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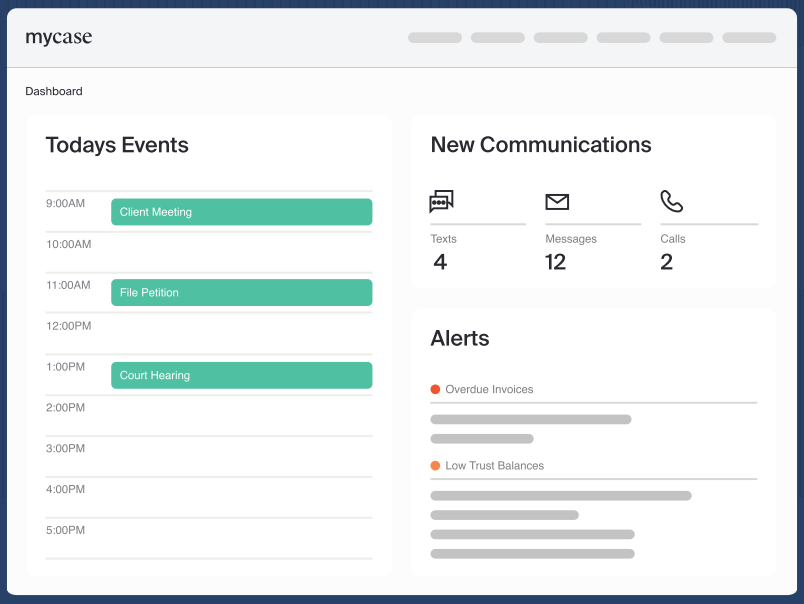

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8TH SUPPLEMENT (2021)

The Eighth Supplement (2021) to the 6th Edition of the Michigan Land Title Standards prepared and published by the Land Title Standards Committee of the Real Property Law Section is now available for purchase.

Still need the 6th edition of the Michigan Land Title Standards and the previous supplements? They are also available for purchase.

MONEY JUDGMENT INTEREST RATE

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

For a complaint filed after Dec. 31, 1986, the rate as of July 1, 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:

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

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

WHAT TO REPORT:
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WHO MUST REPORT:
Notice must be given by all of the following:
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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**:

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IN BRIEF

HEALTH CARE LAW SECTION

At its annual meeting on Sept. 19, the section thanked outgoing chair Rose Willis; welcomed incoming chair Deborah J. Williamson; honored Cara Jansma as a fellow; and recognized outgoing council members Patricia Stamler, Leslie Rojas-Whitworth, and Nicole Stratton. The section's New Lawyers and Law Students Committee presented a virtual Lunch and Learn session for University of Detroit Mercy School of Law students on Oct. 25 and held an in-person event at Wayne State University Law School on Nov. 1.

PARALEGAL/LEGAL ASSISTANT SECTION

The State Bar of Michigan Paralegal/Legal Assistant Section met at Chartier & Nyamfukudza in Okemos on Oct. 21 for its annual retreat. The section's officers, council, and committee members planned and discussed some exciting upcoming events, including the 2024 Annual Day of Education.

REAL PROPERTY LAW SECTION

Join the Real Property Law Section from March 7-9 at the Westin Kierland Resort and Spa in Scottsdale, Arizona, for its 2024 winter conference. Limited rooms are available at book.passkey.com/go/RPLSWinterConference or by calling (800) 354-5892. If calling, be sure to request the RPLS Winter Conference special group rate.

SENIOR LAWYERS SECTION

As part of its annual meeting on Sept. 28, members elected James A. Carolan to serve as chair and Beth Swagman as vice chair. Stephen Olsen and Vince Romano were re-elected to their posts as secretary and treasurer, respectively. J. David Kerr, Denis Monahan, and Robert Thomas were chosen to fill at-large council member seats that expire Sept. 30, 2026.

NEWS & MOVES

ARRIVALS AND PROMOTIONS

PIPPIN C. BREHLER has been elevated to assistant chief counsel with the California Air Resources Board in Sacramento, California.

JEFF DAVIS, **DAVID A. HALL**, and **AARON D. LINDSTROM** with the Grand Rapids office of Barnes & Thornburg have been promoted to partners.

JOSEPH A. PETERSON and **SHANEL T. THOMAS** have joined the Bloomfield Hills office of Plunkett Cooney.

JAMES F. ANDERTON V, **SARA L. CUNNINGHAM**, **MICHAEL R. KLUCK**, **GABRIELLE C. LAWRENCE**, **KELLY REED LUCAS**, **PAULA K. MANIS**, **JAMES R. NEAL**, **MICHAEL G. OLIVA**, **MICHAEL H. RHODES**, **McKENNA S. RIVERS**, **JEFFREY S. THEUER**, and **BRANDON W. WADDELL** have joined Foster Swift.

AWARDS AND HONORS

DEBORAH BROUWER, **TERRY BONNETTE**, and **PATRICIA NEMETH** with Nemeth Bonnette Brouwer have been recognized on DBusiness magazine's list of Top Lawyers for 2024.

ROBERT A. DUBAULT, executive partner with Warner Norcross & Judd, has been recognized among Michigan Lawyers Weekly's 2023 Leaders in the Law.

MICHAEL D. FISHMAN, **BARBARA L. MANDELL**, and **MICHAEL B. STEWART** with Fishman Stewart have been recognized on DBusiness magazine's list of Top Lawyers for 2024.

AUDREY J. FORBUSH, a partner with Plunkett Cooney, was selected by Michigan Lawyers Weekly as a member of its 2023 class of Leaders in the Law.

LAUREL F. MCGIFFERT with Plunkett Cooney was recognized by Crain's Detroit Business as one of its 2023 notable leaders in diversity, equity, and inclusion.

BRIAN MCKEEN, founder and managing partner of McKeen & Associates, has been recognized on DBusiness magazine's list of Top Lawyers for 2024.

DAVID M. MOSS and **A. VINCE COLELLA** of Moss & Colella in Southfield have been recognized on DBusiness magazine's list of Top Lawyers for 2024.

MARK WASSINK, managing partner at Warner Norcross & Judd, has been recognized among the Grand Rapids 200 published by Crain's Grand Rapids Business.

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

IN MEMORIAM

DAVID F. BETZ, P10771, of Ludington, died Sept. 5, 2023. He was born in 1938, graduated from University of Detroit School of Law, and was admitted to the Bar in 1964.

MAURICE N. BLAKE, P10865, of Peoria, Arizona, died Oct. 21, 2023. He was born in 1933, graduated from Wayne State University Law School, and was admitted to the Bar in 1962.

DANIEL D. BREMER, P23554, of Burton, died Oct. 25, 2023. He was born in 1945, graduated from Wayne State University Law School, and was admitted to the Bar in 1969.

LAWRENCE P. BURNS, P32048, of Grand Rapids, died Oct. 25, 2023. He was born in 1950 and was admitted to the Bar in 1980.

WILLIAM R. CONNOLLY, P24970, of Troy, died Oct. 28, 2023. He was born in 1946 and was admitted to the Bar in 1975.

LYLE F. DAHLBERG, P29535, of Bloomfield Hills, died July 16, 2023. He was born in 1953, graduated from Detroit College of Law, and was admitted to the Bar in 1978.

TERRY L. GILLETTE, P13996, of Michigan Center, died Feb. 15, 2023. He was born in 1947, graduated from Wayne State University Law School, and was admitted to the Bar in 1972.

DIANNE L. HOFFMAN, P41233, of Cadillac, died Oct. 23, 2023. She was born in 1963, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1988.

JOHN P. JACOBS, P15400, of Detroit, died Sept. 22, 2023. He was born in 1945, graduated from University of Detroit School of Law, and was admitted to the Bar in 1970.

SCOTT A. KEILLOR, P38880, of Ann Arbor, died Oct. 27, 2023. He was born in 1949 and was admitted to the Bar in 1986.

MICHAEL A. KOWALKO, P36893, of Flint, died June 15, 2023. He was born in 1958, graduated from Detroit College of Law, and was admitted to the Bar in 1984.

WILLIAM I. LIBERSON, P16649, of Bloomfield Hills, died April 1, 2023. He was born in 1926, graduated from Detroit College of Law, and was admitted to the Bar in 1951.

CHARLES A. PFEFFER, P23202, of Northville, died Oct. 18, 2023. He was born in 1945, graduated from Wayne State University Law School, and was admitted to the Bar in 1973.

WILLIAM A. REDMOND, P26801, of Kalamazoo, died July 31, 2023. He was born in 1951, graduated from Wayne State University Law School, and was admitted to the Bar in 1976.

ROBERT L. SHEGOS, P20327, of Grand Blanc, died Sept. 18, 2023. He was born in 1936, graduated from Detroit College of Law, and was admitted to the Bar in 1962.

MICHAEL S. SISSKIND, P20540, of Milford, died July 27, 2023. He was born in 1940 and was admitted to the Bar in 1965.

RALPH SOSIN, P20795, of Bingham Farms, died Oct. 15, 2023. He was born in 1929, graduated from University of Michigan Law School, and was admitted to the Bar in 1952.

JOHN A. TIRONE, P21470, of Macomb, died April 20, 2023. He was born in 1942 and was admitted to the Bar in 1970.

ROBERT J. WENDZEL, P24151, of Southfield, died Jan. 16, 2023. He was born in 1949, graduated from University of Detroit School of Law, and was admitted to the Bar in 1974.

ROBERTA J. F. WRAY, P52715, of Flint, died Aug. 23, 2023. She was born in 1940, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1995.

MICHAEL W. YORK, P22633, of Gaithersburg, Maryland, died Feb. 1, 2023. He was born in 1934, graduated from University of Michigan Law School, and was admitted to the Bar in 1968.

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

FROM THE PRESIDENT

DANIEL D. QUICK

Civility in a post-COVID world: The value of being in court

This is not another ode to the need for civility in our profession. Much ink, better written, has already been spilled.[1] The State Bar of Michigan, in cooperation with the Supreme Court, crafted Principles of Professionalism to help guide both lawyers and judges;[2] the Bar's Special Committee on Professionalism and Civility,[3] chaired by Michael Leib, is busy working to educate and inform the public, attorneys, and students. The good news is that — at least according to a 2021 survey of Illinois attorneys — the focus on civility is working: the vast majority of lawyers (89%) indicated the attorneys they engage with are civil and professional, and instances of incivility declined markedly since 2014.[4] Nevertheless, anecdotes of incivility[5] abound while COVID innovations such as video depositions have spawned their own issues.[6]

That the Bar led the way for the Principles of Professionalism and is committed to ongoing engagement on civility in such a fulsome fashion is good timing. During the pandemic, many saw an increase in civility brought about by our common plight and necessary recognition that accommodations were required (which perhaps explains the Illinois survey results). But we are largely no longer cloistered in our homes, although many of us remain stuck in front of computer screens, many depositions are now live, and several courts (mostly outside of metro Detroit) have resumed in-person hearings. Business is returning to normal (the lack of uniformity amongst courts is a topic for another day.)

Let us all agree on the obvious: attorney incivility has been around for a long time, from the Roman Empire to the origin of the modern profession.[7] It is arguably intrinsic, which makes it no less deleterious. Ninety years ago, Clarence Darrow wrote that "courtroom proceedings seem more like a prize-ring combat than a calm, dignified effort to find out the truth. All judges and lawyers know this. None seem to see any way to change it, except with added tyranny and greater cruelties. It is not easy to figure out the way to improve their method."[8] The modern focus upon civility traces back to the mid-1980s with the perceived rise of the "Rambo litigator."[9] The moniker for bad behavior changed, as did some of the perceived sources of incivility, but no one has suggested a sea change in the intervening 40 years.

What did the pandemic teach us about civility? COVID and the advent of the Zoom court has brought to the surface the value of the commons of the courthouse. With all due respect to those who advocate for changes based on data rather than anecdotes, "not everything that can be counted counts, and not everything that counts can be counted."[10] While we appear in court to handle a specific matter — and that is certainly of paramount concern to our client — the rest of what happens there also matters. Lawyers get to know one another. We take the temperature of the judge and adjust accordingly. We (sometimes) temper the vitriol of the pen when standing a few feet away from our ostensible adversary. Sometimes issues get resolved precisely due to the face-to-face environment. Sometimes we visit with the judge in chambers, getting to know one another and cutting through the formalities of being on the record. These interactions, manifestations of the culture of the law, make up the grease that keeps the formal wheels of justice turning. Do these benefits outweigh the efficiency and access to justice benefits of having some hearings via Zoom? Moderation is best in all things, but my point here focuses on professionalism.[11]

Another impact of the Zoom court upon civility is the disappearance of the motion call in some of our largest courts. During COVID,

many courts stopped having hearings altogether, instead exercising their authority under MCR 2.119(E)(3) to adjudicate motions without a hearing. This practice remains in some courts. It has led to sharper practices amongst counsel in at least two ways: lawyers know they can get away with more and the invidious nature of that, without an active judge, simply spawns additional friction.

Imagine a discovery dispute (discovery having long been identified as a major area of incivility). The plaintiff files a detailed motion accusing the defendant of not producing documents in various areas. The defendant responds, essentially saying, "Not so!" Based on those two briefs, a court would be hard-pressed to figure out who is telling the truth and craft a reasonable solution without micromanaging.

Traditionally, the court would suss out the truth of the matter at oral argument, reviewing the substance of the requests and responses and discerning who was the real problem in the process. An admonishment usually followed. The lesson here was that the court is paying attention, condemns gamesmanship, spots the troublemaker, and reinforces the norm as to how things should proceed in the rest of the case. If that lawyer is a problem in the future either as a serial filer or responder, the court can act accordingly. This is not a precise science, and judges get it wrong. But the condemnatory aspect of an actual motion hearing is critical. When the court cancels the hearing on any issue involving disparate factual claims, query how well it can adjudicate the substance, but the court also misses the opportunity to reinforce norms of practice.[12]

Notably, the Principles of Professionalism recognize the need for judges to set norms: judges "do not condone incivility by one lawyer to another or to another's clients and we call such conduct to the attention of the offending lawyer on our own initiative and in appropriate ways." Former State Bar of Michigan President Edward Pappas said it best during a 2020 public hearing on the principles: "Civility starts at the top and at the top of our profession are the judges. Judges set the tone for civility[.]"[13]

Many judges say they hate discovery disputes and particularly hate finger-pointing between counsel as to who did what to whom. I get it. Surely, some of that is unnecessary venting or attempted character assassination by counsel, but some of it is being raised precisely because without an active judge, bad behavior not only persists, but increases because lawyers think they can get away with it and then the other side raises the volume level, hoping the court will start paying attention and weigh in. Unless courts roll up their sleeves and engage, the nature of litigation means abuses will occur.[14] Some judges think that if they take time to engage in these motions, they somehow actually promote more filings. I don't agree, but what's missing is the other part of the process — reinforcing norms. Along with deciding the substantive issues, it is critical that the court tells the side causing the problem (which, in some cases, is both) to knock it off. That goes a long way towards eliminating future motions, because lawyers know that if they get that second strike, there will be consequences.

