointments with their primary care physicians. These so-called normal findings are accumulated to attempt to show that a treating physician/therapist must have issued unsupported opinion testimony by finding that a patient is disabled. Such reasoning would not get the time of day in a trial court and seems to contradict parts of the *Gayheart* case that could not be abolished by the attempted assassination of the treating physician rule. Social Security practitioners must be aware of these practices to avoid having clients ambushed by what appears to be the SSA's effort to recast basic evidentiary law into a new (and highly anti-plaintiff) evidentiary paradigm.

One of those weapons could be the quite recent U.S. Fourth Circuit Court of Appeals case of *Shelly C. v. Commissioner of Social Security*.[12] In that case, the treating physician rule still applied, and the court catalogued the kind of evidentiary techniques mentioned above and absolutely condemned them all. The Fourth Circuit went on to note that it was joining "our sister Circuits' growing conversation surrounding chronic diseases[.]"[13] The entire opinion sounds a lot like *Gayheart* in terms of what is acceptable evidence and what is acceptable criticism of that evidence; despite what the SSA is saying, there is an ongoing debate in federal courts about how ALJs evaluate evidence and whether their techniques are acceptable. Practitioners should be prepared to challenge those techniques both at and in post-hearing briefs, but there is no excuse for simply accepting ALJ decisions using such reasoning to defeat valid claims. Indeed, the SSA's insistence on its seemingly inverted evidentiary pyramid invites more federal litigation, meaning practitioners must lay the groundwork to pursue cases in those forums.

Part of an attorney's job in this field is marshaling all relevant evidence and remembering that despite SSA efforts to the contrary, the federal courts have yet to decide definitively that the treating physician rule is dead. Since the SSA did not eliminate 20 CFR 404.1527 — and really, how could it? — we attorneys still are able to argue to the courts that the current and inconsistent evidentiary rules propounded by the SSA simply should not deprive clients of evidentiary rights they never lost.

Regarding the SSA, it's best to paraphrase the immortal words of Pogo, the comic strip character created by Walt Kelly: "[Evidence] is not dead, it is merely unemployed."[14] Until and unless the Supreme Court eliminates the treating physician rule, let's take the above information and keep it alive for the sake of our clients.

James R. Rinck has practiced in the field of Social Security law since 1984; he is the only board-certified Michigan attorney in Social Security law. Based in Grand Rapids, he has represented thousands of clients and briefed hundreds of cases in federal courts with several appearances in front of the U.S. Sixth Circuit Court of Appeals. Rinck also practices in the fields of workers' compensation and personal injury

---

ENDNOTES

1. McLeod, *Maslow's Hierarchy of Needs,* Simple Psychology (March 21, 2023) <https://www.simplypsychology.org/maslow.html>[https://perma.cc/QT2D-WXQE] (accessed May 2, 2023).
2. In *Jones v Astrue*, 808 F Supp 2d 993 (ED Ky, 2011), the administrative law judge relied upon the opinions of non-examining physicians who had not reviewed the entire set of records from the plaintiff's treating physician, which included supportive reports from specialists. The *Jones* court found that failure to review the entire record should have disallowed the non-examining physicians' reports. That part of the decision appears to have been rejected by the Sixth Circuit and several of its district courts as no longer good law, *Handshoe v Berryhill*, unpublished opinion of the United States District Court for the Eastern District of Kentucky, signed March 23, 2017 (Docket No 7:15-cv-102-GFVT), p 4.
3. 710 F3d 365 (CA 6, 2013).
4. *Id.* at 376.
5. 378 F3d 541, 546 (CA 6, 2004).
6. 20 CFR 404.1527(d)(2).
7. *Gayheart v Comm'r of Social Security*, 710 F3d at 376.
8. 20 CFR 404.1527(b).
9. *Gayheart v Comm'r of Social Security*, 710 F3d at 377-378.
10. *Id.* at 378.
11. *Wilson v Comm'r of Social Security.* 378 F3d at 544.
12. 61 F4th 341 (CA 4, 2023).
13. *Id.* at 368.
14. "God is not dead, he is merely unemployed," attributed to Walt Kelly (1966), Quotes of Famous People <https://quotepark.com/quotes/1777192-walt-kelly-god-is-not-dead-he-is-merely-unemployed/> [https://perma.cc/U94Y-LXZJ] (accessed May 2, 2023).

The basics: Cross-examining the vocational expert

BY MIN HUANG AND NURA LUTFI

In December 2022, a Washington Post article recounted the story of a man who was denied Social Security disability benefits based on vocational expert testimony that he would still be able to perform work as a nut sorter, dowel inspector, and egg processor despite his limitations.[1] None of those jobs exist in the national economy, as is the case for many other jobs routinely cited by vocational experts to deny claims.[2]

It is safe to say that during the past decades, technological advances and a shifting American economy have revolutionized the labor market.[3] The recent COVID-19 pandemic then dramatically changed it once again. So why is the Social Security Administration (SSA) continuing to use job titles from the 1990s to deny claims?

Since the Social Security Act was enacted in 1935, amendments have been made to further its purpose of providing a safety net to millions of Americans unable to work due to old age or disability.[4] These include creating Social Security disability insurance (SSDI) and supplemental security income (SSI) cash benefit programs. However, the meaning of disability is not how we colloquially or even medically understand the term.

Social Security regulations define "disability" as "the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[5] In operation, a claimant meets this definition of disability if she has a medical impairment or a combination of impairments at a level of severity described in the regulations. This happens infrequently.[6]

More often, after the claimant seeking SSDI or SSI benefits proves she no longer has the residual functional capacity to do relevant past work due to medical impairment, the SSA — or the administra-

tive law judge at the hearing on appeal — will find the claimant disabled only if there are no other jobs that exist in significant numbers in the national or local economy the claimant can still do.[7] Thus, proving there are still jobs out there is the SSA's burden to bear.

In recent years, meeting that burden has often taken the form of testimony from a vocational expert hired by the SSA to address this decisive question at hearings.[8] Vocational experts (VEs) are professionals with educational training and work experience often in, or related to, the field of vocational rehabilitation. However, limitations to vocational expert testimony beg the question of whether VEs actually provide valuable data to administrative law judges making Social Security determinations or whether, in most cases, VEs simply create the illusion that the SSA has met its burden in proving job exists for the claimant.

PROBLEMS WITH EXPERT TESTIMONY

Flawed and outdated Dictionary of Occupational Titles

VEs are required to use the Dictionary of Occupational Titles (DOT) when rendering opinions, among other resources.[9] The DOT — a collection of occupations published by the U.S. Department of Labor with descriptions of their duties, exertional and educational requirements, the amount of training required, and more[10] — was last updated between 1977 and 1991.[11] In many instances, jobs no longer exist, have different requirements, or are done differently altogether. Although the Department of Labor replaced the DOT with a new system called O*Net, Social Security regulations still use the DOT.[12] In recent years, the SSA has been developing a new occupational information source known as the Occupational Information System. Its launch date is unknown.

No prior knowledge of expected testimony

In addition to outdated jobs information, VE testimony often varies from expert to expert and is difficult for attorneys to challenge at hearings due to the lack of prior knowledge of what the expert will say. In most instances, there is no opportunity to depose a VE prior to the hearing. Instead, practitioners must risk asking questions that may result in unfavorable testimony. Often, the only way to know in advance what the expert will say — and thereby giving an attorney a window to a question without hurting their client's case — is familiarity with the VE from past cases.

Lack of foundation for expert testimony

It is unclear whether there is an informed science behind VE testimony relating to the numbers of jobs in the economy for an occupation, particularly those from the DOT that are nearly obsolete. Through their education and work experience, VEs generally have expertise in assessing vocational opportunities. However, they must rely on other sources for information regarding employment statistics. The best source of job data is the Bureau of Census and Bureau of Labor Statistics, and yet VEs often do not use them or use them incorrectly.[13]

HOW CAN PRACTITIONERS MEET CHALLENGES?

Given the challenges created by VE testimony, competent representation of Social Security claimants requires the knowledge and skill to effectively cross-examine these expert witnesses. So, how does one do so? While effective cross-examination is situation-specific, here are some other common strategies to consider.

Modify the hypotheticals

The administrative law judge first conducts a direct examination of the VE by presenting a series of hypotheticals on which the VE renders an expert opinion. The VE is asked to consider a hypothetical person with the claimant's residual functional capacity and vocational background and opine whether there are jobs such a person may still perform. Customarily, there are three main hypotheticals with either an ascending or descending number of physical limitations; the hypotheticals may then be further modified to account for non-physical limitations.

"There are no jobs" is the desired testimony. Short of this testimony, the VE warrants cross-examination to fully develop the record since there is no certainty about which hypothetical the administrative law judge will find most representative of the claimant based on the record. Listening intently to the judge's hypothetical is a critical first step to developing effective cross-examination questions.

What to listen for? Listen for whether limitations are supported by the record and whether additional limitations should be included. Listen for the severity of a limitation; perhaps the record supports finding that the claimant can only lift with her dominant hand occasionally whereas the hypotheticals indicate frequent lifting. Adding a limitation that is not initially included or adjusting its severity may be all that is needed to get the desired VE testimony.

Move beyond leading questions

To seasoned civil litigators, effective cross-examination entails a thorough understanding of the witness's anticipated testimony before the hearing. Then, by default, any questions asked on cross-examination are framed as leading questions to control that witness's testimony. In a Social Security practice, it is unlikely the claimant or counsel would have an opportunity to depose the VE prior to the hearing, so deviating from leading questions may be wise. This is particularly true when the VE testifies on jobs that are unfamiliar or unexpected. In those instances, targeted questions that put the VE to task — such as asking about job duties and its non-exertional demands — may uncover inconsistencies on cross or yield details that can be used to fact-check the VE's testimony post-hearing. Should counsel discover issues during her

fact check, they may provide the basis for a post-hearing memorandum from the judge or an appeal.

Ask about non-exertional limitations

The VE must ensure her testimony is consistent with the DOT and note any deviations from it with the reasoning for the deviations.[14] The DOT largely fails to account for the mental and cognitive demands of listed occupations; in relying on the DOT alone, the VE's testimony primarily accounts for the physical demands of a job. This may be sufficient in circumstances in which the claimant's medical impairments are strictly physical in nature, but it is inadequate when mental and/or cognitive conditions also play a role in the claimant's life.

For instance, a claimant may have difficulty maintaining concentration, persistence, and pace in completing tasks. Another example is a claimant with poor short-term memory that makes it difficult for them to follow even simple oral instructions. Therefore, cross-examining the VE to inquire about a job's mental and/or cognitive demands may take that job off the table if the claimant is unable to meet those demands.

Consider postural accommodations

Though the DOT considers many exertional limitations of described occupations, it is not exhaustive; specifically, it does not address the ability to accommodate postural limitations. One example is the need for a sit/stand option. Some claimants who suffer from physical ailments may not be able to sit for 6-to-8 hours with only standard scheduled breaks as required by a sedentary job. Rather, the claimant may need the flexibility to stand and change from a seated position for a variety of reasons, such as avoiding muscular or joint stiffness or spasms. The opposite could also be true for a job in which someone could do light work and a fair amount of standing and walking, but the claimant needs more opportunities to sit down and perform their work in a seated position to lessen the effects of fatigue. Still others, particularly those with back or spine conditions, may need to be in a reclined position during most of the day to help alleviate pain. Cross-examining the VE to assess a job and the ability to accommodate postural flexibility may expose barriers to successful employment.

