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MAY 2024

Negligence

- Establishing corporate and institutional liability with agency principles and equitable doctrines
- The attorney-client privilege and work product doctrine: How to protect yourself, your firm, and your clients
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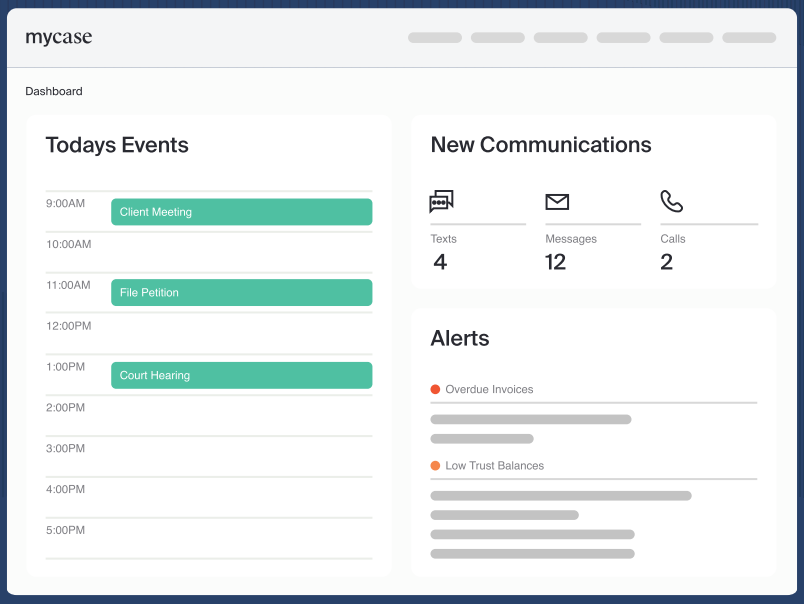

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ON THE COVER: Now in its 95th year, the Tulip Time Festival in Holland draws hundreds of thousands of visitors to the West Michigan city every May.

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MONEY JUDGMENT INTEREST RATE

MCL 600.6013 governs how to calculate the interest on a money judgment in a Michigan state court. Interest is calculated at six-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 January 1, 2024, is 4.392%. This rate includes the statutory 1%.

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

13% per year, compounded annually; or

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

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

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

DUTY TO REPORT AN ATTORNEY'S CRIMINAL CONVICTION

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

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

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

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

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

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

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

RECENTLY RELEASED

MICHIGAN LAND TITLE STANDARDS

6TH EDITION
8TH SUPPLEMENT (2021)

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

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

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BOARD OF COMMISSIONERS
2024 MEETING SCHEDULE

JUNE 14
JULY 26

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MEMBER SUSPENSION
FOR NONPAYMENT OF DUES

This list of active attorneys who are suspended for nonpayment of their State Bar of Michigan 2023-2024 dues is published on the State Bar's website at michbar.org/generalinfo/pdfs/suspension.pdf.

In accordance with Rule 4 of the Supreme Court's Rules Concerning the State Bar of Michigan, these attorneys are suspended from active membership effective Feb. 15, 2024, and are ineligible to practice law in the state.

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

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September 19

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CIRCUIT 56
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IN MEMORIAM

DAVID A. BINKLEY, P31643, of Bloomfield Hills, died Feb. 24, 2024. He was born in 1955, graduated from University of Detroit School of Law, and was admitted to the Bar in 1980.

ROBERT B. EBERSOLE, P30047, of Lisle, Illinois, died April 11, 2024. He was born in 1943, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1979.

ANTOINE F. HOULE, P36798, of Fort Gratiot, died March 22, 2024. He was born in 1959, graduated from University of Detroit School of Law, and was admitted to the Bar in 1984.

ALLEN J. LIPPITT, P44471, of West Bloomfield, died March 30, 2024. He was born in 1937, graduated from Detroit College of Law, and was admitted to the Bar in 1991.

CHARLES E. LOTZAR JR, P25842, of Bloomfield Hills, died March 31, 2024. He was born in 1930, graduated from Detroit College of Law, and was admitted to the Bar in 1965.

ALBERT D. MCCALLUM, P17268, of Springport, died April 5, 2024. He was born in 1938, graduated from University of Michigan Law School, and was admitted to the Bar in 1968.

CHRIS H. PHANEUF, P41366, of Commerce Township, died Jan. 21, 2024. He was born in 1955, graduated from Detroit College of Law, and was admitted to the Bar in 1988.

DENIS V. POTUZNIK, P19045, of Muskegon, died Feb. 5, 2024. He was born in 1942 and was admitted to the Bar in 1968.

HON. CAROL S. READER, P47976, of Howell, died Feb. 15, 2024. She was born in 1947, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1993.

RICHARD K. REIDER, P19323, of Muskegon, died March 20, 2024. He was born in 1945 and was admitted to the Bar in 1971.

GEOFFREY K. RETTIG, P42965, of Midland, died April 5, 2024. He was born in 1964, graduated from Wayne State University Law School, and was admitted to the Bar in 1989.

DEBORAH LAURA RHODES, P39227, of West Bloomfield, died March 31, 2024. She was born in 1961, graduated from Wayne State University Law School, and was admitted to the Bar in 1986.

ANDREW M. SAVEL, P19918, of Oxford, died Jan. 2, 2024. He was born in 1941 and was admitted to the Bar in 1968.

GLENDA M. SIMPKINS, P35309, of Holland, died March 13, 2024. She was born in 1939, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1983.

THOMAS C. SIMPSON, P20516, of Naples, Florida, died March 12, 2024. He was born in 1945, graduated from Detroit College of Law, and was admitted to the Bar in 1973.

PHYLLIS D. FUNK SNOW, P39191, of Grosse Pointe Woods, died March 19, 2024. She was born in 1940, graduated from Detroit College of Law, and was admitted to the Bar in 1986.

HAROLD STERN, P20989, of Huntington Woods, died March 30, 2024. He was born in 1936, graduated from Detroit College of Law, and was admitted to the Bar in 1965.

MARK R. ULICNY, P21668, of Grosse Pointe Woods, died Dec. 27, 2023. He was born in 1941, graduated from Wayne State University Law School, and was admitted to the Bar in 1971.

CHARLES S. WAGGONER II, P21887, of Lake Forest, Illinois, died March 27, 2024. He was born in 1930, graduated from University of Michigan Law School, and was admitted to the Bar in 1958.

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.

NEWS & MOVES

ARRIVALS AND PROMOTIONS

MICHAEL D. CALVERT and **RACHEL L. COMBS** have joined Collins Einhorn Farrell.

KAITLYN ELIAS and **ALEANNA B. SIACON** have joined the Troy office of Dickinson Wright as associates.

BILL GILBRIDE, **TIM KRAMER**, **DAN KIELCZEWSKI**, and **TOM QUILTER** have joined Miller Johnson's Detroit office.

NICHOLAS H. KLAUS has joined the Levitt Law Firm in Mount Pleasant.

MICHAEL E. "MIKE" WOOLEY has joined Varnum as a partner.

AWARDS AND HONORS

LAURA M. DINON with Plunkett Cooney was recognized on the 2024 list of Michigan's Go-To Lawyers for employment law by Michigan Lawyers Weekly.

SARAH HARPER with Warner Norcross & Judd was recognized as Young Dealmaker of the Year by Crain's Grand Rapids Business.

THOMAS S. VAUGHN with Dykema has been awarded the Association for Corporate Growth of Detroit Lifetime Achievement Award.

NEW OFFICE

STEVEN SUSSER and **JESSICA FLEETHAM** have opened a new practice, Evia Law, focused on intellectual property and commercial contract litigation.

OTHER

BODMAN has released its 2023 diversity, equity, and inclusion report.

FISHMAN STEWART awarded a $1,000 scholarship to Margaret J. Van Antwerp, a civil and environmental engineering student at Calvin University, for winning the Engineering Society of Detroit's annual Engineering Student Writing Contest.

MICHIGAN STATE UNIVERSITY is offering a graduate certificate in Neuroscience and the Law.

PRESENTATIONS, PUBLICATIONS AND EVENTS

The **INGHAM COUNTY BAR ASSOCIATION** hosts its annual meeting and shrimp dinner on Wednesday, May 15.

MDTC hosts its annual meeting and conference on Friday-Saturday, June 14-15.

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

FROM THE PRESIDENT

DANIEL D. QUICK

Defending democracy

Our country, and our Bar, are built upon inclusion of a plurality of viewpoints. But sometimes something insidious sneaks in, masquerading as a viewpoint and taking advantage of our freedoms. It thrives on lethargy, distraction, and the exhausting white noise our guarantee to freedom of speech sometimes generates. But it is there nonetheless, and when not called out for what it is and worked against actively, it grows and poisons all it touches.

Each lawyer takes an oath, the first clause of which is to swear to "support the Constitution of the United States and the Constitution of the State of Michigan."[1] The preamble to the Model Rules of Professional Responsibility makes the extent of this obligation crystal clear:

> "As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. […] In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."

Supporting our Constitution and strengthening the pillars of our constitutional democracy are heavy matters. Many balk in the face of such lofty notions; it's easy to just treat them as "politics" and focus on other things. During the past few months, I have participated in some events which have inspired and awed me and reminded me that good people rise in incredible ways to do good. And so can you.

On March 15, Detroit hosted a unique event at Wayne State University Law School — "Taking the Next Step: Ensuring Trusted Elections and Civics for Michiganders."[2] More than 200 community leaders — lawyers, teachers, county clerks and public officials, faith leaders, and journalists — registered to both learn and be heard. The event was led by the American Bar Association Task Force for American Democracy[3] to:

- bolster voter confidence in elections by safeguarding the integrity and non-partisan administration of elections and providing support for election workers and officials;
- educate Americans on democracy and the rule of law and why they are foundational to every aspect of American lives; and
- share ideas with the American people for improving and strengthening our democracy and our elections.

Critically, the task force is both bipartisan and non-partisan, chaired by former Secretary for Homeland Security Jeh Charles Johnson, former federal judge J. Michael Luttig, and former ABA president William Ide. In addition to the ABA chairs, Secretary of State Jocelyn Benson spoke on the extraordinary reliability and security surrounding the election process and the challenges of combatting disinformation. National leaders in election integrity, several county clerks, and the former head of Michigan's elections all addressed how safe our elections are, how they continue to strive for improvement, and how local leaders can reinforce fellow Michiganders' faith in the system.

Hand in hand with election integrity is civics education and professionalism; only if our citizens know basic civics can they be best equipped to defend our democratic government.