An active judge also helps the other downsides of incivility. Incivility affects attorney well-being; that can only be made worse when there is no active judge willing to keep the train on the rails and arrest improper behavior. Incivility also tends to double up with gender and racial biases; promoting civility helps promote access to the profession and works against these noxious biases. Likewise, civility increases the legitimacy of our courts. Clients, informed by TV and Hollywood, perceive litigation as a combat sport, so they expect fighting, but when they feel the other side is getting away with something and the judge simply won't address the matter, faith in the legal system is eroded.

COVID forced attorneys and courts to adapt. Some innovations will remain with us and improve our justice system if appropriately used. For me, the pandemic also reinforced the value of the courtroom and an engaged judge in improving professionalism and civility. The system works best when it works as one.

ENDNOTES

1. See, e.g., Grieco, *A Renewed and Much-Needed Conversation on Civility*, 97 Mich B J 8-11 (Dec 2018).
2. Administrative Order 2020-23.
3. While used somewhat interchangeably, professionalism includes civility, but they are not the same. Professionalism includes competence — how we do our jobs as lawyers — as well as our adherence to ethics. Civility is how we interact with each other and the court. These terms are used broadly in this article.
4. Illinois Supreme Court Commission on Professionalism, *Today's Lawyers are More Civil, But Not to Everyone, Commission Survey Says* <https://www.2civility.org/todays-lawyers-are-more-civil-but-not-to-everyone-commission-survey-says/> [https://perma.cc/TA4M-FH23] (posted December 9, 2021) (all websites accessed November 9, 2023).
5. Anna Sanders, Law360.com, *The Case for Civility Among Attorneys*, <https://www.aatriallaw.com/wp-content/uploads/2023/02/10-24-22-The-Case-For-Civility-Among-Attorneys-Law360-1.pdf> [https://perma.cc/VCZ9-AMMT] (posted October 24, 2022).
6. Jennifer Gibbs and Bennett Moss, JDSupra.com, *Tales From the Trenches of Remote Depositions*, <https://www.jdsupra.com/legalnews/tales-from-the-trenches-of-remote-3893559/> [https://perma.cc/4SLU-URB4] (posted July 21, 2023).
7. Enoch, *Incivility in the Legal System – Maybe It's the Rules*, 47 SMU L Rev 199 (1994).
8. Darrow, *The Story of My Life* (New York: Charles Scribner's Sons, 1932), ch 39, p 352.
9. Browe, *A Critique of The Civility Movement: Why Rambo Will Not Go Away*, 77 Marq L Rev 751 (1994).
10. Cameron, *Informal Sociology: A Casual Introduction to Sociological Thinking* (New York: Random House, 1963) p 4.
11. I cannot resist one addendum: Absent live motion hearings, our newer lawyers' training and professional development is stunted, as is their indoctrination into the profession.
12. In much the same way, the practice of some courts to send attorneys into the hallway like petulant children to talk about their dispute — after what likely dozens of pages of briefing — is often futile. Sometimes, it leads to lawyers resolving their dispute — not because of lack of prior communication, but because both sides doubt the court is going to issue a non-arbitrary ruling, so they jointly decide to minimize the risk. This might be somewhat efficient, but it isn't ideal.
13. Michigan Supreme Court, *Public Hearing: September 23, 2020* <https://www.courts.michigan.gov/4aa976/siteassets/rules-instructions-administrative-orders/public-hearing-transcriptsnotices/public-hearing_09-23-2020.pdf> [https://perma.cc/UE9V-2TTB].
14. This does not excuse or condone attorney misconduct; we all have a long way to go. But it is also true that our adversarial system bakes some of this in and the rest of the legal structure must help balance it. See Enoch, n. 7.

OF INTEREST

The Michigan State Bar Foundation and the Access to Justice Campaign

BY CRAIG LUBBEN

It is my privilege to serve as president of the Michigan State Bar Foundation Board. Although I have been a lawyer in this state for more than 42 years, I did not fully understand the mission of the MSBF until I joined the board. In this column, I'll share what I've learned and urge you to make a year-end contribution to the Access to Justice Campaign.

The Michigan State Bar Foundation was established by lawyers and judges in 1947, about a decade after the creation of the State Bar of Michigan. The MSBF was developed to be the lawyers' charity and through it, attorneys could make contributions to promote improvements in the administration of justice.

In the 1970s, two important events took place. First, in 1974, President Richard M. Nixon signed bipartisan legislation creating the Legal Services Corporation[1] to receive both congressional appropriations and charitable contributions to support legal aid across the country. Second, John Cummiskey, one of the founders of my firm, was an MSBF trustee; he urged the foundation to follow the LSC model, which it did, making civil legal aid for low-income individuals one of its priorities.

A critical source of funds that the MSBF uses to support legal aid organizations is the Access to Justice Campaign, a centralized effort to solicit charitable contributions from the Michigan legal community to support 15 regional and statewide legal aid programs. The campaign is administered by the MSBF in partnership with the State Bar of Michigan. Importantly, donations are not used to cover administrative expenses — every dollar contributed to the ATJ Campaign supports legal aid organizations across Michigan.

The need for legal services among our low-income Michigan neighbors is great. According to the 2022 Legal Services Corporation Justice Gap Report,[2] 55% of low-income individuals who personally experienced legal problems reported that those issues substantially impacted their lives with consequences affecting their finances, mental health, physical health, safety, and relationships. They need legal help.

Michigan legal aid organizations do amazing work to meet this need. In 2022, the state's legal aid organizations — funded by the ATJ Campaign — closed more than 57,000 cases and helped upwards of 111,000 households, including nearly 46,000 children. And the return on the investment in these organizations is significant. The Social Economic Impact and Social Return on Funding Investment Report commissioned by the Michigan Justice for All Commission estimated that in 2019-20, for every $1 invested in Michigan's civil legal aid services, the people received $6.69 in immediate and long-term consequential financial benefits.[3]

Contributions to the ATJ Campaign support legal aid organizations that not only improve peoples' lives, but also enhance the accessibility, effectiveness, and efficiency of the justice system. On behalf of the thousands of people who've benefitted from these resources, I thank the Michigan lawyers and law firms who have recognized this need and have consistently and generously supported the campaign in the past.

In this column, I urge the Michigan legal community to do even more. Michigan Rule of Professional Conduct 6.1 reminds us that lawyers "should render public interest legal service" and that one of the ways to meet that standard is "by financial support for organizations that provide legal services to persons of limited means." As a guideline for that financial support, the State Bar of Michigan Representative Assembly adopted a voluntary pro bono standard recommending contributions of "a minimum of $300" for legal aid organizations and "$500 per year for those lawyers whose income allows a higher contribution."[4]

In that context, it should be noted that in 2022, contributions to the ATJ Campaign amounted to an average of $30 per Michigan attorney. To be clear, some attorneys handle pro bono cases directly and others contribute directly to legal aid organizations rather than through the ATJ Campaign. As a result, it is not fair to conclude that Michigan lawyers are not meeting their professional obligations. However, it is fair to think we can increase our financial support for legal aid.

To that end, the MSBF set a goal to increase the average contribution to the ATJ Campaign to $75 per Michigan lawyer. To meet that goal, we need the support of every lawyer in the state. If you haven't contributed to the ATJ Campaign in the past, please start this year. If you have contributed to the ATJ Campaign, please do your best to increase your gift. Finally, if your firm contributes on your behalf, please consider making a personal gift on top of it. Your contribution makes a difference.

Thank you for reading this column and thank you for your support of the Access to Justice Campaign.

Craig Lubben, MSBF Bar Foundation president, is a member at Miller Johnson in Kalamazoo.

ENDNOTES

1. Legal Services Corporation, *Our History*, <https://www.lsc.gov/about-lsc/who-we-are/our-history> [https://perma.cc/X5KQ-YWM2] (all websites accessed November 9, 2023).
2. Legal Services Corporation, *The Justice Gap: The Study* <https://justicegap.lsc.gov/the-study/> [https://perma.cc/XP8E-ZS9A].
3. Michigan Courts, *Michigan's Legal Aid Organizations: Social Economic Impact and Social Return on Funding Investment*, <https://www.courts.michigan.gov/4a9445/siteassets/court-administration/resources/mi_sroi_final-opt.pdf> [https://perma.cc/6P-DC-EPQT].
4. State Bar of Michigan, *Voluntary Pro Bono Standard* <https://www.michbar.org/programs/atj/voluntarystds> [https://perma.cc/C4YV-FXQJ].

SBM
State Bar of Michigan

FY 2024 BUDGET SUMMARY

STATE BAR OF MICHIGAN

OCTOBER 1, 2023 - SEPTEMBER 30, 2024 ADMINISTRATIVE FUND

On July 22, 2023, the Board of Commissioners adopted a budget for the 2024 fiscal year that continues the funding of the State Bar of Michigan's Strategic Plan.

The budget and the Strategic Plan are available at **michbar.org/generalinfo**

OPERATING AND RELATED REVENUES:	
License Fees and Related	10,795,000
All Other Operating Revenues	1,804,955
Total Operating Revenues	12,599,955
OPERATING EXPENSES:	
Salaries	6,124,434
Benefits and Payroll Taxes	2,071,216
Total Labor-Related Expenses	8,195,650
NON-LABOR OPERATING EXPENSES:	
Legal	246,700
Public and Bar Services	1,232,705
Operations and Public Policy	2,549,680
Total Non-Labor Operating Expenses	4,029,085
Total Operating Expenses	12,224,735
Total Operating Income	**375,220**
NON-OPERATING REVENUE (EXPENSES)	
Investment Income	518,000
BUDGETED INCREASE/(DECREASE) IN NET POSITION	**$893,220**

CRIMINAL LAW

BY KAHLA D. CRINO

"You meet the best people when you volunteer," Michigan Solicitor General Ann Sherman said at a recent State Bar of Michigan event.

That statement rings true when I think of the people I have met while volunteering to serve in the two SBM sections most related to my practice: the Criminal Law and Appellate Practice sections. Through my involvement with these sections, I have met brilliant people from across the state and formed incredible friendships.

If you aren't already a member of a section dedicated to your area of practice or interest, I urge you to take the first step and sign up. It's as easy as logging into your account at michbar.org and choosing the sections that you want to join.

The SBM Criminal Law Section serves three primary purposes:

1. Studying the criminal law and procedures of the state of Michigan and making recommendations to the State Bar of Michigan; the executive, legislative, and judicial branches of Michigan government; and the general public concerning alterations, innovations, and improvements to promote justice and the efficient administration of justice, diversity of the profession, and protection of the public and the rights of each individual;

2. Promoting means of reducing the volume of crime in the state; and

3. Promoting, in cooperation with other sections or committees of the State Bar of Michigan, the effective institutional and non-institutional correction and rehabilitation of individuals convicted of violating criminal laws of the state.

If you are a criminal law practitioner but aren't yet a member of the Criminal Law Section, I invite you to join and help the section fulfill its purposes.

Your membership in the Criminal Law Section gives you access to the Shonkwhiler Sentinel, an exclusive newsletter for members. Membership also gives you reduced admission to educational events where you can earn continuing legal education credits and social events where you can get to know section members from across the state.

While the first step is signing up and enjoying the benefits of membership in a section, there is more that you can do to get involved. State Bar sections, including the Criminal Law Section, are always looking for hardworking individuals to become council members — councils serve as the governing bodies for SBM sections. Serving on a council can be time-consuming, but it is a great way to connect with other leaders in your practice area.

Many sections also need members to volunteer to serve on their committees. Committee membership is a good option if you want to volunteer but don't know if you have enough time to devote to being a council member. The Criminal Law Section has five standing committees: Diversity; Legislation, Court Rules, and Jury Instructions; Nominating; Scholarship; and Social. I invite you to reach out to Sofia Nelson, the 2023-2024 chair of the Criminal Law Section, if you are interested in being appointed to one of our committees.

Truly, by getting involved and volunteering with a section, you will meet the best people. I hope you consider membership in the Criminal Law Section or another section related to your practice area or interests. If you are already a section member, I hope you consider taking your membership to the next level by volunteering for a section council or committee.

Kahla D. Crino, immediate past chair of the State Bar of Michigan Criminal Law Section, is an assistant attorney general for the Michigan Attorney General's Criminal Trials and Appeals Division, where she regularly advises attorneys on both sides of the "v" on criminal trial and appellate issues. Before that, Crino was appellate division chief for the Ingham County Prosecutor's Office, where she served for more than 15 years as a litigator and appellate specialist.

Admitting and excluding other acts under MRE 404(b), MCL 768.27a, and MCL 768.27b

BY KAHLA D. CRINO

Properly admitting or excluding other acts evidence can make or break a criminal case. Was the charged offense an accident? Perhaps a misunderstanding? Is the victim telling the truth? Has the defendant done something like this on another occasion? Often, it is other acts evidence — in combination with the charged offense — that provides the answers to these questions and leads the jury to their verdict. Because of this, it is critical that when the prosecution or the defense utilizes or attacks other acts, they do so properly. This article examines MRE 404(b), MCL 768.27a, and MCL 768.27b and provides guidelines for how criminal practitioners can attempt to admit or exclude other acts evidence.

MRE 404(B)

MRE 404(b) prohibits admitting "[e]vidence of other crimes, wrongs, or acts" to show that a person acted in conformity with their character.[1] This is often called the character-to-conduct inference or, simply, propensity. However, MRE 404(b) permits the admissibility of other acts for purposes besides a character-to-conduct inference.[2] Permissible purposes include, but are not limited to, "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material."[3] Other acts can be from before, after, or contemporaneous with the charged offense.[4]

While MRE 404(b) is a rule of inclusion,[5] not exclusion, in *People v. VanderVliet*[6], the Michigan Supreme Court provided a four-pronged test to ensure that MRE 404(b) evidence is properly admitted or excluded:

> First, the prosecutor must offer the prior bad acts evidence under something other than a character or propensity theory. Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b). Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105.[7]

Thus, when prosecutors seek to admit other acts evidence under MRE 404(b), their focus should be on articulating how the proffered evidence satisfies this test. Correspondingly, the opponent of the other acts evidence should focus on why the proffered evidence does not meet these elements.

MRE 404(b)(2) imposes a notice requirement for the use of other acts evidence offered under MRE 404(b). It states that the prosecution must provide notice at least 14 days before trial, or later if the trial court excuses the delay based on good cause shown.[8] Even though MRE 404(b)(2) only imposes a notice requirement as a practical matter, a notice does not, without more, give the trial court a meaningful opportunity to apply the *VanderVliet* test.

For this reason and others, I have long advised that the best practice for giving notice is to file a motion, supporting brief, and notice of hearing. In contrast to the practice of merely filing a notice, this gives the defense a meaningful opportunity to answer a motion, file a brief in opposition, and appear for a hearing. This practice also creates a better appellate record.