The impact of being off task and absenteeism

An implied component to a disability determination is that the claimant not only has the capability to successfully meet the demands of a job on any given day but can do so competitively for eight hours a day, five days a week, and week after week.[15] Remaining on task and performing work at a pace acceptable to the employer is an important consideration. Being off task could be for any number of reasons, such as more frequent restroom breaks for those with gastrointestinal illnesses, snacking and testing breaks for those with poorly controlled diabetes, or drowsiness caused by opioid pain medication.

Related is the issue of absenteeism, which could result from either physical or mental factors. An individual with cancer experiencing the effects of chemotherapy may be too fatigued to get out of bed in the days following treatment. Similarly, a claimant suffering from severe depression may have a few bad days during the month that keep them bedbound. Some VEs have testified that employers in a competitive job market may tolerate as little as one absent day a month, while others have testified to no more than two absences. Cross-examining the VE to establish on the record these employer expectations could sway the administrative law judge's decision to approve a disability claim. Regardless of the types or number of jobs a VE may testify that the claimant can physically or mentally perform on a given day, the claimant must be able to sustain the work and meet minimum employer expectations regarding reliability and work pace.

CONCLUSION

Vocational expert testimony often determines whether claimants receive government benefits they so desperately need while managing the disabling effects of their health conditions. Despite the gravity of the outcome, a fair disability determination is hindered by a flawed system that prejudices the claimant.

Min Huang is a clinical programs staff attorney with the Wayne State University Law School Clinical Education Program. He supports the law school's Disability Law Clinic and Legal Advocacy for People with Cancer Clinic.

Nura Lutfi is an attorney at Disability Law Group in Troy, where she applies her legal background in client advocacy and genuine passion to help those in need while specializing strictly in disability law.

ENDNOTES

1. Rein, *Social Security denies disability benefits based on list with jobs from 1977*, Washington Post (December 27, 2022) <https://www.washingtonpost.com/politics/2022/12/27/social-security-job-titles-disabled-applicants-obsolete/> [https://perma.cc/92ZM-VNTC]. All websites cited in this article were accessed April 28, 2023.
2. *Id.*
3. *The State of American Jobs*, PEW Research Center (October 6, 2016) <https://www.pewresearch.org/social-trends/2016/10/06/1-changes-in-the-american-workplace/> [https://perma.cc/JY75-DCGK].
4. Kearney, *Social Security and the "D" in OASDI: The History of a Federal Program Insuring Earners Against Disability*, 66 Soc Security Bulletin 3 (2005/2006), available at <https://www.ssa.gov/policy/docs/ssb/v66n3/v66n3p1.html> [https://perma.cc/QMS5-68E9].

5. 20 CFR 404.1505(a) and 20 CFR 416.905(a).
6. 20 CFR 404.1520 and 20 CFR 416.920.
7. 20 CFR 404.1520(a)(4)(iv)-(v) and 20 CFR 416.920(a)(4)(iv)-(v).
8. 2 National Org of Social Security Claimants Representatives, Social Security Practice Guide (rev ed), § 15.04 "Hearings and Appeals Council Practice."
9. 20 CFR 404.1566(d) and 20 CFR 416.966(d).
10. 20 CFR 404.1569 and 20 CFR 416.969.
11. *Occupational Information System Project*, Social Security Admin <https://www.ssa.gov/disabilityresearch/occupational_info_systems.html> [https://perma.cc/64RY-XYHH].
12. *Status of the Dictionary of Occupational Titles; use in Social Security disability adjudications*, United States Dep't of Labor <https://www.dol.gov/agencies/oalj/topics/libraries/LIBDOT#:~:text=The%20Dictionary%20of%20Occupational%20Titles%20(DOT)%20was%20created%20under%20the,primary%20source%20of%20occupational%20information> [https://perma.cc/4JDA-GXW6].
13. Bush, *Social Security Disability Practice (2d ed)* (Commerce Park: James Publishing, 2013), pp 49-50 and pp 3-47 -3-55.
14. *SSR 00-4p: Use of Vocational Expert and Vocational Specialist Evidence, and Other Reliable Occupational Information in Disability Decisions*, policy interpretation ruling of the Social Security Admin (December 4, 2000), available at <https://www.ssa.gov/OP_Home/rulings/di/02/SSR2000-04-di-02.html> [https://perma.cc/4R-WK-XLPL].
15. *SSR 96-8p: Assessing Residual Functional Capacity in Initial Claims*, policy interpretation ruling of the Social Security Admin (July 2, 1996), available at <https://www.ssa.gov/OP_Home/rulings/di/01/SSR96-08-di-01.html> [https://perma.cc/WD3A-43SU].

Representing disabled veterans before the Social Security Administration

BY SASHA BOERSMA

"Hi, Mr. Lawyer. My name is Mr. Smith. I'm a disabled veteran and get a disability check from the VA. Social Security denied my disability claim. How could they do that?"

"Well, Mr. Smith, they don't have to consider VA decisions, so it isn't relevant to your Social Security disability claim."

"But Mr. Lawyer, if you just give the judge my rating decision, they will see I'm disabled."

"Mr. Smith, since the judge can't consider the VA's decision, I'm not going to submit anything related to your VA disability to the Social Security Administration."

While this might seem like an easy answer to give the client, it's dead wrong. Social Security practitioners cannot effectively represent a disabled veteran without understanding the interplay between Social Security disability and veterans' disability. At the Social Security hearing level, practitioners have an opportunity to persuade an administrative law judge and should use every piece of evidence available. More importantly, Veterans Affairs (VA) disability claims generate important evidence that tells the veteran's whole story.

Practitioners may be familiar with the Veterans Health Administration (VHA), which provides medical treatment to veterans, but many are unfamiliar with the decisions and medical records generated by the Veterans Benefits Administration (VBA) and Board of Veterans Appeals (BVA) when adjudicating claims for VA disability benefits.

VA MEDICAL SOURCE STATEMENTS

At first, it can seem like Social Security regulations work against you when representing a disabled veteran. Decisions made by the Department of Veterans Affairs are not binding on the Social Security Administration (SSA) and SSA determinations will not provide any analysis of the VA's decisions about whether a veteran is disabled, blind, employable, or entitled to any VA benefits.[1] While non-binding, SSA must nevertheless "consider all the supporting evidence underlying" the VA's decision in accordance with 20 CFR 404.1513(a)(1)-(4).[2]

The last sentence in 20 CFR 404.1504 of the Social Security regulations is incredibly important — SSA must consider *all the supporting evidence underlying* the VA disability decision. Like SSA consultative medical examinations, the VA obtains compensation and pension examinations (C&P exams) which are usually accompanied by a disability benefits questionnaire (DBQ). C&P exams and DBQs are reports containing "medical evidence" and "medical opinions" as defined by 20 CFR 404.1513. Thus, SSA must consider C&P exams and DBQs using the same rules that apply to all medical evidence and medical opinions.

The most common mistake made in representing disabled veterans is not submitting C&P exams and DBQs to the Social Security Administration. Instead, practitioners should submit C&P exams and DBQs, include 20 CFR 404.1504 in their briefing, and cite the C&P exams and DBQs in the record in the same manner as they would any other medical opinion.

UNDERSTANDING VA DECISIONS

VA adjudications are set forth in rating decisions issued by the VBA and board decisions by the veterans' law judges of the BVA. Both are inherently persuasive in Social Security appeals despite SSA regulations stating they are not binding and cannot be analyzed by an administrative law judge. Understanding VA decisions and explaining them to the administrative law judge may help the judge better understand the veteran's disability.

Veterans can make claims for two main benefits that fall under the catchall term "VA disability." The first is a disability connected to a claim for service, meaning their current disability resulted from their service. These are compensation claims and veterans receive compensation benefits.[3] The second claim is for disabilities not related to service for veterans who meet certain financial need requirements. These are disability pension claims and veterans receive disability pension benefits — not to be confused with military pension retirement benefits. [4]

The VA reviews disabilities for causation in service-connected claims and degree of disability in both types of claims.[5] Veterans can submit claims for disability at any time and usually receive several rating decisions.[6] Rating decisions have important information about the veteran's service including dates and branch of service, combat service, and exposures to chemical, physical, and environmental hazards. Veterans who disagree with their rating decision can appeal to the BVA and receive a board decision from a veterans' law judge.[7]

Veterans with multiple disabilities are issued a combined rating. VA math is, in a word, unique: a 40% disability combined with a 20% disability does not equal a 60% disability. Instead, it is a 52% disability, which is rounded down to 50%.[8]

Understanding the methodology behind the VA's algorithms is less important, but it is important not to let a low combined rating stop you from investigating further. When reviewing board decisions and rating decisions, focus on the disabilities and ratings assigned to each. VA ratings, which are like the Social Security Administration listing of impairments, are determined using the degree of functional impairment caused, diagnoses, treatment plans, diagnostic imaging, labs, and testing.[9] Understanding the ratings helps practitioners argue the severity of an impairment and its functional limitations.

One prominent example is a VA mental health disability rating of 70% for post-traumatic stress disorder.[10] Like the SSA, the VA groups mental health impairments together under one rating based on overlapping symptoms. Social Security practitioners may notice that VA rating language for mental health conditions sounds a lot like the SSA mental health listings:

> A veteran will be rated at 70% disabled for PTSD (or any other mental health condition) if it is found they have "[o]ccupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships."[11]

An administrative law judge in a Social Security Administration case cannot adopt a decision made under this criterion. However, explaining that the VA found the veteran's PTSD on its own to be 70% disabling based on the above criterion is incredibly helpful to your SSA listings and residual functional capacity (RFC) arguments. The VA rating is based on a C&P exam and DBQ, which includes an in-person exam, records review, and a physician's opinion that the PTSD meets this rating definition based on diagnostic criteria, symptoms, and functional ability.[12] The C&P exam and DBQ should both have medical opinions regarding functional ability supported by a review of medical records and objective examination findings which should be evaluated by an administrative law judge in accordance with 20 CFR 404.1527. Failing to submit the C&P exam and DBQ used create the PTSD rating (or any C&P exam and DBQ) to the SSA would be a mistake. An administrative law judge's failure to consider a medical opinion contained in a C&P exam and DBQ is grounds for an appeal.

TOTAL DISABILITY BASED ON INDIVIDUAL UNEMPLOYABILITY

Another important VA disability that Social Security practitioners must understand is total disability based on individual unemployability (TDIU). Veterans not rated as 100% disabled can still receive 100% disability benefits if they meet the TDIU criteria. Total disability ratings may be assigned when a veteran is unable to secure or maintain a substantially gainful occupation.[13] Marginal employment — defined employment below the poverty threshold — is not a substantially gainful occupation.[14] Marginal employment may also be found if the veteran works in a protected environment like a family business or sheltered workshop even if their earnings rise above the poverty level.[15]

The TDIU rules, regulations, and guidance from the M21-1, VA Adjudications Procedures Manual[16] closely follow steps 3-5 of SSA's five-step sequential disability evaluation right down to subsidized work and RFC.[17] A TDIU decision is also based on a C&P exam and DBQ that must be considered by an administrative law judge if it is in the record; therefore, consider submitting the TDIU C&P exam, DBQ, and rating decision to the Social Security Administration as persuasive evidence of the veteran's disability.

OBTAINING VA EVIDENCE

Rating decisions, board decisions, and C&P exams and DBQs can be difficult to obtain. For example, C&P exams are rarely conducted by Veterans Health Administration providers; the VA switched to a contracted C&P system, and more recent C&P exams and accompanying DBQs are seldom included in VHA treatment records.