- In a recent Pew study, 51% of Americans said they are dissatisfied with how democracy is working and 46% said they are open to other forms of government, including rule by a strongman.[4]

- Less than one third of millennials consider it essential to live in a democracy.[5]

- According to a 2022 study from the University of Pennsylvania Annenberg Public Policy Center, less than 25% of U.S. adults can even name one of the three branches of government and more than 20% can't name any government branch.[6]

How to reverse this trend? From Rev. Wendell Anthony to business leader Gary Torgow, attendees heard how all need to unite — from the pulpit to the boardroom — to defeat the forces that might threaten our cherished, yet ever fragile, form of government. As John Adams said, "Liberty cannot be preserved without a general knowledge among the people, who have a right … and a desire to know."[7]

Then the real magic happened. Community leaders gathered in small breakout groups to share thoughts, connect, and report to the group at large on ways to move forward. Overwhelming themes included the need to meet people where they are, engaging on multiple fronts, stressing the importance of civic education and transparency of the process, and focusing on ways to encourage citizens to participate.

Hosting this event with my partner, Dennis Archer, I was humbled by the energy and passion of our citizens — from both political parties, from every walk of life — to rebuild respect for our democracy, brick by brick, through civics education and engagement. I learned about groups like Keep Our Republic and the Levin Center for Legislative Oversight and Democracy that actively engage with everyone from elementary students on up about our invaluable, fragile democracy.

A week later, I was in Lansing for a reception as part of the Michigan Center for Civic Education[8] high school mock trial finals. I am a big fan of mock trials, having started an elementary mock trial program with the Oakland County Bar Association that has now sponsored nearly 4,000 students.[9] At the reception, the sponsors of this charitable organization spoke with the same passion I witnessed the week before about the need for civics education and the tremendous impact — one student or adult at a time — that these programs yield. The goal is not uniformity of thought or opinion but finding ways through civil discourse to bridge gaps and not let partisanship damage critical institutions.

When I spoke in October at the National Trial Advocacy Competition, an event sponsored by the SBM Young Lawyers Section that attracted law students from across the country, I saw it again: the selfless giving of time and energy by lawyers not just to make better communities, a better legal system, and a better America for each of us, but because giving this way is so personally rewarding. Though he never said it,[10] a quote widely attributed to Winston Churchill still rings true: "We make a living by what we get. We make a life by what we give."

In the end, I don't think I need to work very hard to convince you of the need for each of us to help by contributing to the strengthening of our democracy and our civic culture. It's the doing that is daunting. But this is where ghosts get in the way; thoughts of "How can I find the time?" or "I don't want to get involved in politics" or any number of other self-justifications paralyze us. Take heart. If you just start doing even a little, you will see how big of an impact it can make. And you will be energized beyond your hopes by those working beside you and those with whom you engage.

An easy way to start? Your very own Bar.

ENDNOTES

1. State Bar of Michigan, *Lawyer's Oath* <https://www.michbar.org/generalinfo/lawyersoath> (all websites accessed April 16, 2024).
2. Visit <https://www.americanbar.org/groups/leadership/office_of_the_president/american-democracy/listening-tours> for video of this event.
3. American Bar Association, *Task Force for American Democracy*, <https://www.americanbar.org/groups/leadership/office_of_the_president/american-democracy/>.
4. Wike, Silver, and Castillo, *Many Across the Globe Are Dissatisfied with How Democracy Is Working* <https://www.pewresearch.org/global/2019/04/29/many-across-the-globe-are-dissatisfied-with-how-democracy-is-working/> (posted April 29, 2019).
5. Amanda Taub, *How Stable are Democracies?*, The New York Times (posted November 29, 2016) <https://www.nytimes.com/2016/11/29/world/americas/western-liberal-democracy.html>.
6. University of Pennsylvania Annenberg Public Policy Center, *Americans' Civic Knowledge Drops on First Amendment and Branches of Government,* <https://www.annenbergpublicpolicycenter.org/americans-civics-knowledge-drops-on-first-amendment-and-branches-of-government/> (September 13, 2022).
7. Oxford Reference, *Oxford Essential Quotations* (4th ed), <https://www.oxfordreference.com/display/10.1093/acref/9780191826719.001.0001/q-oro-ed4-00000046?rskey=EkCtkS&result=22>.
8. See Michigan Center for Civic Education <https://miciviced.org/>. The event was co-sponsored by the SBM Litigation Section.
9. The program is easily replicable. See *Mock Trial for Elementary School*, Oakland County Bar Association <https://www.ocba.org/?pg=elementary-mock-trial>.
10. International Churchill Society, *Quotes Falsely Attributed to Winston Churchill*, <https://winstonchurchill.org/resources/quotes/quotes-falsely-attributed/>.

Establishing corporate and institutional liability with agency principles and equitable doctrines

BY JENNIFER AND CHAD ENGELHARDT

Michigan generally respects the shield or veil of liability and asset protection afforded by incorporation. Likewise, Michigan courts usually recognize and enforce the distinction between separate corporate entities.[1] These protections may extend to a corporate entity, corporate officers, and shareholders. However, where use of the corporate form furthers an injustice, a number of legal and equitable doctrines are available which may allow the corporation, shareholder, and/or officer to be held accountable for tortious conduct. This article aims to provide an overview of these principles.

AGENCY PRINCIPLES

Whether in tort or contract actions, agency principles are available as an important legal tool to hold an entity or individual vicariously liable for the acts of another. The litmus test of whether an actual agency exists is whether the principal has a right to control the actions of the agent.[2] Importantly, the test is not dependent on whether actual control is or was exerted, but rather it is "the right to interfere that makes the difference between an independent contractor and a servant or agent."[3] As explained by the Court of Appeals, while "it is the power or ability of the principal to control the agent that justifies the imposition of vicarious liability … the control must relate to the method of the work being done."[4]

Determining whether an individual is an agent of another must be based on the particular facts of each case.[5] Where there is a factual dispute, the Michigan Supreme Court has instructed that the

determination is one for the factfinder: "[W]here there is a disputed question of agency, if there is any testimony, either direct or inferential, tending to establish it, it becomes an issue of fact."[6] A principal may be vicariously liable to a third party for harms inflicted by an agent even though the principal did not participate by act or omission in the agent's tort.[7]

Michigan law has long recognized a subset of agency relationship which is alternately called apparent agency, agency by estoppel, or ostensible agency.[8] This doctrine holds a principal liable for the acts of another (such as an independent contractor) where the principal holds out the negligent actor as acting on its behalf even if the actor does not qualify as an actual agent:

> Not only may a principal be estopped in some circumstances from disputing the scope of the authority of one who admittedly is his agent, but it is also established that, in a proper case, one person may be estopped from denying that another is his agent. Thus, an agency by estoppel is established where it is shown that the principal held the agent out as being authorized, and a third person, relying thereon, acted in good faith upon such representation.[9]

Apparent agency is often alleged in medical malpractice cases, with the seminal case being *Grewe v. Mt Clemens General Hospital*.[10] The *Grewe* Court acknowledged that in general, a hospital is not vicariously liable for the negligence of a physician who is an independent contractor and merely used the hospital facilities to render treatment to his or her own patients. However, "if the individual looked to the hospital to provide him with medical treatment and there has been a representation by the hospital that medical treatment would be afforded by physicians working therein, an agency by estoppel can be found."[11] This is because the Court found "the relationship between a physician and a hospital may well be that of an independent contractor … not subject to the direct control of the hospital. However, that is not of critical importance to the patient who is the ultimate victim of the physician's malpractice."[12]

To establish a claim of ostensible agency under *Grewe*, a plaintiff must show:

1. The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one;
2. This belief must be generated by some act or neglect of the principal sought to be charged; and
3. The third person relying on the agent's apparent authority must not be guilty of negligence.[13]

Reaffirming *Grewe* and overruling a number of conflicting Court of Appeals decisions, the Michigan Supreme Court recently held in *Markel v. William Beaumont Hospital* that "when a patient presents

from treatment at a hospital emergency room and is treated during their hospital stay by a doctor with whom they have no prior relationship, a belief that the doctor is the hospital's agent is reasonable unless the hospital does something to dispel that belief."[14] The *Markel* Court also affirmed that whom a deceased patient was looking to for treatment and the reasonableness of belief could be based on circumstantial evidence.[15]

JOINT VENTURE LIABILITY

In addition to vicarious liability under agency law, separate or distinct corporate entities may be held liable under a joint venture theory. A joint venture is ordinarily an association to carry out a single business enterprise for a profit.[16] Notably, in evaluating profit, the Court of Appeals has held that a "strictly financial profit is not always necessary" for a joint venture.[17] A joint venture can be found in noncommercial endeavors where the profit is a joint benefit or a furtherance of mission.[18] The existence of a joint venture may be implied or inferred from the conduct of the parties or from acts and circumstances that make it appear that they are participants in a joint venture.[19]

INVOKING THE COURT'S EQUITABLE POWER TO PIERCE THE CORPORATE VEIL

In addition to the legal doctrines available through agency law, equitable doctrines can be used to prevent injustice or abuse of the corporate form. As the Michigan Supreme Court explained, the corporate veil may be equitably pierced where an otherwise separate corporate existence has been used to "subvert justice or cause a result that [is] contrary to some other clearly overriding public policy."[20] "When this [corporate] fiction is invoked to subvert justice, it is ignored by the courts."[21] A breach of contract constitutes a fraud or wrong that justifies piercing the corporate veil under Michigan law.[22] Michigan courts have further explained that piercing the corporate veil to prevent injustice is an equitable remedy, but such a remedy should be used sparingly and is not a separate cause of action.[23]

While there is no bright-line rule for determining when the corporate veil should be equitably pierced, Michigan courts have developed a three-pronged test to analyze these cases:

1. The corporate entity to be pierced must have been used as a mere instrumentality of another individual or entity;
2. The corporate entity must have been used to commit a wrong or fraud;
3. The plaintiff has suffered an unjust injury or loss.[24]

The first prong regarding mere instrumentality is often the key and focuses on the extent to which a corporate entity is controlled by its owner or a separate body. As the Michigan Supreme Court held almost a century ago, "[w]here a corporation is so organized and controlled, and its affairs so conducted, as to make it a mere instrumentality or agent or adjunct of another corporation, its separate existence as a distinct corporate entity will be ignored."[25]

Michigan courts have also recognized that piercing the corporate veil may be equitable where there is a controlling parent-subsidiary relationship between corporations.[26] As with agency, this equitable principle is often founded on the right of control. In a parent-subsidiary relationship, "the parent, as owner of all or most of the subsidiary's stock, is able to exert control over the subsidiary."[27] In the context of tort liability, relevant factors in showing that a subsidiary is a mere instrumentality of its parent corporation might be that "the parent and subsidiary shared principal offices, or had interlocking boards of directors or frequent interchanges of employees, that the subsidiary is the parent's exclusive distributing arm, or the parent's revenues are entirely derived from sales by the subsidiary."[28]

Where applicable, Michigan courts may also consider the so-called *Glenn* factors in assessing whether to impose liability.[29] These factors include undercapitalization of the company, maintenance of separate books, separation of corporate and individual finances, use of the corporation to support fraud or illegality, honoring of corporate formalities, and whether the company is a mere shell.[30] Notably, a plaintiff does not need to pierce the corporate veil to hold corporate officials liable for their own tortious conduct.[31]

CONCLUSION

While not applicable in every case, where the facts and law justify these legal and equitable principles can be important tools for establishing corporate or shareholder liability. A solid understanding of these principles can assist litigators prosecuting or defending claims in litigation and help transactional lawyers advising clients in the conduct of their business operations.