While MRE 404(b) is treated as a rule only for prosecutors to admit other acts of the defendant,[9] it is worth noting that through proper application of MRE 402 and MRE 403, it is possible for defendants to offer other acts evidence for a reason other than propensity. For example, in *People v. Masi*,[10] the Michigan Court of Appeals found that other acts of the victim were potentially admissible under MRE 402 and MRE 403 for the purpose of explaining a child sexual assault victim's advanced sexual knowledge. The admissibility inquiry here will partially mirror a *VanderVliet* analysis because of the MRE 402 and MRE 403 inquiries.

Practitioners should also be careful not to impute the word "bad" into MRE 404(b). MRE 404(b) does not have a requirement that the other act be bad; instead, it includes "crimes, wrongs, or acts" that may give rise to a character to conduct inference.[11] While it is true that the inference to be drawn is often a bad one, that doesn't mean that the act itself has to be. Further, imputing the word "bad" into MRE 404(b) can lead to prosecutors taking an improperly narrow view of what is MRE 404(b) evidence and what is not. For example, an overly narrow view of other acts evidence under MRE 404(b) could lead to a prosecutor not properly noticing the other acts (or ideally moving to admit them.)

Similarly, defense counsel asserting that the proffered evidence is not an other act as contemplated by MRE 404(b) can have negative consequences. It should be remembered that if something is not MRE 404(b) evidence, it might still be admissible as direct evidence implicating the defendant of the charged offense. If defense counsel strives to characterize other acts as being outside of MRE 404(b), they might be admissible as direct evidence of guilt.[12] Such a mistake could ultimately put the defendant in a worse position than they would have been in with the scrutiny of an analysis under MRE 404(b) and the option of a limiting jury instruction under the last prong of *VanderVliet*.

Lastly, both prosecution and defense should remember the defense in the case might dictate whether evidence under MRE 404(b) is admissible. MRE 404(b)(2) states that "[i]f necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination."

This goes to an examination of MRE 402 and MRE 403, the second and third *VanderVliet* prongs. For example, if the defense is that the defendant lacked the requisite intent for the charged offense, other acts that tended to show intent and lack of mistake or accident will become particularly relevant and probative.

MCL 768.27A AND MCL 768.27B

Another commonly utilized mechanism to admit other acts is MCL 768.27a or MCL 768.27b. As with MRE 404(b), both statutes deal with other acts that can occur before, after, or contemporaneous with the charged offense, and each has a notice requirement that is best met with a motion, brief, and notice of hearing.[13] This is particularly true given the multitude of factors and rules that apply when examining admissibility of evidence under these statutes.

MCL 768.27b allows trial courts to admit other acts of domestic violence or sexual assault during the defendant's trial for domestic violence or sexual assault. The evidence is admissible for any relevant purpose as long as it is not excluded by MRE 403.[14] MCL 768.27a allows trial courts to admit evidence of certain listed offenses against a minor when the defendant is charged with committing a listed offense against a minor.[15] The evidence "may be considered for its bearing on any matter to which it is relevant."[16] Because of this language, other acts admitted under these statutes can be considered for propensity, unlike other acts under MRE 404(b).

Trial and appellate courts often rely on reasoning regarding one statute to inform reasoning and decisions regarding the other. For example, in *People v. Cameron,*[17] the Court of Appeals found that the trial court properly admitted other acts of domestic violence during Cameron's domestic violence trial. In doing so, the Court of Appeals examined MRE 403 as required by MCL 768.27b, but it also relied heavily on reasoning from a case that dealt with MCL 768.27a.

Then, in *People v. Watkins,*[18] the Michigan Supreme Court set forth a non-exhaustive list of factors for trial courts to use when determining the admissibility of other acts under MCL 768.27a[19]:

> (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony.[20]

Watkins also held that when analyzing MRE 403 in the context of other acts, courts must weigh the propensity inference in favor of the other acts evidence's probative value; courts must consider the extent to which the other acts evidence supports the victim's credibility and rebuts the defendant's attacks; and courts must weigh each act alleged in an other acts motion individually rather than lumping them together and excluding them all if one component of an other act is particularly egregious or unfairly prejudicial.[21] While it might be easy to focus on MRE 402, MRE 403, and the *Watkins* factors, these rules are equally important. Though it might seem counterintuitive, the propensity inference under *Watkins* weighs in favor of admissibility under MRE 403. In terms of lumping other acts together, practitioners and courts should be mindful to view other acts individually. There is room for creative rulings that might exclude some aspects of proffered evidence while admitting others.

In the years following *Watkins*, the Court of Appeals and trial courts regularly utilized the *Watkins* factors for reviewing trial court decisions under MCL 768.27b even though *Watkins* was a MCL 768.27a case. In 2021, the Michigan Supreme Court in *People v. Propp*[22] clarified that courts must also consider the applicability of other rules, statutes, and laws when weighing whether evidence noticed under MCL 768.27b is admissible.[23] Because of this, criminal practitioners should utilize any applicable *Watkins* factors along with MRE 402 and 403 when arguing the admissibility of other acts under MCL 768.27a and MCL 768.27b.

Finally, in *People v. Hoskins*,[24] the Court of Appeals stated that while an acquittal did not necessarily make other acts unreliable, an acquittal could be considered in the context of making a finding regarding reliability. Because of this, when a prosecutor tries to admit other acts that resulted in an acquittal (or have yet to result in a conviction), it would help to focus on any alleged facts that lend reliability to the other act despite the lack of conviction or acquittal. On the defense side, the opposite is true. If the defense can show that there was an acquittal and elements of factual unreliability, the absence of reliability will weigh toward exclusion. For example, if there was some other act that resulted in an acquittal but the offense was recorded on video, that would lend factual reliability in spite of acquittal.

CONCLUSION

Proper argument and ruling on the admissibility of other acts under MRE 404(b), MCL 768.27a, and MCL 768.27b can make or break a criminal case by either providing insight into the charged offense or letting the charged offense stand on its own merits. Thus, we reach a more just result when each party argues their positions appropriately and in accordance with the applicable law.

The author's views do not necessarily reflect the views of the Michigan Attorney General.

Kahla D. Crino, immediate past chair of the State Bar of Michigan Criminal Law Section, is an assistant attorney general for the Michigan Attorney General's Criminal Trials and Appeals Division, where she regularly advises attorneys on both sides of the "v" on criminal trial and appellate issues. Before that, Crino was appellate division chief for the Ingham County Prosecutor's Office, where she served for more than 15 years as a litigator and appellate specialist.

ENDNOTES

1. MRE 404(b)(2). Because the phrase "other acts" also encompasses crimes and wrongs, this article refers to all MRE 404(b) evidence as other acts.
2. MRE 404(b).
3. MRE 404(b)(1); *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998).
4. MRE 404(b).
5. *People v Mardlin*, 487 Mich 609, 615-616; 790 NW2d 607 (2010).
6. 444 Mich 52, 74-75; 508 NW2d 114 (1993).
7. *People v Knox*, 469 Mich 502; 674 NW2d 366 (2004) (citing *VanderVliet*, 444 Mich 52, cleaned up).
8. MRE 404(b)(2).
9. While MRE 404(b)(2) imposes a notice requirement on prosecutors who utilize MRE 404(b) evidence, MRE 404(b)(1) speaks only in terms of the type of evidence that is admissible and the purposes for which it can be considered. It does not by its language grant the ability to utilize MRE 404(b) evidence solely to prosecutors.
10. ___ Mich App ___; ___ NW2d ___ (2023) (on application).
11. MRE 404(b), *People v Jackson*, 498 Mich 246, 264-265; 869 NW2d 253 (2015).
12. *Jackson*, 498 Mich at 262-263 (providing examples of cases where other acts are admissible as direct evidence of the charged offense and are not subject to the full scrutiny of MRE 404(b)).
13. The statutes have a 15-day notice requirement that the trial court can move for "good cause shown." MCL 768.27a(1); MCL 768.27b(2).
14. MCL 769.27b.
15. Under MCL 769.27a, listed offenses are defined by MCL 28.722.
16. MCL 768.27a.
17. 291 Mich App 599; 806 NW2d 371 (2011).
18. 491 Mich 450; 818 NW2d 296 (2012).
19. *Watkins* also held that MRE 403 applies to MCL 768.27a even though, unlike MCL 768.27b, MRE 403 is not mentioned in MCL 768.27a. *Id.* at 486.
20. *Id.* at 487–88.
21. *Watkins* at 486-490, 493.
22. 508 Mich 374; 976 NW2d 1 (2021).
23. The *Hoskins* court stated, "*Watkins*'s interpretation of MCL 768.27a is ultimately irrelevant to the meaning of MCL 768.27b." *Id.* Still, in the months that followed, the factors from *Watkins* continued to be utilized by trial courts and the Court of Appeals as a guide for evaluating admissibility of other acts under both MCL 768.27a and MCL 768.27b.
24. ___ Mich App ___ *6; ___ NW2d ___ (2022).

INNOVATIVE PHILANTHROPIC SOLUTIONS FOR CLIENTS

Attorney Amy Hartmann on who she turns to for charitable giving expertise

At our law firm, we often work with individuals who have opportunities to make a significant impact on their communities through philanthropy. Whether it is clients selling their businesses, retirees with substantial assets, or families who have accumulated wealth over the years, many of our clients are eager to incorporate charitable giving into their tax and estate planning.

The Community Foundation for Southeast Michigan has been our trusted partner when creating philanthropic plans for our clients. Their willingness to collaborate and provide invaluable assistance in these matters is energizing and rewarding as it strengthens our relationship with our clients and our communities.

We have even had the privilege of hosting the Community Foundation Donor Services team at our offices, allowing us to present the latest in charitable giving opportunities to our clients alongside their other professional advisors to provide comprehensive wealth planning.

This collaborative approach between advisors and the Community Foundation ensures that the philanthropic goals of our clients align seamlessly with the community's needs.

The innovative solutions by the Community Foundation staff and partners provide endless opportunities for the future of charitable giving in southeastern Michigan.

I am proud to play a small part in the activities of the Community Foundation and encourage you to partner with them and create lasting legacy for your clients.

- Attorney Amy Hartmann, longtime member of the Legal Financial Network of the Community Foundation for Southeast Michigan

Community Foundation
FOR SOUTHEAST MICHIGAN

Visit **CFSEM.org/Advisors** to learn how the Community Foundation can be your trusted partner for your client's philantropic goals.

Expungements: Setting aside the confusion

BY MARISA VINSKY AND TAKURA NYAMFUKUDZA

With the passing of the Clean Slate Act and the introduction of expungement fairs across the state, applications to set aside convictions are on the rise.[1] This article highlights the statute governing the requirements for setting aside convictions and recent changes impacting those wishing to obtain an expungement in Michigan.[2] Because setting aside a conviction is a privilege and not a right, knowing the ins and outs is important to a successful application.[3]

In general, statutes such as the expungement statute, which are remedial in nature, should be liberally construed in favor of its remedial policy.[4] When determining whether to enter an order setting aside a conviction, courts must look at the circumstances and behavior of the applicant from the date of the conviction to the filing of the application.[5] This is balanced against determining whether setting aside the conviction is consistent with the public welfare.[6] Importantly, the nature of the offense itself does not preclude the setting aside of an applicant's record.[7]

THE BASICS

Under the expungement statute, a person convicted of one or more offenses but not more than a total of three felony offenses may apply to have all of his or her convictions set aside.[8] However, a person cannot have more than two convictions for assaultive crimes set aside, and a person can only have one felony conviction for the same offense set aside if that offense is punishable by more than 10 years imprisonment.[9] An example of the latter is if a person

was convicted in 2000 for delivering or manufacturing a schedule 1 controlled substance in an amount of 50 grams or more but less than 450 grams and a 2010 conviction for that same offense, only *one* of those convictions may be expunged because it is a felony punishable by not more than 20 years imprisonment.[10]

Eligible offenses must also satisfy the various waiting periods mentioned in the statute. For an application to set aside more than one felony, the person must wait at least seven years after whichever event occurs last — imposition of the sentence, completion of probation, discharge from parole, or completion of a term of imprisonment.[11] For an application to set aside one or more serious misdemeanors, one first-violation operating while intoxicated offense, or one felony conviction, the person must wait five years.[12] Serious misdemeanors are defined by statute.[13] Finally, a person applying to set aside one or more misdemeanors not classified as serious, assaultive, or a first-violation operating while intoxicated offense must wait at least three years after the imposition of the sentence, completion of any term of imprisonment, or completion of probation.[14]

A new change under the Clean Slate Act is the "one bad night" rule, where more than one offense must be treated as a single conviction if all of the offenses occurred within 24 hours and arose from the same transaction.[15] Yet, assaultive crimes, crimes involving the use or possession of a dangerous weapon, and crimes punishable by 10 or more years imprisonment cannot be considered under the "one bad night" rule.[16] It is beneficial to submit proofs to all parties and the court that the convictions satisfy the "one bad night" rule before the hearing is held.

Also for the first time, a person can have a first-offense operating while intoxicated conviction expunged.[17] In addition to the typical conduct of the petitioner-versus-public welfare balancing test that exists in every expungement application, for this type of conviction, the reviewing court may consider whether or not the petitioner has benefited from rehabilitative or educational programs if any were ordered by the sentencing court or whether such steps were taken by the petitioner before sentencing for the first-violation operating while intoxicated offense conviction he or she is seeking to set aside.[18] Further, select marijuana offenses have their own expungement procedure.[19]

AUTOMATIC EXPUNGEMENTS

Effective April 2023, automatic expungements for certain offenses rolled out across the state.[20] It was reported that on the rollout date alone, nearly 850,000 Michiganders saw at least one conviction automatically set aside under the program, with more than 252,000 individuals ending the day conviction-free.[21] What follows are descriptions of the specific requirements and prohibiting factors.

A misdemeanor of 93 days or more is automatically set aside if seven years have passed from the imposition of the sentence.[22] Misdemeanors of 92 days or less also fall under the seven-year wait period.[23] A felony eligible for expungement under the traditional method will be set aside automatically if 10 years have passed from whichever of the following events occurred last: imposition of the sentence for the conviction or completion of any term of imprisonment for the conviction.[24] The individual cannot have another conviction during the applicable time period.[25]

No more than a total of two felony convictions and four 93-day misdemeanor convictions can automatically be set aside.[26] This limit does not apply to 92-day or less misdemeanors.[27] Just like traditional expungements, an individual whose conviction is set aside under the automatic expungement program impliedly consents to the creation of a nonpublic record.[28] If a person has more than one conviction for an assaultive crime or an attempt to commit an assaultive crime, that person is not eligible for automatic expungements of their felony convictions or misdemeanor convictions for which the maximum punishment is imprisonment for 93 days or more.[29]

Convictions ineligible for automatic expungements involve the commission of or attempted commission of an assaultive crime; a serious misdemeanor; a crime of dishonesty; any other offense punishable by 10 or more years' imprisonment; a violation of the laws of this state listed under chapter XVII of the code of criminal procedure, 1927 PA 175, MCL 777.1 to 777.69, the elements of which involve a minor, vulnerable adult, injury or serious impairment, or death; or any violation related to human trafficking.[30] The following traffic offenses are also not eligible for automatic expungements: a conviction for operating while intoxicated, any traffic offense committed by an individual with an indorsement on his or her operator's or chauffeur's license to operate a commercial motor vehicle that was committed while the individual was operating the commercial vehicle or was in another manner a commercial motor vehicle violation, or any traffic offense that causes injury or death.[31] The listed convictions may be eligible through the traditional application process.

