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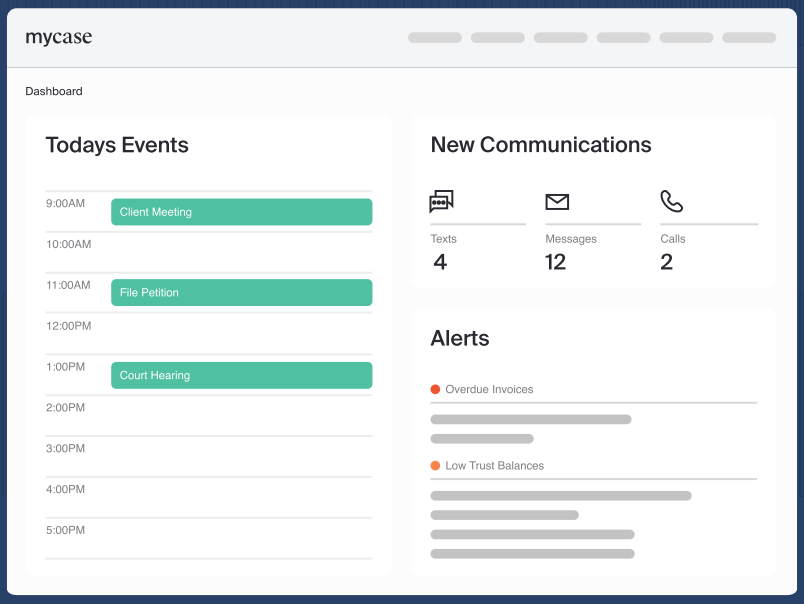

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OF INTEREST

ON THE COVER: The exterior of the Federal Trade Commission building in Washington, D.C.

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BAR JOURNAL

APRIL 2024 • VOL. 103 • NO. 04

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

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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:

13% per year, compounded annually; or

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

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

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

DUTY TO REPORT AN ATTORNEY'S CRIMINAL CONVICTION

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

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

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

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

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

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333 W. Fort St., Suite 1700
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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.

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APRIL 19
JUNE 14
JULY 26

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IN MEMORIAM

ROBERT J. ADAMS, P10045, of Berkley, died Feb. 15, 2024. He was born in 1936, graduated from Detroit College of Law, and was admitted to the Bar in 1966.

HELEN JOAN BRISH, P57324, of Brownstown, died Oct. 4, 2023. She was born in 1949, graduated from Wayne State University Law School, and was admitted to the Bar in 1997.

JULIE A. COHEN, P45617, of Milford, died Feb. 26, 2024. She was born in 1955 and was admitted to the Bar in 1991.

MARGARET ERDEEN DAVIS, P40084, of Washington, D.C., died Feb. 12, 2024. She was born in 1961, graduated from Detroit College of Law, and was admitted to the Bar in 1987.

JUDITH BACH DIXON, P12816, of Pigeon, died March 1, 2024. She was born in 1946, graduated from Detroit College of Law, and was admitted to the Bar in 1972.

MICHAEL L. DOBRA, P39280, of Dearborn, died Aug. 9, 2023. He was born in 1959, graduated from Wayne State University Law School, and was admitted to the Bar in 1986.

MATTHEW SCOTT ESSENBURG, P80170, of Grand Haven, died April 19, 2023. He was born in 1981, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 2015.

JOHN E. GATES JR., P31896, of Royal Oak, died May 10, 2023. He was born in 1951, graduated from Wayne State University Law School, and was admitted to the Bar in 1980.

STEPHEN A. GATTO, P58521, of Kerrville, Texas, died June 15, 2023. He was born in 1961, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1998.

STEPHANIE T. GOECKE, P72685, of Plymouth, died May 9, 2023. She was born in 1961, graduated from Michigan State University College of Law, and was admitted to the Bar in 2009.

CLYDE C. GOODWIN JR., P44461, of Canton, died Feb. 10, 2024. He was born in 1947 and was admitted to the Bar in 1991.

WILLIAM J. HASSETT, P14729, of Monroe, died March 8, 2024. He was born in 1943, graduated from Wayne State University Law School, and was admitted to the Bar in 1969.

JOHN R. HAYES, P14769, of Farmington Hills, died March 3, 2024. He was born in 1941, graduated from Detroit College of Law, and was admitted to the Bar in 1970.

ROBERT L. HINDELANG, P25556, of Grosse Pointe Farms, died Feb. 20, 2024. He was born in 1946, graduated from University of Detroit School of Law, and was admitted to the Bar in 1975.

JOSEPH J. JERKINS, P15496, of Kalamazoo, died Feb. 18, 2024. He was born in 1932, graduated from University of Michigan Law School, and was admitted to the Bar in 1961.

DONALD L. JOHNSON, P15516, of Grand Rapids, died Feb. 16, 2024. He was born in 1940 and was admitted to the Bar in 1965.

DAVID A. KING, P26323, of Ann Arbor, died Feb. 7, 2024. He was born in 1951, graduated from Detroit College of Law, and was admitted to the Bar in 1976.

SUZANNE MARIE KROHN, P70560, of Caro, died March 6, 2024. She was born in 1979, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 2007.

JOHN R. MARQUIS, P17106, of Holland, died Feb. 25, 2024. He was born in 1943 and was admitted to the Bar in 1970.

MICHAEL E. MCCARTY, P65562, of Midland, died June 20, 2023. He was born in 1969 and was admitted to the Bar in 2003.

DONNA MCKNEELEN, P63360, of Fenton, died March 17, 2024. She was born in 1957, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 2003.

WILLIAM P. O'LEARY, P38461, of Grosse Pointe Park, died Dec. 9, 2023. He was born in 1946 and was admitted to the Bar in 1985.

CAMERON H. PIGGOTT, P24630, of Detroit, died Dec. 17, 2023. He was born in 1948, graduated from University of Michigan Law School, and was admitted to the Bar in 1974.

MARGARET L. PITTMAN, P47179, of Germantown, Maryland, died Feb. 12, 2024. She was born in 1950, graduated from Wayne State University Law School, and was admitted to the Bar in 1992.

JOHN G. POSA, P49445, of Troy, died Feb. 25, 2024. He was born in 1953 and was admitted to the Bar in 1994.

NANCY M. RADE, P37234, of Grosse Pointe Park, died Oct. 28, 2023. She was born in 1953, graduated from University of Detroit School of Law, and was admitted to the Bar in 1984.

EDMUND J. SIKORSKI JR., P20449, of Saline, died Feb. 14, 2024. He was born in 1944 and was admitted to the Bar in 1969.

ANNE L. SRUBA, P38150, of Grand Rapids, died Feb. 3, 2024. She was born in 1956 and was admitted to the Bar in 1985.

ROBERT D. STALKER, P20885, of Commerce Township, died March 2, 2024. He was born in 1930 and was admitted to the Bar in 1960.

MARY WICKENS, P30892, of East Lansing, died Feb. 19, 2024. She was born in 1951, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1979.

CLAYTON E. WITTMAN, P77105, of Kentwood, died Feb. 4, 2024. He was born in 1961, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 2013.

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

Access to justice is worth more than $300 per year — but let's start there

There is so much about practicing law that is a privilege. Yes, it is also sometimes a dreary, exhausting job. But whether it is our distinct status as officers of the court, the ability to pass the bar and advocate for our clients, or the general stature our profession holds in society, I feel blessed to call myself an attorney and to have made it a rewarding career these past decades.

Having been at my firm since graduating, I am well aware that (by and large) my clientele is not the average client group of my fellow attorneys. I have always been active in various bars and have seen regular articles about legal aid funding, issues surrounding access to the civil legal system, and the seemingly constant need for more resources and volunteers. And while I've handled many pro bono matters, the reality is that the vast majority of my time is in my own legal bubble.

Several years ago, I was appointed to a committee of the Justice for All Commission established by the Michigan Supreme Court. That task force focused on the "justice gap" and the many challenges facing citizens who lack practical access to the civil legal system.[1]

Through our work on the commission, I heard firsthand from lawyers, social workers, domestic violence advocates, community leaders, and others of the challenges their clients face in receiving justice. Equal justice under the law does not equate to equal access to justice. The Supreme Court — and the Bar — believe it can be fixed.

A critical partner in this mission is your Michigan State Bar Foundation. A key component of its work is a basic request: that all Michigan attorneys be more involved in the Access to Justice Campaign. The ATJ Campaign is a centralized fundraising campaign administered by the foundation in partnership with the State Bar of Michigan to raise money for the Michigan legal aid community. Essentially, it is the arm of the foundation that collects annual donations and distributes them to 15 civil legal aid programs throughout the state.

The need in Michigan is great. It can be broken down by the following numbers:

- In 2023, 1.69 million people in Michigan qualified for civil legal aid because their household income was below 125% of the federal poverty level ($39,000 for a family of four.)[2]
- In 2022, civil legal aid programs closed 57,351 cases. These cases affected 111,455 people, including 45,594 children.[3]
- In 2022, 98% of housing cases with attorney representation had a positive outcome for the client. These are cases of eviction and foreclosure — those on the verge of homelessness.[4]
- In 2022, 92% of family stability cases with attorney representation had a positive outcome. These cases secure personal protection, child and spousal support, and the safety of families. [5]

While civil legal aid produces extraordinary positive outcomes, the justice gap is a chasm. Legal Services Corporation regularly compiles nationwide data in a report aptly named "The Justice Gap:

The Unmet Civil Legal Needs of Low-Income Americans."[6] Legal aid offices throughout Michigan face this need each day, with individuals requesting assistance and organizations unable to help. The numbers speak for themselves:

- 74% of low-income households experience one or more civil legal problems a year.
- The most common issues include consumer law, health care, housing, and income maintenance.
- Half of the requests legal aid organizations receive must be turned away due to limited resources.

These statistics can seem daunting, however, a recent economic study done in Michigan had eye-opening results and clearly shows the immense positive societal impact that can result from funding civil legal aid.

> Every $1 invested in Michigan's civil legal aid services delivered $6.69 in immediate and long-term consequential net financial benefits for services delivered in 2019 and 2020.[7]

I don't know about you, but I definitely do not know any other investment that yields a 669% return.

Most of us are not intimately engaged with the practices found in civil legal aid offices. Legal aid attorneys serve low-income clients in crisis. Their clients come to them on the verge of homelessness, under the threat of domestic violence, and faced with mountains of paperwork they do not understand. Their attorney is their last line of defense and, quite frankly, their saving grace. They need an attorney to solve their issues in a finite, succinct, and timely manner. Isn't this what all our clients need?

The Voluntary Pro Bono Standard adopted by the State Bar of Michigan Representative Assembly encourages Michigan attorneys to provide 30 or more hours of pro bono legal services each year or contribute a minimum of $300 to support civil legal services to low-income individuals. Yet only approximately 12% of Michigan lawyers donated to the ATJ Campaign in 2023. Imagine what could be accomplished if just half of us met this goal – a massive step forward for justice in our state.

I've asked Jennifer Bentley, executive director of the Michigan State Bar Foundation, to weigh in on how we can help.

Prior to becoming executive director of the Michigan State Bar Foundation, I was a legal aid lawyer for 20 years. I saw firsthand the tremendous need for help and the impact we had on families each day. We have fantastic legal aid programs throughout Michigan and the foundation is proud to administer the Access to Justice Campaign to raise money for their important work.

We are grateful for the individuals and firms who give substantial annual donations to the ATJ Campaign. We are steadily increasing the campaign but have significant room for growth.

Several Michigan firms qualified for recognition as leadership firms by giving the equivalent of at least $300 per attorney.[8] Firms give in a variety of ways depending on their internal culture. Some firms commit to multiplying their number of attorneys by the suggested pro bono standard levels of giving ($300 and $500) and make an annual gift, some internally encourage their attorneys to donate, and some do a combination of both. Each leadership firm has had one or more champions who lead the effort and encourage participation.

The ATJ Campaign recognizes attorneys and firms who prioritize the support of legal aid annually. This issue of the Bar Journal includes campaign results and recognition lists from 2023 starting at $500 for individual donations. A full recognition list is included on the ATJ Campaign website.[9] I encourage you to learn more about civil legal aid in Michigan and make access to justice a personal and professional priority.

ENDNOTES

1. Michigan Courts, *Justice for All Commission* <https://www.courts.michigan.gov/administration/special-initiatives/jfa/> [https://perma.cc/93Y7-TJWU] (all websites accessed March 29, 2024).
2. Legal Services Corporation, *Income Level for Individuals Eligible for Assistance*, 45 CFR Part 1611 (2024) <https://www.govinfo.gov/content/pkg/FR-2024-01-24/pdf/2024-01311.pdf>. [https://perma.cc/H8FW-CEAF].
3. Michigan State Bar Foundation, *Civil Legal Aid in Michigan 2022 Report of Services* <https://www.msbf.org/wp-content/uploads/2023/10/2022-Grantee-Services-Report.pdf> [https://perma.cc/EWV4-Y5TJ].
4. *Id.*
5. *Id.*
6. Legal Services Corporation, *The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans* <https://justicegap.lsc.gov/> [https://perma.cc/UZ6G-MSX6].
7. Michigan Courts, 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/5H25-XSZ9].
8. Access to Justice Campaign, *Leadership Firms* <https://atjfund.org/leadership-firms/>.
9. Access to Justice Campaign, *Our Supporters* <https://atjfund.org/supporters/>.

NEWS & MOVES

ARRIVALS AND PROMOTIONS

ROBERT J. ANDRETZ has joined the Lansing office of Fraser Trebilcock.

ANDREW W. BARNES, DANIEL V. BARNETT, **TYLER A. BURK, JOHN R. COLIP**, **MATTHEW S. DERBY**, **MOWITT (MITT) S. DREW III, WILLIAM M. ENGELN**, **JORDAN D. FLORIAN**, **AMBER D. PETERS**, and **KELLY L. TRAVIS** have joined Butzel.

MOHAMMAD G. BEYDOUN, **JEFFREY BULLARD JR.**, **ZACHARY J. DIEDERICHS**, **ANDREW S. GIPE**, and **FADEE A. NAKKASH** with Secrest Wardle were promoted to partners.

DREW W. BROADDUS, **BRANDON C. HAGAMAN**, **AMBER ROUSE HOLLOWAY**, **CHRISTINA K. KORKES**, **ROBERT J. PENROD**, **DANIEL S. SCHRODE II**, and **CLEVELAND B. SIMMONS** with Secrest Wardle were promoted to executive partners.

DANIEL P. ETTINGER, **MATTHEW D. JOHNSON**, and **ALLYSON TERPSMA** with Warner Norcross & Judd were elected to the firm's management committee.

JUSTIN A. GRIMSKE with Secrest Wardle was promoted to senior partner.

FADWA HAMMOUD has joined the Detroit office of Miller Johnson as a managing member.

BILL LENTINE has joined Taft as a partner.

RACHEL ROSEMAN has joined the Grand Rapids office of Bodman.

AWARDS AND HONORS

D. JENNIFER ANDREOU, a partner with Plunkett Cooney, was recognized by Crain's Detroit Business as one of its Notable Women in Law for 2024.

Warner Norcross & Judd partners **JOSCELYN CEKOLA BOUCHER**, **RACHEL J. FOSTER**, and **MADELAINE C. LANE** were recognized by Crain's Detroit Business as Notable Women in Law for 2024.

DEBORAH BROUWER with Nemeth Bonnette Brouwer was named to the Michigan Lawyers Weekly Hall of Fame class of 2024.

JOHN BYL, a partner with Warner Norcross & Judd, was named to the Michigan Lawyers Weekly Hall of Fame class of 2024.

ASHLEY G. CHRYSLER, a partner with Warner Norcross & Judd, was recognized by Michigan Lawyers Weekly on its list of Up-and-Coming Lawyers for 2024.

JENNIFER E. CONSIGLIO and **LAURA E. JOHNSON** with Butzel were recognized by Crain's Detroit Business as Notable Women in Law for 2024.

MICHAEL F. GOLAB with Butzel was named to the Michigan Lawyers Weekly Hall of Fame class of 2024.

MICHAEL D. HANCHETT with Plunkett Cooney was named to the Michigan Lawyers Weekly Hall of Fame class of 2024.

GARETT KOGER with Butzel was recognized by Michigan Lawyers Weekly on its list of Up-and-Coming Lawyers for 2024.

DANIEL P. MAKARSKI, senior partner with Secrest Wardle, received the Michigan Defense Trial Counsel President's Special Recognition Award for extraordinary contributions to civil litigation.