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4. *Laster v Henry Ford Health Sys*, 316 Mich App 726, 734-736; 892 NW2d 442 (2016).
5. *Sliter v Cobb*, 388 Mich 202; 200 NW2d 67 (1972).
6. *St. Clair Intermediate Sch Dist v IEA/MEA*, 458 Mich 540, 556; 581 NW2d 707 (1988) (quotation marks and citation omitted).
7. *Caldwell v Cleveland-Cliffs Iron Co*, 111 Mich App 721, 731; 315 NW2d 186 (1981).
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9. *Id.* (quotation marks and citation omitted).
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20. *Wells v Firestone Tire and Rubber Co*, 421 Mich 641, 650; 364 NW2d 670 (1984).
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The attorney-client privilege and work product doctrine: How to protect yourself, your firm, and your clients

BY MARK A. GILCHRIST AND VICTORIA Y. LYNN

> *"A request for discovery that constitutes an attempt to invade the attorney-client relationship or to discover the mental impressions and strategies generally employed by opposing counsel must be rejected."*[1]

The general rule governing the scope of discovery is MCR 2.302(B)(1), which states that parties may obtain discovery regarding (i) any non-privileged matter that is (ii) relevant to any party's claims or defenses and (iii) proportional to the needs of the case. So, even assuming the relevance and proportionality requirements are satisfied, only non-privileged matters are discoverable. This article focuses on identifying and asserting the attorney-client privilege and work product doctrine to protect matters from disclosure. It also addresses strategy considerations affecting the decision to request an in-camera review or privilege log.

PURPOSES OF ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

The attorney-client privilege promotes thorough and sincere communication between attorneys and their clients by protecting it from disclosure. It encourages clients to share all necessary information with their attorneys so lawyers can provide competent advice and clients can be fully informed. The primary purpose of this privilege is ensuring that legal advice is based on precise and thorough information.[2]

Similarly, the work product doctrine is designed to preserve the sanctity of the attorney-client relationship by protecting from disclosure the attorney's impressions and thought processes.[3] It promotes the attorney's freedom to generate documents and records to facilitate work on legal matters.[4]

ATTORNEY-CLIENT PRIVILEGE: ITS SCOPE, ASSERTING IT, AND WAIVING IT

The attorney-client privilege is one of the "oldest of the privileges for confidential communications known to the common law."[5]

The scope of the attorney-client privilege is narrow, attaching only to confidential communications by the client to his advisor made for the purpose of obtaining legal advice.[6] This includes communications made through agents to attorneys for the purpose of obtaining legal advice.[7] When an attorney's client is an organization or the attorney is part of a law firm, the privilege extends to all communications by and between the law firm and all agents or employees of the client organization authorized to speak on its behalf.[8]

Merely asserting that the attorney-client privilege exists is insufficient in and of itself to avoid discovery. Rather, the party claiming the privilege has the burden of explaining how it applies in each context in which it's asserted.[9]

One way the privilege can be lost is through waiver. Waiver is judged by stringent standards to ensure client confidences are preserved wherever possible, even in the face of inadvertent disclosures.[10] And since the attorney-client privilege is personal to the client, only the client can waive it.[11]

WORK PRODUCT DOCTRINE: ITS SCOPE, ASSERTING IT, AND WAIVING IT

Aside from the attorney-client privilege, Michigan law "recognize[s] the common-law privilege protecting the disclosure of attorney work product."[12]

In *Augustine v. Allstate Insurance Co.*, the Michigan Court of Appeals explained that the work product doctrine "protects from discovery the notes, working documents, and memoranda that an attorney prepares in anticipation of litigation."[13] The trigger to apply it is whether "notes, working papers, memoranda, or similar materials" were prepared in anticipation of litigation.[14]

Work product is prepared "'if the prospect of litigation is identifiable, either because of the facts of the situation or the fact that claims have already arisen.'"[15] Only "mental impressions, conclusions, opinions, or legal theories" are protected by the doctrine.[16] It should also be noted that "[f]actual work product receives less protection than work product that reveals the opinions, judgments, and thought process of counsel."[17]

The attorney work product doctrine isn't absolute. Under MCR 2.302(B)(3)(a), attorney work product becomes discoverable "only on a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." If the party seeking discovery makes the required showing of substantial need and undue hardship, there are still limits on what becomes discoverable. That's because "in ordering discovery of such materials … the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.[18]

Like the attorney-client privilege, "the party asserting a work product privilege has the burden of proving its application."[19] But then the burden shifts to the party seeking to demonstrate substantial need and undue hardship to provide an exception to the general rule against disclosure.[20]

STRATEGY: REQUEST AN IN-CAMERA REVIEW OR PRIVILEGE LOG?

Once a party claims that a document is privileged, there are important considerations to make when requesting or deciding to stipulate to an in-camera review or a privilege log.

Considerations For In-Camera Review

The Michigan Court of Appeals has repeatedly held that trial courts abuse discretion by denying discovery of documents "without first conducting an in-camera inspection to determine whether they contain relevant, nonprivileged material subject to discovery by plaintiff."[21]

For example, the Court of Appeals has held:

> [T]he trial court's blanket refusal to require defendants to justify their asserted privilege constituted an abuse of discretion [where it] did not conduct an in camera review of the documents and did not have sufficient information regarding the documents to determine whether they were privileged.[22]

The panel explained that "[w]ithout information regarding a particular document's author, recipients, and subject matter, the court was unable to assess the applicability of the attorney-client privilege or work product doctrine in a principled way."[23]

Thus, Michigan law requires that "to determine the extent to which the documents are protected, the court must first conduct an in-camera review of the challenged documents."[24]

Considerations For Privilege Log

The Court of Appeals has recognized the burden that in-camera reviews place on trial courts in determining claims of work product or

attorney-client privilege, especially in cases of complex litigation.[25] As a result, the Court of Appeals has "pointed to procedures used in the federal courts to alleviate the burden and assist the trial court in evaluating such claims, procedures that include identifying each document by number, date, author, addressee, recipients of copies, and the general nature of the documents" — i.e., generating a privilege log.[26] The court has also recognized that "use of such procedures would facilitate 'adversarial input on the appropriateness of disclosure while protecting disclosure of the privileged contents.'"[27]

As a result, while a party isn't sua sponte required to produce a privilege log, there's nothing stopping them from voluntarily doing so — or the court from ordering them to do so — to avoid the hassle and expense of an in-camera review.[28] Further, because "exchanging privilege logs ... is more convenient and less costly" than in-camera reviews, "the concept of the privilege log has taken root as a means for saving time and money."[29]

Michigan law "does not require a privilege log to accompany" discovery responses for documents withheld based on privilege or work product.[30] Instead, privilege logs are only required if ordered by the court.[31]

CONCLUSION

There are many important considerations surrounding privilege which must be carefully asserted to protect the interests of clients.

While Michigan does not have a specific process for identifying a privileged document or identifying the type of privilege, a blind assertion of privilege is "woefully inadequate"[32] and could potentially lead to the privilege being waived.[33]

The main purpose surrounding the attorney-client privilege and work product doctrine deal with protecting the sanctity of the attorney-client relationship by keeping from disclosure pertinent information to the representation. While the attorney-client privilege deals with communications made for purposes of the representation, the work product doctrine deals with the attorney's mental impressions and work made to further the representation.

Once a party asserts something is protected from disclosure by privilege or the work product doctrine, there are important strategic considerations regarding whether an in-camera review or a privilege log may be appropriate given the circumstances.

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4. *Great Lakes Concrete Pol Corp v Eash,* 148 Mich App 649; 385 NW2d 296 (1986).
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6. *Reed Dairy Farm v Consumers Power Co,* 227 Mich App 614, 618-619; 576 NW2d 709 (1998).
7. *Id.* at 618; *See also Yates v Keane,* 184 Mich App 80, 83; 457 NW2d 693 (1990); *Ravary v Reed,* 163 Mich App 447, 453; 415 NW2d 240 (1987).
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22. *Warner Norcross & Judd, LLP v Police & Fire Retirement Sys of City of Detroit,* unpublished per curiam opinion of the Court of Appeals, issued February 23, 2012 (Docket No. 300866).
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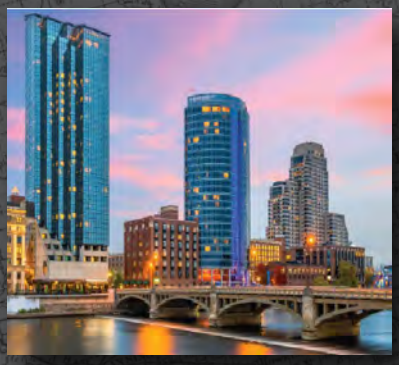

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What's old is new again: Recent decisions on legal duty harken back to time-honored precedent

BY TIMOTHY A. DIEMER

During oral argument near the end of 2021, then Michigan Chief Justice Bridget Mary McCormack asked a rhetorical question that did not ultimately control the Court's opinion in the case of *Rowland v. Independence Village of Oxford, LLC*.[1] In hindsight, McCormack's point that a defendant's legal duty is supposed to be framed generally and not specifically has proven prescient.

Recent Michigan Supreme Court decisions have followed this direction by reorienting the law of legal duty to general considerations of whether one owes any obligation to another, moving away from legal authorities that framed questions of legal duty in very specific terms. With legal duty framed in broad terms, specific actions or inactions of the defendant inform questions of breach, which the Supreme Court has invoked as a legal defense in three decisions.

FOCUS ON GENERAL CONCEPTS OF LEGAL DUTY ROOTED IN PRECEDENT

Decisions include *Clark v. Dalman*[2] and *Moning v. Alfono*,[3] a seminal decision in Michigan that spoke in broad general terms about legal duty rather than highly specific terms about what a defendant must or must not do:

> "Duty" comprehends whether the defendant is under **any obligation** to the plaintiff to avoid negligent conduct[.][4]

Legal duty is framed in even broader terms elsewhere in the opinion:

> "Duty" is essentially a question of whether the relationship between the actor and the injured person gives rise to **any legal obligation** on the actor's part for the benefit of the injured person.[5]
>
> * * *
>
> [I]n negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in light of the apparent risk.[6]

To Michigan lawyers who came of age in the 2000s and 2010s, this language seemed unrecognizably different from what they had come to understand as the definition of legal duty.