Despite some offenses qualifying for automatic expungements, individuals wanting convictions set aside earlier may still apply to have their convictions set aside through the court given that they satisfy all requirements under MCL 780.621.

CASES CLARIFYING THE EXPUNGEMENT STATUTE

In recent years, cases have been argued on appeal in hopes of clarifying the requirements of obtaining an expungement. The Michigan Court of Appeals, in an unpublished opinion, held that the plain language of the statute does not require a hearing and a reviewing court may grant or deny an expungement absent oral argument.[32]

In another unpublished opinion, the Court of Appeals considered the meaning of the phrase "public welfare." While not defined by the statute, the court relied on Black's Law Dictionary to define it as "'[a] society's well-being in matters of health, safety, order, morality, economics, and politics,'" thereby holding that the public welfare includes every member of the public without exclusion.[33] This case is currently pending in the Michigan Supreme Court with the Court to determine, in part, if the Court of Appeals correctly defined "public welfare" under the former expungement statute.[34] The higher courts are expected to issue more decisions as the new expungement statute continues to pick up steam.

JUVENILE EXPUNGEMENTS

While the process for setting aside juvenile adjudications is largely the same as setting aside adult convictions, there are three key differences that are important to note. One is the number of adjudications that can be set aside. A person applying for a juvenile expungement cannot have more than one adjudication that would be a felony if committed by an adult and not more than three juvenile offenses total on their record.[35] If there is one adjudication that would be a felony if committed by an adult, only two misdemeanor adjudications can be expunged.[36] If there are no felonies, the person cannot have more than three adjudications for misdemeanor offenses set aside.[37]

Another difference is that the petitioner only has to wait one year after the termination of court jurisdiction to file the application.[38] Additionally, courts can set aside adjudications prohibited from being set aside as an adult conviction. For example, a person is eligible to have an adjudication for criminal sexual conduct in the third degree set aside despite an adult conviction for the same offense not being eligible for expungement.[39]

BENEFITS OF SETTING ASIDE CONVICTIONS

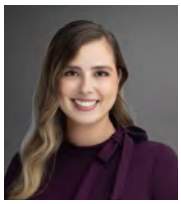
The effects of successful expungements can range from intangibles such as the internal satisfaction of no longer being stigmatized by having a criminal conviction to tangibles such as better employment, education, and housing opportunities. In our practice, we have seen clients receive new job offers, find better housing, and apply for and receive certain licenses through the state. With the whole courtroom clapping in excitement after an emotional and highly anticipated expungement, we have seen a father who is now able to attend his children's field trips. These are very real examples of how the Clean Slate Act and expungements better our communities and foster the notion of rehabilitation.

Specifically, a study out of Michigan examined Unemployment Insurance Agency wage data for individuals who received expungements between January 1998 and May 2011.[40] The results showed large gains in both employment rates and wages following an individual's receipt of an expungement.[41] Within one year, on average, wages increased by more than 22% as the unemployed found jobs and the minimally employed found steadier or higher-paying jobs.[42] This benefit is in addition to a reduction in recidivism as those who have received an expungement have extremely low subsequent crime rates.[43]

CONCLUSION

While the process to set aside convictions may seem confusing, the hope is this article will help practitioners gain a clear understanding of the steps and requirements contained in the new statutes. Now is the time for attorneys to help clients take advantage of this underutilized tool.[44]

With passage of the Clean Slate Act and the introduction of expungement fairs across the state, applications to set aside convictions are on the rise. Learning more about the ins and outs of this important change in our laws can help your clients move forward with their lives.



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Expanding restorative justice in Michigan

BY CHRISTINA HINES

Restorative justice is an approach to address conflict and misconduct that focuses on healing rather than punishment and values accountability over exclusion.

HISTORY OF RESTORATIVE JUSTICE

Although restorative justice has recently gained recognition and support in the United States, restorative justice practices date back centuries to indigenous peoples of Canada and the U.S. One indigenous philosophy views wrongdoing in a profoundly communal, rather than legal, manner; there is a collective responsibility to respond to the harm caused by the wrongdoer.[1] Restorative tribal court systems often employ a team of individuals to address the harm with the ultimate goal of healing the underlying causes of troublesome behavior so the person who caused harm can eventually be reintroduced into the community.[2] In this way, tribal restorative practice helps to restore balance and harmony both to the parties involved and to the community at large.[3]

Many other countries use restorative practices as the dominant model of their criminal justice systems. In New Zealand, the criminal justice system uses family group conferencing — largely based on the traditional practices of the Maori natives. This process is reflective of traditional tribal practices and often brings together the victim, the offender, family, friends, coworkers, teachers, spiritual leaders, and others to facilitate collective responsibility and healing for the victim and offender. This restorative practice views doing

harm as a symptom of a larger problem and allows parties to find lasting resolution.[4] Since the 1990s, the family group conference model has spread to many other countries including Australia, Canada, Jamaica, Ireland, Singapore, South Africa, the United Kingdom, and the U.S.

Howard Zehr founded the Elkhart County (Indiana) Prisoners and Community Together program, the first victim-offender reconciliation program in the United States. Zehr cited three reasons for the necessity of restorative justice work:[5]

- Victims were not only being left out of the justice process, but were often re-traumatized by it; there needed to be a better experience and more options for victims,
- The justice system was ineffectively using punishment under the guise of accountability, and
- The exclusion of the community in justice system decisions was a disempowering oversight.[6]

As a result of Zehr's work, restorative justice has become a popularized term that has sparked interest across the nation and worldwide.[7]

Currently, there are dozens of diversion and deflection programs across the country engaging in restorative justice practices.[8] Many states have formally adopted legislation incorporating restorative justice practices[9] and some states, such as Minnesota this past May,[10] have formally funded restorative justice programs.

EXPANDING RESTORATIVE JUSTICE IN MICHIGAN

A variety of Michiganders are interested in expanding restorative justice programs across the state. Restorative justice practices have been used in workplaces and schools, and religious, state, and nonprofit organizations have all been proponents.

School districts and educators across the state have traditionally relied on zero-tolerance exclusionary discipline policies for years. Too often, these policies remove an excessive number of students from the classroom by suspension or expulsion, create racial disparity gaps, and distract from the educational mission.[11] However, many school districts have moved towards alternative systems that focus more on social-emotional learning, healing practices, and positive behavioral interventions. The State of Michigan has officially listed restorative justice as an alternative to suspensions and expulsions.[12] With restorative justice, the role of discipline is not to be punitive, but to help children become responsible and informed adults through teaching and guidance. Common restorative methods — such as conferences, mediation, and community circles — are easily adoptable to the school setting. There are also 16 community dispute resolution centers spread out across Michigan and several have robust school-based restorative justice services, helping schools expand restorative justice practices and teach children how to resolve conflict.

In recent years, the restorative justice movement has also gained traction in the criminal justice space. As restorative justice has grown in popularity and recognition, some state legislators — and state legislatures across the country — have worked to codify restorative practices.[13] Since November 2020, the Michigan Restorative Justice Council (MRJC) has worked to develop victim-offender mediation strategies for policymakers to use in support of statutory authority.[14] In March 2022, former Rep. David LaGrand introduced House Bill 5987, the Restorative Justice Enabling Act.[15] The final bill provided structure and definitions for use of restorative justice practices in Michigan's criminal justice system; however, Rep. LaGrand's departure from the House of Representatives has left restorative justice in need of a new champion in the legislature. Organizations such as the MRJC and the Metro Detroit Restorative Justice Network continue to push for legislation which would involve both victims and offenders and provide effective ways to communicate, recognize responsibility and healing, and create repair plans.[16]

RESTORATIVE JUSTICE IN WASHTENAW COUNTY

In Washtenaw County, champions of restorative practices have been working for decades to make peacemaking and restorative justice a part of our criminal justice system. While several people deserve to be recognized, two of the giants in Washtenaw County are Circuit Court Judge Hon. Timothy Connors and Belinda Dulin, director of the Dispute Resolution Center of Washtenaw County. In 2013, with funding from the Michigan Supreme Court Connors and Dulin established the Peacemaking Court with the goal of "[creating] a resiliency based court model for future application to conflict resolution ... [and] striv[ing] to better serve our youth, our families and our community through healing rather than harming ongoing relationships."[17] The Peacemaking Court has been available to participants in family, probate, civil, juvenile, abuse and neglect, and district court cases. Groups such as the Friends of Restorative Justice and other community members have pushed for restorative justice practices to be expanded into the criminal justice space for years.

In 2020, Eli Savit ran for county prosecutor on a platform that included expanding options for crime survivors. Even before he was in office, he assembled a workgroup of community members and stakeholders to discuss a restorative justice program for adults and juveniles charged with crimes. The group included representatives from different faith communities, attorneys, social workers, law enforcement officers, nonprofit workers, educators, and students. After Savit was elected, he pulled together a team of volunteers from the prosecutor's office to design a program alongside the Dispute Resolution Center of Washtenaw County.

For most of 2021, the team listened in on the countywide workgroup, had weekly meetings with the Dispute Resolution Center, and met with creators of restorative justice programs from across the country. Over several months, the team crafted documents to help roll out the program including a written policy, a referral

process, referral forms, a frequently-asked-questions packet, a brochure, and a flowchart.[18] Internal changes were made to the case management system and staff were trained on the new policy and process.

The Washtenaw County Restorative Justice Program was officially rolled out in September 2021 as a deflection program — cases would be referred to the program and sent to the Dispute Resolution Center before charges were authorized. Critically, only cases where the crime survivor and the person who caused harm (the would-be defendant) wanted to go through the program would be admitted. If either the crime survivor or the person who caused harm did not want to go through the program, the defendant would be charged and the case would move through the traditional criminal court system.

Many crime survivors needed time to heal before they were ready to participate in restorative justice. It became clear that the program needed to be expanded to include cases in the traditional court system in which a defendant had already been charged. As a result, after meeting with judges and attorneys, Washtenaw County Circuit Court Chief Judge Hon. Carol Kuhnke in October 2022 signed a local administrative order allowing certain criminal cases to be diverted into the restorative justice program.

Washtenaw County's Restorative Justice Program is the first of its kind in the state. Many adult criminal cases are referrable, with exceptions for sexual assault, victimization of children, intimate partner violence, and other cases where the prosecutor determines the defendant poses a public safety risk such as homicides or cases involving gun violence. Thus far, the overwhelming majority of cases that have been officially referred into the program have been successful — meaning the crime survivor and person who caused harm were able to reach an agreement, complete the program, and make amends. The program also requires that the person who caused harm does not commit any new criminal activity for 18 months after admission into the program; thus far, none of the participants who have completed the program have engaged in new criminal activity.

While the program has been successful thus far, it did not come without mistakes or errors. The creation process could have been more intentionally inclusive. Although the workgroup was open to everyone, there were important stakeholders missing from the table at the outset of the process. Further, certain stakeholders were not on board with the program and more attempts could have been made to bring them to the table to discuss their concerns. Finally, the program was created and implemented by staff members with a passion for restorative justice who wanted a new opportunity for crime survivors, but those staff members had other roles in the office, making it a challenge for them to focus exclusively on the program.

CONCLUSION

The Washtenaw County Restorative Justice Program, and restorative justice in general, is certainly a step in the right direction for the criminal legal system. Our traditional system is one where crime survivors frequently do not walk away feeling that justice was granted — often, crime survivors feel left out, may be retraumatized by their participation in the court system, and rarely get the resolution and closure that they desire. Furthermore, offenders are often harmed by the traditional system rather than rehabilitated or reformed, saddled with convictions that destabilize their lives and the lives of family members by making it more difficult to secure housing and good jobs. Taken together, our traditional legal system often fails to make us safer or heal our communities.

Restorative justice is an opportunity for prosecutors to provide accountability and healing, and an opportunity for crime victims to get the answers they desperately want in the fashion they choose. Rather than letting trauma fester in the shadows, it brings it into the open. Data shows that crime survivors feel the restorative justice process is more fair than the traditional criminal justice system.[19] Further, they have greater overall satisfaction, improved attitudes towards and more willingness to forgive the offender, and a heightened sense that the outcome is just.[20]

There is no one-size-fits-all approach to justice. But providing one more choice for crime survivors — especially one that data shows reduces crime[21] — is a great opportunity for the state of Michigan.

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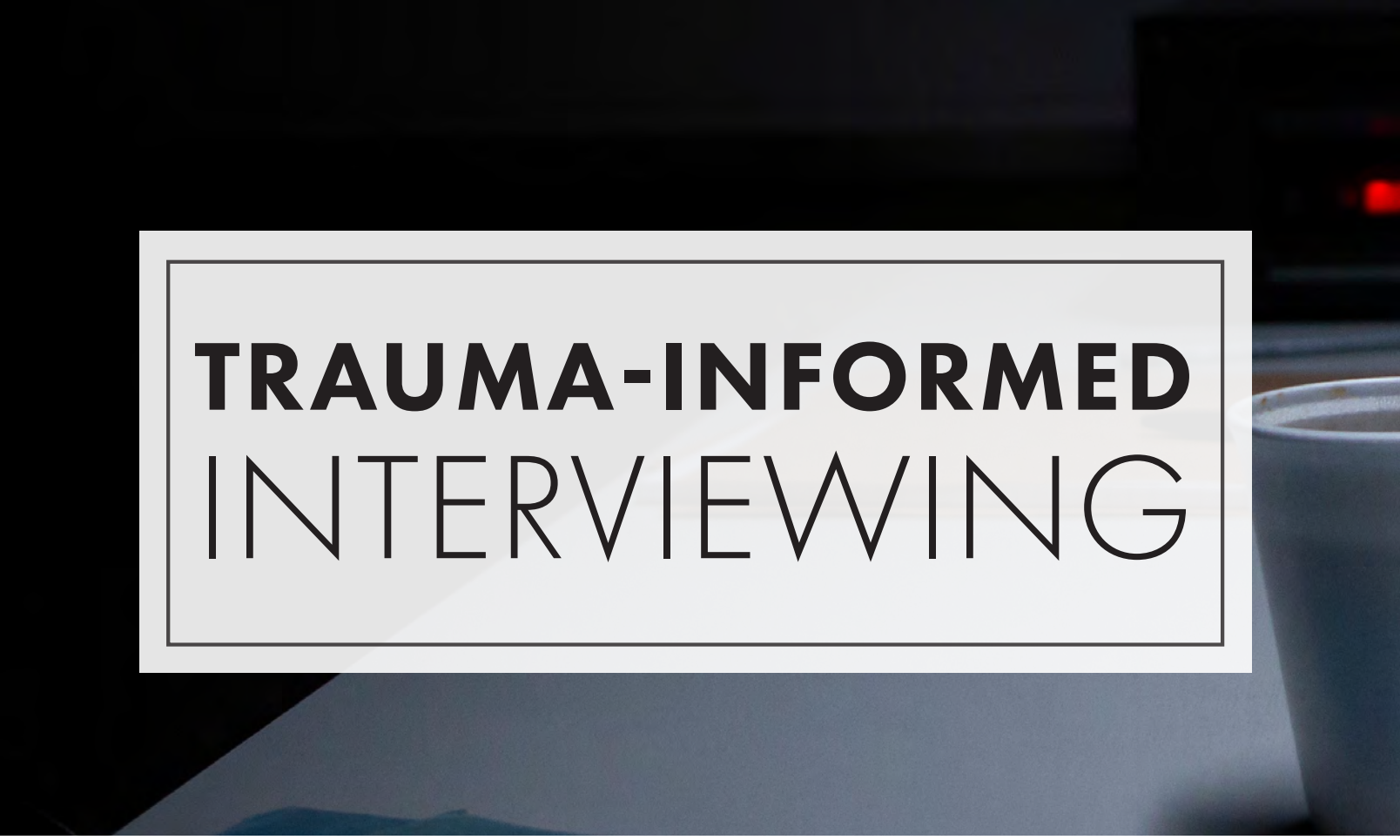

TRAUMA-INFORMED INTERVIEWING

How this approach to criminal prosecution benefits society

BY NATALIE BROOKINS

When investigating and prosecuting a violent crime that only has one witness, the interview of that witness is invaluable. As such, it is critically important that it is done in a manner that generates the most accurate information. This requires us to let go of many misconceptions we may hold about what we typically use to signal that someone is being less than truthful — believing that an inability to retell events in chronological order signals that a person is being dishonest or that remembering more details in the days following the initial interview somehow discredits the witness's initial statement.