SARAH L. NIRENBERG with Butzel was recognized by Michigan Lawyers Weekly on its list of Go-To Lawyers for Employment Law.

RICHARD RATTNER, a partner with Williams Williams Rattner & Plunkett, was named to the Michigan Lawyers Weekly Hall of Fame class of 2024.

HOLLI TARGAN, a partner with Taft, was recognized by Crain's Detroit Business as one of its Notable Women in Law for 2024.

THOMAS P. VINCENT, a partner with Plunkett Cooney, was named to the Michigan Lawyers Weekly Hall of Fame class of 2024.

LEADERSHIP

DEANDRE' HARRIS, a partner with Warner Norcross & Judd, was named a fellow of the American Bar Foundation.

BRIAN T. LANG, a partner with Warner Norcross & Judd, was named a fellow of the Litigation Counsel of America.

SCOTT K. LITES, **MICHAEL P. ASHCRAFT JR.**, and **AUDREY J. FORBUSH**, partners with Plunkett Cooney, were elected to leadership positions on the firm's board.

NAME CHANGE

Fraser Trebilcock Davis & Dunlap has changed its legal name has to **FRASER TREBILCOCK DAVIS DUNLAP & CAVANAUGH.**

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

MICHIGAN
BARJOURNAL

2024 READERSHIP SURVEY

The State Bar's Michigan Bar Journal Committee is conducting a brief survey, our first in 10 years. We want the Bar Journal to be the best it can be—to be a publication that attorneys read and look forward to receiving each month. This survey will take 4 to 5 minutes of your time to answer a maximum of 12 questions. Please provide your input to help us make the Bar Journal more responsive to your needs.

1. What is your current professional status?
   a. Private practice (e.g., solo practice, firm)
   b. Non-private practice (e.g., in-house counsel, governmental attorney)
   c. Not practicing law (e.g., academic, business owner)
   d. Retired
   e. Other: _____

2. How many years have you been licensed?
   a. 1–5
   b. 6–20
   c. 21–40
   d. 41 or more

3. Which version(s) of the Bar Journal do you look at?
   a. Print
   b. Email/online
   c. Both
   d. Neither

4. Which statement below best describes your Bar Journal reading habits?
   a. I regularly read all or most of the Bar Journal.
   b. I browse the Bar Journal and read specific items of interest.
   c. I rarely read or browse the Bar Journal unless something specific captures my attention.

5. In a year, about how many of the 11 issues of the Bar Journal do you read in part or in whole (in any format)? _____

6. What content in the Bar Journal do you typically read? (Circle all that apply.)
   a. Feature articles, which are generally the articles listed on the cover
   b. Best Practices column
   c. Book Reviews
   d. Ethical Perspectives column
   e. From the President column
   f. From the Supreme Court, proposed and adopted rules
   g. In Brief, notices from sections and others
   h. In Memoriam
   i. Law Practice Solutions column
   j. Libraries and Legal Research column
   k. Michigan Lawyers in History
   l. News & Moves
   m. Orders of Discipline & Disability
   n. Plain Language column
   o. Practicing Wellness column
   p. Proposed Jury Instructions
   q. Other: _____

7. Most Bar Journal issues have articles devoted to a specific theme. For example, issues during the past year have been devoted to Probate and Estate Planning, Social Security Law, Immigration Law, Tax Law, and Criminal Law. Theme issues are typically published with the cooperation and assistance of a relevant State Bar section. What best describes your interest in theme-related articles?
   a. Regardless of the theme, I read most or all of the theme-related articles in each theme issue.
   b. I usually browse theme issues or the Table of Contents and read theme-related articles that are of interest.
   c. I usually read only those theme-related articles that are related to my area of practice.
   d. I don't usually read theme-related articles.
   e. Other: Please attach page(s) to make additional comments

8. Articles appearing in non-theme (or general) issues of the Bar Journal are typically unsolicited articles submitted on a wide variety of miscellaneous legal topics. What best describes your interest in non-theme (or general) articles?
   a. I read most or all of the articles in each general issue.
   b. I usually browse general issues or the Table of Contents and read articles that are of interest.
   c. I usually read only articles that are related to my area of practice.
   d. I don't usually read the articles in general issues.
   e. Other: Please attach page(s) to make additional comments

9. The Bar Journal would better serve my needs if: (Circle all that apply.)
   a. Theme issues were discontinued altogether and replaced with general issues.
   b. Some space were instead devoted each month to covering a hot topic in the law, perhaps based on a new statute, court rule, or case.
   c. The number of theme issues were reduced and replaced with more general issues.
   d. No changes; it's fine the way it is.
   e. Other: Please attach page(s) to make additional comments

10. What other types of content would you like to see in the Bar Journal? (Circle all that apply.)
    a. Articles on current legal trends or hot topics
    b. Articles about Michigan attorneys
    c. Articles analyzing statutes, regulations, or court rules (existing or proposed)
    d. Articles on legal history
    e. Analysis about recently decided cases
    f. Articles on court administration or practice
    g. Point/counterpoint pieces
    h. Articles discussing legal education
    i. Anecdotal or human-interest pieces
    j. No changes; it's fine the way it is
    k. Other: Please attach page(s) to make additional comments

11. How likely would you be to recommend the Bar Journal to a friend or colleague? Rate on scale of 1-10. _____

12. Please attach page(s) to make additional comments or suggestions about the Bar Journal.

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Ending duopolies: How the Open App Markets Act could change the digital and legal landscape for big tech

BY GREGORY STAMATOPOULOUS

Have you ever paid to download an app on your Apple iPhone or Google Android? Apple and Google have designed the downloading process to be effortless, provided the apps are purchased through them. With a tap of the screen, consumers can purchase and download apps or enroll in monthly subscription services using technology in the palms of their hands.

Many consumers are also familiar with Apple Pay, a payment application that, according to Apple, "replaces your physical cards and cash with an easier, safer, more private and secure payment method [to use] online, in apps, and in stores."[1]

Most app users, however, don't realize Apple and Google can collect up to 30% from every completed purchase, subscription, and microtransaction,[2] which becomes particularly problematic considering the two tech giants' roles within the market. Controllers of the two leading mobile operating systems (iOS and Android), Apple and Google maintain what is commonly referred to as a duopoly, in part, by utilizing what many antitrust attorneys contend are anticompetitive technological measures — making it difficult for consumers to download rival app stores, which ensures that developers participating in their app store collect payment exclusively via their app/software; implementing technological self-preferencing (for

instance, Apple allows its own payment app to access communications but blocks access for third-party payment apps); and applying self-preferencing to searches by setting up algorithm preferences.[3]

Consumers and app developers are at the mercy of big tech, who set the terms for which apps are granted — or denied — space in top digital storefronts, the manner in which payment can be processed, and the types of information, if any, accessible to either party. Self-preferencing technology serves companies like Apple and Google by keeping many consumers in the dark as to other digital storefront options that may offer lower prices for apps and services. And because the two tech giants are free to change their terms at any time, app developers attempting to share promotional signage or advertisements regarding cheaper prices on alternative app storefronts could result in Apple or Google pulling the app from their stores. In essence, many antitrust experts contend Apple and Google have erected contractual and technological barriers that allow for little, if any, competition for distributing apps to iPhone and Android users, all but guaranteeing that the Google Play Store and Apple App Store continue to account for nearly all downloads from such mobile devices.

These are just some of the ways by which the terms and practices of Apple's App Store and Google's Play Store have raised eyebrows in an antitrust context. In 2021, the Open Apps Market Act (OAMA)[4] was proposed in Congress specifically to combat self-preferencing by big tech, thereby increasing choice and reducing costs for consumers.

If passed, OAMA would significantly curtail this anticompetitive conduct, diversifying the dominant duopoly long maintained by the two tech giants by creating and promoting more competition among app stores by giving users the choice to shop around and download apps from storefronts *not* run by Apple or Google.

LEGISLATIVE BACKGROUND

OAMA and the American Choice and Innovation Online Act (ACIO) were introduced to curb anticompetitive conduct from big tech companies.

Introduced in June 2021,[5] ACIO aimed to target big tech for antitrust and consumer choice violations. OAMA was introduced August 2021[6] as an attempt "to promote competition and reduce gatekeeper power in the app economy, increase choice, improve quality, and reduce costs for consumers"[7] Its narrower focus primarily targets app stores.[8]

Both bills stem from a 16-month U.S. House of Representatives Judiciary Committee investigation in 2020 that uncovered anticompetitive conduct among big tech companies. In a 450-page report, the committee found that four companies — Amazon, Apple, Google, and Meta, the parent company of Facebook and Instagram — wielded "monopoly power" and possessed "the incentive and ability to abuse their dominant position against third-party suppliers, workers, and consumers."[9] The subcommittee, led by then chair Rep. David Cicilline, D-R.I., collected more than a million documents from the companies, interviewed rival business leaders, and consulted with experts.[10]

Following the report's release and legislative proposals, companies like Google and Apple pushed back, arguing their practices are justified to provide essential user security.[11] Apple CEO Tim Cook has publicly opposed antitrust legislation, stating that the company is "deeply concerned about regulations that would undermine privacy and security in service of some other aim."[12] Google Vice President Mark Isakowitz has offered similar comments, stating that OAMA "could destroy many consumer benefits that current payment systems provide."[13]

Countries like South Korea have already approved legislation banning app store operators such as Google and Apple from forcing developers to use their payment systems.[14] The bill, popularly nicknamed the "Google power-abuse prevention law," amended the country's Telecommunications Business Act in 2021.

DIGITAL LANDSCAPE CHANGES

OAMA has been narrowly tailored to apply to companies like Apple and Google, who have more than 50 million subscribers.[15] The bill would limit such companies from collecting certain fees for in-app purchases and prevent them from requiring apps be marketed solely from one storefront on their operating systems.

The measure would curb anticompetitive behavior in several major ways. It would prevent companies like Apple and Google from requiring that app developers use or enable in-app purchases as a condition of distribution. It would prohibit big tech giants from charging excessive fees to app developers. It would also prevent iOS or Android devices from defaulting to the manufacturers' own app stores. Under OAMA, Apple and Google app stores would be prohibited from excluding or suppressing apps that compete with their own products.

In short, OAMA advocates contend it would level the playing field for smaller developers and give customers more choices when it comes to selection and purchase.

EPIC V. APPLE

Aside from its implications on the future of app distribution, OAMA also stands to alter the course of some of the country's most closely watched ongoing litigation — specifically, the 2020 lawsuit filed in the Northern District of California challenging Apple's App Store practices. *Epic Games, Inc. v. Apple, Inc.* raised questions about Apple's restrictions preventing developers from offering in-app methods of purchase outside of the Apple Store.[16]

Epic Games modified its blockbuster game "Fortnite" in order to circumvent the Apple Store payment system, essentially steering users to purchase the game's currency directly from Epic instead of through the Apple Store. For those who are not familiar, "Fortnite" utilizes an in-game currency called V-Bucks,[17] which can be used to purchase in-game items such as outfits, pickaxes, gliders, wraps, character models/skins, and emotes, which are similar to emojis but describe action using words or images. V-Bucks can also be purchased at major retailers like Walmart.

As a result of Epic's decision to divert users to purchase V-Bucks through its own digital storefront, Apple banned Epic from its app store. In turn, Epic filed its lawsuit[18] alleging that Apple's App Store policies violate federal and state antitrust laws and California's unfair competition law. In the suit, Epic claims that Apple is an antitrust monopolist, citing its system of distributing apps on its devices in the App Store and its system of collecting payments and commissions from App Store purchases. Apple disputed the allegations and filed a counterclaim asserting Epic purposely breached its contract.[19]

In the 2021 bench trial, Epic lost on all but one of the 10 counts it brought against Apple.[20] In issuing her decision, U.S. District Judge Yvonne Gonzalez Rogers stated that Epic didn't experience irreparable harm as a result of the app store removal. Rogers did, however, rule against Apple on the charge related to anti-steering provisions and issued a permanent injunction that blocked Apple from preventing developers from linking consumers to other storefronts within apps to complete purchases and/or notifying users of these alternative storefronts.

While the court conceded that Apple was breaking the law by forcing consumers to pay for apps and in-app items through the App Store, the overall resolution was far from what Epic sought. In an apparent win for Apple, the Northern District of California upheld the overall structure of the App Store as legal, asserting that the court "does not find that Apple is an antitrust monopolist in the submarket for mobile gaming transactions."[21]

The succeeding appellate history has yet to result in any major shifts in the digital or legal landscape. On appeal, a coalition of 35 states, Microsoft, and several other groups filed amicus briefs in support of Epic's position that Apple held a monopoly.[22] Despite these efforts, the U.S. Ninth Circuit Court of Appeals disagreed in its April 2023 opinion,[23] agreeing that the lower court ruling should largely be upheld. Further, Apple's subsequent success in navigating the appellate process has (at least temporarily) awarded the company additional time.

Apple filed a motion with the Ninth Circuit requesting suspension initiation of the April 2023 injunction pending submission of its petition for writ of certiorari with the U.S. Supreme Court, giving Apple 90 days to pursue an appeal and stalling enforcement of the requirement to provide in-app links to alternative payment systems.[24]

To no one's surprise, both Epic and Apple appealed to the Supreme Court in July 2023. Epic, displeased with the Ninth Circuit's concession to pause Apple's injunction while appellate proceedings developed, submitted an emergency request that the Supreme Court lift the order suspending the mandate, but Justice Elena Kagan denied its request in August 2023.[25]

Finally, on January 16, 2024, the Supreme Court denied both Apple and Epic's requests to appeal the lower court ruling regarding alleged anticompetitive behavior in Apple's App Store,[26] meaning developers can now point customers to their websites to make purchases.

While considered a partial victory for developers, the Supreme Court decision means the lower court ruling still stands. Additionally, the decision not to hear the case came as a surprise as a unanimous jury verdict in December 2023 found Google guilty in a similar antitrust case with Epic.[27]

BIG TECH'S JUSTIFICATIONS

As noted previously, throughout these legal battles, Apple and Google have maintained that their practices are justified to provide users more choice and security and have actually benefitted developers. In reply to Epic's complaint for injunctive relief, Apple summarized its position that it has not been a monopolist of any relevant market:

> "Competition both inside and outside the App Store is fierce at every level: for devices, platforms, and individual apps. Fortnite users can dance their Floss, ride their sharks, and spend their V-Bucks in no fewer than six different mobile, PC, and game-console platforms. And the business practices that Epic decries as exclusionary and restrictive — including "technical restrictions" on the App Store that have existed since it debuted in 2008 — have vastly increased output and made the App Store an engine of innovation, with the number and diversity of apps, the volume of app downloads, and the dollars earned by app developers increasing exponentially over time. All the while, Apple's commission only decreased while software prices plummeted and barriers to entry evaporated."[28]

Apple further stated:

> "Epic blasts as 'pretext' the idea that Apple's curation of the App Store is 'necessary to enforce privacy and security safeguards.' Compl. ¶ 83. But Apple's requirement that every iOS app undergo rigorous, human-assisted review — with reviewers representing 81 languages vetting on average 100,000 submissions per week — is critical to its ability to maintain the App Store as a secure and trusted platform for consumers to discover and download software. Epic knows this. Indeed, when Epic itself 'sell[s]

> a product to customers, [it too] feel[s] [it] ha[s] a responsibility' — in [EPIC CEO] Mr. Sweeney's words — 'to moderate for a reasonable level of quality, and also a reasonable level of decency.' In the past, Epic has discharged that responsibility with mixed results. That Apple wishes to continue curating its own App Store — rather than outsource the safety and security of Apple's users to Epic (or other third parties) — should come as no surprise, and it ensures that iOS apps meet Apple's high standards for privacy, security, content, and quality."[29]

Thus far, Apple has successfully argued that there is nothing anticompetitive about charging commission for others to use one's service.

CONCLUSION

OAMA advocates contend that it would address a competition crisis within the app marketplace. Its passage would provide numerous benefits to consumers, app developers, and others interested in curbing big tech's monopoly in the free market. OAMA would give consumers a choice when it comes to which digital storefronts they decide to purchase from and for how much. Moreover, it would level the playing field for developers currently caught between a rock and hard place in terms of promoting their apps and capitalizing off their products. Finally, OAMA would bring some closure to ongoing litigation that has arisen from the anticompetitive practices of big tech companies like Apple and Google.

Gregory Stamatopoulos, an associate at the law firm of Weitz & Luxenberg in Detroit, has represented hundreds of plaintiffs across the country in product liability, consumer, and environmental cases. Here in Michigan, he has been heavily involved in the *In re Flint Water* litigation, where his legal team helped secure a landmark settlement against government actors on behalf of Flint residents and businesses.