Moning rose from the sale of slingshots marketed to children. Alfono, the defendant, was an 11-year-old child who bought one of the slingshots and, while playing with his friend, shot a pellet that struck plaintiff Moning in the eye, causing permanent loss of sight. The differing views of legal duty between the majority and dissenting opinions highlight concepts of legal duty framed broadly from those framed specifically, and the majority opinion simply stated that the defendants owed "a duty to avoid conduct that was negligent."[7]

The *Moning* opinion quoted with approval William Lloyd Prosser's treatise that "the problems of 'duty' are sufficiently complex without subdividing it in this manner to cover an endless series of details of conduct. [...] What the defendant must do, or must not do, is a question of the standard of conduct required to satisfy the duty."[8]

In contrast, the dissenting opinion would have ruled that the "defendant did not owe plaintiff minor the asserted duty not to manufacture, distribute and sell slingshots" which the majority opinion held improperly blended questions of duty, general and specific standard of care, and proximate cause.[9] The majority opinion honed in on the differing views of legal duty and admonished the dissenting justices for obscuring "the separate issues in a negligence case (duty, proximate cause and general and specific standard of care) to combine and state them together in terms of whether there is a duty to refrain from particular conduct."[10]

Michigan law had ultimately fallen into the trap Prosser noted; for example, opinions framing legal duty as "[t]he limited duty defendant installers undertook [...] was only to properly deliver and install the washer and electric dryer in plaintiff's home."[11]

ROWLAND: REINVIGORATING *MONING*

In *Rowland*, the plaintiff represented the estate of Virginia Kermath, an elderly tenant of an independent living facility who wandered away from the building and died from exposure to below-freezing temperatures. The plaintiff's complaint alleged highly specific formulations of duty, i.e., whether the defendant had a duty to install alarms on the building's doors, whether there was a duty to use a monitoring system, and other concepts of legal duty which would only relate to the specific dispute between the parties.

Both the Michigan Court of Appeals and Supreme Court decisions focused on whether the harm was foreseeable, a factor in the legal duty analysis. But a question that proved rhetorical foreshadowed an even bigger shift in the law than the ruling that Kermath's death was foreseeable. During the plaintiff's oral argument, McCormack interrupted the discussion to inquire:

> I was confused by the complaint frankly. ... Why aren't the specific things that might have been done to protect [the deceased in this case], **why aren't those questions of breach?** And why are we making this so hard that the duty is to put on a bell that rings at a pitch that's like can be heard by a dog and **I don't understand why we fetishize describing a duty so specifically**. Doesn't the landlord just have a duty of reasonable care and then we determine whether that duty was breached based on the particular facts of this relationship?[12]

Plaintiff's counsel responded that the Court need not answer this question. The Court's opinion did not address it, instead relying on foreseeability to overrule the lower courts and hold that the defendant owed the plaintiff a legal duty.[13]

"ISN'T IT THE CASE THAT A COURT COULD FIND ... THAT THERE'S NO BREACH AS A MATTER OF LAW?"[14]

In the same term *Rowland* was argued and decided, the Court found such a case, *McMaster v. DTE*.[15] The plaintiff, Dean McMaster, was injured after a large metal pipe rolled off the back of a container that had been filled with waste material from renovation and construction projects at a DTE facility. McMaster had been hired to haul scrap materials to a salvage yard. The dispute hinged on which party had the legal duty to secure the scrap materials — McMaster as the hauler or DTE as the shipper — and the Court ultimately held, consistent with our state's comparative fault system, that both parties had legal obligations but that there was no proof DTE breached any obligation it owed to McMaster.

The opinion noted that the "case concerns the duties of shippers, common carriers, and drivers in the trucking industry" and the Court ultimately adopted a doctrine known as the *Savage* rule or shipper's exception, which outlines when a shipper (in this case, DTE) may be liable for an injury or damage caused by the cargo:

> A shipper owes a common-law duty to use reasonable care while loading cargo and will be liable for injury to persons or property for defects that are not readily discernible by the carrier. The carrier still owes a duty to in-

> spect and correct any defects that it can perceive, even if the shipper was the one who initially caused the defect.[16]

The lower courts had dismissed the plaintiff's claim for a lack of legal duty and DTE presented two separate arguments under which no legal duty was owed. The Supreme Court affirmed on different grounds, however, holding that DTE did owe plaintiff a duty of care, but the claim failed for lack of proof of breach.

In the following term, the Supreme Court further shifted its focus away from legal duty and toward breach with its landmark opinion in the consolidated cases of *Elsayed v. F & E Oil* and *Pinsky v. Kroger*.[17] The opinion is properly understood as a repudiation of the open and obvious doctrine as a component of a premises possessor's legal duty, but should also be noted as a further shift of the Court's focus away from legal duty and toward breach. The opinion even cited *Rowland* and held that "the question of breach — 'whether defendants' conduct in the particular case is below the general standard of care' — is a question of fact for the jury."[18]

The Court did not relegate the open and obvious doctrine obsolete and instead reoriented it toward breach and comparative fault rather than legal duty. Even as a question of breach, the Court again reaffirmed that where there are no genuine disputes of material fact concerning breach, courts can decide the issue as a matter of law.[19]

Later that same year, the Court issued a peremptory order further exploring the promise of *McMaster* and *Rowland* as recognized in *Elsayed* and, in a case involving a pedestrian-motor vehicle accident, held that the plaintiff's claim failed where "there was no showing that the defendant driver could have altered his conduct to avoid the accident."[20] The defendant was entitled to summary disposition not because of a lack of duty, but because he had done nothing wrong.

The dissenting Court of Appeals opinion, cited with approval in the Supreme Court's order, framed the deficiency as a failure to prove breach where "nothing could have been done to avoid the accident."[21] Justice Elizabeth Welch's concurring opinion agreed with the conclusion regarding causation, but highlighted the lack of proof of breach or that the defendant failed to exercise reasonable care.[22]

CONCLUSION

The shift from specific formulations of duty to a general formulation has its roots in historic Michigan precedent; it remains to be seen whether the Supreme Court will go all the way back or stop somewhere in the middle. The *McMaster* and *Elsayed* opinions found that a legal duty was owed in each case but did not go so far as to frame it as whether the defendant had any obligation to the plaintiff. As this shift in analytical focus is still relatively new, it remains to be seen just how close to *Moning* the Court gets.

Timothy A. Diemer of Jacobs and Diemer in Detroit concentrates his appellate practice on reversing money judgments, defending trial court victories against challenges on appeal, compelling interlocutory reversals of adverse evidentiary rulings, and wresting cases away from the trial court when controlling questions of law present an opportunity for early appellate review.

ENDNOTES

1. *Rowland v Independence Village of Oxford, LLC*, 509 Mich 922; 974 NW2d 228 (2022).
2. *Clark v Dalman*, 379 Mich 251; 150 NW2d 755 (1967).
3. *Moning v Alfono*, 400 Mich 425; 254 NW2d 759 (1977).
4. *Id.* at 437 (emphasis added).
5. *Id.* at 438-439 (emphasis added).
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What tort lawyers need to know about Michigan Medicaid liens

BY BRYAN WALDMAN

Ask almost any lawyer what part of negligence litigation they most despise, and the answer will almost certainly be liens.

Plaintiff's lawyers spend a disproportionate amount of time tracking down potential liens. Once discovered, liens put the plaintiff's lawyer in a position where they are working to get money for a party they don't represent. Liens also increase the amount of money a case must settle for in order to net a fair recovery for their client. In turn, the need to satisfy a lien often frustrates defense attorneys and liability insurers, who now must ensure that any settlement proposal allows the plaintiff to satisfy liens. Of course, defense counsel also needs to make sure that any settlement protects their client and its insurer from any subrogation rights that might be advanced directly by a lienholder.

Liens and subrogation rights in negligence cases may be asserted by numerous entities including workers' compensation carriers, private health insurance companies, governmental agencies, and companies contracted by government agencies. This article explains one very specific subrogation claim that can be made against tort recovery — claims made by the state of Michigan and health plans it contracts with to pay medical expenses under Michigan's Social Welfare Act, more commonly known as Medicaid.

Since Medicaid is partially funded by the federal government, which imposes certain conditions on states, Medicaid liens or subrogation rights involve both federal and state laws.[1] In an effort to comply with these conditions, Michigan enacted MCL 400.106 as part of the Social Welfare Act to define the state's subrogation and

assignment rights related to a third-party liability for a Medicaid recipient's medical care; create mandatory conditions for Medicaid recipients and their attorneys; and provide a framework to determine resolution of the state's subrogation rights from a tort settlement or judgment.

This article summarizes what Michigan negligence lawyers should know about state and federal law relating to Medicaid subrogation rights.

RULES THAT MUST BE FOLLOWED BY THE PLAINTIFF'S LAWYER

If a complaint is filed in a case in which the state or a contracted health plan may have Medicaid subrogation rights, plaintiff's counsel must notify the state[2] or health plan by sending a copy of the complaint and all documents filed with it within 30 days after the complaint was filed.[3] Plaintiff's counsel must also certify on the summons that the notice has been given.[4] The form summons issued by the state court administrator includes a box to check and states:

> MDHHS and a contracted health plan may have a right to recover expenses in this case. I certify that notice and a copy of the complaint will be provided to MDHHS and (if applicable) the contracted health plan in accordance with MCL 400.106(4).[5]

Whether or not a lawsuit is filed, the state and contracted health plan must be notified about the claim before it is settled.[6] Additionally, before any settlement is finalized, the state or contracted health plan must receive written notice of the settlement amount, attorney costs, attorney fees, and Medicaid or Medicare subrogation interest amounts.[7] Attorneys knowingly failing to timely notify the state or contracted health plan of the case, claim, or settlement, may be fined by the state up to $1,000 for each violation.[8]

RULE THAT MUST BE FOLLOWED BY THE STATE AND CONTRACTED HEALTH PLANS

Within 30 days of receiving written notice of the case or claim, the state or contracted health plan must provide plaintiff's counsel with a written itemization expenses paid for which subrogation rights may be asserted.[9] Failure to do so excuses the plaintiff and their attorneys from any obligation to protect the subrogation interests of the state or contracted health plan.[10] However, the state or contracted health plan may still pursue recovery through its own means.[11]

CALCULATING STATE OR CONTRACTED HEALTH PLANS' RIGHT TO REIMBURSEMENT

In order to receive federal Medicaid funding, states must comply with the requirements for the program.[12] One of those requirements is what is known as the Medicaid Act's anti-lien provision, which states that "[n]o lien may be imposed against property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under a State plan."[13] Therefore, the challenge for states is enacting legislation that provides for subrogation rights for medical payments made on behalf of or for the benefit of Medicaid recipients without violating the anti-lien provision by asserting claims against the recipient's property.