To begin, we must first discuss the neurobiology of trauma as it is used to describe a person's response to becoming the victim of a crime. "Neurobiology of trauma" is an increasingly common phrase used by those involved in investigating and prosecuting crimes, particularly sex crimes. Do not be dissuaded by the phrase; this column is not a deep dive into the science of brain function!

"Neurobiology of trauma" refers to a combination of various sciences that help explain the different ways in which people react to traumatic situations — reactions that are often misinterpreted as signs that a person is being untruthful. The term is used to explain the ways a person responds during a traumatic event, the way they encode and store the experience in their memory, and the way they recall those memories later.[1] The functions of these neural networks are automatic, serve to protect us from attack, and are deeply ingrained within each of us.[2] An interviewer who does not understand the impact a traumatic event has on the brain — and thus does not conduct a trauma-informed interview — will not be able to elicit the same quantity and quality of information as an interviewer who has such an understanding.

What does it mean to conduct a trauma-informed interview? A trauma-informed interview involves understanding how the victim is affected by the various traumatic experiences of crime both in how

it impacts their ability to recall and recite what occurred to them and how it impacts their overall mental and physical health. A true victim-centered approach empowers the victim of a crime to make informed decisions about their participation in the criminal justice process from beginning to end including, but not limited to, whether to participate in the process at all, thus providing the system with a means to hold offenders accountable.[3] It is important for the interviewer to collect accurate information from the victim in order to get as complete a retelling of what occurred as possible. Accuracy and completeness benefit all who are impacted by the criminal justice process: victim, suspects, and society at large.

To do this, we must be aware that traditional methods of interviewing crime victims simply do not square up with what we now know about the way trauma impacts the brain.[4] When talking about traumatic events, information typically is not recalled in chronological order. As such, questions presented to victims as "who, what, when, where, why, and how?" may not yield informative responses and will very likely be lacking details such as a suspect's appearance and behavior during the assault.[5]

This occurs because the brain experiences a response to the physiological effects of stressful events that impacts the functioning in the memory centers, which play a critical role in successful recollection and memory-guided decision making.[6] In training sessions, Dr. Rebecca Campbell, a psychology professor at Michigan State University, uses an easy-to-understand metaphor about Post-it Notes[7] to describe neurobiology of trauma. She explains that during a stressful event, the brain is taking down the information related to memory in Post-it Note-sized snippets and the notes are shuffled together in the brain's storage.

When asked to retell the circumstances of the stressful event, the notes emerge as if they are scattered across the floor, with the victim able to pick up some of them. Often, the victim is not able to recall all notes while being questioned, which explains why a complete recollection of the details regarding the assault are not pres-

AT A GLANCE

When investigating and prosecuting a violent crime that only has one witness, the interview of that witness is invaluable. Trauma-informed interviewing takes into account the impact trauma has on the brain and leads to more accurate retelling of events than traditional interviewing styles. This increased accuracy is ultimately beneficial for both the survivors of violent crime and society at large.

ent at that time. And because the notes are shuffled in the victim's brain, events may be recited in non-chronological order. This helps us understand why a victim may later remember facts that were not reported at first, as that particular note is "found" in the brain after initial statements are given and the person has had time to process information after the pressure of the interview is gone.

The brain also experiences a response to the physiological effects of stress during attempts to recall information,[8] which is important to note because talking to police, prosecutors, judges, and juries can all qualify as stressful events. Achieving justice for victims of crimes, protecting society from predators, and ensuring suspects are investigated fairly demands that we understand the reality of this physiological response. Signs that a person has undergone a stressful event — such as lack of details, not speaking in chronological order, or memory blocks — should not be misinterpreted as signs that a victim lacks credibility. In a 2019 report for End Violence Against Women International, Dr. Jim Hopper, an expert on neurobiology and trauma, wrote:

> "Not recalling such details may simply indicate that those details were not encoded into memory in the first place or were not retained, which should be *expected* of a brain for *any* experience, especially a traumatic one. For example, law enforcement professionals recognize that colleagues involved in officer-involved shootings often don't remember drawing their weapon or how many shots were fired, let alone whether the suspect was holding a gun … in their right or left hand."[9]

How should we conduct a trauma-informed interview? Making the interview environment as stress-free as possible is a good start. This is accomplished by making sincere efforts to establish rapport with the victim, acknowledging that the victim has experienced a traumatic and painful event, and communicating in language the victim is comfortable with and understands. This also means allowing the victim to speak without interruption, avoiding "why?" questions (which tend to come across as victim-blaming), inviting mental health advocacy specialists or a support person in the room with the victim during the interview, and including other measures designed to make the victim more comfortable.

How do we ensure the victim provides as much accurate and reliable information as possible while also understanding the impacts that the trauma has had on their memory? In addition to the above suggestions, use non-leading questions and open-ended prompts, allow for and encourage narrative responses without interruption, and focus on what the victim was feeling throughout the experience. Instead of insisting on chronological storytelling, focus on sensory experiences the victim can recall (smell, sight, sound, taste, touch, and internal body sensations.) Lastly, accept without pressure or judgment when the victim responds by saying "I don't know" or "I don't remember."

For further information on trauma-informed interviewing, see Effective Victim Interviewing: Helping Victims Retrieve and Disclose Memories of Sexual Assault at https://evawintl.org/courses/evawi-06-effective-victim-interviewing-helping-victims-retrieve-and-disclose-memories-of-sexual-assault/ [https://perma.cc/9B56-G8ME] and Sexual Assault: A Trauma Informed Approach to Law Enforcement First Response at https://www.sakitta.org/toolkit/.

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PLAIN LANGUAGE

The Clear and Concise Content Act of 2023: Another step toward plain writing in the federal government

BY RACHEL STABLER

Over a decade has passed since the first federal legislation was enacted mandating that federal agencies use plain language in certain communications with the public. The Plain Writing Act of 2010 was a positive step forward, but a new — and better — law is on the horizon. The Clear and Concise Content Act of 2023 has been introduced in the Senate. This bipartisan bill has the potential to make greater strides toward plain writing in the federal government, achieving better transparency and accessibility for the public.

THE FIRST STEP: THE PLAIN WRITING ACT OF 2010

Readers may already be familiar with the Plain Writing Act of 2010, which President Barack Obama signed into law in October of that year. The Act requires federal agencies to use plain writing in "covered documents": documents related to government services, benefits, requirements, or taxes.[1] It defines "plain writing" as "writing that is clear, concise, well-organized, and follows other best practices appropriate to the subject or field and intended audience."[2] Finally, it also requires that agencies annually report on their progress in using plain language.[3]

While the 2010 Act was celebrated as a victory for the plain-language movement,[4] even its advocates acknowledged that it was "just the beginning."[5] Change within the federal government comes slowly, and plain writing is no exception. Indeed, a review of agency compliance about two years after the Act took effect showed that only about half the agencies had complied with the mandatory reporting requirement and that many were still releasing covered documents that committed the most common plain-language mistakes.[6]

Even in 2023 — 13 years after the 2010 Act became law — agencies are still struggling to use plain language. The most recent Plain Language Report Cards issued by the Center for Plain Language reflect a decrease in the agencies' average writing grade: C, down from a B in the previous year.[7] A quick review of agency websites shows that compliance with the reporting requirement remains lackluster.[8] On the more positive side, though, many agencies have indeed improved — or are in the process of improving — their public communication in various ways.[9]

All of this reveals that there is still work left to be done. The 2010 Act, while a victory for the plain-language movement, has its shortcomings. Its scope is fairly limited in two ways: (1) it narrowly defines "covered documents" and (2) it applies only to documents created or substantially revised after the Act's passage. Other shortcomings stem from a lack of oversight.[10] While it requires agencies to issue annual reports, it does not require any particular content in those reports. Moreover, it directs agencies to simply post their reports on their websites; no one outside the agencies is required to review those reports. Instead, the Act puts the burden on the public to ensure compliance, envisioning a public that is aware of the Act's existence, can recognize when a document fails to use plain writing, and will proactively inform the agency of that failure.

"Plain Language," edited by Joseph Kimble, has been a regular feature of the *Michigan Bar Journal* for nearly 40 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 NEXT STEP: THE CLEAR AND CONCISE CONTENT ACT OF 2023

The Clear and Concise Content Act of 2023[11] would replace the 2010 Act, addressing its shortcomings and improving on it in numerous ways:

1. Broader Coverage. It broadens the type of writing that is required to be in plain language. It also requires all existing covered content — not just new or revised documents — to be in plain writing. This means that agencies must review all their content to see whether it is covered content that must be in plain writing.

2. More Inclusive. It defines "plain writing" to expressly include an audience who might be underserved or disadvantaged, such as those with disabilities or those who lack proficiency in English.

3. Compliance Metrics and Testing. It assigns the Director of the Office of Management and Budget the task of establishing metrics to determine the extent of an agency's compliance with the requirement to use plain writing. It also requires agencies to routinely test their own covered content.

4. Better Oversight and Reporting. It provides additional levels of oversight: agencies must report to the Director, who then must report to Congress annually. In addition, agencies must address their plain-writing compliance metrics in the annual performance plans that 31 U.S.C. § 1115(b) requires.

5. Active Solicitation of Public Feedback. It requires agencies to reach out to the public and proactively solicit feedback, rather than putting the burden on the public to reach out to the agencies.

Here is a more comprehensive chart describing the differences between these laws.

	Plain Writing Act of 2010	**Clear and Concise Content Act of 2023**
Types of Writing Included in the Act's Coverage	Includes "covered documents," defined as: (1) documents that provide information about a government service or benefit; (2) documents that are necessary to file taxes or obtain a government service or benefit; (3) documents that explain how to comply with a government requirement.	Includes "covered content," defined as: (1) content that provides information about a government service or benefit; (2) content that is necessary to file taxes or obtain a government service or benefit; (3) materially important content that is posted publicly and provides information about an agency's operations, policies, or guidance (specifically including content explaining how to comply with government requirements); (4) content that provides information about how to interact with or give feedback to an agency about its operations, policies, or guidance; (5) content that provides information about or is necessary to use any agency website, digital service, or office; (6) instructions for submitting feedback to a regulation at any point during the rulemaking or implementation process.
Applicability	Applies only to covered documents that an agency creates or "substantially revises" after the Act takes effect.	Applies to all covered content, including existing content; also applies to agency websites and digital services that are newly created or revised.
Definition of "Plain Writing"	"[W]riting that is clear, concise, well-organized, and follows other best practices appropriate to the subject or field and intended audience."	"[W]riting that is clear, concise, well organized, and follows other best practices appropriate to the subject or field and intended audience, including an audience who may be disabled, may not be proficient in English, or may otherwise be disadvantaged or traditionally underserved."

Oversight	Each agency designates a senior official to oversee that agency's compliance.	(1) Each agency designates a senior official (no lower than an Assistant Secretary or its equivalent) to oversee that agency's compliance. (2) The Director is appointed to create new guidance for agencies and to receive reports from agencies about their compliance with the Act.
Measuring Compliance	None	In the new guidance, the Director will establish qualitative and quantitative metrics to measure how well agencies are (1) identifying covered content, (2) using plain writing in covered content, and (3) incorporating public feedback and data to improve public engagement and interaction with the agency. Agencies must routinely test their content to determine its compliance.
Public Feedback	Agencies must provide a mechanism to allow the public to give feedback.	Agencies are required to actively solicit and incorporate public feedback.
Reporting	Agencies self-report by posting annual reports on their websites.	(1) Agencies report to the Director, who then reports to Congress (specifically, the Committee on Homeland Security and Governmental Affairs in the Senate and the Committee on Oversight and Reform in the House) annually. The Director may also publish the reports to Congress online. (2) Agencies must include their plain-writing compliance metrics in their annual performance plans (31 U.S.C. § 1115(b)).

REASON FOR OPTIMISM

This 2023 Act is substantially similar to one introduced in 2022,[12] which passed the Senate by unanimous consent in December 2022 but unfortunately didn't make it through the House before the legislative session ended. Sen. Gary Peters, D-Mich., reintroduced the bill on March 8, 2023, with Sen. James Lankford, R-Okla., again cosponsoring. Just two weeks later, the Committee on Homeland Security and Governmental Affairs unanimously ordered that the bill be reported favorably.[13] Given its bipartisan support and the success of the 2022 version in the Senate, good reason exists to be optimistic that this 2023 Act will become law. Of course, a call or email to your local senator and representative can only help.[14] With the passage of the Clear and Concise Content Act of 2023, we can take another step toward broader use of plain writing in the federal government.

Rachel Stabler is a clinical professor of law at Arizona State University Sandra Day O'Connor College of Law.

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LAW PRACTICE SOLUTIONS

Three keys to implementing your 2024 goals

BY MARGARET BURKE

It's the most wonderful time of the year! The holidays are here and if you're like many people in the legal industry, you've begun reviewing the lessons you learned in 2023 as you prepare to ring in the new year.

What has been successful? What changes will you implement? You may be thinking about growing your firm, acquiring and retaining the right clients, remaining competitive, or building your brand. You may also have projects that stalled this year, things you know should be addressed before someone addresses them for you — and not in a way that benefits your firm. Areas of lingering concern may include modernizing partner compensation models, establishing attorney partnership tracks, launching a new service, or improving client service workflows and efficiencies.