ENDNOTES

1. Apple Pay, *Apple*, <www.apple.com/apple-pay/> (accessed August 8, 2023).
2. Leswing, *Google to Enforce 30% Take from In-App Purchases next Year*, CNBC (September 28, 2020) <https://www.cnbc.com/2020/09/28/google-to-enforce-30percent-cut-on-in-app-purchases-next-year.html>; Nicas, *How Apple's 30% App Store Cut Became a Boon and a Headache*, The New York Times (August 14, 2020) <https://www.nytimes.com/2020/08/14/technology/apple-app-store-epic-games-fortnite.html>.
3. Apple has denied that its search algorithm preferences its own apps, but both *The New York Times* and *The Wall Street Journal* have concluded that Apple's apps are consistently ranked higher. See Mickle, *Apple Dominates App Store Search Results, Thwarting Competitors*, The Wall Street Journal (July 23, 2019) <https://www.wsj.com/articles/apple-dominates-app-store-search-results-thwarting-competitors-11563897221>; Nicas and Collins, *How Apple's Apps Topped Rivals in the App Store It Controls*, The New York Times (September 9, 2019) <https://www.nytimes.com/interactive/2019/09/09/technology/apple-app-store-competition.html>.
4. OAMA was introduced in the Senate as S 2710 by Senator Richard Blumenthal of Connecticut on August 8, 2021. Open App Markets Act, S 2710, 117th Congress (2021-2022): <https://www.congress.gov/bill/117th-congress/senate-bill/2710/text>.
5. ACIO (sometimes referred to as the American Innovation and Choice Online Act, or AICO) was introduced in the House of Representatives as HR 3816 by Representative David Cicilline of Rhode Island. American Innovation and Choice Online Act, HR 3816, 117th Congress (2021-2022): <https://www.congress.gov/bill/117th-congress/house-bill/3816/text/ih>.
6. OAMA was introduced in the Senate as S 2710 by Senator Richard Blumenthal of Connecticut on August 8, 2021. Open App Markets Act, S 2710, 117th Congress (2021-2022): <https://www.congress.gov/bill/117th-congress/senate-bill/2710/text>.
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14. Shaban, Hazma, and Lima, *South Korea Passes Law Prohibiting Apple and Google from Requiring In-App Payments*, The Washington Post (August 31, 2021) <https://www.washingtonpost.com/business/2021/08/31/apple-google-app-store-south-korea/>.
15. Open App Markets Act, S 2710, 117th Congress (2021-2022): <https://www.congress.gov/bill/117th-congress/senate-bill/2710/text>.
16. Complaint for Injunctive Relief, *Epic Games, Inc v Apple Inc*, No. 4:20-cv-05640 (ND Cal 2020).
17. Players of *Fortnite* can obtain V-Bucks through direct purchase or, alternatively, by earning them.
18. Epic Games filed an antitrust lawsuit against Google for similar practices in 2020. That case is scheduled for trial in November 2023. *Epic Games, Inc v Google LLC*, No. 20-cv-05671 (ND Cal 2023). In that lawsuit, Epic Games and dating app Match Group, accompanied by over three dozen state attorneys general, have accused Google of unfairly leveraging its market dominance and harming competition through its Googe Play Store terms and practices.
19. Apple Inc.'s Answer, Defenses, and Counterclaims in Reply to Epic Games, Inc.'s Complaint for Injunctive Relief, *Apple*, No. 4:20-cv-05640 (ND Cal 2020).
20. *Apple*, 559 F Supp 3d 898 (ND Cal 2021) (Rule 52 Order after Trial on the Merits). The 185-page order can be accessed here: https://www.documentcloud.org/documents/21060696-epic-v-apple-ruling.
21. *Apple*, 559 F Supp 3d 898 (ND Cal 2021) (September 10, 2021, Order).
22. See, e.g., Brief for 38 Law, Economics, and Business Professors as Amici Curiae in Support of Appellant/Cross-Appellee, *Epic Games, Inc v Apple, Inc*, Nos. 21-16505, 21-16695 (CA9 2022).
23. *Epic Games, Inc v Apple, Inc*, 67 F 4th 946 (CA9 2023).
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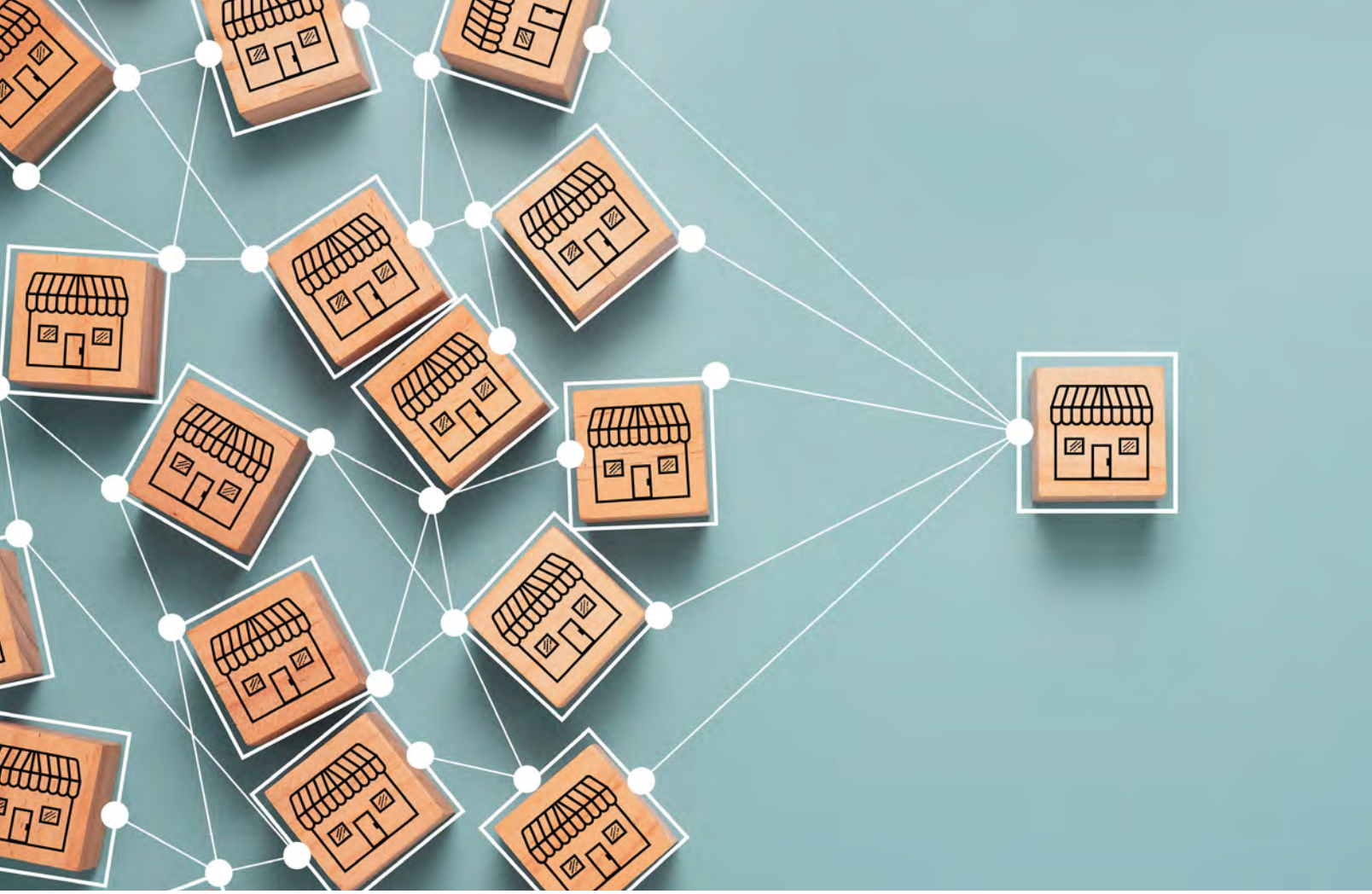

General corporate attorneys: Beware the accidental franchise

BY MARK J. BURZYCH

Imagine that a client presents you with a business plan to sell equipment for use in operating a vehicle deodorizing and sanitation business under a trade name. The purchaser of the equipment will have the right to use the trade name in their business and on their work vehicle; be obligated to report weekly sales numbers to your client; and charge prices recommended by your client. Without a clear understanding of franchise law, you may advise your client into an accidental franchise.[1]

An accidental franchise occurs when a business relationship unknowingly and unintentionally meets the elements expressed in the Federal Trade Commission Franchise Rule[2] or the Michigan Franchise Investment Law (MFIL).[3] The MFIL — like the laws in 14 other states that specifically regulate franchise sales — are liberally interpreted in favor of the franchisee.[4] While important to remain cognizant of the FTC rule, this article focuses on the MFIL, which requires registration of franchises offered for sale in Michigan and regulates the relationship between franchisors and franchisees.[5] This article will specifically address the elements of a franchise, exceptions to the MFIL requirements, and the consequences of non-compliance under the MFIL while noting where the FTC rule differs.

MICHIGAN FRANCHISE INVESTMENT LAW

The MFIL applies only to the offer, sale, and subsequent relationship arising in connection with a franchise.[6] The MFIL defines a franchise as a contract or agreement — whether express or implied, and whether oral or written — between two or more persons to which each of three elements apply:

1. A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor;

2. A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services substantially associated with the franchisor's trademark, services mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and

3. The franchisee is required to pay, directly or indirectly, a franchise fee.[7]

An agreement failing to meet all three elements is not a franchise under Michigan law and, thus, the MFIL does not apply.[8] Market developments subsequent to the offer or sale cannot transform a relationship into a franchise.[9]

ELEMENTS OF A FRANCHISE

Marketing plan prescribed in substantial part by franchisor

First, the MFIL requires that the relevant contract or agreement grant the alleged franchisee the "right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor."[10] A marketing plan is prescribed if the agreement, nature of the business, or other circumstances "permit or require the franchisee to follow an operating plan or standard operating procedure, or their substantial equivalent, promulgated by or for the franchisor."[11]

To make that determination, courts examine the policy and practices surrounding the marketing plan. Courts use the following to weigh in favor of finding a prescribed marketing plan:

- providing advertising material and maintaining control over the material;[12]
- contractual provisions that require the franchisee to follow an operating plan or standard operating procedure, whether the procedure requires or prohibits certain practices;[13]
- recommending or setting prices the franchisee will charge customers for relevant services;[14] and
- training a franchisee or assisting in training employees, which is expressly enumerated in the Michigan Administrative Code.[15]

In the cases of *Vaughn v. Digital Message Systems Inc.* and *Buist v. Digital Message Systems Inc.*, the supplier reserved the right to approve all promotional material and methods; provided franchisees a training/operating manual, order/price forms, and prices for products; and required franchisees to abide by rules, regulations, and policies proffered by the supplier.[16] Both the U.S. District Court for the Eastern District of Michigan and the Michigan Court of Appeals found that the respective suppliers prescribed a marketing plan.[17] And similar to the hypothetical scenario at the beginning of this article, the Eastern District of Michigan found a prescribed marketing plan when the franchisor required the franchisee to purchase a van wrapped with the franchisor's trademarks, asked for the franchisee's client list with the purpose of sending out promotional material, suggested to the franchisee what to charge customers, and required the franchisee to report weekly sales to the franchisor.[18]

In short, the unwary attorney who does not focus on the client's actual business plan may not recognize that the marketing-plan element of the definition of a franchise is satisfied. The best practice is thoroughly understanding your client's business plan before making recommendations on a transaction or organizational structure.

Trademark association

The MFIL also requires that the relevant contract or agreement grant to the alleged franchisee the "right to engage in the business of offering, selling, or distributing goods or services substantially associated with franchisor's trademark."[19] A substantial association exists when "circumstances permit or require the franchisee to identify its business to its customers primarily under that trademark" or "otherwise use the franchisor's mark in a manner likely to convey to the public that it is an outlet of, or represents directly or indirectly, the franchisor."[20] The Michigan Administrative Code provides courts with guidelines to make this determination: whether the mark is used either by the franchisor or franchisee to increase the chances of the franchisee's success[21] and whether an agreement or procedure exists for the franchisee to directly or indirectly contribute part of its operating revenue to the franchisor for advertising expenses.[22]

In *Jerome-Duncan v. Auto-By-Tel*,[23] Jerome-Duncan (JDI) entered into an agreement with Auto-By-Tel (ABT) in which JDI would use ABT's website to promote the sale of Ford cars. JDI used the ABT logo on advertisements signifying it as an ABT-certified dealer and employed an ABT manager to help facilitate sales. The Eastern District of Michigan held there was no franchise agreement because the product being sold was Ford cars; ABT was used as a means of promoting Ford.[24] When looking at whether an alleged franchisee's business is substantially associated with the franchisor's trademark, the court reviews whether the business would survive if the trademark were to disappear.[25] In the hypothetical scenario at the beginning of this article, when a party authorizes another to do business under the franchisor's trade name and wrap the franchisee's vehicle with the franchisor's trade name, the trademark element is clearly met.[26]

Franchise fees

Finally, the MFIL requires a franchise fee,[27] which it defines as "a fee or charge that a franchisee or sub-franchisor is required to pay or agrees to pay for the right to enter into a business under a franchise agreement, including but not limited to payments for goods

and services."[28] The MFIL exempts transactions involving franchise fees of less than $500.[29] If the fee is greater than $500, there is a presumption that the franchise fee element is met.

Courts have held that a franchise fee is a transfer of wealth from the alleged franchisee to the alleged franchisor and required under the parties' agreement for the right to engage in the alleged franchisee's business.[30] The transfer of wealth may be a direct payment to the franchisor at the time the agreement is signed or an indirect payment via a required repayment of a loan if the interest rate exceeds that of market value, the purchase of wholesale products at a price more than the bona fide wholesale price, rent paid to the alleged franchisor, fees in connection with services, and other costs.[31]

Under the MFIL, a transfer of wealth to the franchisor or its affiliate must be required by the agreement to constitute a franchise fee; courts consistently reject the argument that such a fee exists when it is not required.[32] For example, interest payments on a loan supplied by the franchisor is not a franchise fee if the franchisee is not required to obtain a loan from the franchisor.[33]

Additionally, a payment must be made for the right to engage in business to qualify as a franchise fee.[34] Franchise fees are more likely when said fees are unrecoverable industry-specific expenses or generally occur at the inception of an agreement.[35] Ordinary business expenses are generally not considered franchise fees.[36]

In *Watkins & Son Pet Supplies v. Iams Co.*, the franchisee was required to maintain a level of excess inventory in operation of a pet supplies store.[37] The franchisee argued that the costs associated with required excess inventory qualified as a franchise fee.[38] The Eastern District of Michigan rejected that argument, stating that excess inventory was an ordinary business expense which would only be considered a franchise fee if the inventory was excessive and illiquid.[39]

Although initial franchise fees clearly fall within the franchise fee definition, the Michigan Regulations and courts have developed applicable rules to specific types of alleged indirect franchise fees. The Michigan Administrative Code enumerate payments for services including "ideas, instruction, training, and other programs" as franchise fees.[40]

The MFIL explicitly excludes the purchase or agreement to purchase "goods, equipment, or fixtures directly or on consignment at a bona fide wholesale price" from the franchise fee definition.[41] The bona fide wholesale price refers to a price that constitutes a fair payment for goods purchased at a comparable level of distribution and no part of which constitutes a payment for the right to enter into or continue with the franchise business.[42]

A bona fide wholesale price is determined by considering "relevant costs, marketing, pricing, or payment information, among other factors."[43] For example, when a franchisee is charged an out-of-pocket markup on goods that consist of the licensor's shipping and general overhead expenses, payment may qualify as a bona fide wholesale price unless the licensee provides evidence to the contrary.[44] Conversely, payment falls outside the bona fide wholesale price exception when a franchisee is required to pay an amount exceeding the fair market value.[45] Interest rates on a franchisor-provided loan may be considered a franchise fee when the rate exceeds the fair market rate.[46]

EXEMPTIONS

Certain situations are exempt from the required disclosures under the MFIL, even when the relationship meets the elements of a franchise.[47] Among the possible exemptions listed in MFIL Section 6:

(a) The transaction is by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator;

(b) The offer or sale is to a bank, savings institution, trust company, investment company, or other financial institution, association, or institutional buyer or to a broker-dealer where the purchaser is acting for itself or in some fiduciary capacity;

(c) The prospective franchisee is required to pay, directly or indirectly, a franchise fee which does not exceed the $500 threshold to constitute a franchise fee;

(d) The offer or sale is to a franchisee or prospective franchisee who is not domiciled in Michigan and the franchise business will not be operated in Michigan;

(e) There is an extension or renewal of an existing franchise or the exchange or substitution of a modified or amended franchise agreement with no interruption operation, and no material change in the relationship;

  (i) The offer or sale of a franchise by a franchisee for the franchisee's own account if (1) the sale is isolated and not part of a plan of distribution of franchisees; (2) the franchisee provides the prospective purchaser full access to the records and books related to the franchise;
  (ii) The offer or sale of a franchise to an existing franchisee if (1) the existing franchisee has actively operated the franchise for the last 18 months; and (2) the franchisee purchases for investment and not the purpose of resale.