In 2006, the U. S. Supreme Court decided a challenge to Arkansas' Medicaid subrogation statute in *Arkansas Dept. of Health and Human Services v. Ahlborn*.[14] The plaintiff was injured in an automobile collision and received Medicaid payments for medical expenses totaling $215,645. In order to be eligible for Medicaid payments, Arkansas law required Ahlborn to give the state the "right to any settlement, judgment, or award" she might receive in medical benefits up to the amount Medicaid had paid for her treatment.[15] The plaintiff's tort case settled for $550,000 with only $35,581 of the settlement earmarked for medical treatment; the rest was for pain and suffering, lost earnings, and lost earning capacity. The state claimed it was entitled to be reimbursed the full $215,645, but in a unanimous decision written by Justice John Paul Stevens, the Court ruled that federal Medicaid statutes only allow states to assert subrogation rights against that portion of a third-party settlement earmarked for medical expenses.

Seven years later, the Supreme Court again found a state law violated the Medicaid Act's anti-lien statute. In *Wos v. E.M.A*,[16] the Court struck down a North Carolina statute that created an irrebuttable presumption that one-third of a Medicare recipient's tort recovery was attributable to medical expenses since the statute had no mechanism to determine if a one-third allocation was reasonable.

In *Neal v. Detroit Receiving Hospital*,[17] the Michigan Court of Appeals was presented with a case addressing application of Michigan's Medicaid lien statute, MCL 400.106. In *Neal*, Meridian Health Plan, a Medicaid plan, incurred medical expenses totaling a little more than $110,000. Neal brought a medical malpractice lawsuit that resulted in a confidential settlement agreement that allocated $26,775 — 5% of the total settlement — for medical expenses. Like the state in *Ahlborn*, Meridian claimed it was entitled to reimbursement for the entire sum it paid from the medical malpractice settlement pursuant to MCL 400.106(5), which provided:

> The state department or the department of community health has first priority against the proceeds of the net recovery from the settlement or judgment in an action settled in which notice has been provided under subsection (3). The state department, the department of community health, and a contracted health plan shall recover the full cost of expenses paid under [Michigan's Social Welfare Act] unless the state department, the department of community health, or the contracted health plan agrees to accept an amount less than the full amount. If the individual [recipient] would recover less against the proceeds of the

> net recovery than the expenses paid under this act, the state department, the department of community health, or contracted health plan, and the individual shall share equally in the proceeds of the net recovery. As used in this subsection, "net recovery" means the total settlement or judgment less the costs and fees incurred by or on behalf of the individual who obtains the settlement or judgment.[18]

Citing *Ahlborn*, the Court of Appeals held MCL 400.106(5) was preempted by the federal anti-lien provision[19] that prevented states from imposing liens against property on a recipient for medical expenses paid under the state plan.[20] However, the court agreed that Meridian was not bound by the allocation of 5% of the total settlement representing medical expenses. The case was remanded with instructions that the trial court conduct a hearing to assess the true value of the case and allocation of different types of damages (noneconomic, lost wages, loss of earning capacity, and medical expenses) before determining the subrogation rights of Meridian, which would only be applied to damages allocated for medical expenses.[21]

In 2018, Medicaid subrogation rights gained the attention of the Michigan Court of Appeals and the state legislature. That summer, the state filed an appeal in *Byrnes v. Martinez*,[22] which involved a medical malpractice case where the trial court made a finding regarding the subrogation rights of the state following a settlement. The state objected to the trial court's allocation of settlement proceeds on numerous grounds, including a ruling that the state was responsible for its pro rata share of litigation expenses and attorney fees. That fall, a bill amending MCL 400.106 was introduced; it moved quickly though the legislature and became law on Dec. 27, 2018. The amendments failed to correct the portion of the statute that the *Neal* court decided was a violation of the federal anti-lien law. However, it did address the issue of attorney fees by adding language clarifying that the state would not be required to pay fees for attorneys whose work resulted in the state being reimbursed for Medicaid expenses. The amended portion of the statute was renumbered section 106(8) and includes the following sentence: "The department or a contracted health plan is not required to pay an attorney fee on the net recovery."

Ultimately, the *Byrnes* court held that the trial court committed reversible error when it made the settlement allocation because it failed to conduct an evidentiary hearing to determine what portion of the settlement was attributable to medical expenses.[23] However, the most controversial portion of the opinion was not the holding, but this somewhat gratuitous statement:

> When calculating "medical expenses" the trial court should consider what amount, if any, can be attributed to future medical costs. … Neither *Ahlborn* or *Wos* limit "medical expenses" to past medical costs as a per se rule, and nothing in the relevant statutory language indicates a Congressional intent to exempt plaintiff's future medical expenses from recovery by the DHHS.[24]

Following application for leave, the Michigan Supreme Court vacated the portion of the Court of Appeals opinion that discussed including future medical expenses in the amount of medical expenses subject to reimbursement, stating the issue should first be addressed by the trial court.[25]

The issue of whether future medical expenses could be included in medical expenses subject to the state's subrogation rights was addressed by the Court of Appeals not long after the Supreme Court issued its order in *Byrnes*. In *Peterson v. Oakwood Healthcare, Inc.*,[26] the Court of Appeals held that Medicaid and its contracted health plans can recover only the portions of tort settlement proceeds allocated to past — not future — medical expenses and that Medicaid's lien could be reduced on pro rata basis. In other words, if the plaintiff's settlement represented a small percentage of the total damages, the state's lien could be reduced by that same percentage.

Peterson seemed to settle any dispute as to whether future medical expenses could be subject to state reimbursement until the United States Supreme Court granted leave in *Gallardo v. Marstiller*,[27] a case that would examine the same issue. In a 7-2 opinion authored by Justice Clarence Thomas, it held that despite the federal anti-lien statute, states can assert Medicaid liens over settlement amounts specifically allocated for an injured person's future medical expenses — not just allocations for past expenses paid by Medicaid.[28]

Justice Sonia Sotomayor wrote a dissent critical of the majority for restricting its analysis to only one section of the Medicaid Act.[29] She believed that by looking at the Medicaid statute as a whole, there are several textual signals indicating that Congress intended states' subrogation rights to apply only to medical expenses it had paid. She also correctly noted that a future medical expense would not necessarily mean the state would pay for it through its Medicaid program for various reasons, including the fact that the individual may no longer be a Medicaid beneficiary when incurring that expense. As a result, allowing a state to subrogate against a settlement for future medical expense would be a clear violation of the federal anti-lien statute and "unfair to the recipient" because it would allow the state to "share in damages for which it has provided no compensation."[30]

While the U.S. Supreme Court decision seems to settle the question of whether states are permitted to assert Medicaid liens over settlement amounts specifically allocated for an injured person's future medical expenses, whether it is allowable in Michigan pursuant to MCL 400.106 remains unsettled. Prior U.S. Supreme Court and Michigan Court of Appeals cases dealing with the right to seek reimbursement for future medical expenses only analyzed whether they are permissible under federal law. None of the opinions, including *Peterson*, de-

cided whether Michigan's statute allows the state to subrogate against future medical expenses. The relevant portion of the statute states:

> "[t]he department and a contracted health plan shall recover the full cost of expenses paid ... "[31] (emphasis added)

This language seems to make it clear that the Michigan Legislature intended Medicaid subrogation rights to apply to only past medical expenses, particularly when one looks at the language of other subrogation statutes. For example, the Worker's Disability Compensation Act gives workers' compensation insurers subrogation rights in third-party liability claims for benefits "paid or payable."[32] Clearly, if the legislature had intended to allow for Medicaid subrogation rights to apply to past and future medical expenses, it would've included similar language in the Medicaid Act. Instead, it decided to limit the reimbursement rights to medical expenses it had already paid. Accordingly, even though *Gallardo* stands for the proposition that states can enact laws that provide them with subrogation rights on future medical expenses, Michigan law does not allow the state or its contracted health plans to be reimbursed from damages allocated as future medical expenses.

The author thanks Ted Larkin for his assistance with this article.

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BEST PRACTICES

Lawyering in the age of GenAI

BY ANN T. HOLLENBECK AND EMILY J. TAIT

The first public release of ChatGPT in November 2022 had an immediate, disruptive impact — seemingly overnight, the excitement and fear surrounding generative artificial intelligence (GenAI) could be felt across legal and business circles. Organizations across diverse industries ranging from art[1] to health care[2] to zoology[3] grappled with the promise and peril of this breakthrough technology.

In our state, the University of Michigan became the first major university to develop its own GenAI tool, U-M GPT[4]; the Michigan Campaign Finance Act was amended to require disclosure when political ads are wholly or substantially generated by AI[5]; and Detroit-based Rocket Mortgage launched Pathfinder, a GenAI tool to help develop loan agreements.[6]

By training on voluminous data to learn language patterns, grammar, and context, GenAI can generate new, human-like content (including visual, written, and audio content) in response to a user's prompt. While AI has been around (and evolving) for decades, GenAI places sophisticated technological tools in the hands of any individual with an account. For employers, that means these tools are potentially in the hands of their workforce. For in-house counsel, it means that evaluating legal risks associated with GenAI is now a key responsibility which must be balanced against business opportunities GenAI can create.[7]

While 2023 was marked by a flurry of activity as organizations scrambled to understand the implications of GenAI, 2024 marks a shift towards recognizing that GenAI is here to stay even as the law and technology continue to change. Here are a few tips for navigating this complex and constantly evolving area.

STAY TUNED

With the legal, regulatory, and technological aspects of GenAI continuously changing, staying up to date is critical. Expect continued regulation of AI at the state, federal, and international levels.[8] Regulation may be generally applicable or industry-specific, such as the U.S. Department of Health and Human Service's algorithm transparency rules.[9]

Agency activity is also expected. For example, the U.S. Copyright Office in 2023 published Registration Guidance for Works Containing Material Generated by AI and then issued a notice of inquiry regarding AI, which may lead to more guidance in 2024.[10] Significant lawsuits involving GenAI are already underway, so judicial decisions and jury verdicts should be closely watched. Every attorney has a general duty to keep abreast of changes in the law and technology,[11] but effective counsel relating to GenAI will require particular attention.

UNDERSTAND THE LEGAL EFFECT OF OUTPUT

GenAI users may be unaware of limitations on their rights to content it generates in response to their input.