In my experience working in and with law firms for more than 20 years, I understand that implementation is often a sticking point. Time is limited, and the resources needed to implement viable options often seem scarce. Whatever your aspirations, these three best practices will support you in implementing your goals in the coming year and beyond.

NARROW YOUR FOCUS

Change, especially at the beginning of a new year, can be both exhilarating and challenging. While capitalizing on your enthusiasm to start strong is important, it is just as important to avoid biting off more than you can chew. Setting too many goals can end up backfiring, causing you to become so overwhelmed that you accomplish less rather than more.

Instead, prioritize actions and projects that will increase the value of your firm and make sense based on the financial and human resources you have available. Invest time in considering what matters most to you as well. What changes might have the greatest impact professionally and financially? Choose goals that excite you and you can commit to putting energy and effort behind.

LEVERAGE THE POWER OF THREE

I advise clients to choose no more than three things to focus on at one time. Depending on the size and scope of the goals, these things might be something you want to accomplish each quarter or over the entire year.

It's possible that these goals are interconnected, such as the multiple steps required to strengthen and maximize your technology infrastructure. Or you might decide to set one goal that will move you or your firm forward in three different areas. The idea is not to set too many goals while making sure each one is specific, measurable, and achievable. Make them tangible by writing them down and sharing them with your team.

If you are struggling on where to set your sights, the following are three areas that many law firms are zeroing in on for 2024.

Business Development: Managing Client Relationships

Tops on the resolutions lists of many law firms is maintaining or developing business growth strategies to diversify their client and referral base. Your firm's most valuable asset is your clients, and if your goal for 2024 is to be in front of more clients, having an effective client relationship management (CRM) system enables you to spend less time prospecting and more time leveraging the wealth of business potential at your fingertips.

In the past, companies kept contact information scattered across business cards, email records, and spreadsheets. As businesses grow and evolve, having a central database for customer information

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becomes essential. Organizing client details and referrals in one place makes it easy for your entire team to gain insight into your client relationships.

Establishing and maintaining a client list that allows you to identify and build relationships with your top referral sources is the ultimate goal. Start with your clients over the past 3-to-5 years and work backward, documenting addresses, emails, and phone and mobile numbers. Systematically organize your client data by categorizing practice areas, revenues, activity status, etc. If you don't already have a program in place, consider choosing a user-friendly CRM system and assigning a team member to learn and manage it.

Then, commit to tracking referrals in and referrals out. Allocate time to review the data monthly. Focus on your top 5 or 10 high-value clients and strategize ways to maintain or enhance these relationships with the goal of creating a monthly touch point.

Marketing: Boosting Your Digital Presence

When it comes to business planning, marketing often falls to the bottom of the list. The start of a new year is an ideal time to evaluate your firm's marketing efforts and ensure there are plans that support your specific objectives.

No matter how limited your resources may be, establishing and maintaining a strong online presence is essential. Amplifying your brand by maximizing your firm's digital assets does not need to be a complex undertaking. Whether you handle it internally or outsource key tasks, consider including the following on your to-do list:

- Ensuring that your website is well-designed, up to date, and maximized for search engine optimization.
- Maintaining a current LinkedIn profile with connections (ideally more than 500) that demonstrates a commitment to marketing and business development.
- Identifying and implementing social media and other digital marketing strategies that emphasize your team's expertise and thought leadership.
- Actively seeking and gathering positive online reviews and addressing any negative feedback promptly.
- Continuing or introducing a quarterly or monthly e-newsletter to stay top of mind with clients.

Retention: Cultivating a Culture of Trust

Many law firms invest a significant amount of time and resources in recruiting and hiring, only to incur considerable costs due to high staff turnover. Prioritizing employee retention in 2024 can not only save time and money, but it can help position your firm as a destination for top talent whose skills and energy will help your business thrive.

Ensuring that roles are clearly defined and responsibilities are appropriately assigned is an important first step in improving team management. However, cultivating a strong culture of trust is essential to boosting motivation and morale. It begins with getting to know your team — understanding their individual career goals and providing the support and mentorship they need to achieve them. Meet for coffee to discuss their successes and challenges. Celebrate small wins while looking at areas where their work can be improved. Establish regular performance assessments, reward top performers, and commit to addressing specific human resources issues promptly. Implementing these steps will go a long way toward keeping staff engaged and fulfilled while avoiding unwelcome surprises.

PUT A PROCESS IN PLACE

Once you establish your goals, you now face the challenge of implementing them. In my experience, the key to effectively creating change is developing a process that helps you stay focused and allows you to track progress.

Don't overthink it. All you need is a simple plan that allows you to chip away at your goals. Break larger goals into smaller tasks and carve out time to tackle each one. Be realistic about how much time you can dedicate to these duties — it may be an hour a week or two hours a month — but be sure to save your most productive time for client work.

While scheduling the tasks you want to accomplish, don't forget to incorporate any additional resources you may need. Attorneys are often more likely to try to do everything themselves than to ask for help. Seeking support can be invaluable, whether it's tapping a team member's expertise, embracing time-saving technology, or getting an outside perspective from a mentor, coach, or colleague.

As the year unfolds, you might find the strategies you're using to achieve your goals are not working. Remember Newton's first law of motion: every object at rest stays at rest and an object in motion stays in motion.[1] Embrace flexibility, adjust as needed, and recommit to your process. Over time, it will become a habit — one that delivers tangible results for you and your firm.

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

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LIBRARIES & LEGAL RESEARCH

What's in a number? Basic statistical literacy for lawyers

BY CODY JAMES

There is a running joke within the legal profession that lawyers choose to go to law school because they are bad at math.[1] Facially, this proposition makes sense. The bread and butter of the legal profession is written and oral advocacy, not numbers and arithmetic.

But the legal profession has never existed outside of the realm of numbers. And in today's world of big data where judges' decisions and opposing counsel's actions can be quantified and packaged into orderly statistics, basic statistical literacy is a critical part of legal research and practice.

Statistical literacy refers to the skills pertaining to reading and interpreting statistical data.[2] This includes analyzing the meaning of the data represented by statistics and understanding the limitations of those statistics. Statistical literacy does not necessarily include knowing how to mathematically calculate statistics; instead, it is focused on effectively engaging with statistical data that has already been created.[3] At its core, statistical literacy is about being able to effectively judge if statistical information is accurate and trustworthy.

The good news is that most attorneys are already using statistical literacy skills in their everyday lives. For example, let us assume a study found that 55% of Michiganders prefer coffee over tea. Most people would be able to read the data and conclude that coffee is slightly more popular in Michigan than tea because they know statistics generally add up to 100% and that 55% is more than half of 100. Based on that knowledge, people could also deduce that 45% of Michiganders prefer tea. These basic interpretations of a single statistic are examples of using statistical literacy skills to analyze the meaning of a number.

Statistical literacy goes beyond just reading the numbers, however; it also includes critically analyzing their validity. In the previous example, effective statistical literacy would also include examining the collection methods and presentation of the information. For example, if the survey only included people from Detroit, then the results could not accurately be applied to all Michiganders. Or, if only 20 people from around the state were surveyed, the survey pool would be too small to be accurately applied to the entire state.

It is this second part of statistical literacy — critically engaging with the validity or accuracy of a statistic — that can be the most important part of statistical legal research. Presenting or crafting statistics in a manner that privileges a certain view or result is not difficult.[4] These statistics can distort the weight a judge or jury might put on certain pieces of evidence. The ability to critically research statistical claims is vital to being able to effectively counter their assertions.

STATISTICS IN LEGAL RESEARCH

Statistics can be effectively used in oral arguments, contract negotiation, trial planning, and many other areas of legal practice.[5] But before an attorney can use a statistic, they must first critically examine the data set used to create it and understand the limits of its application.

The emerging field of litigation analytics provides a good example of how attorneys can effectively review statistics. Using litigation analytics software, attorneys can look up the individual judge they are appearing in front of to see the statistical likelihood of that judge granting a motion to dismiss.[6] This statistic is calculated by analyzing data on that judge's prior motions to dismiss.[7]

To analyze the accuracy of that statistic, a lawyer should first look at how the data was collected and the number of data points used to create it. In regard to analyzing data collection, it is important to know what data was used to create the statistic as well as what data

was left out. Many litigation analytics software applications only have data from federal courts, so a prior state court judge's record would be completely left out of the statistical analysis. The omitted data has the potential to affect the statistic's accuracy. Furthermore, if the data points used to create the statistic are too few, the results would not be statistically significant and would not provide useful information. For example, if a judge was appointed to the bench within the last year, it is probable they simply have not ruled on enough motions to dismiss to create statistically significant data.

At its core, statistical literacy is about being able to effectively judge if statistical information is accurate and trustworthy.

Secondly, a lawyer should examine how the data is being presented. A judge might generally grant a motion to dismiss 53% of the time across all practice areas but might specifically grant motions to dismiss 72% of the time in immigration cases. How this statistic is presented can shape its interpretation and effectiveness. If an immigration attorney is told that the judge only grants 53% of motions to dismiss, that attorney would be making a decision based on inaccurate information for their specific practice area. The statistics used to inform decisions must be both relevant and narrowly tailored to an attorney's question.

CONCLUSION

For the statistically literate attorney, it is crucial to never take a statistic at face value. It is only by first critically examining the creation and presentation of a statistic that an attorney can effectively engage with it. Whether it is to employ a statistic to inform trial preparation or to counteract opposing counsel's use of statistics, statistical literacy is a vital skill in both modern legal research and legal practice.

Cody James is reference and student services librarian at the University of Michigan Law Library. He received his law degree from the University of Colorado Law School and his master's degree in library science from the University of Kentucky. He is a member of the Colorado State Bar.

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1. At a White House event for the National Science Foundation, First Lady Michelle Obama said, "I'm a lawyer because I was bad at [science and math]. All lawyers in the room, you know it's true. We can't add and subtract, so we argue." ObamaWhiteHouse.Archives.gov, *Remarks by the First Lady at the National Science Foundation Family-Friendly Policy Rollout,* <https://obamawhitehouse.archives.gov/the-press-office/2011/09/26/remarks-first-lady-national-science-foundation-family-friendly-policy-ro> [https://perma.cc/WVX7-EHG5]. (September 26, 2011) (All websites accessed on November 7, 2023).
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BEST PRACTICES

Selecting and working with testifying expert witnesses

BY CAROLINE B. GIORDANO

A good expert witness is extremely valuable — they can help effectively present your story to the factfinder by providing an authoritative, professional opinion on the facts of your case. Selecting a good expert is half the battle. Still, no matter how smart they are, your expert witness needs your help to do their best work. This article outlines some practical advice for attorneys about selecting and working with testifying expert witnesses.

SELECTING YOUR EXPERT

You should think about whether to retain an expert witness very early on in your case. If the case involves technical subject matter and there is an important issue or substantial amount of money at stake, you should seriously consider retaining an expert. If you know you want expert testimony to support your case, it's best to lock in your expert sooner rather than later to avoid a time crunch at the end of the discovery period.

So, where do you look for an expert witness? In addition to asking colleagues and friends, you may also want to run Westlaw or LexisNexis searches to identify experts who testified in cases with subject matter like yours. The attorneys who worked on these cases may be able to share valuable insight on the experts involved. Local bar associations or special-interest legal organizations may also be able to make recommendations. Finally, don't underestimate a targeted Google search. With any luck, you will have at least a few names to choose from.

You'll also want to consider what type of expert best fits your needs. There are several types of experts that tend to testify in litigation: professional experts (a.k.a. hired guns, many of whom work for expert consulting firms), practitioners in the relevant field, and academicians. All these experts can work well depending on the nature of your case and your budget. If you have the time, try to interview different types of experts to get a sense of their personality and how they might appear to your jury.

Do not assume the professional expert will necessarily be the best just because they do this for a living. No matter the credentials, your expert may risk putting off a jury if they are overly formal or wonkish. Likewise, don't count out potential experts simply because they may not have litigation experience. The best expert I ever worked with was a laid-back practitioner who had never testified in a lawsuit before. He needed to be educated on the procedural quirks of litigation, but he understood the complex subject matter at issue better than anyone else and communicated it in a clear, folksy way that resonated with the court. Experts with less litigation experience also generally cost less to retain, and they may come with less baggage in the form of prior testimony your opposing counsel will want to unpack at deposition or trial. If you are looking for a technical or industry expert, you may also want to ask your client if they have worked with any retired executives or business consultants with a relevant knowledge base who might be willing to help.

That said, if you are seeking an expert in a large, complex case with a demanding client, a seasoned professional may be exactly what you need. These experts will likely be more expensive, but they will be comfortable with the practicalities of sitting for deposition so you won't need to waste time educating them in that regard and can spend your time focusing on the key substantive issues involved in your case. If they have testified frequently, professional experts are also less likely to appear nervous and they will be able to draw on their experience when opposing counsel throws them curveballs.

Academic experts can be very impactful if they have developed a body of research in the specific subject matter at issue in your case. For example, if you have a case involving medical issues, consider

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

whether it would be useful to retain a research physician with experience analyzing those issues across an extended patient population. That kind of testimony can be incredibly persuasive to a jury provided your academic expert is able to explain their research in a straightforward, accessible manner. One potential downside of retaining an academic expert — especially one who does not have much litigation experience — is that they may be used to working with more generous timelines in their own careers. You may need to factor in extra time to make sure they stick to a comparatively tight litigation deadline.

You may also have received unsolicited emails from companies offering to find you an expert that fits your case. Proceed with caution here. While these services may be helpful in difficult situations, they increase your costs and are no substitute for your own due diligence on a proposed expert.

Finally, before retaining any expert, determine whether the potential expert's testimony has ever been disqualified or stricken in a court proceeding. Westlaw, LexisNexis, and Google searches may reveal that your proposed expert has previously been disqualified by a court or has taken a position that is harmful to your client's position. If a court has previously disqualified your potential expert, think long and hard before retaining them. A previous disqualification can become a huge side issue; you probably do not want to waste valuable time on your case dealing with it.

When you decide to retain an expert, execute a retainer agreement clearly identifying their role in the case and your expectations about the scope of their work and their rates.

WORKING WITH YOUR EXPERT

Developing a good working rapport with your expert is key. The better understanding your expert has of the case and their role in it, the more valuable your expert will be both as a witness and a knowledgeable sounding board as you develop your litigation strategy. Building a solid foundation of trust and communication with your expert will also help them feel more comfortable speaking freely with you about any potential concerns they may have about your case. You will also want to get to know the expert's team if there is one — in many instances, the expert's associates may be more accessible than the expert, but are still highly knowledgeable because they are doing the bulk of the grunt work needed to get the testifying expert up to speed.

Make sure your expert understands the scope of the documents and information available and provide them with whatever documents and information they believe they need to be fully prepared to do their best work in your case. Also, do not be afraid to ask your expert what you perceive to be dumb questions. The entire reason you hire an expert is that they know far more than you do about the subject of their expertise. You should feel free to pummel the expert with dumb questions because they will turn out to be some of the same questions that a jury, judge, or opposing attorney will pose. And if the expert can't answer your dumb questions clearly and respectfully, they are probably not going to be a very good testifying witness.