(f) The transaction is a fractional franchise where:

  (i) The prospective franchisee is presently engaged in an established business of which the franchise will become a component;

(ii) An individual directly responsible for the operation of the franchise, or a person involved in the management of the prospective franchise for at least two years;
(iii) The parties have reasonable grounds to believe, at the time of sale, that the franchisee's gross sales in dollar volume from the franchise will not represent more than 20% of the franchisee's gross sales in dollar volume from the franchisee's combined business operations.

ACCIDENTAL FRANCHISE CONSEQUENCES FOR FRANCHISOR

Section 31 of the MFIL provides a limited private right of action specifically to purchasers of franchises against sellers when the seller violates MFIL sections 5 (fraud), 7(a) (registration requirements), and 8 (disclosure requirements.)[48] The Michigan Legislature carefully restricts liability to the sale or offer of sale, thus excluding remedies for renewals or extensions of franchise agreements,[49] and Michigan courts clarify that Section 31 explicitly provides an action only for the purchaser of a franchise against the seller in connection with the sale.[50]

In *Franchise Management Unlimited v. America's Favorite Chicken*, a franchisee sued the franchisor for violating the MFIL after the franchisor conditioned consenting to the transfer of one of the franchisee's stores on the franchisee releasing the franchisor from all future and pending MFIL claims.[51] The Michigan Court of Appeals held that the legislature clearly intended to restrict liability to conduct at the time of sale as evidenced by its specific exclusion of renewals or extensions of a franchise agreement from the definitions of the terms "offer" and "offer to sell."[52] Since the franchisor's alleged breach was not connected with its sale of the franchise to the franchisee, the MFIL did not provide a private right of action for the franchisee to bring a claim.[53]

The Eastern District of Michigan reaffirmed the Court of Appeals' limited interpretation of Section 31 in *Walker v. Brooke Corp.*[54] In *Walker*, a franchisee sued the franchisor and an affiliate for fraud under Section 5 of the MFIL.[55] The court held that the franchisee could not bring suit against the franchisor affiliate because the affiliate was not a party to any contract or agreement selling a franchise or interest in a franchise and did not dispose of a franchise or interest in a franchise for value.[56] Instead, the affiliate's sole purpose was providing the funds necessary to complete the acquisition.[57]

Franchisors violating the MFIL may be assessed damages that may include actual damages,[58] recission of the agreement,[59] fines,[60] and imprisonment.[61] Further, the state is not precluded from pursuing charges under any additional statutes the violation falls under. With the severity and range of penalties for operating an accidental franchise, scrutinizing business agreements alongside the MFIL is imperative.

CONCLUSION

The easiest way to avoid an accidental franchise is clearly understanding the business plan of the prospective client and, if necessary, ensuring compliance with the MFIL. It is critical for attorneys and businesses to understand the elements of a franchise to avoid the pitfalls and consequences of forming an accidental franchise.

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ENDNOTES

1. See *Lofgren v AirTrona Canada*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued May 12, 2016 (Case No. 2:13-cv-13622).
2. 16 CFR 436.1 and 436.8(a)(1) (2024) (The FTC Rule defines a franchise as a relationship that meets the following elements: (1) the franchisee receives a license for, or uses the franchisor's trademark; (2) the franchisor exerts significant control over or provides significant assistance to the franchisee; and (3) the franchisor charges a direct or indirect fee over a designated threshold anytime during the first six (6) months of the relationship.).
3. MCL 445.1501 et. seq.
4. Fransway, *Transversing the Minefield: Recent Developments Relating to Accidental Franchises*, 37 Franchise LJ No 2, 217 (2017).
5. MCL 445.1504(1).
6. MCL 445.1504.
7. MCL 445.1502.
8. See *SPX Corp v Shop Equip Specialists, Inc*, unpublished opinion of the United States District Court for the Western District of Michigan, issued March 28, 2001 (Case No. 4:00cv 49) ("Michigan law requires three general prerequisites for the finding of a franchise.").
9. *Hamade v Sunoco, Inc*, 271 Mich App 145, 159; 721 NW2d 233 (2006) (rejecting a distributor's argument that the market conditions occurring after it executed a distribution agreement with its suppliers created a franchise agreement).
10. MCL 445.1503.
11. Mich Admin Code, R 445.101(4)(a).
12. See *Vaughn v Digital Message Sys Corp*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued March 10, 1997 (Case No. 96-CV-70533), p 17-18.
13. See *Vaughn*, unpub op at 17-18; *Buist v Digital Message Sys Corp*, unpublished opinion of the Michigan Court of Appeals, issued December 27, 2002 (Docket No. 229256), p 18-20.
14. Price setting or price recommendations in favor of a marketing plan may look like: (1) providing franchisee with order/price forms and up-to-date pricing products that the distributor was selling; (2) suggesting or prescribing the prices the franchisee will charge customers for services; or (3) the franchisor retaining control over the setting of franchisee's prices; See *Vaughn*, unpub op at 17-18; *Buist*, unpub op at 18-19.
15. Mich Admin Code, R 445.101(4) (expressly lists "[r]epresentations by, or requirements of, the franchisor that the franchisor aid or assist the franchisee in training" as an indication of a prescribed marketing plan or system); See also *Lofgren*, unpub op at 29-30.
16. See *Vaughn*, unpub op at 17-18; *Buist*, unpub op at 18-20.
17. *See Vaughn*, unpub op at 18; *Buist*, unpub op at 20.
18. *Lofgren*, unpub op at 28-31.
19. MCL 445.1503.
20. Mich Admin Code, R 445.101(5).
21. Mich Admin Code, R 445.101(5)(a).

22. Mich Admin Code, R 445.101(5)(b).
23. *Jerome-Duncan, Inc v Auto-By-Tel, LLC*, 989 F Supp 838 (ED Mich 1997).
24. *Id.*
25. *Id.*
26. *Lofgren*, unpub op at 31.
27. MCL 445.1502.
28. MCL 445.1503(1).
29. MCL 445.1506(c).
30. See *Hamade*, 271 Mich App at 157; *Watkins & Son Pet Supplies v Iams Co*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued April 5, 1995 (Case No. 94-70379), p 8-10.
31. *Bucciarelli v Nationwide Mut Ins Co*, 662 F Supp 2d 809, 819-20 (ED Mich 2009); Mich Admin Code, R 445.101(2)(a)-(e).
32. MCL 445.1503.
33. *Bucciarelli*, 662 F Supp 2nd at 819.
34. MCL 445.1502.
35. *Watkins & Son Pet Supplies*, unpub op at 10-11.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. Mich Admin Code, R 445.101(2)(c).
41. MCL 445.1503.
42. Mich Admin Code, R 445.101(6).
43. *Id.*
44. *Kenaya Wireless v SSMJ*, unpublished opinion of the Michigan Court of Appeals, issued March 24, 2009 (Docket No. 281649), p 3-5 (finding a mark-up fell under the bona fide wholesale price exception when the mark-up was to cover the shipping cost and overhead expenses. Licensee purchased wireless phones for distribution at $105/phone. The licensor purchased the phones from the supplier at $95/phone.)
45. *Lofgren*, unpub op at 22-27 (charging the franchisee for certain upgraded equipment necessary for delivering new services. The franchisor invoiced the franchisee for $20,000 while the equipment retailed for $13,500.).
46. *Boeve v Nationwide Mut Ins Co*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued August 20, 2008 (Case No. 08-CV-12213), p 16; Contra *Bucciarelli*, 662 F Supp 2d at 819 (mentioning in dicta that interest rates above market value on a loan arguably qualifies as a franchise fee, however, the court does not address because the alleged franchisee did not raise this issue.)
47. MCL 445.1506-08.
48. MCL 445.1531(1); It is also important to note that the FTC Rule does not provide any private right of action for franchisees.
49. See MCL 445.1503(3).
50. See *Franchise Management Unlimited, Inc v America's Favorite Chicken*, 221 Mich App 239, 250-51; 561 NW2d 123 (1997), *Walker v Brooke Corp*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued March 30, 2010 (Case No. 2:08-cv-145740), p 20-21.
51. *Franchise Management Unlimited*, 221 Mich App at 241-42.
52. *Id.* at 250-51; MCL 445.1503(3).
53. *Franchise Management Unlimited*, 221 Mich App at 250-51.
54. *Walker*, unpub op at 20-21.
55. *Id.* at 18.
56. *Id.* at 21.
57. *Id.*
58. MCL 445.1531(1).
59. MCL 445.1531(3), (4) (non-compliance under §7(a) may result in approximated damages incurred by the alleged franchisee from the purchase of the franchise).
60. MCL 445.1538.
61. *Id.* (providing a penalty of a singular fine not to exceed $10,000, or imprisonment for not more than seven years, or both).

FTC proposal bars employer-employee noncompetition agreements

BY HOWARD YALE LEDERMAN

In January 2023, the Federal Trade Commission published a proposed rule barring employer-employee noncompetition agreements.[1] Though the FTC has no deadline for issuing the final rule, the general consensus is that it could come as soon as this month.[2]

Such noncompetition agreements bar employees "from working for a competing employer, or starting a competing business, within a certain geographic area and period of time after the [employee's] employment ends."[3] A noncompetition agreement can also be a business-business agreement, like a franchisor-franchisee agreement barring the franchisee from operating a business in the same or similar line of business as the franchise business, again within a certain geographic area and period of time after the franchise agreement ends.

The FTC proposal would contain a limited exception for noncompetition agreements arising from the sale of a business where "the party restricted by the non-compete clause is an owner, member, or partner holding at least 25% ownership interest in a business entity."[4]

NONCOMPETITION AGREEMENT EXAMPLES

The FTC cited a number of examples as part of its noncompetiton rule proposal, including:

- An agreement between a security company and its guards barring the guards after termination of their employment from accepting any employment in a competing business located within a 100-mile radius of the guard's primary job site with the company and stating that the guards may not assist any

firm, corporation, partnership, or other business to compete with the company.[5]

- An agreement between a glass container manufacturer and its workers barring them "for two years following the conclusion of [their] employment with the company" from performing or providing the same or similar services to any business in the U.S., Canada, or Mexico involved with or supporting the "sale, design, development, manufacture or production of glass containers in competition with the company."[6]

- An agreement "between a sandwich shop chain and its workers stating that for two years after the worker leaves their job, the worker may not perform services for 'any business [deriving] more than 10% of its revenue from selling submarine, hero-type, deli-style, pita and/or wrapped or rolled sandwiches' located within three miles of any of the chain's" 2,000-plus U.S. locations.[7]

- An agreement between a medical services firm and an ophthalmologist barring the ophthalmologist for two years after his employment from practicing medicine in two Idaho counties unless the ophthalmologist pays the firm either $250,000 or $500,000 depending on when the employment ends.[8]

A recent Michigan case — *BHB Investment Holdings v. Ogg* — offers another example. BHB owned and operated Goldfish Swim School of Farmington Hills, part of a franchise system which, as of early 2017, had "65 locations in 17 states."[9]

Ogg, the defendant, worked part time for BHB from June 2012 through February 2015, starting as a swim instructor earning $10 an hour and ending as a deck supervisor making $12.50 an hour.[10] When hired, he signed an agreement that, among other things, prohibited him from working for competitors within a 20-mile radius of any Goldfish location for one year after ending Goldfish employment and barred him from soliciting any Goldfish employees or customers for an 18-month period after separation.[11]

The parties recognized Ogg had access to confidential Goldfish materials and information — trade secrets; instructional materials; proposed products and services; identities of customers and prospective customers; and more. The agreement required Ogg to keep that information confidential indefinitely.[12]

WHY THE PROPOSED RULE?

Noncompetition agreements are becoming widespread

Evidence of the growing use of noncompete agreements in employment contracts, while anecdotal, is prevalent. Among practicing attorneys, the consensus appears to be that such agreements "are being more frequently requested from a greater variety of workers and more vigorously pursued post-termination."[13]

Noncompetition agreements "tend to cluster in high-skilled, high-wage jobs. Executives are the most likely to sign them — at a rate of like 60-80% depending on the studies."[14] But according to one survey cited by New Yorker magazine, "the modal worker bound by a non-compete agreement is actually an hourly-paid worker who makes a median wage of $14 an hour. And that's because hourly-paid workers actually comprise about two-thirds of the U.S. workforce."[15]

The FTC estimated that approximately one in five U.S. workers — roughly 30 million employees — are bound by noncompetition agreements.[16] The agency also cited a 2014 study by University of Michigan professors J.J. Prescott and Norman Bishara and University of Maryland professor Evan Starr, who surveyed 11,500 employees nationwide. They found that:

- 18% of respondents were working under a noncompetition agreement, and 38% had worked under such an agreement "at some point in their lives."
- Among respondents without bachelor's degrees, 14% were working under a noncompetition agreement, and 35% reported having worked under one at some point.
- Among respondents earning less than $40,000 annually, 13% were working under a noncompetition agreement, and 33% worked under one at some point.
- 53% of employees working under noncompetition agreements were paid hourly wages.[17]

Noncompetition agreements, once primarily used to keep top executives from taking trade secrets to rivals, are now much more common among all types of workers.[18] For example, Amazon used them for warehouse workers; Jimmy John's for sandwich-makers; doggy day-care chain Camp Bow-Wow for dog walkers; and commercial real-estate company Cushman & Wakefield used them for janitors.[19]

The FTC cited several other studies, among them:

- A study by Starr and Donna Rothstein of the U.S. Bureau of Labor Statistics from 2021 revealing that 18% of employees they surveyed worked under noncompetition agreements.[20]
- A 2021 study by Duke University professor Matthew Johnson and FTC economist Michael Lipsitz showing that 30% of hair stylists worked under noncompetition agreements.[21]
- A 2020 study led by Ohio State University professor Kurt Lavetti indicating that 45% of doctors had noncompetition agreements.[22]
- Carnegie Mellon University professor Liyan Shi's 2021 study showing that 67% of CEOs had noncompetition agreements.[23]

Noncompetition agreements have devastating impacts on employees

Employers imposing noncompetition agreements on employees are

not the exception, but the rule. Employer-employee bargaining over noncompetition agreements is not the rule, but the exception.

The 2014 Prescott study found that about 10% of respondents with noncompetition agreements bargained over them; nearly 8% reported consulting a lawyer; and 11.4% thought they would have been hired had they refused to sign the agreement.[24] These findings show the perception that employees could not refuse to sign such agreements without risking their jobs.

In issuing its proposal, the FTC cited several studies showing that noncompetition agreements lowered employee earnings anywhere from 3-13%[25] and lowered earnings for employees without agreements by 3-6%.[26] One study showing that noncompetition agreements increased wage gaps based on race and sex;[27] the FTC estimated banning them would close those gaps by up to 9%."[28] The agency also referred to studies indicating noncompetition agreements reduced labor mobility.[29]

Other studies referenced by the FTC indicated that noncompetition agreements increased business concentration,[30] inhibited competitors' ability to access talent by forcing future employers to buy out employees from their noncompetition agreements if they want to hire them,[31] reduced entrepreneurship and new business formation,[32] and decreased innovation.[33]

FTC COMMISSIONERS UNPERSUADED BY PRO-NONCOMPETITION ARGUMENTS

The FTC considered justifications for noncompetition agreements and acknowledged the legitimacy of protecting trade secrets and confidential information.[34] Still, the agency recognized that nondisclosure and nonsolicitation agreements can accomplish the same goals while placing less of a burden on competition.[35]

> "[N]on-compete clauses restrict considerably more activity than necessary to achieve these benefits. ... These alternatives restrict a considerably smaller scope of beneficial competitive activity than non-compete clauses because — while they may restrict an employee's ability to use or disclose certain information — they generally do not prevent [them] from working for a competitor or starting their own business."[36]

The agency added that trade secret law offers employers an effective legal alternative to noncompetition agreements.[37]

FTC Chair Lina Khan and commissioners Rebecca Slaughter and Alvaro Bedoya declared that by their design, noncompetition agreements often close off workers' natural alternative employment options — jobs in the same geographic area and profession — which can undermine economic liberties burden the ability to freely switch jobs.[38] The agency projects that the proposed ban would increase workers' total earnings by close to $300 billion per year while decreasing consumer prices up to $150 billion annually.[39]

In her dissent, then Commissioner Christine Wilson said the proposed rule represented a radical departure from centuries of legal precedent that employed fact-specific inquiries into whether noncompete clauses were unreasonable based on justifications for the restrictions.[40] She argued that the FTC lacked the authority to make rules regarding "unfair methods of competition" and speculated that the proposed rule will lead to "protracted litigation in which the [FTC] is unlikely to prevail."[41]

CONCLUSION

Even if the U.S. Supreme Court invalidates the proposed rule, the notion of barring employer-employee noncompetition agreements will be reinvigorated. States may ban or severely restrict them. Thus, the proposed rule will lead to a major noncompetition law change nationwide or intensify the contradictions in state noncompetition law.