First, users may assume they have intellectual property rights in the output. But human authorship and inventorship are required under U.S. copyright and patent laws, so output autonomously generated by a GenAI tool is unlikely to be eligible for protection.[12] With sufficient human assistance or modification, however, the output may qualify for protection.[13] Just how much human involvement is necessary to qualify for inventorship and authorship is unclear and will be the subject of ongoing discussion.

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GenAI raises additional complexities regarding trade secrets. A trade secret is information that derives independent economic value from not being "generally known to" others or "readily ascertainable by proper means."[14] Some GenAI tools allow the user's inputs and the generated outputs to serve as training data for the tool or otherwise disclosed to a third party, which can potentially eviscerate trade secret protection.

Second, rights in the output may be limited by third-party IP rights. Numerous lawsuits have already been filed alleging that GenAI tools have made unlawful use of copyrighted works.[15] Though some GenAI providers offer a degree of indemnification,[16] its scope may be limited — e.g., the indemnification may extend only to outputs autonomously created by the tool and not to any user modifications of the output — thus creating potential liability for the user.

KNOW THE EULAS

End-user license agreements (EULAs) governing GenAI tools vary in how they address user prompts, output rights, ownership, data privacy, compliance, liability, confidentiality, and more. As mentioned previously, the scope of indemnification (if any) must be evaluated. Since some tools may be governed by interconnected policies and EULAs are frequently updated, assessing the terms and conditions governing AI tools is an ongoing process. In some instances, a user may have the ability to pursue a specific enterprise version of a GenAI tool — even though it may be difficult to persuade a GenAI provider to meaningfully deviate from its standard EULA. If this option is available, however, it may offer better protection and more effectively address the user's particular needs.

BEWARE OF BIAS AND HALLUCINATIONS

GenAI tools may "hallucinate" and present inaccurate information as fact or generate biased or otherwise harmful outputs.[17] Some EULAs state that GenAI providers do not warrant the accuracy of output and may limit or disclaim liability for inaccuracies or other damages.

In a well-publicized case, a New York attorney was sanctioned after filing a brief written by a GenAI tool that contained citations from non-existent cases, resulting in the attorney being sanctioned.[18] In late 2023, the U.S. District Court for the Eastern District of Michigan proposed rules requiring attorneys to disclose GenAI use in any filings and verify that a human had reviewed the filing.[19] Other courts have proposed and adopted similar rules.[20] Human review and verification can reduce the risk of potential liability and embarrassment.

EDUCATE

Employee education and policies can help reduce risk while also allowing organizations to benefit from GenAI. Inadvertent disclosure of confidential information is less likely if employees understand what is (and is not) appropriate use of the technology.[21] Education is also important to ensure that GenAI tools are being used in a legal and ethical manner consistent with the organization's policies, goals, and values. An employee using GenAI in a manner that perpetuates bias or disseminates false information, for example, can expose the organization to liability and damage the employer's reputation.

BALANCE RISK WITH OPPORTUNITY

Immediately following the launch of ChatGPT, some organizations reacted by banning GenAI tools altogether.[22] Today, outright bans appear to be less common and may be seen as unrealistic, overly risk-adverse, costly to enforce, and disadvantageous from a competitive and efficiency standpoint. The balancing act of risk versus opportunity will be critical to any GenAI users.

CONCLUSION

GenAI is here to stay and will continue to evolve from a technological, legal, and regulatory perspective. As clients navigate uncharted waters and try to find a balance between risk and opportunity within their organizations, attorneys have a critical role in ensuring that GenAI tools are used in a legal and ethical manner.

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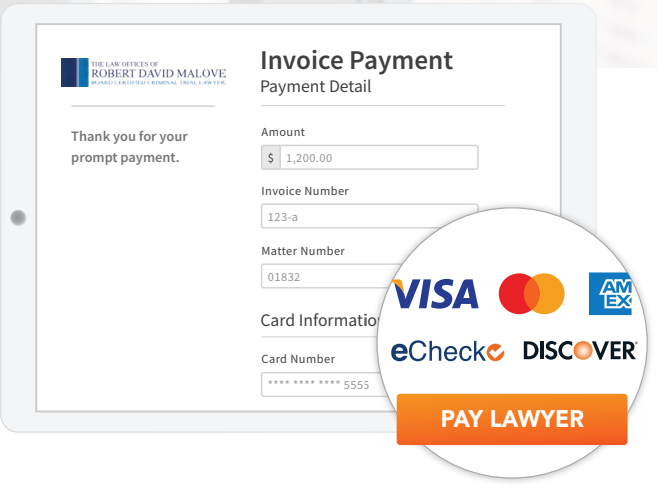

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ETHICAL PERSPECTIVE

The *Brady* conflict?

BY NICHOLAS M. OHANESIAN AND ROBINJIT K. EAGLESON

The Michigan Rules of Professional Conduct (MRPC) provide attorneys with their ethical obligations within their roles as lawyers. However, there is one specific rule that speaks to the unique authority and responsibilities of prosecutors.

MRPC 3.8 is the only rule limited to one segment of the legal profession; it provides an additional level of responsibility above those already required of lawyers. While there can be much discussion regarding MRPC 3.8, this article focuses on subsection (d), which requires that prosecutors in criminal cases:

> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the degree of the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Subsection (d) provides the additional responsibility for a prosecutor to provide all evidence or information that may negate the guilt of a defendant or disclose information that may mitigate information for sentencing. While prosecutors must contend with their ethical responsibilities regarding evidence under MRPC 3.8(d), they must also abide by *Brady v. Maryland,*[1] which specifically states:

> [T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.[2]

Evidence is considered material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[3]

The wording of MRPC 3.8(d) is noticeably different from that of *Brady.* The rule seems to suggest a greater ethical obligation on the part of prosecutors than required under the Constitution as it has been interpreted by *Brady.* MRPC 3.8(d) does not provide for "material" but instead states "all evidence or information[.]" There is an exception provided within the commentary recognizing that "a prosecutor may seek an appropriate protected order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest."[4]

The American Bar Association (ABA) analyzed this conflict in Formal Ethics Opinion 09-454 and concluded that 3.8(d) creates a broader requirement than *Brady.*[5] In pertinent part, it states that "review of the rule's background and history indicates that Model Rule 3.8(d) does not implicitly include the materiality limitation recognized in the constitutional case law. The rule requires prosecutors to disclose favorable evidence so that the defense can decide on its utility."[6] It concluded that the "ethical duty is separate from [the] disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders."[7]

It further analyzed the rule in question as follows:

> Rule 3.8(d) sometimes has been described as codifying the Supreme Court's landmark decision in *Brady v. Maryland,* which held that criminal defendants have a due process right to receive favorable information from the prosecution. This inaccurate description may lead to the incorrect as-

"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.

> sumption that the rule requires no more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure, which frequently are discussed by the courts in litigation. Yet despite the importance of prosecutors fully understanding the extent of the separate obligations imposed by Rule 3.8(d), few judicial opinions, or state or local ethics opinions, provide guidance in interpreting the various state analogs to the rule. Moreover, although courts in criminal litigation frequently discuss the scope of prosecutors' legal obligations, they rarely address the scope of the ethics rule. Finally, although courts sometimes sanction prosecutors for violating disclosure obligations, disciplinary authorities rarely proceed against prosecutors in cases that raise interpretive questions under Rule 3.8(d), and therefore disciplinary case law also provides little assistance.[8]

The Ohio Supreme Court in *Disciplinary Counsel v. Kellogg-Martin*[9] considered the threshold issue of whether the interpretation of 3.8(d) is consistent with ABA Formal Opinion 09-454 or whether it is merely coextensive with *Brady*. The majority, over a strong dissent from the chief justice, found that the obligation to disclose exculpatory evidence under 3.8(d) did not exceed the obligation under *Brady*.

Whether the language of Rule 3.8(d) is clear or not, the meaning of the duty it imposes is clear: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."[10] The ABA recognized the inherent discrepancy within MRPC 3.8(d) and *Brady*, which is why it clarified in Formal Opinion 09-454 that "Rule 3.8(d) does not implicitly include the materiality limitation recognized in the constitutional case law" but instead "requires prosecutors to disclose favorable evidence so that the defense can decide on its utility."

Therefore, in Michigan, the question is: Should the idea of materiality continue to play a role in defining the scope of a prosecutor's disclosure obligations under *Brady*? Or should all evidence be provided irrespective of materiality to the defense and left to the defense to determine what is necessary or favorable to present?

With respect to Mr. Ohanesian, the views expressed herein are his in his personal capacity as a private citizen. The views expressed do not in this article represent the views of the Social Security Administration or the United States Government. There is no expressed or implied endorsement of his views or activities by either the Social Security Administration or the United States Government.

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LAW PRACTICE SOLUTIONS

Leverage the power of the SBM Practice Management Resource Center

BY JOANN L. HATHAWAY

In today's competitive legal landscape, success hinges not only on legal knowledge but also on effective practice management. Recognizing this need, the State Bar of Michigan Practice Management Resource Center offers a suite of resources and services tailored to support legal professionals in enhancing their efficiency, productivity, and overall success. From expert guidance to practical tools and training, here's a look at how each resource can help State Bar of Michigan members and their staff.

WEB RESOURCES: A COMPREHENSIVE GUIDE TO EXCELLENCE

The Practice Management Resource Center website is a treasure trove of resources designed to equip legal professionals with the knowledge and tools they need to thrive. Through a curated collection of articles, guides, templates, and checklists, lawyers can gain insights into best practices across various facets of law firm management including:

- Financial management: Learn how to optimize billing practices, manage accounts receivable, and improve profitability.
- Marketing and client development: Discover strategies for attracting and retaining clients, enhancing your online presence, and leveraging social media effectively.
- Technology and workflow optimization: Explore the latest tools and technologies to streamline your workflows, enhance collaboration, and boost productivity.
- Practice growth and sustainability: Gain insights into strategic planning, succession planning, and other key considerations for long-term success.

Additionally, the website offers resources specifically focused on technology competency, making sure legal professionals have the skills and knowledge to use technology effectively in their practices. The PMRC tech competency webpage provides access to guides, training materials, and more to help attorneys enhance their technological skills and meet the evolving demands of the legal profession.

HELPLINE: PERSONALIZED SUPPORT WHEN YOU NEED IT

Navigating the complexities of law practice management can be daunting, but you need not go it alone. The Practice Management Resource Center Helpline offers direct access to experienced professionals who can provide personalized guidance and support on a wide range of practice-related issues. Whether you're seeking advice on technology selection or workflow optimization, help is available. Coupling access to the knowledge of the State Bar of Michigan ethics team with that of the practice management team allows us to ensure that legal professionals receive comprehensive and reliable guidance.