There are reasons for not having clients obtain their own evidence but in this case, the most effective way to get rating decisions, board decisions, and C&P exams and DBQs is for the veteran to request them from their veterans' service officer, veterans' attorney, or directly from the VA. The veteran may have some, but likely not all, of these documents. For example, veterans rarely receive copies of their C&P exams and DBQs. The VA also re-rates disabilities and issues new rating decisions — ratings can stay the same, increase, or decrease. Requesting these records from the VA is the only way to ensure you have complete and accurate evidence.

Similar to how Social Security practitioners can access the SSA electronic claims folder using the Electronic Records Express,[18] veterans' service officers and veterans' attorneys often have access to the VA's electronic claims folder through the Veterans Benefits Management System.[19] Veterans can also request records directly from the VA by using Form 20-10206 for a Freedom of Information Act or Privacy Act request.[20] On Form 20-10206, it's important to check the correct boxes in section III; in section IV, write "all rating decisions, board decisions, compensation and pension examinations, and disability benefits questionnaires." Given its complex nature, it may be prudent to help the veteran complete and submit the form.

Form 20-10206 also allows a third party to request a veteran's records (sections II and IX). To do so, the veteran must include VA Form 21-0845 (Authorization to Disclose Personal Information to Third Party) and VA Form 10-5345 (Request for and Authorization to Release Health Information). In the box labeled "Other" write "all rating decisions, board decisions, compensation and pension examinations and disability benefits questionnaires."

Section III of Form 20-10206 also has a box to check for Service Treatment Records/Military Treatment Records. If the veteran received medical treatment while still in service, those records will not be at their current VHA medical facility, but they may be in their VA claims file. If those treatment records pertain to the period of disability for the veteran's Social Security claim, practitioners should obtain them as well. Practitioners and the Social Security Administration can get these records directly from the treatment provider or use Form 20-10206 to request them from the VA claims folder.

Section III also has a check box for Vocational Rehabilitation and Employment Records. If the veteran has received vocational rehabilitation services or is receiving TDIU benefits, check this box for these records.

Processing time for these records varies. Consequently, practitioners are encouraged to submit requests as soon as they accept representation. It is not recommended to request a client's entire VA claims folder — it increases processing time and generates needless documents.

CONCLUSION

Representing disabled veterans is very rewarding. They have been among my favorite and most grateful clients. Obtaining Veterans Administration records is challenging, but necessary due to their evidentiary value. Though rating decisions and board decisions are not binding for the Social Security Administration, do not assume they have no persuasive value and do not ignore this important source of evidence. The SSA must consider compensation and pension examinations and disability benefits questionnaires. Using this evidence to tell the veteran's story can tip the scales toward a favorable decision in their Social Security claim. This advice will not guarantee success, but at least you will have told the disabled veteran's full story.

Sasha Boersma practices veterans' disability, Social Security disability, and workers' compensation at Conybeare Law Office. She has been accredited to represent veterans before the Department of Veterans Affairs since 2012.

ENDNOTES

1. 20 CFR 404.1504.
2. *Id.*
3. 38 USC 1110 and 38 USC 1131.
4. 38 USC 1521.
5. 38 USC 1101, *et seq.* and 38 USC 1501, *et seq.*
6. *Id.*
7. *Id.*
8. 38 CFR 1, Part 4, Subpart A – General Policy in Rating.
9. 38 CFR 1, Part 4, Subpart B – Disability Ratings.
10. 38 CFR 1, Part 4, Subpart B – Mental Disorders, §4.130.
11. *Id.*
12. *M21-1, Adjudication Procedures Manual, Table of Contents*, US Dep't of Veterans Affairs, available at <https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-us/portal/554400000001018/content/554400000073398/M21-1-Adjudication-Procedures-Manual-Table-of-Contents> [https://perma.cc/62VK-N4JT]. All websites cited in this article were accessed May 3, 2023.
13. 38 CFR 4.16(a).
14. *Id.*
15 *Id.*
16. 38 CFR Chapter 1, Part 4, Subpart A – General Policy in Ratings and *M21-1, Adjudication Procedures Manual, Table of Contents*
17. 20 CFR 404.1520.
18. Available at <https://www.ssa.gov/ere/> [https://perma.cc/3R34-5K3Z].
19. *Accreditation, Discipline, & Fees Program*, Office of General Counsel, US Dep't of Veterans Affairs <https://www.va.gov/ogc/accreditation.asp> [https://perma.cc/LJY2-L2MR].
20. The VA forms cited in this article are available at <https://www.va.gov/find-forms/> [https://perma.cc/HR8N-L7B6].

Michigan Lawyers in History: Flavius Littlejohn

BY CARRIE SHARLOW

Perhaps if Flavius Josephus Littlejohn had not become ill, Michigan might never have abolished capital punishment.

Fifteen years before Michigan became "the first English-speaking jurisdiction to ban capital punishment,"[1] the territory was most likely not even on Littlejohn's radar. Instead, he was in the early stages of a brilliant legal career in New York.

Littlejohn was born in Herkimer County in upstate New York to John and Katherine Littlejohn, sandwiched neatly in the middle of their 12 children with six older siblings and five younger. The Littlejohns were either well-read or fascinated with Roman history — among their children's names were Silas, Augustus, Philo, Lydia, and, of course, Flavius.

By the time Flavius Littlejohn was in his late 20s, he had completed college and studied law at a local firm;[2] got married to Harriet Hackley and had two children, Cornelia and Wolcott; and was admitted to practice before the United States Supreme Court.[3]

He became ill at the top of his game. Around 1832, as described by one biographer, Littlejohn had an episode of "bleeding at the lungs" while in a courtroom in the middle of a lawsuit.[4] Another account reported that Littlejohn had "hemorrhage of the lungs."[5] Whatever happened, it wasn't good, and Littlejohn was likely looking at either a shortened career or an early death.

This is where Michigan entered the picture. The 19th century remedy for such ailments was a change in climate: Move West for your health! The Littlejohn family — one ill lawyer, his wife, and two toddlers — settled in west Michigan:.[6] However, they were not alone. Joining in on the adventure were Littlejohn's parents and three of his siblings — Philo, Silas, and John — made the journey as well.[7] The extended family's new home base was no longer Herkimer County, but Allegan County.

Once in a new (and healthier) climate and presumably feeling better, Littlejohn picked up where he left off in New York. He was the

Flavius and Harriet Littlejohn in front of their Allegan home with an unknown girl. Photo courtesy of Center for Adventist Research Image Database

second attorney in Allegan County; George Y. Warner beat him to the punch by only a few months.[8]

But, in a new untamed land, there were far more exciting things to do. Littlejohn worked as a surveyor, charting "the west side of Barry County, near the north end of Gun Lake, to Allegan, and thence to the mouth of the Kalamazoo" for a possible canal connecting the Clinton and Kalamazoo rivers.[9] He plotted the road leading from Allegan to Kalamazoo and another to Paw Paw. He even resurveyed others' work, correcting it in some cases. Littlejohn also worked as a geologist, exploring the Upper Peninsula with another upstate New York native who had put down his stakes in Michigan, Dr. Douglass Houghton, the state's first geologist.[10]

Years later, Littlejohn remembered "his explorations as a [s]urveyor and [g]eologist [when] the scenery, topography, water courses and indigenous products of various sections in both peninsulas became familiar objects of sight and investigation."[11]

His travels as a surveyor and geologist put him in contact with many of Michigan's native tribes — among them the Chippewa, the Huron, the Ottawa, and the Potawatomi. He was fascinated by their knowledge of the terrain, flora, and fauna; the routines of their daily lives; and especially their historical accounts and tales of legends passed down from generation to generation by word of mouth.

Over the years, Littlejohn wrote down these stories under the pseudonym "Old Trailer" primarily for his own enjoyment. In 1874 at the bequest of people whom he termed "partial friends,"[12] [do you wan to include this? It looks like for the time he was actually very forward thinking] but also referred to in derogatory terms, he compiled his written accounts into a book titled, "Legends of Michigan and the Old North West" and published it under his own name. The book includes tales of an Ottawa hunter named Lynx Eye being rescued from a wolf attack by a sharpshooter; an account of an ongoing battle between the Potawatomi, led by Chief Pokagon and the Shawnee of Chief Elkhart; and the story of an Ojibwe chief Ne-oh-ta-no-mah, who expelled his wife, Star Light, and son, Red Hand, from the tribe's Upper Peninsula settlement.[13]

When he wasn't surveying, exploring, or writing, Littlejohn practiced law — no reason to waste such a good education. He also discovered that he was well-suited for public office. In the span of about a decade, he served as Allegan Township supervisor, Allegan County prosecuting attorney, state representative, circuit court commissioner, and, finally, state senator.

Once elected to the House of Representatives, Littlejohn became involved in an issue that had been discussed by Michigan officials for some time. Years before — when Littlejohn was still a New York resident — Michigan carried out its last criminal execution.[14]

In 1843, having been elected to another term as a state representative, Littlejohn was reappointed to the House Judiciary Committee. Archibald Y. Murray, a representative from Wayne County, suggested that the committee "inquire into the expediency of abolishing capital punishments."[15] Four days after Murray's instruction, Littlejohn "reported a bill entitled 'an act to abolish capital punishment.'"[16] The bill passed the House by a 35-15 margin.[17] Although it failed in Michigan Senate a week later,[18] it was the first time any American legislative body voted to abolish capital punishment.[19]

Two years later, Littlejohn was a member of the Senate and was elected as its president pro-tem on Jan. 6, 1846.[20] He was also appointed to a special committee tasked with revising the state's statutes along with the Judiciary Committee.[21] Petitions from across the state urged for "passage of a law abolishing capital punishment."[22] The Judiciary Committee made its recommendation to the Statutes Committee, and the measure went to a conference committee. It passed both the House and the Senate, and when Gov. Alpheus Felch signed the new statute "Michigan became the first state, as well as the first English-speaking jurisdiction, to ban capital punishment for first-degree murder."[23]

Littlejohn continued in the state Legislature and even made an unsuccessful run for governor[24] before he settled into the position as a judge presiding over one of Michigan's biggest circuits — it covered more than 20 counties and went as far north as Emmet County[25] — likely traveling the roads he surveyed many years ago. And, of course, some of the next generation of lawyers read law in his office.[26]

The pioneer air must have helped Littlejohn; almost 50 years after the initial concern over his lungs, he died at age 76 on May 14, 1880. His funeral was "the largest and most imposing ever seen" in the area.[27]

Carrie Sharlow is an administrative assistant at the State Bar of Michigan.

ENDNOTES

1. *Id.*
2. *Hamilton College*, Albany Argus (August 24, 1827), p 3.
3. Albany Argus (July 23, 1833), p 1.
4. Bartholomew, ed., *Historical Collections Made by the Pioneer Society of the State of Michigan Including Reports of Officers and Papers Read at the Annual Meeting of 1887*, Vol. XI (2nd ed) (Lansing: Wynkoop Hallenbeck Crawford Co, 1908), p 305.