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ENDNOTES

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2. Gilbert, et al, *Update on the Status of Non-Competes and What to Expect in 2024*, 14 Nat'l L Rev 72 (2024) <https://www.natlawreview.com/article/update-status-non-competes-and-what-expect-2024#:~:text=The%20Status%20of%20the%20FTC%20Proposed%20Rule%20Banning%20Non%2DCompetes&text=There%20is%20no%20deadline%20for,the%20proposed%20rule%20or%20comments>[https://perma.cc/6U5W-QN27] (all websites accessed March 12, 2024).
3. 88 Fed Reg at 3482.
4. *Id.* at 3483.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 3484.
9. *BHB Inv Holdings, LLC v Ogg*, unpublished per curium opinion of the Michigan Court of Appeals, issued February 21, 2017 (Docket No. 330045), p 1 n 1.
10. *Id.* at 1.
11. *Id* at 1-2.
12. *Id* at 2.
13. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 Oregon L Rev 1163, 1164 FN5 (Winter 2001). See also Bredemeier, *In a Bind over Noncompete Clauses: More Workers Caught in Grip of Required Agreement*, Washington Post (March 18, 2001), p E1; Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L Rev 519, 577-578 (February 2001) (showing a great increase in federal and state noncompetition cases from 1970 to 1995).
14. Chotiner, The New Yorker, *What a Ban on Non-Compete Agreements Could*

Mean for American Workers <https://www.newyorker.com/news/q-and-a/what-a-ban-on-non-compete-agreements-could-mean-for-american-workers> [https://perma.cc/G73Q-Q2SG] (posted January 10, 2023).
15. *Id.*
16. 88 Fed Reg at 3485.
17. *Id.*; Prescott, Bishara, and Starr, *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, Mich St L Rev 2, 369-464 (2016).
18. *Id.*
19. O'Brien, Washington Post, *Even janitors have noncompetes now. Nobody is safe,* <https://www.washingtonpost.com/business/2018/10/18/even-janitors-have-non-competes-now-nobody-is-safe/> [https://perma.cc/C5Z3-9723] (posted October 18, 2018). See also Leon, Labor Notes, *Non-Compete Agreement Leaves Workers Homeless and Jobless* <https://www.labornotes.org/2023/02/non-compete-agreement-leaves-workers-homeless-and-jobless> [https://perma.cc/F9AM-F3DD] (posted February 2, 2023).
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21. Johnson and Lipsitz, *Why Are Low-Wage Workers Signing Noncompete Agreements?*, 57 J Hum Res 689, 700 (2022).
22. Lavetti, Simon, and White, *The Impacts of Restricting Mobility of Skilled Service Workers Evidence from Physicians*, 55 J Hum Res 1025, 1042 (2020).
23. Liyan Shi, *Optimal Regulation of Noncompete Contracts*, 91 Econometrica 425-463 (March 2022) <https://onlinelibrary.wiley.com/doi/pdf/10.3982/ECTA18128>.
24. Prescott, Bishara, and Starr, supra note 17.
25. 88 Fed Reg at 3486.
26. 88 Fed Reg at 3488.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 3490.
31. *Id.*
32. *Id.* at 3491.
33. *Id.* at 3492.
34. See, e.g., *Prudential Securities, Inc. v Plunkett,* 8 F Supp 2d 514, 519 (ED Va, 1998) ("[A] company spending a great deal of time and money cultivating clients may see its efforts destroyed when a former broker violates a restrictive covenant and solicits his former company's clients."); *PSC, Inc v Reiss,* 111 F Supp 2d 252, 256 (WD NY 2000) (Employers have an interest in preventing the employee from working for a competitor's company where the "employee possesses highly confidential or technical knowledge concerning manufacturing processes, marketing strategies, or the like."); *Darugar v Hodges,* 471 SE2d 33, 36 (Ga App 1996) (An employer had the "right to protect itself from the risk that the former employee might use contacts [cultivated while employed] to unfairly appropriate customers."); *BDO Seidman v Hirshberg,* 712 NE2d 1220, 1225 (NY 1999) (Employers have "a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment."); *Reed, Roberts Assoc, Inc v Strauman,* 353 NE2d 590, 593 (NY 1976) (recognizing an employer's "legitimate interest in safeguarding that which has made his business successful and to protect himself against deliberate surreptitious commercial piracy").
35. 88 Fed Reg at 3505-08.
36. 88 Fed Reg at 3505.
37. 88 Fed Reg at 3505-06.
38. 88 Fed Reg at 3536 (citing *Pollack v Williams*, 322 US 4, 17-18 (1944)).
39. 88 Fed Reg at 3537.
40. 88 Fed Reg at 3540.
41. *Id.*

SINCE 1951

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2023 Sixth Circuit en banc opinions

BY DANIEL PING

The United States Court of Appeals for the Sixth Circuit issued three en banc opinions in 2023.

WILLIAM GLENN ROGERS v. TONY MAYS, WARDEN[1]

Judge Amul Thapar in June 2023 authored an en banc opinion affirming the denial of the appellant's habeas petition which claimed ineffective assistance of counsel (IAC) in connection with his felony murder conviction and death-penalty sentence in Tennessee state court. One significant issue addressed whether to excuse the appellant's procedural default at the post-conviction phase.

A jury convicted the appellant of raping and murdering a nine-year-old girl and sentenced him to death based in part on its finding that he killed the victim while committing a rape. In Tennessee, the predicate rape required proof of penetration. The appellant claimed that his trial counsel failed to adequately investigate and challenge evidence that heads of sperm had been detected in the victim's underwear, arguing that his counsel should have argued a "washing machine theory," i.e., that the sperm could have been deposited during a laundry cycle.

The majority applied Antiterrorism and Effective Death Penalty Act (AEDPA) deference, concluding the state court had reviewed the matter on the merits as it related to the guilt and penalty phases based upon the courts' reference to "verdicts," plural, and the appellants' concession to merits-based review. (The dissenting judges

disagreed with how the majority had parsed the state court decision, urging that de novo review was appropriate, but did not address the appellant's waiver.) The majority went on to conclude that claims of ineffective assistance were doubly meritless: counsel did not unreasonably fail to pursue the far-fetched washing machine theory and the appellant could not show prejudice arising from lack of evidence that merely confirmed that the source of the sperm was inconclusive.

The appellant also brought several defaulted claims of ineffective assistance of trial counsel and sought to excuse the default by claiming his post-conviction counsel had performed deficiently by failing to preserve the claims in a motion for a new trial, which Tennessee law requires as a prerequisite to an appeal. Under *Martinez v. Ryan*[2] and *Trevino v. Thaler*,[3] ineffective assistance of post-conviction counsel can excuse procedural default in some circumstances. Here, however, the majority applied *Shinn v. Ramirez*,[4] which precluded federal courts from conducting evidentiary hearings on post-conviction counsel claims, concluding that the appellant could not establish that the exception applied because he could not point to anything in the state court record to prove his trial counsel claims were substantial. The dissent believed it was imprudent for the majority to apply *Shinn* prior to a remand to the district court. The remainder of the dissent was dedicated to arguing that the *Martinez-Trevino* exception — which does not apply to appellate counsel IAC claims — should apply to post-conviction counsel IAC claims, which the majority assumed without deciding.

The appellant brought two remaining non-IAC claims. He claimed that there was insufficient evidence of penetration. The majority held that a rational juror could have inferred penetration by the presence of sperm in the victim's underwear; evidence that the appellant was the last person to see the victim alive; and the available inference that the victim's shirt was inside-out because the appellant had removed it. The dissent would have held that this body of evidence, while not necessarily insufficient to support an inference of penetration, supported its conclusion that the appellant had established that he was prejudiced by his counsels' ineffective assistance. Finally, the appellant claimed that the state courts unreasonably excluded evidence that the victim's brother had sex with her six years prior to the killing. The majority rejected that argument, holding that the state courts reasonably concluded that such evidence was properly excluded because it was "remote in time and irrelevant and possibly confusing to the jury" as the victim's brother had significant mental illness and could not remember making the claim.

IN RE: DANNY HILL[5]

This opinion from August 2023 addressed whether the habeas petitioner's second-in-time petition is "second or successive" as defined in 28 U.S.C. § 2244(b)(1). When a petition is second or successive, it cannot proceed unless it is grounded upon a new, retroactive rule of constitutional law or sets forth newly discovered evidence not available previously that would have changed the outcome at trial. But not all second-in-time habeas petitions are second or successive.

The petitioner-appellant was convicted of the kidnap, rape, torture, and murder of a 12-year-old boy. The voluminous evidence included forensic testimony that bitemarks on the victim came from the appellant. A complicated procedural history ensued. After the appellant exhausted his state court remedies, he filed a 1996 habeas petition challenging, among other things, the denial of expert assistance on the bitemark evidence. The matter was remanded to the state court to apply a new constitutional rule regarding the appellant's alleged intellectual disability, which an en banc panel put to rest in the warden's favor in 2021.

Meanwhile, however, the appellant moved for a new trial in state court based on newly discovered evidence — two scientific reports that postdated his conviction and habeas petition by about two decades — that significantly undermined the prosecution's bitemark testimony. The state courts held that the reports needed to have existed at the time of trial to be cognizable and, regardless, they would not have changed the outcome. The appellant in 2020 filed a second habeas petition challenging this decision.

Writing for the majority, Judge John Nalbandian evaluated whether the 2020 petition was second or successive. After cataloguing three circumstances in which a second-filed petition is not second or successive, he concluded that the appellant's petition was indeed second or successive. First, notwithstanding its connection to the motion for a new trial, the second petition ultimately attacked the same judgment of conviction. Second, the claim had been "ripe" at the time of the first petition insofar as some challenge to bitemark evidence was available at that time. This stood in contrast to, e.g., a non-successive, second-filed petition raising an ex post facto challenge to new parole conditions imposed during the petitioner's incarceration. Third, notwithstanding the claim's ripeness, the appellant failed to raise the claim. Accordingly, with none of the exceptions being applicable, the appellant's second petition was deemed second or successive.

The majority observed that it was not ignoring the fact that the new evidence was not available at the time of trial. But the proper consideration of that fact belonged in the gatekeeping procedure set forth in 28 U.S.C. § 2244(b)(2)(B) — which the majority remanded to the original panel. In other words, the non-existence of the evidence was not relevant to the ripeness question.

In dissent, Judge Eric Clay (joined by judges Karen Nelson Moore and Jane Branstetter Stranch) took issue with the majority's conclusion that the appellant's claim — invoking a sea change in bitemark forensics — was "ripe" when his first petition was filed. The dissent

stated that the second petition's claim is properly understood to comprise the unreliability of the testimony rather than merely an abstract challenge to bitemark evidence, rendering the claim unripe at the relevant time. A contrary rule, asserted the dissent, imposes an impossible burden on a petitioner to predict future scientific discoveries in their original petition and even if such a prediction had been made, it would have been unsupportable.

Judge Amul Thapar concurred with the majority and took the opportunity to criticize the Sixth Circuit's habit of ignoring a statutory 30-day deadline to decide motions for orders authorizing the district court to consider a second or successive petition. The concurrence was joined by Chief Judge Jeffrey Sutton and judges Richard Griffin, Raymond Kethledge, and Chad Readler.

SAMUEL FIELDS v. SCOTT JORDAN, WARDEN[6]

Judge Eric Murphy in November 2023 penned an en banc majority opinion affirming the denial of habeas relief and reaffirming a petitioner's need to identify "clearly established federal law" in overcoming AEDPA deference.

In 1993, the appellant became very intoxicated one evening (including using the hallucinogen PCP) before walking to the home of his girlfriend's landlord, using a knife to remove 17 screws from the landlord's storm window to gain access to her home, and murdering her with a different knife. The appellant was found next to the victim's body and confessed to two police officers and, later, an EMT. At trial, however, he pursued an innocence defense and sought to blame his confessions on his intoxication.

During deliberations, the jury had employed the knife allegedly used to remove the victim's storm window to remove a cabinet door in the jury room. (The defense theorized that the appellant had been too intoxicated to complete this task.) The jury's experiment came to light and the appellant argued it violated his Sixth Amendment rights to confrontation and an impartial jury trial and his 14th Amendment right to due process.

The majority held that the appellant failed to identify "clearly established Federal law, as determined by the Supreme Court of the United States" — a prerequisite to habeas relief under 28 U.S.C. § 2254(d)(1) — because no Supreme Court case has addressed the specific scenario of an out-of-court jury experiment that employed unadmitted physical evidence. In dissent, Judge Moore, joined by judges Clay, Stranch, Stephanie Dawkins Davis, and Andre Mathis, would have permitted the appellant to rely on a Sixth Circuit case holding that the Supreme Court had established the relevant principle.

The majority and dissent disagreement hinged on the validity of that case, *Doan v. Brigano*,[7] in which a juror simulated the victim's bruise at her home using lipstick and communicated her conclusions to the rest of the jury, violating the defendant's rights. *Doan* interpreted prior Supreme Court case law as establishing that a jury's consideration of extraneous material violates a defendant's constitutional rights. The Supreme Court case law on which *Doan* relied comprised a case in which a bailiff told the jury the defendant was guilty and wicked, thereby acting as a witness against the defendant, and a case in which the prosecution's two law-enforcement witnesses had repeatedly fraternized with jurors throughout the trial.

Whereas the dissent urged application of *Doan*'s conclusion regarding a juror experiment, the majority deemed *Doan* to have been abrogated because it was issued "only five years after AEDPA" and prior to case law interpreting the phrase "clearly established" to exclude "abstract principles." It concluded that the two Supreme Court opinions employed in *Doan* did not constitute pronouncements regarding juror experimentation. Because the constitutionality of the jury's consideration of extraneous physical evidence was an abstract principle, the majority held that the appellant could not invoke *Doan*. The appellant was left with no clearly established federal law in his favor, precluding relief.

The dissent did not take issue with the majority's disposition of the appellant's remaining four claims, three of which comprised claims of ineffective assistance of counsel regarding trial strategy. Generally, the appellant argued that counsel should have emphasized his intoxication, but the court ratified counsel's strategy of deeming such evidence as "double edged," potentially supporting the prosecution's theory. Lastly, the court held that the state courts reasonably declined to permit the appellant to introduce parole statistics at the penalty mitigation phase, which the state court deemed irrelevant.

Daniel Ping is an assistant attorney general in the Michigan Department of Attorney General, where he focuses on appeals and consumer protection. A member of the U.S. Courts Committee, he previously clerked at the Michigan Supreme Court, the U.S. District Court for the Eastern District of Michigan, and the U.S. Court of Appeals for the Sixth Circuit.

ENDNOTES

1. *William Glenn Rogers v Tony Mays, Warden*, unpublished en banc opinion of the United States Court of Appeals for the Sixth Circuit (CA 6, 2020).
2. *Martinez v Ryan*, 566 US 1; 132 S Ct 1309; 182 L Ed 2d 272 (2012).
3. *Trevino v Thaler*, 569 US 413; 133 S Ct 1911; 185 L Ed 2d 1044 (2013).
4. *Shinn v Ramirez*, 596 US 366; 142 S Ct 1718; 212 L Ed 2d 713 (2022).
5. *Samuel Fields v Scott Jordan, Warden*, unpublished en banc opinion of the United States Court of Appeals for the Sixth Circuit (CA 6, 2022).
6. *In re: Danny Hill*, unpublished en banc opinion of the United States Court of Appeals for the Sixth Circuit (CA 6, 2023).
7. *Doan v Brigano*, 237 F3d 722 (CA 6, 2001).