VIRTUAL SEMINARS: LEARNING FOR PROFESSIONAL GROWTH

Staying current with the latest trends and developments in legal practice is essential for professional growth and success. The Practice Management Resource Center virtual seminars offer legal professionals access to high-quality educational content presented by industry experts and thought leaders. Topics include:

- Practice management fundamentals: Learn essential skills and strategies for running a successful law firm from time management and client communication to risk management and practice growth.
- Technology tools and trends: Explore emerging technologies, software applications, and digital tools that can enhance efficiency, automate routine tasks, and improve client service delivery.

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

- Considerations in the digital age: Stay informed on technology, cybersecurity, and data privacy to protect client confidentiality and avoid disciplinary issues.

MONTHLY PODCAST: INSIGHTS ON THE GO

For legal professionals on the move, the State Bar of Michigan monthly podcast offers a convenient way to access valuable insights and practical tips to enhance their practices. Featuring interviews with industry experts, solo practitioners, and legal tech innovators, the podcast covers a wide range of topics including:

- Successful law firm management strategies: Hear firsthand accounts of how successful practitioners have built thriving practices and overcome challenges to meet their professional goals.

- Technology adoption and innovation: Discover how innovative technologies are reshaping the legal landscape and learn practical tips for integrating new tools and systems into your practice.

- Career development and work-life balance: Gain inspiration and advice on achieving career satisfaction, maintaining a healthy work-life balance, and navigating the unique challenges legal professionals face.

YOUTUBE CHANNEL: VISUAL LEARNING REINVENTED

Visual learners will appreciate the State Bar of Michigan YouTube channel, which includes video content designed to inform, educate, and inspire legal professionals. From instructional tutorials to software demos to case studies, the channel covers a diverse range of topics, including videos on:

- Using popular practice management software platforms and tools.

- Best practices for digital marketing, client intake, and online reputation management.

- Insights from industry experts on leadership, professional development, and growth strategies.

PUBLIC SPEAKING: KNOWLEDGE SHARING IN ACTION

The Practice Management Resource Center engages with the legal community through public speaking engagements at law schools, local bar associations, and special purpose bars. These presentations provide opportunities for legal professionals to:

- Gain valuable insights and practical advice on practice management topics relevant to their daily work.

- Connect with industry experts, thought leaders, and fellow practitioners to share ideas, experiences, and best practices.

- Stay informed about emerging trends, technologies, and practice management that may affect their practices and clients.

ONE-ON-ONE GUIDANCE: TAILORED SOLUTIONS FOR SUCCESS

For law firms seeking personalized support, the Practice Management Resource Center offers guidance tailored to their specific needs. We work closely with firm leaders and staff to assess operations, workflows, and technology; identify opportunities for improvement; and recommend practical solutions to enhance efficiency, productivity, and profitability.

SOCIAL MEDIA: CONNECT, ENGAGE, AND STAY INFORMED

Connect with the Practice Management Resource Center by following the State Bar of Michigan on social media. This enables legal professionals to:

- Stay informed about upcoming events and initiatives supporting professional development.

- Engage with our team and fellow practitioners by sharing insights, asking questions, and participating in discussions on relevant topics.

- Access curated content, resources, and tips to help optimize practices and stay ahead of the curve in a rapidly evolving legal landscape.

The State Bar of Michigan Practice Management Resource Center is committed to empowering legal professionals by providing the knowledge, tools, and support needed to succeed in today's legal market. Through its comprehensive array of resources and services — including website resources, helpline support, webinars, podcasts, public speaking engagements, social media engagement, and Michigan Bar Journal articles — the State Bar of Michigan strives to equip practitioners with the skills, insights, and strategies they need to enhance their efficiency, productivity, and overall success. Whether you're a solo practitioner, member of a small firm, or part of a larger organization, we invite you to take advantage of our offerings and unlock the full potential of your practice.

JoAnn L. Hathaway is practice management advisor for the State Bar of Michigan Practice Management Resource Center.

LIBRARIES & LEGAL RESEARCH

Surveys: Who's asking? Who's answering? Is anybody listening?

BY VIRGINIA C. THOMAS

Most readers of this journal are familiar with efforts to gather opinions on the many facets of this nation's developing law (and lawmakers.) Surveys and polls provide snapshots of perspectives and insights into current issues and trends. They help us understand our legal system and the values that drive it. They reflect existing priorities and indicate potential departures from the status quo. Constructively, they can pinpoint where we are, describe where we've been, and advise where we may want to go.

Surveys and polls may be highly structured or take a nuanced approach to harvesting information. Or they may be more informal, such as singular solicitations for an up-or-down response on social media.

ENQUIRING MINDS WANT TO KNOW

The focus of surveys and polls often extends beyond institutions' policies and practices to the cohorts or individuals who serve within them. How do lawmakers view their peers and associates? Some questionnaires are designed to tackle both.

A look at one case requires a trip on Mr. Peabody's wayback machine: A Pageant magazine survey of Congress about Congress, likely inspired by escalating public criticism of Congress and its individual members.[1] Pageant was a monthly publication between 1944-1977 known for its visuals and ability to mix them with "informative text on a wide range of subjects."[2] The magazine appears to have had credibility with members of Congress — some of its articles were cited, discussed, or reprinted in the Congressional Record[3] — so it is not surprising that members of Congress would respond to its survey.

About three weeks before the 1964 general election, Pageant published the results of its survey, revealing whom sitting members of Congress ranked as the most and least effective of their peers.[4] The article, which included responses to a parallel survey distributed to 220 members of the Washington press corps, also summarized suggestions for making Congress more efficient.[5] Provocative, to say the least.

Following the election, the House Special Committee to Investigate Campaign Expenditures convened a hearing to consider whether Pageant's survey violated federal or state election law.[6] Among the special committee's concerns were complaints from members of Congress regarding the truthfulness of the survey, its impact on their reputations, and its possible impact on the elections. Did the survey constitute election interference — intentionally or otherwise?

The special committee unanimously agreed to refer a full record of the hearing to the House Administration Committee for further action in the upcoming Congressional session, which was days away from starting. Specifically, it recommended that the House Administration Committee address the failure of U.S. marshals to locate a single representative from Pageant to testify at the hearing.[7]

The special committee also prepared a detailed report on its investigation and referred it to the Committee of the Whole House on the first day of the session.[8] The report discussed the following suggestions from respondents on how to make Congress more effective:

- Modify seniority rules in the House and Senate to limit power concentrated in the hands of committee chairs to avoid pigeonholing important legislation.
- Limit the power of the House Rules Committee to determine which bills move to the floor for consideration.
- Revise filibuster and cloture rules in the Senate to prevent unproductive delays in the legislative process.
- Establish a mandatory retirement age for members of Congress to distribute leadership more equitably.

- Set limits on the length of congressional sessions.
- Improve and increase staffing support for minority committees.
- Reduce the ability of lobbyists and the White House to pressure members of Congress and influence legislation.
- Adopt a strict conflict-of-interest protocol for all members of Congress that would include full disclosure of assets, outside income, and relationships with the private sector.

During the ensuing legislative session, the House and Senate considered major election reform bills,[9] comprehensive congressional reorganization measures,[10] and ways to improve efficiency in the short term such as increasing the number of legislative assistants for members of the House.[11] While it may not be possible to draw a line from the Pageant survey to the legislative initiatives, it's fair to say that most of the recommendations from the survey were discussed by Congress.

LEGACY

The years between 1965-1975 became known as a decade of decentralization in Congress marked by openness and a flurry of legislative activity.[12] The 1980s brought yet another cultural shift; when members of Congress in 1988 were surveyed about the need for change, almost 95% of respondents called for "better legislative scheduling, higher pay, improved campaign financing and a reduction in the number of subcommittees."[13] One source suggests that most experts attributed the problems to the reforms from 1965-1975.[14]

In 1994, the Chicago Tribune's popular Intelligence Report surveyed House and Senate members for their take on how good a job Congress was doing.[15] According to the report, "[v]irtually all the respondents said Congress could be more effective" and a majority called for "widespread reform."[16] Recommendations included reducing the number of committees and the size of congressional staffs, campaign finance and lobbying reforms, and ending the filibuster in the Senate.[17] Public misconceptions about what (and how) Congress works were attributed to "an image problem."[18]

RESEARCH CHALLENGE

Congressional activity is a magnet for pollsters, but finding results on a specific topic can be tricky because there is no primary aggregator of survey information. Survey sources can be narrowly focused or comprehensive in scope. For example, American National Election Studies and Open Secrets focus on analyzing election outcomes and election financing, respectively, with recent resources usually linked through their web pages.

Well-known surveyors like Gallup and Harris frequently publish information on public approval rates of Congress and other governmental entities on their websites. And yes, there are even pollsters that rate pollsters,[19] which can help researchers identify appropriate sources for major surveys.

Many impactful surveys are conducted by newspapers and magazines, such as those highlighted earlier in this column. The surveys may be one-offs with no earlier version and no follow-up. Newspaper and magazine databases are helpful tools for identifying their existence, and popular search engines such as Google and Firefox also are good starting points. And please remember to give a hat tip to librarians who compile research guides on how to do survey research.[20]

Surveys and polls — we appreciate many, curse some, and simply disregard others. But they are a fact of modern life. The next time you're asked to participate in a survey, consider that you may be making history.

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

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PRACTICING WELLNESS

Recognizing and combatting lawyer burnout: A guide

BY KARISSA WALLACE

In a demanding career like the law, burnout is a constant threat at all levels. From associates facing relentless deadlines to partners juggling multiple high-stakes cases, the pressure to succeed can take a significant toll on mental and emotional well-being.

If you're leading a team of legal professionals, recognizing the signs of burnout is crucial. Lawyer burnout leads to lost productivity, unplanned time out of the office, and, in severe cases, malpractice liability.[1] Burnout is not just an individual problem — it is an issue that impacts your bottom line and the reputation of your organization. By understanding the symptoms and taking proactive steps to create a supportive work environment, you can foster a healthier and more productive team.

UNDERSTANDING BURNOUT

Burnout is a state of emotional, physical, and mental exhaustion caused by prolonged or excessive stress.[2] It's not simply feeling tired after a long day, but a deep sense of disillusionment and cynicism that can erode one's sense of accomplishment and motivation.

There are three core dimensions of occupational burnout:[3]

1. **Emotional exhaustion:** Feeling emotionally drained and depleted. Lawyers experiencing emotional exhaustion may feel constantly on edge, irritable, or unable to cope with additional stress.

2. **Depersonalization:** Feeling detached from your work and colleagues. Lawyers feeling depersonalized may become cynical about their clients or the legal system as a whole.