5. *Portrait and Biographical Album of Newaygo County, Michigan* (Chicago: Chapman Brothers, 1884), p 501.
6. Cornelia Littlejohn was born in 1832 and Wolcott Littlejohn in 1835.
7. *History of Allegan and Barry Counties, Michigan with Illustrations and Biographical Sketches of Their Prominent Men and Pioneers* (Philadelphia: D.W. Ensign & Co, 1880), p 157.
8. *Id.*, p 151.
9. *Id.*, p 77.
10. *Portrait and Biographical Album of Newaygo County.*
11. Littlejohn, *Legends of Michigan and the Old North West* (Allegan: Northwestern Bible and Publishing Co, 1875), p 5.
12. *Id.*
13. *Id.*
14. Chardavoyne, *A Hanging in Detroit: Stephen Gifford Simmons and the Last Execution Under Michigan Law* (Detroit: Wayne State Univ Press, 2003).
15. 1843 House Journal 142.
16. 1843 House Journal 158.
17.[19] 1843 House Journal 210.
18. 1843 House Journal 210.
19. "The Northwest Ordinance and Michigan's Territorial Heritage," *The History of Michigan Law.*
20. 1846 Senate Journal 7.
21. *A Hanging in Detroit*, p 156.
22. 1846 Senate Journal 357.
23. "The Northwest Ordinance and Michigan's Territorial Heritage," *The History of Michigan Law.*
24. *Pioneer Collections. Report of the Pioneer Society of the State of Michigan, Together with Reports of County, Town, and District Pioneer Societies, Volume III* (Lansing: Robert Smith Printing Co, 1903), p 311.
25. *The Late Judge Littlejohn*, Lake County Star (May 27, 1880), p 3.
26. *History of Allegan and Barry Counties,* p 153.
27. *Obsequies of Judge Littlejohn*, Detroit Free Press (May 18, 1880), p 6.

50 YEAR CELEBRATION

Congratulations to our 1973 50-year honorees!

PLAIN LANGUAGE

Taking aim at multiword prepositions

BY JOSEPH KIMBLE

Multiword prepositions — also called compound or complex or phrasal prepositions — are among the most noxious and pervasive small-scale faults in legal writing. C. Edward Good calls them the "compost of our language."[1] Bryan Garner says, "If you're trying to sound like a bureaucrat, you'll need lots of phrasal prepositions."[2] And long ago, H.W. Fowler pegged them as "among the worst element in modern English."[3]

These bits of flab can usually be replaced with a one-word preposition. A short list of the most common offenders:

- prior to (= before)
- with regard to, with respect to, in relation to (= about, concerning, on, for)
- during the course of (= during, while)
- for a period of (= for)
- for the purpose of (= for, to)
- in the amount of (= for, of)

There are lots more. My book *Lifting the Fog of Legalese: Essays on Plain Language* (Durham: Carolina Academic Press, 2006), pp 170–71, has a long list.

The following are examples from some recent federal opinions.

"The Administrative Law Judge concluded that Plaintiff was not disabled ~~prior to~~ before January 5, 2007."

"The LCCA Defendants move for partial summary judgment ~~as to~~ on their liability for any injuries Plaintiff sustained ~~prior to~~ before her transfer to Life Care Center of Auburn."

"~~Subsequent to~~ After this decision, neither the Secretary nor the plaintiff returned to the district court for entry of a final judgment."

"Bond's appearance before a doctor ~~for the purpose of obtaining~~ to obtain a DOT certification was not for ~~the purpose of~~ care or treatment of a physical, mental, or emotional condition." [Better still: Bond appeared before a doctor to obtain . . . , not to receive care or treatment for . . . .]

"Moreover, ~~with regard to~~ on certain of the items, no claim of exemption is valid."

"The parties conducted the limited walk-through on December 6, 2017, and have submitted additional information ~~with regard to~~ about the elements not included in the FMP" [probably an unnecessary initialism].

"~~In order to~~ To assert a false-advertising claim, Plaintiffs must have standing both under Article III and the Lanham Act." [For parallelism, make it "under both."]

"James's claim, therefore, is only that Primer cashiered him to avoid paying equity incentives to which James was entitled ~~by virtue of~~ for his past services." [I'd write "that James was entitled to."]

"The Court did not explicitly address the arguments made ~~in connection with~~ regarding these requests."

"A Victoria's Secret manager told Ruffin where to set up and directed him ~~as to~~ where and how to position his equipment."

"On motion of Jasper [Jasper's motion], the action was dismissed ~~as to~~ against him under Rule 12(b), Federal Rules of Civil Procedure." [Or: "the action against him was dismissed."]

"The following day, Cheryl withdrew three cashier's checks ~~in the amount of~~ for $100,000, $111,500, and $150,700."

"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.

"The determination was based ~~upon~~ a failure to report income ~~in the amount~~ of $2,604 and to pay self-employment and FICA taxes thereon" [archaic; try "on it"].

"His punishment was fixed at imprisonment in the penitentiary for ~~a period of~~ five years on the third count, ~~for a period of~~ one year on the fourth count . . . ." [This sentence lumbers on with seven more such uses.]

"The Court will now memorialize [set out?] its rulings ~~with respect to~~ on those issues."

This column is reprinted from Judicature*, Summer 2022.*

Joseph Kimble taught legal writing for 30 years at WMU–Cooley Law School. His third and latest book is *Seeing Through Legalese: More Essays on Plain Language*. He is senior editor of *The Scribes Journal of Legal Writing*, editor of the Redlines column in *Judicature*, a past president of the international organization Clarity, and a drafting consultant on all federal court rules. He led the work of redrafting the Federal Rules of Civil Procedure and Federal Rules of Evidence. Follow him on Twitter @ProfJoeKimble.

ENDNOTES

1. Good, *Mightier Than the Sword* (Charlottesville: Blue Jeans Press, 1989), p 73.
2. Garner, *The Winning Brief* (3d ed) (New York: Oxford Univ Press, 2014), p 325.
3. Fowler, *A Dictionary of Modern English Usage* (Gowers ed, 2d ed) (New York: Oxford Univ Press, 1965), p 102.

LAW PRACTICE SOLUTIONS

Professionalism and civility: You cannot have one without the other

BY EDWARD H. PAPPAS

In 2022, the State Bar of Michigan Board of Commissioners formed a new special committee — the Professionalism and Civility Committee, whose members and chair are appointed by the president of the State Bar of Michigan.

The committee intends to contribute articles to the Michigan Bar Journal focusing on professionalism and civility, and the well-earned honor of writing the first column rightfully belongs to Edward H. Pappas. There is no one in Michigan more influential in promoting attorney professionalism and civility, instituting educational programs, contributing to the creation and adoption of the Professionalism Principles for Lawyers and Judges, and helping to develop the Professionalism and Civility Committee, whose mission he describes in this article.

For the title of this article, I adapted a saying from the University of Michigan Marching Band to describe the connection between professionalism and civility. These two concepts are often used synonymously, but professionalism is a much broader concept that, at a minimum, encompasses competence, integrity, honesty, and civility.

The importance of professionalism and civility to the legal profession, our justice system, and society as a whole cannot be overstated. In fact, with incivility at a crisis level in our government and society, professionalism and civility are more important now than ever before.

Lawyers and judges play an important role in society and have a responsibility to safeguard our constitutions, protect human rights, advance the rule of law, and ensure access to justice for everyone. As former United States Supreme Court Justice Warren Burger stated in a 1971 speech:

> "Lawyers who know how to think but have not learned how to behave are a menace and a liability, not an asset to the administration of our justice … I suggest the necessity for civility is relevant to lawyers because they are the living exemplars — and thus teachers — every day, in every case, and in every court; and their worse conduct will be emulated more readily than their best."[1]

Lawyers and judges have the opportunity to teach the leaders and citizens of our great nation that you cannot have the dialogue necessary to resolve important issues without civility and respect.

The State Bar of Michigan has actively promoted professionalism and civility in the practice of law. My first Bar Journal column as State Bar president in October 2008 dealt with professionalism.[2] In 2009, during my presidency, the State Bar created a Professionalism in Action program that was incorporated into the orientation programs at all five Michigan law schools to emphasize to students the importance of professionalism and civility in the practice of law.

In October 2018, the State Bar sponsored a summit entitled, "Promoting Professionalism in the 21st Century."[3] Among the recommendations that emerged from that summit was adopting civility guidelines that would apply to all Michigan lawyers and judges.

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.

As a result of the summit, the State Bar formed a Professionalism Workgroup which I had the privilege of chairing. Among other things, the workgroup drafted proposed professionalism principles[4] which were approved by the State Bar Representative Assembly and submitted to the Michigan Supreme Court. On Dec. 16, 2020, the Supreme Court adopted 12 principles of professionalism which, combined with their comments, provide guidance to lawyers and judges on how to conduct themselves professionally. In adopting these principles, the Supreme Court stated, in pertinent part:

> In fulfilling our professional responsibilities, we, as attorneys, officers of the court, and custodians of our legal system, must remain ever mindful of our obligations of civility in pursuit of justice, the rule of law, and the fair and peaceable resolution of disputes and controversies. In this regard, we adhere to the following principles adopted by the State Bar of Michigan and authorized by the Michigan Supreme Court.
>
> - We show civility in our interactions with people involved in the justice system by treating them with courtesy and respect.
>
> - We are cooperative with people involved in the justice system within the bounds of our obligations to clients.
>
> - We do not engage in or tolerate conduct that may be viewed as rude, threatening, or obstructive toward people involved in the justice system.
>
> - We do not disparage or attack people involved in the justice system or employ gratuitously hostile or demeaning words in our written and oral legal communications and pleadings.
>
> - We do not act upon or exhibit invidious bias toward people involved in the justice system and we seek reasonably to accommodate the needs of others, including lawyers, litigants, judges, jurors, court staff, and members of the public who may require such accommodation.
>
> - We treat people involved in the justice system fairly and respectfully notwithstanding their differing perspectives, viewpoints, or politics.
>
> - We act with honesty and integrity in our relations with people involved in the justice system and fully honor promises and commitments.
>
> - We act in good faith to advance only those positions in our legal arguments that are reasonable and just under the circumstances.
>
> - We accord professional courtesy, wherever reasonably possible, to other members of our profession.
>
> - We act conscientiously and responsibly in taking care of the financial interests of our clients and others involved in the justice system.
>
> - We recognize ours as a profession with its own practices and traditions, many of which have taken root over the passing of many years, and seek to accord respect and regard to these practices and traditions.
>
> - We seek to exemplify the best of our profession in our interactions with people who are not involved in the justice system.[5]

These principles are all encompassing, but the essence of the principles is acting with integrity and honesty and treating people with civility and respect.

After the principles were adopted, the Professionalism Workgroup continued to develop strategies to promote professionalism and civility and keep these concepts at the forefront of the practice of law. Based on the workgroup's recommendation, the State Bar last year formed the Special Committee on Professionalism and Civility with the mission of being "a resource to lawyers, judges, and those involved in the administration of justice to help promote the highest standards of personal conduct of lawyers and judges in the practice of law as articulated in"[6] the principles of professionalism.

The principles of professionalism and the commentary on those principles offer nuts-and-bolts guidance to lawyers and judges on professionalism and civility but as I wrote in my first President's Page 15 years ago, every Michigan lawyer need only adhere to the Lawyer's Oath[7] he or she took when admitted to practice law:

> I will maintain the respect due to courts of justice and judicial officers[.]
>
> * * *
>
> I will employ for purposes of maintaining the causes confided to me such means only as are consistent with truth and honor[.]
>
> * * *
>
> I will abstain from all offensive personality[.]
>
> * * *

I will in all other respects conduct myself personally and professionally in conformity with the high standards of conduct imposed upon members of the Bar as a condition to practice law in this State.