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BEST PRACTICES

The underappreciated direct examination

BY STEVEN SUSSER

Direct examinations are underappreciated. The spotlight shines on the flashier opening statements and cross examinations, but nothing at trial packs a punch like a good story told through a direct examination.

The purpose of this article is to help make your stories more persuasive.

A story is how you tie issues together. Your issues are the points you want to impress on the judge or jury — the trier of fact. Direct examination is how you present your complete version of the issues to the trier. So the better your witness is at presenting the case issues on direct, the better your chance for victory. To be clear, when I refer to direct examination, I am including both the affirmative presentation to the jury and your witness's handling of cross-examination questions.

DIRECT EXAMINATION TECHNIQUES

This article contains three suggestions to make your direct examination more persuasive. First, select your case issues early and frame them in a positive way. Second, elicit answers that will make an impression on the trier. Third, prepare your witness to turn dangerous cross-examination questions into opportunities.

Spot (positive) issues early

Begin work on your case issues early, preferably when you file your complaint or answer. Sit down and prepare an issues chart with these headings:

#	Issue	Witness	Document	Comment

As your case progresses, revisit this chart periodically to modify it. I suggest using as a guide the jury instructions applicable to your case. For this process, use both the pertinent standard instructions and anticipated custom instructions. There is no better clue to your key issues than the facts that support the legal issues you must satisfy.

The issues chart is the foundation for your direct examination. For each issue a witness covers, prepare direct examination questions designed to elicit that issue. In a way, you can look at your issues chart as a first draft of your direct examination.

There is a twist. The key takeaway here is framing each issue as a positive statement and not as a reactive or defensive statement. A positive statement would be, "My client is correct." In contrast, a defensive statement would be, "My client did not do what you claim he did." By framing your case issues as positives, you control the narrative. Otherwise, the examination can appear to be defensive.

Here is a fact pattern to use as an example. Peter paid Debbie $10 for a sandwich. The sandwich had mayonnaise, which Peter hates. Peter asked for a replacement sandwich without mayonnaise at no charge. Debbie refused, claiming Peter did not ask for no mayonnaise. Peter responded that the description of the sandwich did not say it included mayonnaise.

If I represent Peter, one of my issues might be, "I had to pay $10 for a sandwich I did not order." The defensive equivalent would be, "No one told me that the sandwich would have mayonnaise on it." Both are accurate but the first cries out for redress while the second makes Peter seem reactive. For Debbie, the positive statement would be "I gave Peter what he ordered." The defensive statement would be, "Peter never told me to hold the mayonnaise."

"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.

How you frame your case issues allows you to create subtle, but important, differences that may affect how the trier perceives it. When you position your case issues in a positive way, you appear confident about those positions. If you position your issues to respond to what you think your opponent will claim, you may appear reactive or defensive.

Note that I am not suggesting that you avoid issues, even difficult ones. Rather, attach a positive statement to your response to difficult case issues. For example, when Peter says, "I had to pay $10 for a sandwich I did not order," he is anticipating Debbie's defense that he did not say "hold the mayo," but Peter is folding that defense into a positive statement as opposed to highlighting a defensive answer.

Another good way to sweeten the cross examination is to "draw the sting" before you get to cross examination, referring to the practice of anticipating your opponent's best points and controlling how those points are presented to the jury. In our scenario, Peter may want to admit that he did not specify "no mayonnaise." He knows this fact will come out during trial and rather than waiting to get asked about it during cross examination, he uses it to show his credibility to the trier. It also gives him the opportunity to shape that response, perhaps, by adding that he assumed no mayonnaise because it was not on the menu.

Find your range

When it comes to using your case issues to craft questions, consider the range between you and the witness. Let me explain. I like watching mixed martial arts fights. A key fight strategy is controlling the space between you and your opponent. Space control translates well to the trial fight — you want to be cognizant of how you space your questions.

Imagine a spectrum of questions. On one end would be open-ended questions. These questions generally start with who, what, when, where, or how, and leaves it to the witness to give a narrative answer. An open-ended question does not call for a yes-or-no answer.

Here is an example of an open-ended question using our scenario: "What kind of sandwich did you order?"

Open-ended questions have the advantage of allowing the witness to answer how he sees fit and will not elicit a leading objection. But they make it difficult for the attorney to guide the direct examination and encourage narrative answers, which can be boring.

On the other end of the spectrum is the leading question. Black's Law Dictionary defines a leading question as one "that suggests the answer to the person being interrogated; esp., a question that may be answered by a mere 'yes' or 'no.'"[1]

Here is an example of a leading question: "You ordered a sandwich without mayonnaise, didn't you?"

A leading question allows the examiner to exert more control over the examination and often results in simple, short answers that can be more persuasive. But Rule 611 of both the federal and state rules of evidence generally prohibit the use of leading questions during direct examination.

In my experience, many lawyers ask open-ended questions on direct and leading questions on cross. But there is a third way — the closed-ended question. A closed-ended question has been defined as one to which an answer must be selected from a limited set. Closed-ended questions are not necessarily leading if they allow the witness to choose from more than one option.

Here is an example of a closed-ended question: "Did you order a sandwich with mayonnaise or a sandwich without mayonnaise?" (Note that one could just ask "Did you order a sandwich with mayonnaise" and leave the rest implicit; whether you explicitly spell out all the options or leave them implied may depend on your judge.)

The key difference between a closed-ended question and a leading question is that the leading question only proposes a take-it-or-leave-it scenario with one option; the closed-ended question presents more than one option for the witness to select.

A closed-ended question can be used during direct examination if it does not suggest an answer. The most effective way to ask a closed-ended question is framing it in such a way that the witness could just as easily agree or disagree with the question. If challenged, you can correctly respond that your question does not suggest one answer.

Changing your direct examination approach by making it heavy on closed-ended questions will improve the persuasiveness of your examination. You will be able to control the flow of testimony and make it more interesting and understandable to the trier. In addition, by asking questions in a more focused way, you are able to better focus the jury's attention on where you want it to be.

To help frame closed-ended questions, consider a technique I learned long ago at an excellent trial seminar. Instead of writing out your questions, write the answers you expect to get (and, of course, confirm them with your witness.) So instead of writing, "What was the weather like?" you would write, "It was sunny and warm." This approach offers flexibility in how you phrase your question and gives it an air of genuineness because you are creating the question on the spot. It also dissuades you from becoming wedded to your direct examination outline.

One final point on this topic: Consider mixing open- and closed-ended questions into your direct. This will spice it up and make it less likely that the trier will see you as a puppet master. If you have an energetic and persuasive witness, it will also allow that witness to connect with the trier using his own words.

Exploit cross-examination opportunities

Once you have completed your scintillating direct, your adversary gets a chance to ask your witness leading questions on cross examination. Many lawyers and witnesses see cross examination as a threat; instead, view it as an opportunity. Indeed, approach cross-examination preparation as an extension of your direct examination. This way, you reinforce your direct-examination points when the jury is on heightened alert.

Make sure your witness is prepared with reasonable responses to all the cross-examination approaches you can envision. Often, you can use case issues as a life raft your witness can go to when pressed by your adversary. Practice asking your witness tough questions and using the case issues to respond.

Please note that I am not suggesting that your witness memorize answers. It's not an effective strategy. During both direct and cross, you want to avoid rehearsed or memorized exchanges. The trier can sense a canned answer, and an authentic response will win the day every time. Indeed, the demeanor of your witness during cross examination should be the same as it is during direct examination. What you want is a witness whose attitude on cross is, "I'm glad you asked me that question …"

Steven Susser is a shareholder with Carlson, Gaskey & Olds in Birmingham who concentrates in intellectual property and commercial litigation. He believes that settlement is usually better than going to trial, but that the best way to get a good settlement is to be ready, willing, and able to try a case to its conclusion.

ENDNOTE

1. Leading Questions, *Black's Law Dictionary* (11th ed 2019).

ETHICAL PERSPECTIVE

The ethics of appointing from the bench

BY ROBINJIT K. EAGLESON

Many criminal law attorneys can relate to this situation: They are sitting in the gallery waiting for their case to be called and suddenly, they hear their name, but not for the case they have prepared for. The judge has called them from the bench requesting that they represent an in pro per litigant or a litigant whose attorney has not appeared. The attorney looks around for a moment, secretly hoping it really was not their name that they heard; then, the realization hits that their name was actually called to represent a litigant they do not know, and the attorney does not see a way out with a judge and an entire gallery looking on. It is that deer-in-the-headlights moment where the attorney must make an immediate decision.

With an immediate response needed, we usually do not recall our time in law school in that moment, but when we do have the time, we remember our constitutional law class and the feeling of learning why we went into law in the first place. We remember reading and debating the right to an attorney in *Gideon v. Wainwright*[1] and the right to an attorney for juveniles in *In re Gault.*[2] And while we may not remember our constitutional law class when called upon to represent a litigant at the spur of the moment, our memory tracks to the fundamental right that the guarantee of counsel is essential to a fair trial and applies through the due process clause of the 14th Amendment to the U.S. Constitution. This fundamental understanding is what drives attorneys to accept the appointment instinctively and automatically. However, while we know this right, there's the question of ethics and when attorneys should pause prior to accepting appointments from the bench.

Ethics Opinion RI-51 provides:

> It is well established that under the Sixth Amendment a criminal defendant must be afforded a reasonable opportunity to secure counsel of the client's own choosing, *Urquhart v. Lockhart,* 726 F2d 1316 (CA8 1984); *U.S. v. Burton,* 584 F2d 485 (DC Cir 1978), cert den 439 US 1069 (1979).

The key phrase there is "secure counsel of the client's *own choosing*" (emphasis added). When an appointment occurs from the bench, there is an inherent balancing act of the party's right to counsel of their own choosing, the defendant's right to be represented at every stage, the demands on the court's docket, and the ethical considerations attorneys must consider prior to taking an appointment.

Attorneys asked to accept appointments must also weigh the ethical considerations prescribed in the Michigan Rules of Professional Conduct (MRPC) prior to taking on any representation, even in a limited scope. The first ethical consideration attorneys must weigh is whether representing the client creates a conflict of interest. Prior to taking on any client, be it retained or appointed, attorneys must conduct a conflict-of-interest check under MRPC 1.7 and 1.9.[3] Under MRPC 1.7, attorneys must not represent a client if representation would be directly adverse to another client unless the attorney reasonably believes representation will not adversely affect the relationship with the other client and each client has consented to representation after consultation. Further, attorneys must not represent a client if representation would materially limit duties and responsibilities to another client, third party, or the attorney's own interests unless the attorney reasonably believes representation will not be adversely affected and the client consents after consultation. Additional considerations are required under MRPC 1.7 when attorneys are considering representing multiple clients in a single matter.

This analysis can't happen at a moment's notice. Attorneys must figure out whether MRPC 1.7 applies by reviewing their current

"Ethical Perspective" is a regular column providing the drafter's opinion regarding the application of the Michigan Rules of Professional Conduct. It is not legal advice. To contribute an article, please contact SBM Ethics at ethics@michbar.org.

roster of clients, determining if representation would be adversely affected in any capacity, and providing consultation and receiving consents from both clients. These considerations take time — it can't happen during the walk to the defendant needing representation after the attorney's name is called.

MRPC 1.9 must also be considered when determining whether there is a conflict of interest with a former client. An attorney who has formerly represented a client in a matter must not represent another person in the same or substantially related matter where the person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.[4] Again, the attorney must analyze whether MRPC 1.9 applies by reviewing their former roster of clients, determining if representation would be adversely affected, and providing consultation and receiving consent from the former client, which cannot be accomplished during the few moments after their name is called from the bench.

In addition to the aforementioned analyses, additional ethical considerations to consider are:

- Competence in the area they are asked to be appointed to under MRPC 1.1.
- Scope of representation under MRPC 1.2.
- Communication under MRPC 1.4.
- Client with a disability under MRPC 1.14.
- Communication with a person represented by counsel under MRPC 4.2 (if the defendant is represented but the attorney did not appear.)
- Dealing with a self-represented person under MRPC 4.3.
- Accepting appointments under MRPC 6.2.

Courts may require an appointed attorney to be present for arraignments in case a party's retained or appointed counsel does not appear, or a party appears in pro per as they have not yet secured representation. Commentary to MRPC 1.1 provides:

> In an emergency, a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

While arraignments are often considered pro forma, in instances where a retained or appointed attorney does not appear, attorneys picked from the gallery may violate their duty of competence under MRPC 1.1 as they have no knowledge of how the retained or appointed attorney intended to proceed with the case, don't know whether discussions occurred with opposing counsel, and are unsure if a possible legal strategy may be affected by the hearing. The same can be said for clients who haven't had the opportunity to secure representation and have appeared in pro per.

In a scenario where a case is further along, an attorney called from the gallery or public defender's office is not in a position to competently represent the client under MRPC 1.1 since they have no knowledge of how the retained attorney intended to proceed with the case. If the defendant asks to terminate the relationship with retained counsel and requests alternative counsel, whether that counsel be retained or appointed, the court should adjourn the hearing to provide time for the defendant to speak with their retained counsel. During adjournment, the prospective attorney should ensure they have no ethical issues with taking the client, have a conversation with retained counsel to confirm the attorney-client relationship has ended, and, if necessary, complete a substitution of attorney or give time for the retained counsel to file a motion to withdraw and receive an order approving the withdrawal under MRPC 1.16 before speaking with the defendant and filing their appearance. It would be the same as any other attorney assuming a case midstream, however, covering without approval of the client or retained attorney would be unethical.

This same analysis applies whether an attorney is summoned from the gallery or whether the judge requested that a contracted entity be present for just-in-case scenarios, i.e., a public defender's office. In fact, conflicts may be more evident with a public defender's office as it may currently represent a co-defendant, a victim, or a witness that possibly may create a conflict of interest with the defendant needing representation at that moment.

In the end, pinch hitting may cause substantial adverse ramifications to the party and their case. Attorneys should request adjournment to fulfill their ethical duties and consider whether they are able to take on the representation even in a limited scope. While this may cause delays to the court's docket, it is paramount to remember that the client's interests come first and attorneys must consider their ethical obligations before proceeding.

The next question for the court is dealing with the attorney who does not appear for a scheduled proceeding. The court should summon the missing attorney and determine the reason for the absence. The court may also wish to consider sanctions for nonappearance. If the attorney continues to miss scheduled court appearances, the court should determine whether it is appropriate to report[5] the attorney to the appropriate disciplinary entity under MRPC 8.3.

CONCLUSION

Often, there is no second thought when a judge appoints an at-

torney who happens to be in the courtroom on the day of a proceeding. Judges have large dockets and must keep them moving. However, attorneys must consider their ethical obligations before accepting an appointment. Otherwise, the client may be further disadvantaged by the appointment due to trial strategy, the need to find another attorney due to a conflict of interest, or other issues that may arise. The client must be afforded the opportunity to secure counsel of their own choosing, and the attorney must have the opportunity to fulfill ethical obligations and avoid situations that could result in disciplinary consequences.

Robinjit K. Eagleson is ethics counsel at the State Bar of Michigan.

ENDNOTES

1. *Gideon v Wainwright,* 372 US 335; 88 S Ct 792; 9 L Ed 2d 799 (1963)
2. *In re Gault,* 387 US 1; 87 S Ct 1428; 18 L Ed 2d 527 (1967)
3. Additional considerations fall under MRPCs 1.8, 1.10, 1.11, 1.12, and 1.18.
4. MRPC 1.9 should be reviewed for additional considerations.
5. See Judicial Ethics FAQs – Reporting Obligations <https://www.michbar.org/opinions/ethics/judicialgeneralFAQs> (website accessed March 12, 2024).

LIBRARIES & LEGAL RESEARCH

Researching antitrust law

BY KEITH LACY

Antitrust is a dynamic area of law subject to rapid change. It is highly sensitive to the attitudes of regulators and market conditions, always looking forward to how decisions made today will affect businesses and the lives of individual consumers. Current events — and passionate consumers, or fans — can incur "Swift" antitrust scrutiny, as Live Nation Entertainment discovered recently.[1] Yet it is inextricably linked to more abstract considerations.