It's crucial to make sure at the outset that your expert understands the nature and scope of the attorney-client and work-product privileges to ensure they are maintained. In Michigan, the attorney-client privilege generally extends to confidential communications between the attorney and an agent of the client or attorney, including an expert witness. Communications between an expert and an attorney are not privileged, however, to the extent they relate to compensation for the expert's study or testimony; identify facts or data that the party's attorney provided and the expert considered in forming the opinions to be expressed; or identify assumptions that the party's attorney provided and the expert relied on in forming the opinions to be expressed.[1]

Michigan Court Rules do not require testifying experts to serve expert reports per se, but many parties still opt to have their expert prepare a formal report and reports may be required by the scheduling order. If your expert is preparing a report, make sure they have an idea of the type of information you think needs to be included. You should also set hard deadlines for initial drafts of the report that fall well before the deadline for serving the final report. Both you and your expert will probably need more time than you think for this step, so make sure you have ample time to review and comment on drafts and for the expert to recirculate multiple rounds of revisions.

When preparing your expert to testify at deposition and trial, you should set aside time for multiple preparation sessions. Ideally, these sessions will be in person, but often that isn't feasible with experts because they are located far away from where your case is pending. In these sessions, emphasize to your expert that they should always remain polite and professional regardless of opposing counsel's antagonistic attitude or off-the-wall line of questioning. They should avoid jargon and speak clearly in terms a layperson can understand.

You should confirm during your preparation sessions that your expert knows their report inside and out and is thoroughly familiar with any reports submitted by opposing experts. You should also make sure your expert understands that the scope of their testimony is limited. If pressed by opposing counsel on an unrelated issue, your expert should not speculate on a topic that is outside that scope.

Caroline B. Giordano is a principal in the litigation and dispute resolution practice group at Miller Canfield and is headquartered in the firm's Ann Arbor office. In addition to handling a broad commercial litigation practice, Giordano has represented a wide variety of governmental entities throughout Michigan at the trial and appellate levels including the defense of numerous class-action lawsuits brought against municipalities.

ENDNOTE

1. MCR 2.302(B)(4)(f)(i)-(iii).

PRACTICING WELLNESS

Authenticity: The best (cheap) sunglasses money can't buy

BY BLAIR JOHNSON

It's no secret lawyers have a dismal reputation when it comes to trust. Since Gallup began polling on public trust and confidence in professional institutions in 1985,[1] lawyers have never had more than 25% of the public having high or very high levels of trust and confidence in the legal profession, which is "significantly below" ratings for doctors, nurses, judges, and police officers.[2] When asked in 2023 which categories of the ABA Model Rules of Professional Conduct should be revised, 65% of attorneys polled noted "maintaining integrity of the profession" as the area most in need of improvement.[3] Even lawyer civility has plummeted, as summarized by past State Bar of Michigan President Jennifer Grieco in December 2018.[4] But behaving ethically is not a challenge unique to lawyers.

A fascinating 2010 Harvard study evaluated the ethics of participant behavior based on the type of sunglasses they thought they were wearing.[5] Lead researcher Francesca Gino and her team divided participants into two groups and gave each person a pair of $300 designer sunglasses, except those in the second group received their sunglasses in a box marked "fake" or "counterfeit." The participants then answered a series of questions which paid them a nominal fee based on whether their answers were right or wrong. The results: 70% of participants wearing the "fake" glasses lied to inflate their scores for more money while 26% of wearing the "authentic" glasses inflated their scores. Different variations produced similar results.

The researchers didn't tell the participants they were all wearing the same brand of sunglasses and only the labels on the boxes were different. The team's conclusion: it wasn't the fake sunglasses that drove the unethical behavior; it was the feeling of inauthenticity that came from wearing something fake. In layperson's terms, "feeling like a fraud makes people more likely to commit fraud."[6] Striving to live authentically — or practice law authentically, for our sake — might be a remedy to help change the public perception of our profession.

Being authentic is generally perceived as operating in concert with one's values regardless of the circumstances. Think genuine, bona fide, the real McCoy, or, in modern parlance, "being real." But this is a column about wellness, not ethics, so why or how does authenticity impact a lawyer's well-being? Two words: cognitive dissonance.

Cognitive dissonance, a term coined by social psychologist Leon Festinger in the mid-1950s, is the perception of contradictory information and the mental and/or physical toll that results from it.[7] When two actions or ideas are not psychologically consistent with each other, a person will do everything in their power to restore balance.[8] Often, achieving that internal balance may employ the not-so-ethical (or effective) mental devices of justification, rationalization, and avoidance.[9]

In the Harvard example above, one's internal dialogue might run something like this: *"No one will know I'm fudging my answers because they already think I'm wearing designer sunglasses except they're really just knockoffs, and besides it's only a few dollars that I'm making by lying so what's the big deal?"*

As lawyers, we experience cognitive dissonance all the time — and not always because our clients ask us to engage in bad behavior or we see an opportunity to do so as advantageous to our or our clients' interests. It's often innately part of being a lawyer;

"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

the very nature of our work as lawyers exposes us to both more opportunities for cognitive dissonance and a lesser degree of trust and confidence in our profession from the public. Could there be any more perfect storm for the erosion of lawyer well-being? Added to the effect of being a lawyer is the legal training we acquired to become lawyers. As legal expert Lawrence S. Krieger noted:

> Traditional teaching methods [in law schools] and beliefs that underlie them undermine "the sense of self-worth, security, authenticity, and competence among students. Law students get the message, early and often, that what they believe, or believed, at their core, is unimportant — in fact 'irrelevant' and inappropriate in the context of legal discourse — and their traditional ways of thinking and feeling are wholly unequal to the task before them."[10]

Whether or not we knew it, the schools we paid so handsomely for our degree and training to do what we do unintentionally robbed us of the essential qualities we need to live a balanced and fruitful life. It's no wonder that nearly 30% of American lawyers report experiencing depression, anxiety, and/or stress and more than 20% report having problems with alcohol use, a rate that has increased by more than 50% since the mid-2000s.[11]

Can practicing law authentically be an antidote to our wellness demise? Perhaps. One study in the Journal of Counseling Psychology found that "authenticity was correlated with higher self-esteem, psychological well-being, and happiness."[12]

So how do we get back on the beam of living authentically and push back against the cognitive dissonance we must endure as legal practitioners? You've probably heard of social scientist Brené Brown, whose name has become synonymous with vulnerability, shame, and authenticity.[13] In her book, *The Gifts of Imperfection,* she offered a definition and summary of authenticity:

> Authenticity is the daily practice of letting go of who we think we're supposed to be and embracing who we are. Choosing authenticity means cultivating the courage to be imperfect, to set boundaries, and to allow ourselves to be vulnerable; exercising the compassion that comes from knowing that we are all made of strength and struggle; and nurturing the connection and sense of belonging that can only happen when we believe that we are enough.[14]

Applying the insights of Brown (and others[15,16,17]) to the practice of law, you might consider the following (note that I wouldn't offer these tips had I not applied them myself … this is authenticity exemplified!):

- **Let go of who you think you're supposed to be:** We're not superheroes, we are humans. Though we work in a meaningful profession trying to deliver the best possible solution for clients who need our help, we are still just humans. We can't read minds. We can't stop time to catch up on our work. We rarely, if ever, have all the facts. And we are called upon to handle legal problems, though rarely, if ever, do clients bring us singularly legal problems.

- **Embrace who you are:** Know your strengths and weaknesses. If you are fastidious in your study of the law, promote that in your dealings with clients and courts. If your soft skills are on fire, encourage those conversations with clients and colleagues to build rapport. If you've had a rough week (or month or year), own that reality and accept that tough conditions will likely impair your ability to deliver your best. Again, human, not superhuman.

- **Cultivate the courage to be imperfect:** Allow yourself to make mistakes. This is not a license to be reckless, but if you're reading this article, you've surmounted some impressive obstacles to earn your subscription to this magazine and you made some mistakes along the way.

- **Set boundaries:** Boundaries support authenticity. Regardless of the size of your caseload, we all need boundaries to protect our ability to serve our clients competently, zealously, and dutifully while preserving the need to have a life outside of work. In the five-plus years since I've implemented this principle, I've yet to have a client take offense when I've clearly communicated a boundary and stuck to it. The cost of not setting boundaries always leads to more stress and a roomful of resentments you can't have living rent-free in your head.

- **Let yourself be vulnerable:** Sharing our human side with clients can relieve the stress we may feel to be perfect while affording clients the opportunity to show us grace in our efforts to deliver the best product we can offer. Note that authenticity does not mean baring all. Rather, acknowledging to our clients that our plates are full or that we need some time to recenter can build confidence and trust. Authenticity enables our ability to connect with others.

- **Practice mindfulness:** The messages our bodies and brains are trying to send us about how we are doing or feeling in a given moment is the best authenticity barometer. Mindfulness allows us to honor and tend to the parts of ourselves that care nothing

about deadlines or client demands. It allows us to hear whether what we are doing or about to do resonates with the core beliefs that guide our thoughts, words, and actions and gives us the chance to avoid a path that may erode our self-esteem, sense of worthiness, and security.

We may have a long way to go to change the public perception of our profession, but we can change how we relate to ourselves, our clients, and our peers by striving to live authentically in our practice and at home. And maybe if we ditch the designer sunglasses (or the knockoffs) and let people see us for who we really are, we can experience less stress, less fear, and greater self-esteem. If you're feeling overwhelmed and could use help finding balance in your life, contact the Lawyers and Judges Assistance Program.

Blair Johnson is a family law attorney and domestic and civil mediator at Blair Law in St. Joseph.

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PUBLIC POLICY REPORT

AT THE CAPITOL

HB 5046 (Shannon) **Civil procedure: costs and fees; Courts: reporters or recorders;** Civil procedure: costs and fees; fees for transcripts; increase. Amends sec. 2543 of 1961 PA 236 (MCL 600.2543).

POSITION: Neutral on the bill due to the absence of a fee waiver for indigent parties and parties represented by pro bono counsel in civil matters.

HB 5131 (Skaggs) **Legislature: apportionment; Legislature: other; Courts: court of appeals;** Legislature: apportionment; redistricting of court of appeals; provide for. Amends secs. 301, 302 & 303d of 1961 PA 236 (MCL 600.301 et seq.); adds sec. 303e & repeals secs. 303a, 303b & 303c of 1961 PA 236 (MCL 600.303a et seq.).

POSITION: Oppose HB 5131 because additional Court of Appeals judges are not warranted based on the court's existing or anticipated caseload; No position on the proposed redistricting of Court of Appeals judicial districts.
(Position adopted by roll call vote. Commissioners voting in support: Anderson, Bennett, Bryant, Burrell, Christenson, Clay, Cripps-Serra, Easterly, Evans, Hamameh, Howlett, Larsen, Lerner, Low, Mansoor, Mantese, Mason, McGill, Murray, Nyamfukudza, Ohanesian, Perkins, Quick, Reiser, Simmons, Simpson, Walton. Commissioners abstaining: Gant.)

HB 5271 (Hope) **Criminal procedure: DNA;** Criminal procedure: DNA; post-conviction DNA testing; modify. Amends sec. 16, ch. X of 1927 PA 175 (MCL 770.16).

POSITION: Support.
(Position adopted by roll call vote. Commissioners voting in support: Anderson, Bennett, Bryant, Burrell, Christenson, Clay, Cripps-Serra, Easterly, Evans, Gant, Hamameh, Howlett, Larsen, Lerner, Low, Mansoor, Mantese, Mason, McGill, Murray, Nyamfukudza, Ohanesian, Reiser, Simmons, Simpson. Commissioners voting in opposition: Walton. Commissioners abstaining: Quick.)

HB 5300 (Pohutsky) **Probate: other;** Probate: other; name change proceedings; modify. Amends secs. 1 & 3, ch. XI of 1939 PA 288 (MCL 711.1 & 711.3).

POSITION: Support.

SB 0514 (Irwin) **Civil procedure: costs and fees; Courts: reporters or recorders;** Civil procedure: costs and fees; fees for transcripts; increase. Amends sec. 2543 of 1961 PA 236 (MCL 600.2543).

POSITION: Neutral on the bill due to the absence of a fee waiver for indigent parties and parties represented by pro bono counsel in civil matters.

IN THE HALL OF JUSTICE

Proposed Rescission of Administrative Order No. 2020-17 and Proposed Amendment of Rule 4.201 of the Michigan Court Rules (ADM File No. 2020-08) – Continuation of Alternative Procedures for Landlord/Tenant Cases; Summary Proceedings to Recover Possession of Premises (See Michigan Bar Journal October 2023, p 60).
STATUS: Comment period expires Jan. 1, 2024; Public hearing to be scheduled.

POSITION: Support.

Proposed Amendments of Rules 1.15 and 1.15A and Proposed Additions of Rules 1.15B and 1.15C of the Michigan Rules of Professional Conduct (ADM File No. 2022-19) – Safekeeping Property; Trust Account Overdraft Notification; Lawyer Trust Account Records Trust Account Overdraft Notification (See Michigan Bar Journal November 2023, p 60).
STATUS: Comment period expires Jan. 1, 2024; Public hearing to be scheduled.

POSITION: Support.

Proposed Amendment of Rule 3.701 and Proposed Additions of Rules 3.715, 3.716, 3.717, 3.718, 3.719, 3.720, 3.721, and 3.722 of the Michigan Court Rules (ADM File No. 2023-24) – Personal Protection Proceedings; Applicability of Rules: Forms; Definitions; Commencing an Extreme Risk Protection Action; Dismissal; Issuing Extreme Risk Protection Orders; Orders; Modification, Termination, or Extension of Order; Contempt Proceedings for Violation of Extreme Risk Protection Orders; Appeals (See Michigan Bar Journal November 2023, p 60).
STATUS: Comment period expires Jan. 1, 2024; Public hearing to be scheduled.

POSITION: Support with amendments recommended by the Family Law Section.

Proposed Amendment of Rule 4.303 of the Michigan Court Rules (ADM File No. 2022-33) – Notice (See Michigan Bar Journal November 2023, p 65).
STATUS: Comment Period Expires 01/01/24; Public Hearing to be Scheduled.

POSITION: Support with two additional amendments: (1) clarifying when "within 91 days" begins; and (2) including additional language, as follows: "Prior to a court dismissing a case for no progress on its own initiative, the court shall serve notice on all parties that the case will be dismissed if no progress has been made within 14 days."

Proposed Amendments of Rules 6.907, 6.909, and 6.933 of the Michigan Court Rules (ADM File No. 2022-24) – Arraignment on Complaint and Warrant; Releasing or Detaining Juveniles Before Trial or Sentencing; Juvenile Probation Revocation (See Michigan Bar Journal November 2023, p 64).