It is a privilege to be a lawyer and a judge and with that privilege comes the responsibility to act professionally, act with integrity and civility, and act with truth and honor. I encourage all lawyers and judges to maintain the highest levels of professionalism and civility in the "pursuit of justice, the rule of law, and the fair and peaceable resolution of disputes and controversies."[8]

Edward H. Pappas, a leading business litigator, mediator, arbitrator, and former State Bar of Michigan president, has led efforts focusing on professionalism and civility. He is a past recipient of the Robert P. Hudson Award, the State Bar's highest honor.

ENDNOTES

1. *Excerpts From the Chief Justice's Speech on the Need for Civility,* New York Times (May 19, 1971) p 28 <https://www.nytimes.com/1971/05/19/archives/excerpts-from-the-chief-justices-speech-on-the-need-for-civility.html> [https://perma.cc/C2TS-BS4F]. All websites cited in this article were accessed May 16, 2023.
2. Pappas, *Professionalism Under Siege,* 87 Mich B J 14, 14-15 (October 2008), available at <https://www.michbar.org/file/barjournal/article/documents/pdf4article1415.pdf> [https://perma.cc/KB5L-4Y98].
3. *Promoting Professionalism in the 21st Century,* SBM (October 18, 2018), available at <https://www.michbar.org/file/professional/pdfs/Professionalism-Summary.pdf> [https://perma.cc/6ZQE-F8JZ].
4. Administrative Order No 2020-23 (2020), available at <https://www.courts.michigan.gov/4a6252/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/adopted-orders/2019-32_2020-12-16_formattedorder_ao2020-23.pdf> [https://perma.cc/EBU8-FS98].
5. *Id.*
6. *Professionalism and Civility Committee,* SBM <https://www.michbar.org/generalinfo/professionalism> [https://perma.cc/C4CG-9MGR].
7. *Lawyer's Oath,* SBM <https://www.michbar.org/generalinfo/lawyersoath> [https://perma.cc/6NYV-CY4C].
8. Administrative Order No 2020-23.

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 Jan. 1, 2023, is 3.743%. This rate includes the statutory 1%.

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

13% per year, compounded annually; or

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

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

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

DUTY TO REPORT AN ATTORNEY'S CRIMINAL CONVICTION

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

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

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

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

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

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

LIBRARIES & LEGAL RESEARCH

Social Security shortfall in context

BY DARYL THOMPSON

How is Social Security running out of money? We keep paying payroll taxes, but Social Security's retirement program, officially called Old Age, Survivors, and Disability Insurance (OASI), is projected to only be able pay out approximately 77% of benefits starting in 2034.[1] That being said, Social Security distributions have continued to be paid out for the past 40 years and even periodically increased for cost-of-living adjustments.

Why are there expected shortfalls? What can we do? This article provides some background and resources for understanding the shortfall.

To find out more about Social Security retirement funding, two easily usable free resources stand out. The Social Security website has considerable information, including pages on the history of Social Security[2] and statistics on Social Security funding.[3] Another great research point are the Congressional Research Service reports, also known as CRS reports.[4] Many of the references in this article are from sources found there.

Social Security is funded largely through a payroll tax[5] and based on an insurance model.[6] With the insurance model, people pay into the system over the course of their lives and when they are of retirement age, they can collect according to average income over their highest 35 years of pay,[7] which in turn is related to the amount they have paid in. Roughly speaking, the more someone has contributed, the more they are able to collect per month in their retirement. Excess payroll taxes are put into a trust fund that can loan money to the government and collect interest.

While Social Security pays more to people who have contributed more, it also proportionally rewards people at the bottom of the income scale more than those at the top.[8] Perhaps coming from the lessons of the Great Depression, the Social Security Act was considered to contribute to the general welfare as evidenced from its title stating, "AN ACT To provide for the general welfare ... ."[9]

In a balance with Social Security's redistributive aspect, there has always been a cap on the amount of income subject to the payroll tax. The current cap is $160,200; income above that cap is not subject to the payroll tax.[10] Although variable by retirement age, the current maximum benefit distribution for someone who retires at age 70 is $4,555 per month.[11]

Social Security has a long tradition of periods where it did not have enough money. Although not technically a shortfall, the Social Security Act that passed in 1935 did not collect payroll taxes until 1937 and did not pay out monthly benefits until 1940.[12] That being said, from 1937-40, Social Security did provide a lump sum to people who retired during that period.[13] Because the Social Security retirement system was scheduled to make payments to elderly people only five years after it passed, it may have needed some time to build up its reserves. As a method of addressing other shortfalls, periodic hikes in the percentage of payroll taxes have been used to fund Social Security. These tax rates have risen from 1% in 1937 to 12.4% (split between employees and employers, including disability insurance along with OASI) in 1990, which is still the current payroll tax percentage.[14] The 1990 rate increase was instituted by the Social Security Amendments of 1983 to address a shortfall.[15] The increase worked quite well until 2010. That year, Social Security funds shifted to a cashflow deficit that has persisted since and is projected to continue under the current tax and distribution scheme.[16]

There are several reasons why the Social Security payroll tax has failed to keep up with distributions and, more importantly, is projected to continue to fail to keep up with distributions. Social Security actuarial experts point out that the biggest cause of the sustained shortfall is the continued decreased in birth rate after the baby-boom generation.[17] The average number of children born to a single family has gone from roughly three children down to two children.[18] This reduction in birth rate has resulted in fewer workers supporting each retired person.[19] Another major contributing factor, of course, is the increasing life expectancy in the U.S., which can also lead to an increased number of beneficiaries per worker.[20] There are many contributing factors beyond birth rate and death rates, however, including employment rates, productivity gains, and interest rates.[21] One example of a surprising economic factor contributing to the shortfall is increasing economic inequality.[22]

Calculations show a clear prediction of the gap between what payroll taxes bring in and what distributions go out. But there are many solutions to close the gap, such as payroll tax rate hikes, al-

ternative sources of revenue, smaller payments, and increased ages for retirement. The Office of the Chief Actuary has described and analyzed many of them.[23] While no solution will be perfect, planning for the long term can be successful. As discussed, the 1983 Social Security Amendment made adjustments that provided 40 years of solvency and may be adequate for another 10 years. Despite predictions of a Social Security shortfall, history shows there is still time and means to prevent it.

Daryl Thompson is a librarian at Michigan State University College of Law. He received his law degree from Michigan State University College of Law and his master's in library and information science from San José State University.

ENDNOTES

1. *2022 Long-Term Projections for Social Security,* Congressional Budget Office (December 16, 2022), p 9, available at <http://www.cbo.gov/publication/58564> [https://perma.cc/LMH8-CMYY]. All websites cited in this article were accessed May 3, 2023.
2. *Social Security History,* Social Security Administration (SSA) <https://www.ssa.gov/history> [https://perma.cc/6B5C-8AZ9].
3. *Statistical Tables,* SSA <https://www.ssa.gov/oact/STATS/index.html> [https://perma.cc/87KA-MP9E].
4. *Search CRS Reports,* Congressional Research Service <https://crsreports.congress.gov> [https://perma.cc/CP6U-7ZK9].
5. *How is Social Security financed?* SSA <https://www.ssa.gov/news/press/factsheets/HowAreSocialSecurity.htm> [https://perma.cc/HHP4-5R8C].
6. *Historical Background and Development of Social Security,* SSA <https://www.ssa.gov/history/briefhistory3.html> [https://perma.cc/XZL3-RFLL].
7. *Social Security: Benefit Calculation,* Congressional Research Service (November 17, 2022), p 4, available at <https://crsreports.congress.gov/product/pdf/R/R46658> [https://perma.cc/G5SM-ZVKC].
8. *Id.* p 5.
9. PL 74-271, 49 Stat 620 (1935).
10. *Contribution and Benefit Base,* SSA <https://www.ssa.gov/oact/cola/cbb.html> [https://perma.cc/SFV3-7LHX].
11. *What is the maximum Social Security retirement benefit payable?* SSA (April 20, 2023) <https://faq.ssa.gov/en-us/Topic/article/KA-01897> [https://perma.cc/KY4M-XHWJ].
12. *Historical Background and Development of Social Security.*
13. *Id.*
14. *Social Security & Medicare Tax Rates,* SSA <https://www.ssa.gov/oact/progdata/taxRates.html> [https://perma.cc/Q99G-YMZ3].
15. PL 98-21, 97 Stat 65 (1983).
16. *Social Security: The Trust Funds,* Congressional Research Service (June 29, 2022), pp 6-8, available at <https://crsreports.congress.gov/product/pdf/RL/RL33028> [https://perma.cc/E3L2-VNP9].
17. Goss, *The future financial status of the Social Security program* 70:3 Soc Sec Bull 111, 122 (2010), available at <https://www.ssa.gov/policy/docs/ssb/v70n3/v70n3p111.html> [https://perma.cc/ENC9-CPWP].
18. *Id.*
19. *Id.*
20. *Id.,* p 124.
21. Huston, *Social Security's Funding Shortfall,* In Focus, Congressional Research Service (June 22, 2022), p 2, available at <https://crsreports.congress.gov/product/pdf/IF/IF10522> [https://perma.cc/EBL9-BHSN].
22. Li, *Social Security Taxable Earnings Base: An Overview,* In Focus, Congressional Research Service (March 27, 2023), p 2, available at <https://crsreports.congress.gov/product/pdf/IF/IF12360> [https://perma.cc/TP8A-L8ZW].
23. *Office of the Chief Actuary's Estimates of Individual Changes Modifying Social Security,* SSA <https://www.ssa.gov/OACT/solvency/provisions/> [https://perma.cc/2YFT-H2QK].

PRACTICING WELLNESS

What lawyers can learn about wellness from the month of June

BY VICTORIA VULETICH KANE

The month of June in Michigan is a glorious duality. Most years, we enter June fresh from the splendor of flowering, pastel-colored trees and green yards dotted with bright tulips and daffodils and end it in full summer mode clad in shorts at backyard barbeques and planning, or having already enjoyed, a trip up north to revel in the state's many natural gifts.

The ancient Romans must also have experienced the duality of June. They were the ones who gave June its name in honor of the Roman goddess, Juno, herself an interesting study in duality. Juno is traditionally associated with being the protector of women and childbirth.[1] Yet Juno was also viewed as the principal deity and protector of the state and is regularly depicted as an armed goddess complete with shield and spear.[2]

Juno had her own festival, Matronalia, which celebrated spring and the renewal of nature.[3] She is also honored as a protector of the military, and legend has it that her sacred geese alerted the Roman military to the impending attack on Rome by invading Gauls in 390 BCE.[4]

Though most of us accept the happy duality of June, much of our modern world is uncomfortable with reconciling dualities in life:

> The dualistic mind is essentially binary, either/or thinking. It knows by comparison, opposition, and differentiation. It uses descriptive words like good/evil, pretty/ugly, smart/stupid, not realizing there may be a hundred degrees between the two ends of each spectrum. Dualistic thinking works well for the sake of simplification and conversation, but not for the sake of truth or the immense subtlety of actual personal experience. Most of us settle for quick and easy answers instead of any deep perception, which we leave to poets, philosophers, and prophets ...
>
> We do need the dualistic mind to function in practical life, however, and to do our work as a teacher, a nurse, a scientist, or an engineer. It's helpful and fully necessary as far as it goes, but it just doesn't go far enough. The dualistic mind cannot process things like infinity, mystery, God, grace, suffering, sexuality, death, or ove; this is exactly why most people stumble over these very issues. The dualistic mind pulls everything down into some kind of tit-for-tat system of false choices and too-simple contraries ...[5]

One need only look at the headlines to see a world awash in either-or and us vs. them thinking, and the suffering such mindsets cause.