The term "antitrust" is itself archaic, reflecting animosity to a business practice innovated by Standard Oil in 1882.[2] Understanding the history of antitrust actions often requires understanding something of history broadly and politics specifically.[3] Finally, applying antitrust law requires some grasp of economic principles such as efficiency, market power, and network effects. One book on the subject begins with the line, "Perhaps no field of law is as dominated by economics as antitrust law."[4]

With all this in mind, there is simply a lot that may be relevant when working on an antitrust or competition law problem. This column will attempt to point out some helpful resources for practitioners working in this field.

MAJOR TREATISES

As a subject area, antitrust enjoys a number of high-quality research references and guides — the resources highlighted below are by no means an exhaustive list. Compared to other areas of law, the problem is less whether there are resources to consult, but rather where to start.

When trying to zero in on the most relevant rules for an issue, sometimes beginning with a general reference tool can help you move on to more specialized resources. For example, the legal encyclopedia Michigan Civil Jurisprudence contains discussions of antitrust topics under a number of headings, including the interplay of state and federal laws.[5]

The leading treatise is the fifth edition of "Antitrust Law: An Analysis of Antitrust Principles and their Application" by Phillip E. Areeda and Herbert Hovenkamp. This fourteen-volume work is an authoritative and comprehensive treatment. Available electronically on the Lexis+ and VitalLaw databases, the cost of updating such an extensive series can make access prohibitive. Areeda and Hovenkamp also have a one-volume, practitioner-oriented guide keyed to their larger work that is less of an investment called "Fundamentals of Antitrust Law," now in its fourth edition.

Approximately every five years, the Antitrust Law Section of the American Bar Association publishes "Antitrust Law Developments," a two-volume set that aims to "state as objectively as possible the current state of the law and developments in the antitrust field."[6] The section also compiles a guide to state antitrust law, "State Antitrust Practice and Statutes," published irregularly.[7]

PRIMARY SOURCES AND REPORTERS

Many major federal antitrust laws are found in Title 15 of the United States Code. Some of the more notable ones are:

- The Sherman Antitrust Act of 1890,[8]
- The Clayton Act of 1914,[9]
- The Federal Trade Commission Act of 1914.[10]

There are many other antitrust statutes specific to particular industries and situations, including at the state level, and there may be overlaps in application. Checking practice guides specific to the type of business or jurisdiction can help identify these instances. Other good sources of relevant rules are enforcement agencies. The Federal Trade Commission provides a list of antitrust statutes on its website.[11] Similarly, the U.S. Department of Justice Antitrust Division publishes guidance and policy statements under the public documents section of its website, including the recently updated

merger guidelines.[12] Both agencies also maintain case portals that provide access to decisions and filings.[13]

"Trade Regulation Reporter" published by Wolters Kluwer is the longest running and most comprehensive topical reporter for antitrust, providing a looseleaf service for current developments and preserving significant decisions in bound volumes. Also available via the VitalLaw database, those without access to a current subscription can consult copies frequently held by academic law libraries. The University of Michigan Law Library's print collection of the title ceased in 2013, but its coverage of reported cases extends back to 1932.[14]

STAYING CURRENT

There is no shortage of reporting on antitrust developments — nearly every major legal information platform offers current awareness tools for antitrust developments. However, most of these are behind a paywall of some sort. Legal blogs do not have this restriction.

The Antitrust Law Blog offers antitrust news and commentary from attorneys at Sheppard Mullin.[15] Wolters Kluwer also sponsors a free page, AntitrustConnect.[16] For a more academic perspective, Antitrust and Competition Policy Law Blog is a good option.[17]

An underutilized source of good antitrust information is the National Bureau of Economic Research. The NBER collection of antitrust materials is freely browsable and searchable online and offers industry-specific data and analysis.[18] All users are entitled to three downloads of working papers annually, and free and low-cost subscription options are frequently available.

FURTHER RESOURCES

- Von Kalinowski et al, "Antitrust Laws and Trade Regulations" (2nd ed.) (Matthew Bender 2023, also available on Lexis+).
- Holmes, "Antitrust Law Handbook" (Thomson Reuters 2023, also available on Westlaw).
- ABA Antitrust Law Section, "Antitrust Law Journal" at www.americanbar.org/groups/antitrust_law/resources/journal/.
- SAGE Publications, "Antitrust Bulletin" at https://journals.sagepub.com/home/abx.
- New York Times, Antitrust Laws and Competition Issues, www.nytimes.com/topic/subject/antitrust-laws-and-competition-issues.

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

ENDNOTES

1. *That's the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment: Hearing Before the Committee on the Judiciary United States Senate,* 118th Cong (Jan 24rd, 2023); See CSPAN, Hearing on Ticketmaster Sale for Taylor Swift Concert <https://www.c-span.org/video/?525428-1/hearing-ticketmaster-sale-taylor-swift-concert> (All websites accessed March 14, 2024).
2. United States Dep't Commerce and Labor, *Report of the Commissioner of Corporations on the Petroleum Industry Part 1: Position of the Standard Oil Company in the Petroleum Industry,* (Washington Gov't Printing Office 1907), p xvii; Orbach, *The Antitrust Curse of Bigness,* 85 Southern Cal L Rev 605, 610 (2012).
3. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice 7th* § 2.1 (6th ed) pp. 69-82.
4. Elhauge, *Introduction and overview to current issues in antitrust economics,* Research Handbook on the Economics of Antitrust Law (Northampton, Elgar 2012), p 1; See generally *Antitrust Economics for Lawyers* (Lexis, 2023 ed).
5. See *Michigan Civil Jurisprudence,* General Index COMBINATIONS AND MONOPOLIES (Thomson Reuters Nov 2022). Also available on Westlaw Precision. See also 33 Michigan Law & Practice 2d, Unfair Competition, Consumer Protection § § 41-45 (Sept 2023), also available on Lexis+.
6. ABA Antitrust Law Section, 1 *Antitrust Law Developments* (9th ed 2022), p. iii.
7. ABA Antitrust Law Section, *State antitrust practice and statutes* (5th ed 2014).
8. 15 USC 1-7.
9. 15 USC 12-27.
10. 15 USC 41-58.
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PRACTICING WELLNESS

Embrace hypocrisy: Leveraging cognitive dissonance as a mechanism for change

BY THOMAS GRDEN

The word "hypocrite" is wonderfully complex. Rarely spoken calmly or quietly, many of us are filled with a sense of triumphant moral superiority when we have occasion to use it and experience a unique discomfort whenever we happen to be the target of the term. Even when the transgression itself is relatively benign, an accusation of hypocrisy often remains shaded by malice. With the understanding that holding ideals and failing to live up to them is universal to the human condition, why is it that a word used to describe incongruence between thoughts and actions inspires such intense emotional reactions?

Today's news media may not know the answer, but they certainly leverage it to drive online traffic in their direction to great effect. Search for the word "hypocrite" on any news site across the political spectrum and without fail you'll find an article from the past month with it in the headline. The reaction they're hoping for is as follows: you see the word, feel the suspense, click the article (maybe even read it), feel the satisfaction, *and you keep coming back for more.* Eventually, you associate that satisfaction with the emotional language, regardless of the content. Dog, meet Pavlov.[1]

These complex feelings, particularly surrounding the subject of hypocrisy, are the result of a phenomenon known as cognitive dissonance.[2] As human beings, we expect alignment between the principles we value and the actions we take. When they aren't, we become increasingly uncomfortable until we change either the principle or the behavior. This is why accusations of hypocrisy are so powerful — regardless of whether or not they are true, they imply that something is out of alignment. It's often easier to forgo even entertaining the idea than to seriously question whether our thoughts and actions match because we understand subconsciously that if they aren't, it's going to require change — and change is hard.[3] But because I know that the Venn diagram of "Lawyers who read Practicing Wellness" and "Lawyers open to change" is nearly a perfect circle, the idea that we can wield cognitive dissonance as a weapon for personal growth is worth exploring.

To do so fairly requires a crash course on the relationship between thoughts, feelings, and actions. While psychiatrist Aaron Beck receives credit for bringing this concept to the field of modern psychology,[4] the general principles have been recognized for nearly two millennia by distinct cultural philosophies such as Greek stoicism,[5] Islamic psychology,[6] and Buddhism.[7] For our purposes, we'll stick with Beck's framework in which thoughts are influenced by our beliefs about ourselves, others, and the future. Feelings are shaped by thoughts. Behaviors are informed by feelings and also reinforce thoughts (creating a neat little feedback loop) based on external reactions to the behavior. Sometimes the progression from thought to feeling to action happens so fast they're indistinguishable from one another. It's important to know when you can prevent the train from leaving the station, and when it risks becoming a runaway.

We have direct, conscious control over two of these areas: thoughts and behaviors. Feelings are trickier, which is a good thing — if we could all will ourselves to be happy and healthy forever, I'd be out of a job. Conveniently, cognitive dissonance addresses only our thoughts and actions. Theoretically, there are two ways to go about this: developing a new behavior that feels insincere in order to combat problematic thinking or updating your belief system in order to create new, healthier behaviors.

"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

As a hypothetical example, let's say fictional litigator Jennifer Walters develops a skin condition that affects her self-esteem to the point where she begins to feel shame about being seen and scales back public appearances. Working with her therapist, she develops a plan to engage in shame-attacking exercises in public in order to challenge the belief that being judged by others is intolerable for her. This creates cognitive dissonance, as her actions imply that the opinions of others are irrelevant to her.

We might also look at the hypothetical case of fictional district attorney Harvey Dent, who presents to his therapist with what he describes as "breathtaking anger management issues." After convincing Harvey that anger itself is just a feeling and the behavioral outbursts are the real problem, the therapist suggests that Harvey incorporate a short meditation into his daily routine during which he repeats to himself internally, "I am a peaceful, nonviolent man." Logically, Harvey knows he's lying to himself. He then thinks about a close friend who possesses a diplomatic nature that he admires (he also happens to be a genius billionaire playboy philanthropist) and decides to try to emulate his friend's behavior. Internally, he knows his behavior is totally insincere but, over time, this personal belief that, "I have a violent temper and am just faking good" continues to clash with his behavior, which incidentally has created opportunities for him to receive positive reinforcement.

One final (important) note: Your mind is capable of incredible gymnastics when it comes to maintaining stasis. When a conscious behavior change is made to help modify problematic thinking, it's an example of cognitive dissonance used right. Too often though, our instinct is to try to have our cake and eat it by using tricks like justification, denial, and ignoring reality. When a person convicted of a crime makes a statement along the lines of, "The victim was asking for it," it's really an attempt to alleviate their own cognitive dissonance by justifying their objectively poor behavior to fit with their positive image of themselves. Be wary of falling into that trap. A properly licensed and credentialed therapist can help immensely in identifying problematic thought patterns and harmful behaviors and play a key role in developing a plan to eliminate threats to mental health. The SBM Lawyers and Judges Assistance Program can help you find such a person in addition to offering other resources for attorneys interested in improving their overall well-being.

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

ENDNOTES

1. Pavlov, *Classical Conditioning* (1901).
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3. Grden, *The case for discomfort – why we struggle to change,* 101 Mich B J 08, 42 (September 2022).
4. Trull, *Clinical Psychology* (Wadsworth/Thomson Learning, 2007).
5. Donald Robertson, *The Philosophy of Cognitive-Behavioural Therapy: Stoicism as Rational and Cognitive Psychotherapy* (Routledge, 2010).
6. Haque, *Psychology from Islamic Perspective: Contributions of Early Muslim Scholars and Challenges to Contemporary Muslim Psychologists,* 43 J of Religion and Health 4, 357-377 (Winter, 2004).
7. Gilbert, *The Compassionate Mind: A New Approach to Life's Challenges* (New Harbinger Publications, 2009).

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PUBLIC POLICY REPORT

AT THE CAPITOL

Executive Budget for the Michigan Indigent Defense Commission for the 2024-2025 Fiscal Year

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

Executive Budget for the Department of the Judiciary for the 2024-2025 Fiscal Year

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

IN THE HALL OF JUSTICE

Proposed Amendments of Rules 2.508 and 4.002 of the Michigan Court Rules (ADM File No. 2022-42) – Jury Trial of Right; Transfer of Actions from District Court to Circuit Court (See *Michigan Bar Journal* February 2024, p 56).

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

POSITION: Support.

Proposed Amendment of Canon 7 of the Michigan Code of Judicial Conduct (ADM File No. 2022-54) – A Judge or a Candidate for Judicial Office Should Refrain from Political Activity Inappropriate to Judicial Office (See *Michigan Bar Journal* February 2024, p 57).

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

POSITION: Support

ORDERS OF DISCIPLINE & DISABILITY

SUSPENSION AND RESTITUTION WITH CONDITIONS

Daniel J. Andoni, P67098, Flint, by the Attorney Discipline Board Genesee County Hearing Panel #2. Suspension, 179 days, effective Feb. 23, 2024.

Based on the respondent's default and evidence presented to the hearing panel at hearings held in this matter in accordance with MCR 9.115, the hearing panel found that the respondent committed professional misconduct during his representation of two separate clients in their child support and visitation matters and another client in a family court matter and when he failed to timely answer two requests for investigation as set forth in a four-count formal complaint filed by the grievance administrator.

The panel found that the respondent neglected a legal matter entrusted to the lawyer in violation of MRPC 1.1(c) (counts 1-2); failed to act with reasonable diligence and promptness in representing a client in violation of MRPC 1.3 (counts 1-2); 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(a) (counts 1-3); charged an excessive fee in violation of MRPC 1.5 [counts 1-2]; failed to take reasonable steps to protect a client's interests upon termination of representation such as giving reasonable notice to the client, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned in violation of MRPC 1.16(d) (counts 1-3); engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b) (count 2); engaged in conduct prejudicial to the proper administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1) (counts 1-4); 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 1-4); engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3) (counts 1-4); and failed to knowingly answer a request for investigation or demand for information in conformity with MCR 9.113(A)(B)(2) in violation of MCR 9.104(7) and MRPC 8.1(a)(2) (count 4).

The panel ordered that the respondent's license to practice law be suspended for a period of 179 days, that he pay restitution in the total amount of $3,500, and that he be subject to conditions relevant to the established misconduct. Costs were assessed in the amount of $1,845.47

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

Jason Robert Baker, P72645, Grand Rapids, by the Attorney Discipline Board Kent County Hearing Panel #2. Interim suspension, effective Feb. 6, 2024.

The respondent failed to appear for a Jan. 23, 2024, 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 Feb. 6, 2024, and until further order of the panel or the board.

SUSPENSION WITH CONDITIONS (BY CONSENT)

W. Dane Carey, P79898, Grayling, by the Attorney Discipline Board Grand Traverse County Hearing Panel #1. Suspension, 179 days, effective Jan. 31, 2024.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Discipline pursuant to MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contained the respondent's admissions that he pled guilty to two felonies, Possession of a Controlled Substance, in violation of MCL 333.7403(2)(b)(i), and Using a Computer

to Commit a Crime, in violation of MCL 750.145(D)(2)(d); that his conduct violated a criminal law of a state or of the United States, an ordinance, or tribal law, and constituted professional misconduct; and to all of the factual and misconduct allegations set forth in the formal complaint.

Based on the respondent's admissions and the stipulation of the parties, the panel found that the respondent engaged in conduct that violated a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615 in violation of MCR 9.104(5); engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b); engaged in conduct that is prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); and engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent's license to practice law in Michigan be suspended for 179 days effective immediately upon entry as agreed to by the parties and accepted by the panel. The panel also ordered that the respondent be subject to conditions relevant to the established misconduct. Total costs were assessed in the amount of $837.82.

REPRIMAND (BY CONSENT)

Lucas X. Dillon, P75866, East Lansing, by the Attorney Discipline Board Ingham County Hearing Panel #1.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Reprimand 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 Sept. 16, 2022, by guilty plea of operating a motor vehicle while visibly impaired in violation of MCL 257.625(3), a misdemeanor, in a matter titled People v. Lucas Dillon, 65A District Court, Case No. 220977-OD, as set forth in a notice of filing of judgment of conviction by the grievance administrator.

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. Costs were assessed in the amount of $759.97.

REPRIMAND (BY CONSENT)

Joseph J. Farah, P30439, Grand Blanc, by the Attorney Discipline Board Livingston County Hearing Panel #1. Reprimand, effective Feb. 22, 2024.

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 to the factual allegations and no-contest plea to the allegations of professional misconduct set forth in the formal complaint in its entirety.

Based upon the respondent's admission and no-contest plea as set forth in the parties' stipulation, the panel found that the respondent committed professional misconduct during his tenure as a judge when he made comments of a sexual nature and sent inappropriate text messages to a third-year law student who was working for respondent as an intern at the Genesee County Circuit Court.