STATUS: Comment period expires Jan. 1, 2024; Public hearing to be scheduled.

POSITION: Support with the following amendments:

1. **After each instance of the new sentence "Best efforts must be made to avoid placing youthful inmates in isolation to comply with this provision", add another sentence reading "If the youthful inmate is placed in isolation, the jail must immediately notify the assigned judge or on-call judge or magistrate and indicate the reasons for the placement in isolation, and the court must provide the youthful inmate with an opportunity for a hearing within 24 hours."**
2. **Clarify the definition of "youthful inmate."**

LEGAL NOTICE

NOTICE OF APPOINTMENT OF INTERIM ADMINISTRATOR

The 9th Circuit Court in Kalamazoo, Michigan has ordered that:

The State Bar of Michigan
306 Townsend Street
Lansing, MI 48933
517.364.6355

is hereby appointed Interim Administrator to serve on behalf of:

Attorney **Michael A. Hettinger**, P51282
200 Admiral Ave. Ste A
Portage, MI 49002
269.324.6000

Ordered by 9th Circuit Court, Kalamazoo, Michigan on November 22, 2023.

ORDERS OF DISCIPLINE & DISABILITY

DISBARMENT AND RESTITUTION

James J. Kiebel, P75914, Wyoming, by the Attorney Discipline Board Kent County Hearing Panel #3. Disbarment, effective Nov. 3, 2023.

After proceedings conducted pursuant to MCR 9.115, the panel found by default that the respondent committed professional misconduct in his representation of three separate clients in a divorce action, a driver's license restoration matter, and a custody and parenting time dispute as charged in the three-count formal complaint filed by the grievance administrator.

Based on the respondent's default and the evidence presented at the hearing, the hearing panel found that the respondent neglected a legal matter entrusted to the lawyer in violation of MRPC 1.1(c) [counts 1-3]; failed to act with reasonable diligence and promptness in violation of MRPC 1.3 [counts 1-3]; failed to keep a client reasonably informed about the status of a matter and to comply promptly with reasonable requests for information in violation of MRPC 1.4(a) [counts 1-3]; failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation in violation of MRPC 1.4(b) [counts 1-3]; failed to seek permission from the tribunal to withdraw from representation in violation of MRPC 1.16(b) [count 2]; upon termination of representation, failed to refund any advanced payment of fee that had not been earned in violation of MRPC 1.16(d) [counts 1 and 3]; in the course of representing a client, knowingly made a false statement of material fact or law to a third person in violation of MRPC 4.1 [counts 2-3]; knowingly made a false statement of material fact in connection with a disciplinary matter in violation of MRPC 8.1(a)(1) and MCR 9.104(6) [count 1]; and knowingly failed to respond to a lawful demand for information from a disciplinary authority in violation of MRPC 8.1(a)(2) [count 3]. The respondent was also found to have violated MRPC 8.4(b) and (c) and MCR 9.104(1)-(3) [counts 1-3].

The panel ordered that the respondent be disbarred and pay restitution in the total amount of $6,050. Costs were assessed in the amount of $2,653.20.

INTERIM SUSPENSION PURSUANT TO MCR 9.115(H)(1)

Michael G. Mack, P31173, Alpena, by the Attorney Discipline Board Emmet County

Hearing Panel #3. Interim suspension, effective Oct. 25, 2023.

The respondent failed to appear at the Oct. 5, 2023, hearing and satisfactory proofs were entered into the record that he possessed actual notice of the proceedings. As a result, the hearing panel issued an Order of Suspension Pursuant to MCR 9.115(H)(1) [Failure to Appear], effective Oct. 25, 2023, and until further order of the panel or the board.

REPRIMAND WITH CONDITIONS (BY CONSENT)

Michael Thomas Mamut, P81102, Southfield, by the Attorney Discipline Board Tri-County Hearing Panel #64. Reprimand, effective Nov. 7, 2023.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Discipline in accordance with MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by the hearing panel.

The stipulation contained the respondent's admission that he was convicted on Oct. 31, 2022, by guilty plea of operating while intoxicated, second offense, a misdemeanor, in violation of MCL 257.625(1) in a matter titled *People of the State of Michigan v. Michael Thomas Mamut,* 51st District Court (City of Waterford, County of Oakland, State of Michigan), Case No. 22-0340-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 MCR 9.104(5).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be reprimanded with conditions relevant to the established misconduct. Costs were assessed in the amount of $800.40.

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

SUSPENSION AND RESTITUTION

Adam C. Reddick, P71543, Bay City, by the Attorney Discipline Board Tri-Valley Hearing Panel #1. Suspension, one year, effective Nov. 3, 2023.[1]

After proceedings conducted pursuant to MCR 9.115, the panel found by default that the respondent committed professional misconduct during his representation of a client in a driver's license reinstatement and a driving while license suspended (DWLS) case. Furthermore, despite the fact that the respondent's license to practice law was suspended in two unrelated disciplinary matters and that he has remained suspended continuously since Oct. 25, 2019, the respondent remained the attorney of record on both the driver's license reinstatement and DWLS cases. The panel also found that the respondent failed to answer a request for investigation served on him by the grievance administrator.

Based on the respondent's default, the hearing panel found that the respondent neglected a legal matter entrusted to the lawyer in violation of MRPC 1.1(c) [count 1]; failed to seek the lawful objectives of a client in violation of MRPC 1.2(a) [count 1]; failed to act with reasonable diligence and promptness in representing a client in violation of MRPC 1.3 [count 1]; failed to 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 [count 1]; failed to notify an active client in writing by registered or certified mail, return receipt requested, of his suspension in violation of MCR 9.119(A) [count 1]; failed to file with the tribunal and all parties a notice of the attorney's disqualification from the practice of law in violation of MCR 9.119(B) [count 1]; failed to answer a request for investigation in conformity with MCR 9.113(A) and (B)(2) in violation of MCR 9.104(7) [count 2]; knowingly failed to respond to a lawful demand for information from a disciplinary authority in violation of MRPC 8.1(a)(2) [count 2]; engaged in conduct that is a violation of the Michigan Rules of Professional Conduct in violation of MRPC 8.4(a) and MCR 9.104(A)(4) [counts 1-2]; engaged in conduct prejudicial to the administration of justice in violation of MCR 9.104(1) and MRPC 8.4(c) [count 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) [counts 1-2]; engaged in conduct contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3) [counts 1-2]; and violated an order of discipline in violation of MCR 9.104(9) [count 2].

The panel ordered that the respondent's license to practice law be suspended for one year, effective Nov. 3, 2023, and that the respondent pay restitution totaling $1,500. Costs were assessed in the amount of $1,796.48.

1. The respondent has been continuously suspended from the practice of law since Oct. 25, 2019. See Notice of Suspension with Conditions, *Grievance Administrator v Adam C. Reddick*, Case No. 19-24-GA, issued Oct. 31, 2019.

FROM THE MICHIGAN SUPREME COURT

ADM File No. 2019-33
Rescission of Administrative Order No. 2021-7 and Adoption of the Michigan Continuing Judicial Education Rules

To read this ADM file, visit www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposedadopted/administrative-orders/.

ADM File No. 2022-30
Proposed Amendments of Rules 702 and 804 of the Michigan Rules of Evidence

On order of the Court, this is to advise that the Court is considering amendments of Rules 702 and 804 of the Michigan Rules of Evidence. 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 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

(a)-(c) [Unchanged.]

(d) the expert's opinion reflects a reliable application of ~~has reliably applied~~ the principles and methods to the facts of the case.

Rule 804. Exceptions to the Rule Against Hearsay — When the Declarant is Unavailable as a Witness

(a) [Unchanged.]

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1)-(3) [Unchanged.]

(4) Statement Against Interest. A statement that:

(A) [Unchanged.]

(B) if the statement tends to expose the declarant to criminal liability, ~~and is offered to exculpate the accused,~~ it must be supported by corroborating circumstances that clearly indicate its trustworthiness.

(5)-(6) [Unchanged.]

Staff Comment (ADM File No. 2022-30): The proposed amendment of MRE 702 would require the proponent of an expert witness's testimony to demonstrate that it is more likely than not that the factors for admission are satisfied and would clarify that it is the expert's opinion that must reflect a reliable application of principles and methods to the facts of the case. The proposed amendment of MRE 804 would require corroborating circumstances of trustworthiness for *any* statement against interest that exposes a declarant to criminal liability. **Please note that the unchanged language in these rules reflects the Court's non-substantive amendments of the rules that become effective Jan. 1, 2024. See ADM File No. 2021-10, Order.**

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 Feb. 1, 2024, by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2022-30. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2022-45
Proposed Amendment of Rule 9.131 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 9.131 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 9.131. Investigation of Member or Employee of Board or Commission, or Relative of Member or Employee of Board or Commission; Investigation of Attorney Representing Respondent or Witness; Other Investigations Creating the Appearance of Impropriety; Representation by Member or Employee of Board or Commission.

(A)-(C) [Unchanged.]

(D) Other Investigations Creating the Appearance of Impropriety. If the administrator determines that an appearance of impropriety would arise if a request for investigation is handled in the manner prescribed by MCR 9.112(C), the procedures in subrule (A) shall be followed.

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

Staff Comment (ADM File No. 2022-45): The proposed amendment of MCR 9.131 would require that the Supreme Court review requests for investigations involving allegations of attorney misconduct in instances where the Attorney Grievance Commission (AGC) administrator determines that an appearance of impropriety would arise if the AGC handled the investigation.

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 Feb. 1, 2024, by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2022-45. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2023-01
Appointment of Chief Judges of the 10th Circuit Court and the 70th District Court

On order of the Court, effective immediately, Hon. Julie A. Gafkay is appointed as chief judge of the 10th Circuit Court and Hon. Terry L. Clark is appointed as chief judge of the 70th District Court for the remainder of terms ending Dec. 31, 2023.

ADM File No. 2023-01
Appointment of Chief Judge of the 89th District Court (Cheboygan and Presque Isle counties)

On order of the Court, effective immediately, Hon. Aaron J. Gauthier is appointed as chief judge of the 89th District Court for the remainder of a term ending Dec. 31, 2023.

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

The Committee on Model Criminal Jury Instructions has adopted the following new jury instruction, M Crim JI 40.4 (Furnishing Alcohol to a Minor), for the crime found at MCL 436.1701. This new instruction is effective in December 2023.

[NEW] M Crim JI 40.4
Furnishing Alcohol to a Minor

(1) Defendant is charged with the crime of selling or furnishing alcohol to a minor. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant knowingly sold or furnished[1] alcohol to [*name minor complainant*].

(3) Second, that [*name minor complainant*] was under 21 years of age.

(4) Third, that when defendant sold or furnished the alcohol, the defendant knew that [*name minor complainant*] was under 21 years of age or failed to make diligent inquiry[2] to determine whether [*name minor complainant*] was under 21 years of age by inspecting [*name minor complainant*]'s pictured identification.

[*Where the aggravating element has been charged under MCL 436.1701(2):*]

(5) Fourth, that the consumption of the alcohol obtained by [*name minor complainant*] was a direct and substantial cause of [(*name minor complainant*)'s death/an accidental injury that caused (*name minor complainant*)'s death].

Use Notes

1. *People v Neumann,* 85 Mich 98, 102; 48 NW 290 (1891), provided a definition of *furnishing*: "letting a minor have liquor."

2. *Diligent inquiry* is further defined in MCL 436.1701(11)(b).

The Committee on Model Criminal Jury Instructions has adopted the following new jury instruction, M Crim JI 37.1c (Using False Documents to Deceive Principal or Employer), for the crime found at MCL 750.125(3). This instruction addresses paragraph (3) of the bribery statute, MCL 750.125, and relates to bribery of or by an employee involving false receipts or documents intending to deceive the employer or principal. This new instruction is effective in December 2023.

[NEW] M Crim JI 37.1c
Using False Documents to Deceive Principal or Employer

(1) The defendant is charged with the crime of using a false document(s) to deceive a principal or employer. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

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

(3) Second, that the defendant [*Select* (*a*) *or* (*b*):][1]

(a) [gave/used] a [receipt/account/invoice/(*describe other document*)] concerning the business of [*name principal or employer*] to [*identify agent or employee*].

(b) [used/approved/certified] [a receipt/an account/an invoice/a (*describe other document*)] concerning the business of [*name principal or employer*].

(4) Third, that the [receipt/account/invoice/(*describe other document*)] contained a statement that [was materially false, erroneous, or defective/failed to fully state any commission, money, property, or other valuable item[2] given to ([*identify agent or employee*]/the defendant) or agreed to be given to (him/her)].

(5) Fourth, that when the defendant [gave/used/approved/certified] the [receipt/account/invoice/(*describe other document*)], [he/she] intended to deceive [*name principal or employer*].

Use Notes

1. Use "(a)" where it is alleged that the defendant gave a document to the agent/employee of the principal in order to deceive or cheat the principal. Use "(b)" where the defendant is an agent/employee of the principal and was the person who is alleged to have approved or used a document to deceive or cheat the employer/principal.

2. The court may identify the specific money or property in lieu of reading this entire phrase.

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LAWYERS & JUDGES ASSISTANCE
MEETING DIRECTORY

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

For questions about any of the meetings listed, please contact the Lawyers and Judges Assistance Program at 800.996.5522 or jclark@michbar.org.

PLEASE DO NOT HESITATE TO CONTACT LJAP DIRECTLY WITH QUESTIONS PERTAINING TO VIRTUAL 12-STEP MEETINGS. FOR MEETING LOGIN INFORMATION, CONTACT LJAP VOLUNTEERS ARVIN P. AT 248.310.6360 OR MIKE M. AT 517.242.4792.

ALCOHOLICS ANONYMOUS & OTHER SUPPORT GROUPS

Bloomfield Hills
WEDNESDAY 6 PM*
Kirk in the Hills Presbyterian Church
1340 W. Long Lake Rd.
1/2 mile west of Telegraph

Detroit
MONDAY 7 PM*
Lawyers and Judges AA
St. Paul of the Cross
23333 Schoolcraft Rd.
Just east of I-96 and Telegraph *(This is both an AA and NA meeting.)*

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

Houghton Lake
SECOND SATURDAY OF THE MONTH 1 PM
Lawyers and Judges AA Meeting
Houghton Lake Alano Club
2410 N. Markey Rd.
Contact Scott with questions 989.246.1200

Lansing
THURSDAY 7 PM*
Virtual meeting
Contact Mike M. for meeting information
517.242.4792

Lansing
SUNDAY 7 PM*
Virtual meeting
Contact Mike M. for meeting information
517.242.4792

Royal Oak
TUESDAY 7 PM*
Lawyers and Judges AA
St. John's Episcopal Church
26998 Woodward Ave.

Stevensville
THURSDAY 4 PM*
Al-Anon of Berrien County
4162 Red Arrow Highway

THURSDAY 7:30 PM
Zoom
(Contact Arvin P. at 248.310.6360 for Zoom login information)

GAMBLERS ANONYMOUS

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

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

OTHER MEETINGS

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

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

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

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

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

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

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