Because of our culture and the way we're wired, lawyers are particularly ill-equipped for the task of integrating dualities. This is in large part because we primarily inhabit only one aspect of Juno's dual nature.

The legal culture easily identifies with Juno and her role as the protector of the state. Many of us are comfortable, and even quick, to engage in battle to protect those we perceive as vulnerable. We take up our swords and shields in the form of logic, reason, analysis, and objectivity. Then, in courtrooms and at the bargaining table, we battle opposing lawyers and their clients — people struggling, to one extent or another, to reconcile duality.

We identify with our role as officers of the court and have become accustomed to, and even comfortable with, doing things in our role that are confusing and even occasionally morally distasteful to "civilians," as one of my friends calls non-lawyers.

"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

If the law is one of the three learned professions along with medicine and theology, it is the only one lacking a clear healing, nurturing component to its mission. We are the one learned profession that focuses not on healing the person directly but rather fixing their legal problems and hoping that their minds, bodies, and hearts improve as a result.

Though all three professions serve people when they are at their most vulnerable, the legal culture is fundamentally uncomfortable with vulnerability. Our culture is predominantly adversarial — as evidenced by the conflict inherent in litigation, negotiation, billable hour rates, salaries, and jury awards. We are also a culture where an addiction to work is not only excused but encouraged.

Further, the very traits that make us good at our craft also keep us mired in binary thinking. Dr. Larry Richard of LawyerBrain indicates that lawyers as a group deviate significantly from the general population with regard to the following psychological traits:

- skepticism
- autonomy
- urgency
- abstract reasoning
- sociability
- resilience
- empathy[6]

We are all familiar with the statistics about the perilous state of the mental health of attorneys. The connection between the statistics and Dr. Richard's data regarding these psychological traits makes sense intuitively and is quite insightful when explored more deeply.

In a 2020 article in General Counsel magazine, Dr. Richard recommends lawyers employ techniques to improve resilience and train their brains to seek out positives and identify strengths, not just highlight deficiencies that need improvement. He recommends focusing on positive social emotions such as gratitude, compassion, and pride, but adds that research shows that strong social connections are the most powerful antidote to problems caused by negativity.

> I mean ongoing, authentic connections with people. Where you interact with people and you reveal your true self, which might entail some risk or vulnerability, and you show a genuine interest in the other person. Listening to people's stories, giving them your full attention — there's actually some very compelling research on the power of presence, the power of full attention in building social connection.
>
> There is strong evidence that these shifts in mindset not only change the outlook, but they also change your biology, they change your immune system for the better, so people get sick less often, they have less frequent common colds, they can actually live longer, and they are more likely to make balanced decisions. That's a bit of speculation on my part, but all the pieces are there for me to make that inference.[7]

In the legal realm, the restorative justice and collaborative divorce approaches are efforts to integrate the dualities of the legal system and make the law the healing profession it can (and should) be in appropriate circumstances.

In short, Dr. Richard urges us to reconcile duality — to be both the defenders of the state and life-affirming individuals — which we cannot do without recognizing and becoming comfortable with vulnerability, compassion, and regularly laying down our cognitive and metaphorical tools of war when nurturing and healing is the order of the day.

Doing so will not only heal others, but it will also heal us. Happy June!

Victoria Vuletich Kane is a professional responsibility attorney, former law professor, and the director of Title IX and equal opportunity compliance at Grand Rapids Community College.

ENDNOTES

1. *Juno, Roman Goddess,* Britannica (March 23, 2023) <https://www.britannica.com/topic/Juno-Roman-goddess> [https://perma.cc/ZQK8-4M6R] and Wasson, Juno, World History Encyclopedia (April 8, 2015) <https://www.worldhistory.org/Juno/> [https://perma.cc/LRQ2-47FF]. All websites cited in this article were accessed May 4, 2023.
2. *Id.*
3. *Matronalia,* Britannica (November 8, 2007) <https://www.britannica.com/topic/Matronalia> [https://perma.cc/29JZ-3SRK].
4. Malesky, *How Swiss Guards and Sacred Geese Saved Rome,* NPR (May 6, 2012) <https://www.npr.org/2012/05/05/152092224/how-swiss-guards-and-sacred-geese-saved-rome> [https://perma.cc/GN6Y-C489].
5. *The Dualistic Mind,* The Center for Action and Contemplation (January 29, 2017) <https://cac.org/daily-meditations/the-dualistic-mind-2017-01-29/> [https://perma.cc/4889-VG5G].
6. Richard, *Herding Cats: The Lawyer Personality Revealed,* LawyerBrain (2002) <https://lawyerbrain.com/sites/default/files/caliper_herding_cats.pdf> [https://perma.cc/3U8L-UV9H], pp 4-7.
7. *All in the Mind,* General Counsel Magazine (2020) <https://www.legal500.com/gc-magazine/feature/all-in-the-mind/> [https://perma.cc/8VSY-MYNW].

ORDERS OF DISCIPLINE & DISABILITY

SUSPENSION WITH CONDITIONS (BY CONSENT)

Frederick J. Blackmond, P29696, Lansing, by the Attorney Discipline Board Ingham County Hearing Panel #2. Suspension, 90 days, effective May 1, 2023.

The respondent and the grievance administrator filed a Stipulation for Consent Order of 90-Day Suspension with Conditions pursuant to MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contains the respondent's admission to the factual allegations and allegations of misconduct set forth in the formal complaint filed by the administrator in its entirety. Specifically, the respondent admitted that he committed professional misconduct during his representation of a criminal defendant by failing to appear for his client's first scheduled preliminary examination, appearing to be under the influence of an unknown substance on the days of two other scheduled hearings, and conceding on the record at the last hearing that he was not in a condition to proceed.

Based on the respondent's admissions and the stipulation of the parties, the panel found that the respondent failed to competently represent his client in violation of MRPC 1.1(a); failed to seek the lawful objectives of the client in violation of MRPC 1.2(a); failed to act with diligence and promptness in representing a client in violation of MRPC 1.3; failed to adequately keep the client reasonably informed about the status of a matter in violation of MRPC 1.4(a); failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation in violation of MRPC 1.4(b); engaged in conduct prejudicial to the administration of justice in violation of MCR 9.104(1); engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); and engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent's license to practice law in Michigan be suspended for 90 days, effective May 1, 2023, as agreed to by the parties. The panel also ordered that the respondent be subject to conditions relevant

to the established misconduct. Total costs were assessed in the amount of $772.74.

DISBARMENT AND RESTITUTION (BY CONSENT)

Russell D. Brown, P60583, Plymouth, by the Attorney Discipline Board Tri-County Hearing Panel #13. Disbarment, effective April 25, 2023.[1]

The respondent and the grievance administrator filed a stipulation for consent order of discipline pursuant to MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contained the respondent's admissions to the factual statements and allegations of misconduct set forth in the two-count formal complaint in its entirety. Specifically, the respondent admitted to sending several emails to opposing counsel that were disrespectful and disparaging while defending two clients in a civil action and in a separate, unrelated civil matter he was retained to file on behalf of a couple, neglecting their matter, failing to return requested documents and unearned fees, making misrepresentations to them about the status of their matter, and failing to notify them that his license to practice law had been suspended.

Based on the respondent's admissions and the stipulation of the parties, the panel found that the respondent neglected a legal matter in violation of MRPC 1.1(c); failed to keep a client reasonably informed about the status of a matter in violation of MRPC 1.4(a); failed to protect a client's interests upon termination of representation such as giving notice to the client, returning papers and property, and refunding unearned fees in violation of MRPC 1.16(d); engaged in the unauthorized practice of law by holding himself out as a lawyer after his suspension in violation of MRPC 5.5(b)(2) and MCR 9.119(E)(4); failed to treat with courtesy and respect all persons involved in the legal process in violation of MRPC 6.5; engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law which reflects adversely on the lawyer's honesty, trustworthiness, or fitness in violation of MRPC 8.4(b); violated an order of discipline in violation of MCR 9.104(9); failed to notify all active clients in writing of his suspension in violation of MCR 9.119(A); and contacted clients during a period of suspension in violation of MCR 9.119(E)(2). The panel also found the respondent to have violated MCR 9.104(1)-(3) and MRPC 8.4(c).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be disbarred from the practice of law in Michigan effective April 25, 2023, and that he pay restitution totaling $3,160. Total costs were assessed in the amount of $854.92.

1. The respondent's license to practice law in Michigan has been continuously suspended since Nov. 20, 2021. See Notice of Suspension and Restitution with Conditions, issued Nov. 30, 2021, *Grievance Administrator v. Russell D. Brown*, 21-11-GA.

REPRIMAND WITH CONDITIONS (BY CONSENT)

Richard Francis Cummins, P69582, Traverse City, by the Attorney Discipline Board Emmet County Hearing Panel #3. Reprimand, effective April 27, 2023.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Reprimand with Condition pursuant to MCR 9.115(F)(5) that was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

contained the respondent's admission that he was convicted by guilty plea of operating a motor vehicle while intoxicated with a BAC of .17 or more, a misdemeanor, in violation of MCL 257.625(1)(c), in *People v. Richard Francis Cummins,* 70th District Court, Case No. 22-4497-SD.

Based on the respondent's conviction, admission, 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 MRPC 8.4(b) and MCR 9.104(5).

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 $776.79

REPRIMAND (BY CONSENT)

Heather M. Gosnick, P75344, Chelsea, by the Attorney Discipline Board Washtenaw County Hearing Panel #4. Reprimand, effective April 14, 2023.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Reprimand pursuant to MCR 9.115(F)(5) that was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contained the respondent's admission that she was convicted by guilty pleas on March 2, 2018, and April 19, 2022, respectively, of Driving While License Suspended/Revoked/Denied, a misdemeanor, in violation of MCL/PACC Code 257.9041B, in *People v. Heather Marie Gosnick,* 14A3 District Court, Case No. 1730527SD; and Allowing Intoxicated Person to Operate a Motor Vehicle, a misdemeanor, in violation of MCL/PACC Code 257.6252A, in *People v. Heather Marie Gosnick,* 14A3 District Court, Case No. 1830190SD.

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

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be reprimanded. Costs were assessed in the amount of $759.82.

AUTOMATIC SUSPENSION FOR NONPAYMENT OF COSTS

Michael G. Mack, P31173, Alpena, effective April 20, 2023.

On March 13, 2023, an Order of Reprimand with Conditions (By Consent) was issued by Emmet County Hearing Panel #3 in *Grievance Administrator v. Michael G. Mack,* Case Nos. 22-60JC; 22-61-GA. Pursuant to that order, the respondent was ordered to pay $1,359.46 in costs on or before April 4, 2023. The respondent failed to do so and a certification of nonpayment of costs was issued on April 12, 2023, in accordance with MCR 9.128(C).

Pursuant to MCR 9.128(D), the respondent's license to practice law in Michigan

was automatically suspended on April 20, 2023, and will remain suspended until the costs have been paid or a payment plan is approved by the board, and the respondent has complied with MCR 9.119 and 9.123(A).