Based upon the respondent's admissions, no-contest plea, and the stipulation of the parties, the panel found that the respondent failed to treat with courtesy and respect all persons involved in the legal process in violation of MRPC 6.5; engaged in conduct prejudicial to the proper administration of justice in violation of MCR 9.104(1); engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3); and engaged in conduct that violated the rules of professional conduct in violation of MCR 9.104(4).

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

REPRIMAND AND RESTITUTION (BY CONSENT)

Richard G. Kessler, P34755, Grand Rapids, by the Attorney Discipline Board Kent

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

County Hearing Panel #1. Reprimand, effective Feb. 15, 2024.

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 parties' agreement to dismiss paragraphs 27(a) and (d)-(h) and 55(a) and (d)-(h) of the formal complaint. The stipulation also contained the respondent's no-contest plea to the factual allegations and grounds for discipline set forth in the remaining paragraphs of the formal complaint, namely that the respondent committed professional misconduct during his representation of two clients in immigration matters.

Based upon the respondent's no-contest plea and the stipulation of the parties, the panel found that the respondent failed to act with reasonable diligence and promptness in representing a client in violation of MRPC 1.3 and failed to adequately keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information in violation of MRPC 1.4(a).

In accordance with the stipulation of the parties, the panel ordered that the respondent be reprimanded and pay restitution totaling $15,130. Costs were assessed in the amount of $759.97.

DISBARMENT

Michael G. Mack, P31173, Alpena, by the Attorney Discipline Board Emmet County Hearing Panel #3. Disbarment, effective Feb. 15, 2024.[1]

After proceedings conducted pursuant to MCR 9.115, including show cause proceedings based upon the respondent's failure to comply with the panel's earlier Order of Reprimand with Conditions (By Consent) issued in *Grievance Administrator v. Michael G. Mack,* 2260JC, 2261GA, the panel found by default that the respondent failed to follow the requirements of the panel's previous order; committed professional misconduct while serving as the assigned judge in a case titled *State of Michigan v. Kala McDonald,* 26th Circuit Court Case No. 2017-8132-FH; sent numerous explicit sexual text messages to a client requesting suggestive photos and sexual favors and encouraging the on-probation client to drink alcohol; practiced while his license was suspended; and failed to respond to a grievance administrator's request for investigation.

Based on the respondent's default and the evidence presented by the grievance administrator, the panel found that the respondent failed to uphold the integrity and independence of the judiciary in violation of Michigan Code of Judicial Conduct (MCJC) Canon 1 [count 1]; failed to avoid all impropriety and the appearance of impropriety in violation of MCJC Canon 2(A) [count 1]; failed to observe and respect the law in violation of MCJC Canon 2(B) [count 1]; allowed social or other relationships to influence his judicial conduct or judgment in violation of MCJC Canon 2(C) [count 1]; failed to remain faithful to the law and maintain professional competence in the law in violation of MCJC Canon 3(A)(1) [count 1]; failed to be patient, dignified, and courteous to litigants and others with whom he dealt in an official capacity in violation of MCJC Canon 3(A)(3) [count 1]; initiated, permitted, or considered ex parte communications or considered other communications made to him outside the presence of the parties concerning a pending or impending proceeding in violation of MCJC Canon 3(A)(4) [count 1]; made pledges, promises, or commitments that were inconsistent with the impartial performance of the adjudicative duties of judicial office in connection with cases, controversies, or issues that were likely to come before the court in violation of Canon 3(A)(7); failed to raise the issue of disqualification whenever he had grounds to believe that grounds for disqualification may exist under MCR 2.003(C) in violation of MCJC Canon 3(C) [count 1]; failed to provide competent representation to a client in violation of MRPC 1.1 [count 2]; failed to seek the lawful objectives of a client through reasonably available means in violation of MRPC 1.2(a) [count 2]; counseled a client to engage or assist a client in conduct that the lawyer knows is illegal or fraudulent in violation of MRPC 1.2(c) [count 2]; represented a client when the representation of that client

may be materially limited by the lawyer's own interests contrary to MRPC 1.7(b) [count 2]; practiced law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction in violation of MRPC 5.5 [count 2]; failed to treat with courtesy and respect all persons involved in the legal process in violation of MRPC 6.5(a) [count 2]; failed to treat every person fairly with courtesy and respect in violation of MRPC 6.5(b) [count 1]; knowingly failed to respond to lawful demands for information from an admissions or disciplinary authority in violation of MRPC 8.1(a) [count 4]; engaged in conduct that violates a criminal law of a state, an ordinance, or tribal law pursuant to MCR 2.615 in violation of MRPC 8.4(b) [counts 1 and 3]; and engaged in conduct prejudicial to the proper administration of justice in violation of MRPC 8.4(c) and 9.104(1) [counts 1-4].

The panel also found that the respondent committed the following violations of the Michigan Court Rules: 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 1-4]; engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3) [counts 1-4]; engaged in conduct that violates the standards or rules of professional conduct adopted by the Supreme Court in violation of MCR 9.104(4) [counts 1-4]; engaged in conduct that violates a criminal law of the state, an ordinance, or tribal law in violation of MCR 9.104(5) [count 3]; failed to answer a grievance administrator's request for investigation in violation of MCR 9.104(7) [count 4]; 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 3]; practiced law, had client contact, appeared as an attorney in court, and/or held himself out as an attorney while suspended in violation of MCR 9.119(E) [count 3]; engaged in persistent incompetence in the performance of his judicial duties in violation of MCR 9.202(B)(1)(a) [count 1]; treated a person unfairly or discourteously because of the person's race, gender, or other protected personal characteristic in violation of MCR 9.202(B)(1)(d) [count 1]; misused his judicial office for personal advantage or gain or for the advantage or gain of another in violation of 9.202(B)(1)(e) [count 1]; and engaged in conduct that violates the Code of Judicial Conduct or the Rules of Professional Conduct whether the conduct occurred before or after he became a judge or was related to judicial office in violation of MCR 9.202(B)(2).

The panel ordered that the respondent be disbarred. Costs were assessed in the amount of $2,283.20.

1. The respondent's license to practice law in Michigan has been continuously suspended since April 20, 2023. Please see Notice of Automatic Suspension for Non-Payment of Costs, issued April 24, 2023, in *Grievance Administrator v Michael G. Mack*, 22-60-JC; 22-61-GA.

DISBARMENT (BY CONSENT)

Samir W. Mashni, P32552, Redford, by the Attorney Discipline Board Tri-County Hearing Panel #15. Disbarment, effective Feb. 16, 2024.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Discipline pursuant to MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contained the respondent's acknowledgment that he was convicted by guilty plea on Jan. 18, 2023, of the felony offense of Conspiracy to Commit Honest Services Mail Fraud in violation of 18 U.S.C. §§ 371, 1341, and 1346 and that his conviction constituted professional misconduct.

Based on the stipulation of the parties, 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), and engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b).

In accordance with the stipulation of the parties, the panel ordered that the respondent be disbarred from the practice of law in Michigan. Total costs were assessed in the amount of $774.47.

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

DISBARMENT AND RESTITUTION

Donald J. Neville, P60213, Taylor, by the Attorney Discipline Board Tri-County Hearing Panel #9. Disbarment, effective March 1, 2024.[1]

After proceedings conducted pursuant to MCR 9.115, the panel found by default that the respondent committed professional misconduct during his representation of two separate, unrelated clients, one in a child custody matter and the other in several pending legal matters, and by failing to answer a request for investigation as alleged in a three-count formal complaint.

Based on the respondent's default and the evidence presented by the grievance administrator, the panel found that with regard to count 1, the respondent neglected a legal matter entrusted to him in violation of MRPC 1.1(c); engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of MRPC 8.4(b); engaged in conduct prejudicial to the proper administration of justice in violation of MCR 9.104(1) and MRPC 8.4(c); engaged in conduct that exposes the legal profession to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3); failed to knowingly answer a demand for information in conformity with MCR 9.113(A)(B)(2) in violation of MCR 9.104(7) and MRPC 8.1(A)(2); and engaged in conduct that violates the Michigan Rules of Professional Conduct in violation of MCR 9.104(4) and MRPC 8.4(a).

With regard to count 2, the panel found that the respondent neglected a legal matter entrusted to him in violation of MRPC 1.1(c); failed to seek the lawful objective of a client through reasonably available means in violation of MRPC 1.2(a); failed to act with reasonable diligence and promptness in representing a client in violation of MRPC 1.3; failed to keep his client reasonably informed about the status of a matter and comply with reasonable requests for information in violation of MRPC 1.4(a); upon termination, failed to return an unearned fee in violation MRPC 1.16(d); failed to make reasonable efforts to expedite litigation consistent with the interests of his client in violation of MRPC 3.2; engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of MRPC 8.4(b); engaged in conduct prejudicial to the proper administration of justice in violation of MCR 9.104(1) and MRPC 8.4(c); engaged in conduct that exposes the legal profession to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3); and engaged in conduct that violates the Michigan Rules of Professional Conduct in violation of MCR 9.104(4) and MRPC 8.4(a).

With regard to count 3, the panel found that the respondent knowingly failed to respond to a lawful demand for information from a disciplinary authority in violation of MRPC 8.1(a)(2); failed to answer a request for investigation in conformity with MCR 9.113(A) and MCR 9.113(B)(2) in violation of MCR 9.104(7); engaged in conduct that violates the Michigan Rules of Professional Conduct in violation of MCR 9.104(4) and MRPC 8.4(a); engaged in conduct prejudicial to the proper administration of justice in violation of MCR 9.104(1) and MRPC 8.4(c); engaged in conduct that exposes the legal profession to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); and engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3).

The panel ordered that the respondent be disbarred and pay restitution in the total amount of $3,760. Costs were assessed in the amount of $1,706.50.

1. The respondent has been continuously suspended from the practice of law in Michigan since July 7, 2023. See, Notice of Suspension with Conditions and Restitution, issued July 10, 2023, in *Grievance Administrator v Donald J. Neville*, 23-22-JC; 23-23-GA.

REPRIMAND (BY CONSENT)

Aubrey H. Tobin, P31256, West Bloomfield, by the Attorney Discipline Board Tri-County Hearing Panel #51. Reprimand, effective Feb. 16, 2024.

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 parties' agreement to dismiss the factual statements set forth in paragraphs 13, 18, and 20 and the allegations of professional misconduct contained in subparagraphs 25(a), (c)(e), (h) and (i) of the formal complaint and to amend para-

graphs 19, 22, and 23 of the formal complaint as provided in the stipulation. The stipulation also contained the respondent's no contest plea to the factual allegations and grounds for discipline set forth in the remaining paragraphs of the formal complaint, namely that the respondent committed professional misconduct during his representation of two clients in a landlord/tenant dispute. Specifically, the respondent failed to notify opposing counsel and the court that the rental payments his clients were supposed to be depositing into an escrow account maintained by the respondent were not current.

Based upon the respondent's no contest plea and the stipulation of the parties, the panel found that the respondent failed to act with fairness to opposing party and counsel in violation of MRPC 3.4; engaged in conduct that is prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1); and engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2).

In accordance with the stipulation of the parties, the panel ordered that the respondent be reprimanded. Costs were assessed in the amount of $812.54.

SUSPENSION AND RESTITUTION

Thomas J. Wilson, P33071, Lexington, by the Attorney Discipline Board Genesee County Hearing Panel #3. Suspension, 180 Days, effective March 5, 2024.

After proceedings conducted pursuant to MCR 9.115, the panel found by default that the respondent committed professional misconduct during his representation of two clients and when he failed to answer a request for investigation filed by one of the clients as set forth in a two-count formal complaint filed by the grievance administrator.

Based on the respondent's default, the hearing panel found that the respondent neglected a legal matter 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 his client reasonably informed about the status of a matter and comply promptly with reasonable requests for information in violation of 1.4(a) [count 1]; failed to explain a matter to the extent reasonably necessary to permit the client to make an informed decision regarding the representation in violation of MRPC 1.4(b) [count 1]; failed to take reasonable steps to protect the client's interests upon termination of representation in violation of MRPC 1.16(d) [count 1]; failed to expedite litigation in violation of MRPC 3.2 [count 1]; 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 violates the Rules of Professional Conduct in violation of MRPC 8.4(a) and MCR 9.104(4) [counts 1-2]; engaged in conduct that is prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1) [counts 1-2]; 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 that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3) [counts 1-2]; and failed to answer a request for investigation in violation of MCR 9.104(7), MCR 9.113(A) and MCR 9.113(B)(2) [count 2].

The panel ordered that the respondent's license to practice law in Michigan be suspended for 180 days, effective March 5, 2024, and that he pay restitution totaling $1,270. Costs were assessed in the amount of $1,730.27.

SUSPENSION

David L. Wisz, P55981, Birmingham, by the Attorney Discipline Board Tri-County Hearing Panel #54. Suspension, 18 months, effective March 9, 2024.[1]

The grievance administrator filed a formal complaint alleging that the respondent engaged in professional misconduct when he applied for a position as a patent attorney even though his license to practice law was suspended from a prior unrelated disciplinary matter, knowingly and intentionally submitted an outdated resume that contained false information in order to deceive his prospective employer, and made a false statement about his employment history in his affidavit of personal history attached to his petition for reinstatement filed on May 28, 2022.

The panel found that the respondent made a false statement of material fact regarding his employment history on his affidavit of

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

personal history in violation of MRPC 8.1(a)(1) and MCR 9.104(6); submitted false information in his affidavit of personal history and that this submission was dishonest, deceitful, and a misrepresentation reflecting adversely on his honesty, trustworthiness, and fitness as a lawyer in violation of MRPC 8.4(b); held himself out as an attorney while his license to practice law was suspended in violation of MCR 9.119(E)(4); and violated an order of discipline by submitting a resume that listed the respondent's Michigan bar license while his license was suspended in violation of MCR 9.104(9). The panel also found that the respondent's conduct violated MCR 9.104(1)-(3) and MRPC 8.4(c).

The panel ordered that the respondent's license to practice law in Michigan be suspended for 18 months, effective March 9, 2024. Costs were assessed in the amount of $2,208.

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

SUSPENSION AND RESTITUTION (BY CONSENT)

Carl M. Woodard, P37502, Dansville, by the Attorney Discipline Board Ingham County Hearing Panel #6. Suspension, one year, effective Feb. 10, 2024.[1]

The respondent and the grievance administrator filed an Amended 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. Based upon the respondent's admissions to all of the allegations set forth in the formal complaint, the panel found that he committed professional misconduct during his representation of two clients in a civil matter. Specifically, the respondent failed to comply with discovery, resulting in the dismissal of his clients' case. Thereafter, the respondent misrepresented to his clients that the defendant wished to settle and that he had submitted a proposal to the defendant's insurance company. The respondent also failed to advise his clients that he had a pending disciplinary case and had agreed to accept a 180-day suspension of his license to practice law in Michigan, effective May 4, 2021. The panel also found that the respondent failed to answer a request for investigation served on him by the grievance administrator.

Based upon the respondent's admissions as set forth in the parties' stipulation, the hearing panel found that the respondent neglected a legal matter entrusted to him 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 violation of MRPC 1.3 [count 1]; failed to keep a client reasonably informed about the status of a matter in violation of MRPC 1.4(a) [count 1]; 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) [count 1]; failed to take reasonable steps to protect a client's interests upon termination of representation, such as failing to surrender papers and property to which the client is entitled and failing to refund any advance payment of fee that has not been earned, in violation of MRPC 1.16(d) [count 1]; 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 involving dishonesty, fraud, deceit, or misrepresentation where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness in violation of MCR 8.4(b) [count 1]; engaged in conduct that is prejudicial to the administrator of justice in violation of MCR 9.104(1) and MRPC 8.4(c) [count 2]; 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 that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3) [counts 1-2]; engaged in conduct that violates the standards or rules of professional conduct adopted by the Supreme Court in violation of MRPC 8.4(a) and MCR 9.104(4) [counts 1-2]; and failed to answer a request for investigation in violation of MCR 9.104(7), MCR 9.112(A), and MCR 9.113(B)(2) [count 2].

The panel ordered that the respondent's license to practice law be suspended for one year effective Feb. 10, 2024, and that the respondent pay restitution totaling $1,000. Costs were assessed in the amount of $769.94.

1. The respondent has been continuously suspended from the practice of law in Michigan since May 4, 2021. See Notice of Suspension & Restitution with Condition (By Consent), issued May 4, 2021, *Grievance Administrator v Carl M. Woodard*, 2074GA.

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

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