SUSPENSION WITH CONDITIONS (BY CONSENT)

Robert J. Pleznac, P18950, Kalamazoo, by the Attorney Discipline Board Kalamazoo County Hearing Panel #1. Suspension, 30 days, effective April 27, 2023.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Discipline pursuant to MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contains the respondent's admissions to the factual allegations and allegations of misconduct set forth in the formal complaint filed by the administrator in its entirety. Specifically, the respondent admitted that he misused his client trust account by causing an overdraft to occur in the account, commingled personal and client funds in the account, and neglected and provided incompetent representation in his client's bankruptcy matter.

Based on the respondent's admissions and the stipulation of the parties, the panel found that the respondent failed to provide competent representation of a client in violation of MRPC 1.1(a); failed to adequately prepare for his representation of his client in violation of MRPC 1.1(b); neglected his client's legal matter in violation of MRPC 1.1(c); failed to communicate with his client regarding the status of his legal matter in violation of MRPC 1.4(a); failed to communicate with his client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation in violation of MRPC 1.4(b); failed to hold property of clients or third persons in connection with a representation separate from the lawyer's own property in violation of MRPC 1.15(d); failed to safeguard client funds in his IOLTA account in violation of MRPC 1.15(d); and deposited funds into his IOLTA account in an amount in excess of an amount reasonably necessary to pay financial institution service charges or fees in violation of MRPC 1.15(f). The panel also found that the respondent violated MCR 9.104(1)-(4) and MRPC 8.4(a).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent's license to practice law in Michigan be suspended for 30 days and that he be subject to conditions relevant to the established misconduct. Total costs were assessed in the amount of $1,040.17.

REPRIMAND AND RESTITUTION WITH CONDITIONS (BY CONSENT)

Jerard M. Scanland, P74992, Southgate, by the Attorney Discipline Board Tri-County Hearing Panel #10. Reprimand, effective April 19, 2023.

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. The parties' stipulation contained the respondent's admission that he committed professional misconduct during his representation of three clients in their separate and unrelated real estate/probate and civil matters as set forth in a three-count formal complaint filed by the grievance administrator.

Based on the respondent's admissions and the stipulation of the parties, the panel found that the respondent failed to adequately keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information in violation of MRPC 1.4(a) (counts 2-3); failed to act with reasonable diligence and promptness in representing a client in violation of MRPC 1.3 (counts 2-3); failed to return unearned fees in violation of MRPC 1.16(d) (count 2); and engaged in the unauthorized practice of law in violation of MRPC 5.5(a) (count 1). In addition, the panel found that the respondent engaged in conduct prejudicial to the administration of justice in violation of MCR 9.104(1) (counts 1-3) and engaged in conduct that exposes the legal profession or the court to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2) (counts 1-3).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be reprimanded, pay restitution totaling $5,998.34, and comply with conditions relevant to the established misconduct. Costs were assessed in the amount of $750.

SUSPENSION (BY CONSENT)

David L. Wisz, P55981, Birmingham, by the Attorney Discipline Board Tri-County Hearing Panel #57. Suspension, 30 days, effective April 13, 2023.[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 contains the respondent's admission that he was convicted on March 11,

2022, of one count of disorderly person, a misdemeanor offense, in violation of MCL 750.167, in a matter titled *People v. David Leonard Wisz*, 52/3 District Court Case No. 21-004466-SM.

Based on the respondent's admissions and the parties' stipulation, the panel found that the respondent violated a criminal law of a state or of the United States, an ordinance, or tribal law which constituted professional misconduct under MCR 9.104(5).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent's license to practice law in Michigan be suspended for 30 days, effective April 13, 2023. Total costs were assessed in the amount of $943.

1. The respondent's license to practice law in Michigan has been continuously suspended since Oct. 1, 2021. See Notice of [180-Day] Suspension (By Consent), issued July 30, 2021, in *Grievance Administrator v. David L. Wisz*, 20-79-GA.

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

The Committee on Model Criminal Jury Instructions has adopted the following amended model criminal jury instructions: M Crim JI 37.3b (Bribing Witnesses — Crime/Threat to Kill); M Crim JI 37.4 (Intimidating Witnesses); M Crim JI 37.4a (Intimidating Witnesses — Criminal Case, Penalty More Than Ten Years); M Crim JI 37.4b (Intimidating Witnesses — Crime/Threat to Kill); M Crim JI 37.5b (Interfering with Witnesses — Crime/Threat to Kill); M Crim JI 37.6 (Retaliating Against Witnesses); M Crim JI 37.8b (Retaliating for Crime Report); and M Crim JI 37.9a (Influencing Statements to Investigators by Threat or Intimidation) to add "true threat" language in order to avoid infringement on First Amendment protections. The amended instructions are effective June 1, 2023.

[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, 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.

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

(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, 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, 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.

(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. 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, 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, 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.

(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. 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, 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 ten 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, 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.

(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 of that shows an intent to injure or harm another person or that person's property or family in some way. 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, 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].

[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, 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.

(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, 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.

(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, 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, 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 [the defendant/(*identify other person*)] [*describe conduct to be reported*].

(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 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, 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

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS (CONTINUED)

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

(1) [The defendant is charged with/You may also consider the less serious offense of] threatening or intimidating a person 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, 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.]

FROM THE MICHIGAN SUPREME COURT

ADM File No. 2022-28 Amendments of Rules 1.109, 1.201, 2.622, 3.002, 3.218, 3.616, 3.903, 3.914, 3.921, 3.928, 3.946, 3.953, 3.956, 3.963, 3.965, 3.972, 3.979, 5.404, 6.006, 6.450, 6.903, 6.931, 6.933, 6.935, 6.937, 7.105, 7.202, 7.305, 8.103, 8.105, and 8.119 of the Michigan Court Rules and Rule 5 and Rule 8 of the Rules for the Board of Law Examiners

To read ADM File No. 2022-28 dated May 3, 2023, visit https://www.courts.michigan.gov/49a15b/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/adopted-orders/2022-28_2023-05-03_formor_housekeeping.pdf

ADM File No. 2002-37 Amendment of Rule 1.109 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 1.109 of the Michigan Court Rules is adopted, effective Jan. 1, 2024.

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

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

(A)-(C) [Unchanged.]

(D) Filing Standards.

(1)-(10) [Unchanged.]

(11) Change in Contact Information for Purposes of Service; Modified Captions of Documents.

(a) A party or attorney must file with the court and serve on other parties or attorneys written notice of a change in contact information that is needed for service under MCR 2.107(C) or MCR 1.109(G)(6)(a). Contact information includes name, physical address, mailing address, phone number, and when required, email address. The written notice of changed contact information must be served in accordance with MCR 2.107(C) or MCR 1.109(G)(6)(a), as applicable.

(i) In all cases, written notice of a change in name, physical address, mailing address, and phone number shall be on a form approved by the State Court Administrative Office.

(ii) In cases using alternative electronic service under MCR 2.107(C)(4), written notice of a change in email address shall be on a form approved by the State Court Administrative Office.

(iii) In cases using the electronic filing system for service, written notice of a change in email address shall be provided using the electronic filing system.

(b) The clerk of the court must update the case caption with the modified contact information; however, the case title shall not be modified as a result of a change of name.

(c) The court and parties to the case must send or serve subsequent documents to the new mailing address as required by MCR 2.107(C) or the new email address as required by MCR 1.109(G)(6)(a).

(E)-(F) [Unchanged.]

(G) Electronic Filing and Service.

(1)-(6) [Unchanged.]

(7) Transmission Failures.

(a)-(c) [Unchanged.]

(d) Notice of Undeliverable Transmission of Served Document. Electronic service by the electronic-filing system is complete upon transmission as defined in subrule (G)(6)(b) unless the person or entity making service learns that the attempted service did not reach the intended recipient.

(i) If the transmission is undeliverable, the person or entity responsible for serving the document must immediately serve by regular mail under MCR 2.107(C)(3) or by delivery under MCR 2.107(C)(1) or (2) the document and a copy of the notice indicating that the transmission was undeliverable. The person or entity

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

must also include a copy of the notice when filing proof of service with the court under this subrule.

(ii) A recipient who is served with a notice under subrule (7)(d)(i) should ensure the electronic filing system reflects their current email address.

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

(H) [Unchanged.]

Staff Comment (ADM File No. 2002-37): The amendments of MCR 1.109(D) and (G) address e-filing issues relating to changes in contact information and e-service of documents that are returned as undeliverable to an email address in the e-filing system.

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

ADM File No. 2022-11
Proposed Amendments of Rules 2.511 and 6.412 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering amendments of Rules 2.511 and 6.412 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 2.511 Impaneling the Jury

(A)-(B) [Unchanged.]

(C) Examination of Jurors~~; Discharge of Unqualified Juror~~. The court may ~~conduct the~~ examine~~ation of~~ prospective jurors or ~~may~~ permit the attorneys for the parties to do so. If the court examines the prospective jurors, it must permit the attorneys for the parties to:

(1) ask further questions that the court considers proper; or

(2) submit further questions that the court may ask if it considers them proper.

(D) Discharge of Unqualified Juror. When the court finds that a person in attendance at court as a juror is not qualified to serve as a juror, the court shall discharge him or her from further attendance and service as a juror.

(D)-(H) [Relettered (E)-(I) but otherwise unchanged.]

Rule 6.412 Selection of the Jury

(A)-(B) [Unchanged.]

(C) Voir Dire of Prospective Jurors.

(1) [Unchanged.]

(2) Conduct of the Examination. The court may ~~conduct the~~ examine~~ation of~~ prospective jurors or permit the attorneys for the parties~~lawyers~~ to do so. If the court ~~conducts the~~ examine~~sation~~ the prospective jurors, it must~~may~~ permit the attorneys for the parties~~lawyers~~ to:~~ supplement the examination by direct questioning or by submitting questions for the court to ask.~~

(a) ask further questions that the court considers proper; or

(b) submit further questions that the court may ask if it considers them proper.

On its own initiative or on the motion of a party, the court may provide for a prospective juror or jurors to be questioned out of the presence of the other jurors.

(D)-(F) [Unchanged.]

Staff Comment (ADM File No. 2022-11): The proposed amendments of MCR 2.511(C) and 6.412(C) align with Fed Crim P 24 and Fed Civ R 47 and would require the court to allow the attorneys or parties to conduct voir dire in civil and criminal proceedings if the court examines the prospective jurors. The proposed requirement is subject to the court's determination that the parties' or attorneys' questions are proper.

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 Aug. 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. 2022-11. Your comments

and the comments of others will be posted under the chapter affected by this proposal.

VIVIANO, J., would decline to publish for comment.

ADM File No. 2022-14
Proposed Amendment of Rule 2.311 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.311 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 2.311 Physical and Mental Examination of Persons

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

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

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

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

(1) be unobtrusive,

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

(3) be filed under seal.

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

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

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

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 Aug. 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. 2022-14. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2022-26
Proposed Amendment of Rule 6.425 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.425 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 6.425 Sentencing; Appointment of Appellate Counsel

(A)-(C) [Unchanged.]

(D) Sentencing Procedure.

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

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

(a)-(b) [Unchanged.]

(c) before imposing sentence

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

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

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

(iv) address any victim of the crime who is present at sentencing and permit the victim to be reasonably heard,

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

(d)-(f) [Unchanged.]

(2)-(3) [Unchanged.]

(E)-(H) [Unchanged.]

Staff Comment (ADM File No. 2022-26): The proposed amendment of MCR 6.425(D)(1)(c) would require a trial court, on the record before sentencing, to personally address the defendant regarding his or her allocution rights and to address any victim who is present and allow the victim to be reasonably heard, similar to FR Crim P 32(i)(4).

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 Aug. 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. 2022-26. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2023-01
Supreme Court Appointment to the Foreign Language Board of Review

On order of the Court, pursuant to MCR 8.127(A) and effective immediately, Amy Etzel (court administrator member) is appointed to the Foreign Language Board of Review for the remainder of a term expiring on Dec. 31, 2025.

ADM File No. 2023-01
Supreme Court Appointment to the Justice For All Commission

On order of the Court, pursuant to Administrative Order No. 2021-1 and effective immediately, Magistrate Carol Jackson (tribal court member) is appointed to the Justice For All Commission for the remainder of a term expiring on Dec. 31, 2023.

ADM File No. 2023-08
Amendment of Rule 7.202 of the Michigan Court Rules

On order of the Court, the following amendment of Rule 7.202 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 public hearings are posted on the Public Administrative Hearings page.

Immediate adoption of this proposal does not necessarily mean that the Court will retain the amendments in their present form following the public comment period.

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

Rule 7.202 Definitions

For purposes of this subchapter:

(1)-(5) [Unchanged.]

(6) "final judgment" or "final order" means:

(a) In a civil case,

(i)-(v) [Unchanged.]

(vi) in a foreclosure action involving a claim for remaining proceeds under MCL 211.78t, a postjudgment order deciding the claim.

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

(b) [Unchanged.]

Staff Comment (ADM File No. 2023-08): The amendment of MCR 7.202 includes in the definition of "final judgment" or "final order" postjudgment orders deciding a claim for remaining proceeds under MCL 211.78t.

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 Aug. 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. 2023-08. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2023-01
Assignment of Judges to the Court of Claims and Appointment of Chief Judge

On order of the Court, effective May 2, 2023, the following Court of Appeals judges are assigned to sit as judges of the Court of Claims for terms expiring May 1, 2025:

Hon. Elizabeth L. Gleicher
Hon. James R. Redford
Hon. Douglas B. Shapiro
Hon. Brock A. Swartzle

On further order of the Court, the Hon. Elizabeth L. Gleicher is appointed as chief judge of the Court of Claims for a term ending May 1, 2025.

CLASSIFIED

INTERESTED IN ADVERTISING IN THE *MICHIGAN BAR JOURNAL*? CONTACT **ADVERTISING@MICHBAR.ORG**

ACCOUNTING EXPERT

Experienced in providing litigation support services, expert witness testimony, forensic accounting services, fraud examinations, contract damage calculations, business valuations for divorce proceedings, lost wages valuations for wrongful discharges, and estate tax preparation for decedents and bankruptcies (see www.chapski.com). Contact Steve Chapski, CPA, CFE, CSM, at schapski@chapski.com or 734.459.6480.

APPRAISALS

Commercial and residential property appraisals with 18 years of experience. Areas include but not limited to probate, finance, divorces, SEV appeals, and asset valuation. Sosnowski Appraisal, Sheila Sosnowski, certified general appraiser, LC #1205068429, 248.342.0353, sheila@sosnowskiappraisal.com.

CHIROPRACTIC EXPERT

Active certified chiropractic expert. Plaintiff and defense work, malpractice, disability, fraud, administrative law, etc. Clinical experience over 35 years. Served on physician advisory board for four major insurance companies. Honored as 2011 Distinguished Alumni of New York Chiropractic College. Licensed in Michigan. Dr. Andrew M. Rodgers, chiropractic physician, 201.592.6200, cell 201.394.6662, chiroexcel@verizon.net, www.chiropracticexpertwitness.net, www.fortleechiropractic.com. No charge for viability of case.

CONSTRUCTION

BUILDING & PREMISES EXPERT

Mr. Tyson reviews litigation matters, performs on-site inspections, and interviews litigants, both plaintiff and defendant. He researches, makes drawings, and provides evidence for court including correct building code and life safety statutes and standards as they may affect personal injury claims, construction, contracts, etc. and causation. Specializing in theories of OSHA and MIOSHA claims. Member of numerous building code and standard authorities, including but not limited to IBC (BOCA, UBC), NFPA, IAEI, NAHB, etc. A licensed builder with many years of tradesman, subcontractor, general contractor (hands-on) experience and construction expertise. Never disqualified in court.

Ronald Tyson
248.230.9561
tyson1rk@mac.com
www.tysonenterprises.com

EMPLOYMENT AVAILABLE

Associate needed to take over firm established in 1971 with Houghton Lake and Traverse City presence. Excellent opportunity for ambitious, experienced attorney in non-smoking offices. Total truth, honesty, and high ethical and competence standards required. Mentor available. Get paid for what you produce. Firm handles general practice, personal injury, workers' compensation, Social Security, etc. Send résumé and available transcripts to Bauchan Law Offices PC, PO Box 879, Houghton Lake MI 48629; 989.366.5361; mbauchan@bauchan.com; www.bauchan.com.

Career Center. The State Bar of Michigan has partnered with an industry leader in job board development to create a unique SBM employment marketplace with features different from generalist job boards including a highly targeted focus on employment opportunities in a certain sector, location, or demographic; anonymous résumé posting and job application enabling job candidates to stay connected to the employment market while maintaining full control over their confidential information; an advanced job alert system that notifies candidates of new opportunities matching their preselected criteria; and access to industry-specific jobs and top-quality candidates. Employer access to a large number of job seekers. The career center is free for job seekers. Employers pay a fee to post jobs. For more information visit the Career Center at jobs.michbar.org.

Lakeshore Legal Aid serves low-income people, seniors, and survivors of domestic violence and sexual assault in a holistic manner to address clients' legal issues and improve our communities. Lakeshore provides free direct legal representation in 17 counties in

southeast Michigan and the Thumb and client intake, advice, and brief legal services throughout Michigan via our attorney-staffed hotline. Our practice areas include housing, family, consumer, elder, education, and public benefits law. Search the open positions with Lakeshore at lakeshorelegalaid.org/positions and apply today.

FOIA SERVICES MICHIGAN

Information is power. Need to send a FOIA? Don't want the FOIA coming from you? Want to see the FOIAs submitted to the State of Michigan? Email info@foiaservicesmichigan.com, check out www.foiaservicesmichigan.com, or call 517.881.4784. FOIA Services Michigan is used by many of the best law firms in Michigan.

FOR SALE

Gaylord real estate, probate, estate planning, and divorce firm. Attorney in practice for 42 years selling, would be interested in of counsel relationship if desired. Please contact James F. Pagels at 989.732.7565 or jpagels@jpagels.com.

OFFICE SPACE & VIRTUAL SPACE AVAILABLE

Class A legal space available in existing legal suite. Offices in various sizes. Packages include lobby and receptionist, multiple conference rooms, high-speed internet and wifi, e-fax, phone (local and long distance included), copy and scan center, and shredding service. $640-$950 per month. Excellent opportunity to gain case referrals and be part of a professional suite. Call 248.645.1700 for details and to view space.

Farmington Hills law office. Immediate occupancy in an existing legal suite of a mid-sized law firm. One to five executive-style office spaces available including a corner office with large window views. All offices come with separate administrative staff cubicles. The offices can be leased together or separately. These offices are available in the Kaufman Financial Center; the building itself is award-winning and one of the most attractive buildings in the city. Your lease includes use of several different-sized conference rooms including one conference room with dedicated internet, camera, soundbar, and a large monitor for videoconferencing; there is a reception area and receptionist; a separate kitchen and dining area; a copy and scan area; and shredding services. For further details and to schedule a visit to the office, please contact Frank Misuraca at famisuraca@kaufmanlaw.com or 248.626.5000.

For lease, Troy. Two furnished, windowed offices available within second floor suite of smaller class "A" building just off Big Beaver, two blocks east of Somerset Mall. Includes internet and shared conference room; other resources available to share. Quiet and professional environment. $650/month each. Ask for Bill at 248.646.7700 or bill@gaggoslaw.com.

Individual windowed offices with secretarial or virtual space available in large all-

CLASSIFIED (CONTINUED)

Protecting your health. We're here to help.

Don't take chances with your health insurance. You and your staff deserve a quality Blue Cross® Blue Shield® of Michigan health plan.

- **Group plans:** New group plans can be started at any time during the year.
- **Individual plans:** Individual open enrollment has ended unless you have a qualifying event.
- **Recognized worldwide.**
- **Solutions tailored to your needs.**

To learn more about the affordable BCBSM plans, contact Member Insurance Solutions. Call **800.878.6765** or visit **memberinsurancesolutions.com**.

Protecting tomorrows. Today.

member insurance solutions
Protecting tomorrows. Today.

Blue Cross Blue Shield of Michigan

A nonprofit corporation and independent licensee of the Blue Cross and Blue Shield Association

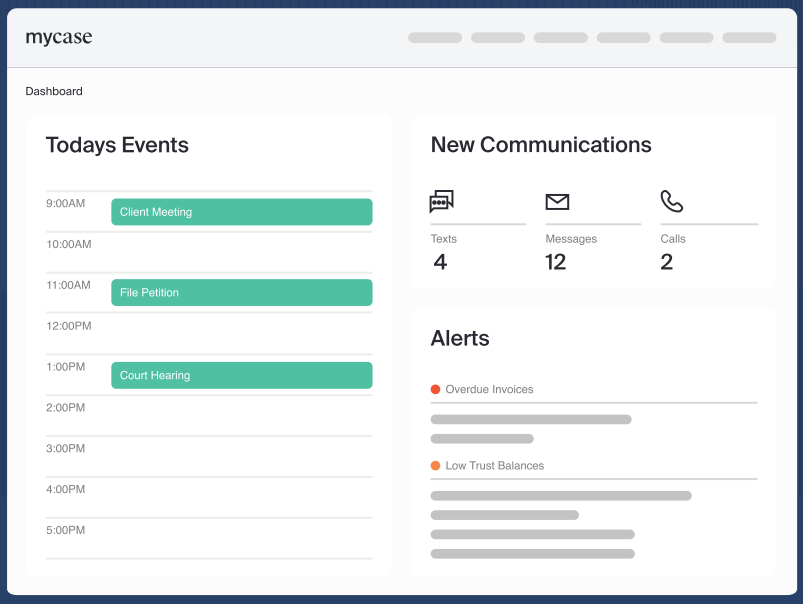
SBM State Bar of Michigan
PREFERRED PARTNER

Member Insurance Solutions is a marketing name of MDA Insurance & Financial Group.

mycase

The #1 Rated Law Practice Management Software

Streamline your cases, track more time, communicate with clients quickly, and get paid faster with MyCase.



"As a business owner, the impact it has had on clients paying on time is tremendous."

Michelle Diaz
Managing Attorney,
The Law Office of Michelle E. Diaz

Visit MyCase.com

800-571-8062

SERLING & ABRAMSON, P.C.

ATTORNEYS AT LAW

MICHIGAN'S FIRST & FINEST

IN MESOTHELIOMA & ASBESTOS LITIGATION

50 Years

Pioneer Asbestos Specialists

REPRESENTING VICTIMS OF

Mesothelioma and Lung Cancer
caused by Asbestos Exposure
Defective Medical Devices
Non-Hodgkins Lymphoma and Leukemia Caused by Roundup©

First Asbestos Verdict in Michigan

248.647.6966 • 800.995.6991

Offices in Birmingham and Allen Park

www.serlinglawpc.com