3. **Reduced sense of accomplishment:** Feeling that your work is meaningless or that you're not good enough at your job. Lawyers with a reduced sense of accomplishment may withdraw from challenging tasks or procrastinate on important deadlines.

CAUSES

Several factors can contribute to lawyer burnout,[4,5] including:

- **High workload and long hours:** Lawyers are often expected to work long hours to meet deadlines and client expectations, which can lead to chronic stress and fatigue.

- **Demanding clients:** Difficult or unreasonable clients (or colleagues) can be a significant source of stress for lawyers.

- **Lack of control:** Lawyers often have limited control over their workload, deadlines, and the outcomes of their cases, which can lead to feelings of helplessness and frustration.

- **Competitive work environment:** The legal profession is incredibly competitive, which can create pressure to outperform colleagues.

- **Lack of social support:** Lawyers may neglect their personal lives due to the demands of the job, which can exacerbate feelings of isolation and loneliness.

BURNOUT WARNING SIGNS

While burnout manifests itself differently in each individual, the following are common warning signs:

"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

- **Increased absenteeism or tardiness:** Frequent absences or tardiness can indicate disengagement or a struggle to cope with work demands.

- **Declining productivity or quality of work:** Errors, missed deadlines, and a general decrease in work quality can signal burnout-induced difficulties in focusing and applying oneself. Note that some lawyers fixate on their work when overly stressed, so declining performance may not always be a part of burnout.

- **Difficulty concentrating or making decisions:** Impaired concentration and indecisiveness can indicate a burned-out mind struggling to function effectively.

- **Negative personality shifts:** Increased irritability, impatience, and social withdrawal can indicate emotional exhaustion and detachment. Lawyers may express feelings of cynicism about their work and the legal system.

- **Changes in habits:** Noticeable alterations in sleep patterns, appetite, or reliance on alcohol or drugs may indicate coping mechanisms for unmanaged stress. Burned-out lawyers often experience physical symptoms (headaches, stomach aches, muscle tension) and may cope in negative ways.

- **Neglecting social activities:** Abrupt loss of interest in previously enjoyed activities can be a sign of burnout.

- **Expressions of hopelessness:** Statements of self-harm or suicidal thoughts demand immediate intervention and involvement of mental health resources.

If you notice any of these signs in a team member, it's important to have a conversation with them in a private and supportive setting. Let them know that you care about their well-being and that you're there to help.

PREVENTING BURNOUT

Research shows that lawyers who work in environments that value professionalism, skill, and humanity over productivity and availability are in better health and experience lower levels of stress than their counterparts.[6] Whether you're a partner or managing one attorney, as a leader, you play a vital role in creating an environment that promotes lawyer well-being. Among the steps you can take:[7]

Set realistic expectations

Be realistic when assigning tasks and setting deadlines. Support your team in responding to unrealistic client deadlines. Encourage open communication about workloads and seek adjustments when needed. Delegate tasks effectively by distributing work fairly. Consider individual strengths and capacities when assigning projects.

Champion work-life balance

Lead by example: Disconnect after work hours and encourage your team to do the same. Promote the use of vacation time. Normalize taking breaks and encourage team members to prioritize personal well-being.

Be flexible and supportive

Be understanding when team members need to adjust their schedules for personal reasons. Go beyond understanding and explore flexible scheduling options, which could include compressed work weeks, remote work arrangements on specific days, or offering flex time to accommodate personal needs.

Recognize and reward good work

Acknowledge your team members' accomplishments and contributions. Consider celebrating team accomplishments publicly, which can foster a sense of pride and motivate others. When possible, tailor your recognition to individual preferences. While public praise is valuable, some may appreciate a personalized note or a dedicated one-on-one meeting to acknowledge their contributions. Reward excellent work by offering opportunities for professional development, which can include participating in conferences, mentorship programs, or leadership training programs.

Open communication

Create a safe space and culture of open communication where team members feel comfortable discussing their stress levels and well-being without fear of judgment or retribution. Implement regular check-ins to discuss workloads, identify potential problems, and offer support.

Provide access to resources

Learn about resources available at your organization so you can inform your team about them, such as employee assistance programs. Equip yourself and other managers with basic mental health awareness training. This will enable you to identify early signs of burnout and provide appropriate support.

By taking these steps, you can create a more supportive work environment that helps your team members thrive and avoid burnout.

BUILDING A CULTURE OF RESILIENCE AND COLLABORATION

Lawyers are often seen as solitary figures tackling complex cases alone. However, fostering a culture of collaboration and teamwork can be a powerful weapon against burnout.[8] Here's how leaders can leverage these aspects to build resilience:

Collaboration

- **Mentorship:** Implement formal or informal mentorship programs. Pair experienced lawyers with junior associates to provide guidance, answer questions, and offer career advice.

This builds relationships, fosters trust, and allows younger lawyers to learn from the experiences of their peers.

- **Knowledge sharing:** Organize regular sessions where lawyers can discuss specific areas of expertise or recent case experiences. This promotes cross-team collaboration, encourages learning from one another other, and creates a sense of collective problem-solving.

Teamwork

- **Collaborative task forces:** Instead of assigning tasks solely based on individual expertise, consider forming task forces for complex projects. This allows lawyers to leverage their diverse skills, foster a sense of shared responsibility, and distribute the workload, reducing individual stress.

- **Team building:** Organize team-building activities that are not work-related. This could involve volunteering for a cause your team cares about, participating in a sporting event, or simply having a casual social gathering. These activities help build relationships and a sense of unity outside the typical work environment.

Encouraging collaboration and promoting teamwork can create a support network within your team. Lawyers will feel more comfortable seeking help from colleagues, sharing knowledge, and tackling challenges together. This sense of shared purpose and collaboration creates a more resilient team environment that is better equipped to weather the inevitable stresses of legal practice.

CONCLUSION

The legal profession thrives on dedication and resilience. By fostering a work environment that prioritizes well-being and actively combats burnout, team leaders can cultivate a thriving legal team. Recognizing the signs of burnout and implementing the strategies outlined here empowers you to create a supportive culture where lawyers feel valued, connected, and equipped to navigate the demands of the legal world. Remember, a healthy and resilient team translates to a more productive, successful, and happier practice.

This article first appeared in the #BetterLawLife LinkedIn newsletter.

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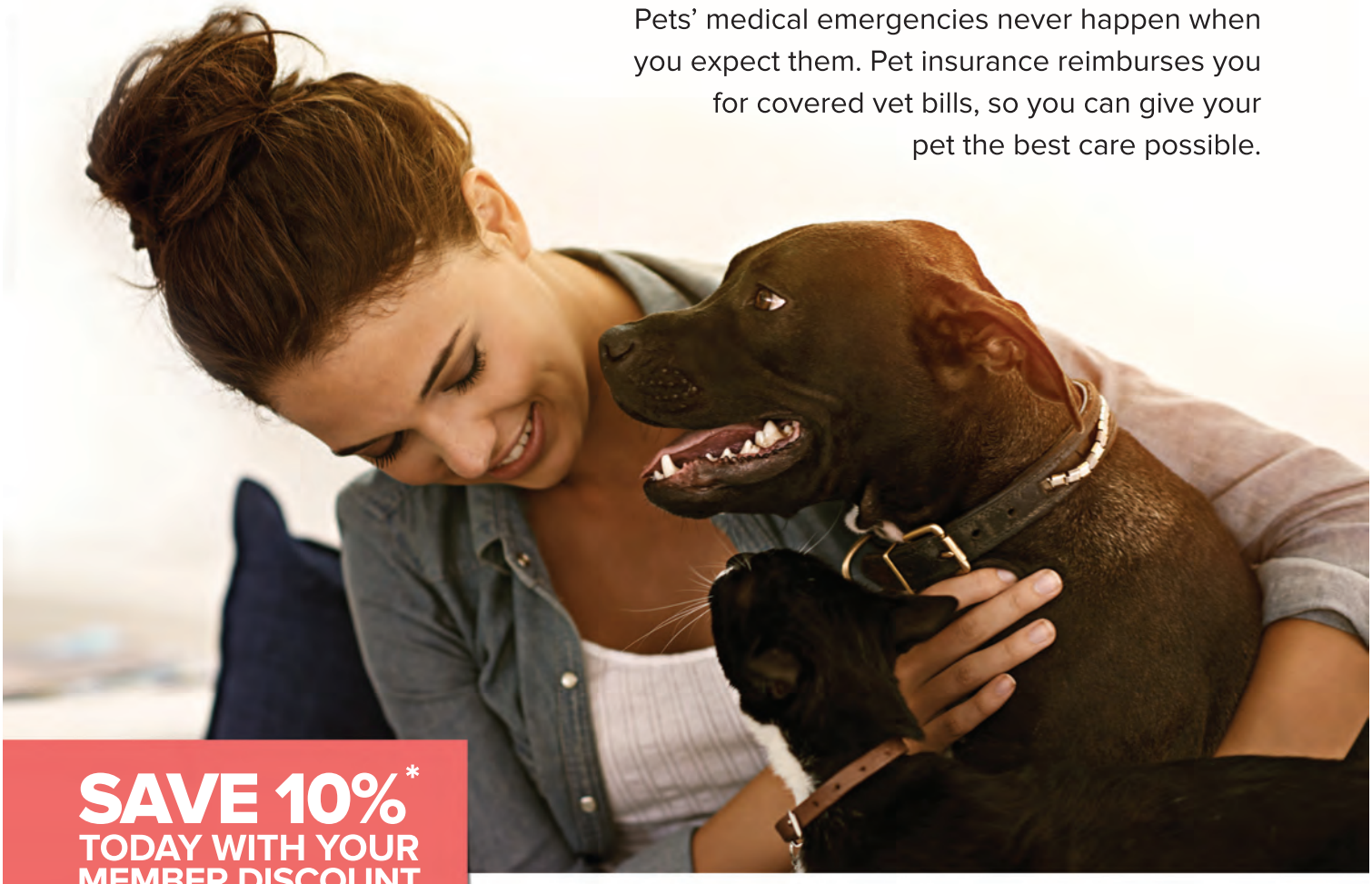

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PLAIN LANGUAGE

Avoiding *shall* when expressing policies

BY MARK COONEY

A common misstep in legal drafting is thinking of the future instead of the present. To clarify: yes, lawyers of course need to think ahead. Transactional lawyers and other drafters must anticipate issues, contingencies, and remedies. In fact, that's when a lawyer's experience and insight are at a premium.

Yet the document that emerges from a lawyer's careful forethought, negotiation, and drafting should speak to the present.[1] Once the document is activated — the contract signed or the law effective — it should have currency, immediacy. More simply, a well-drafted document is alive in the present whenever a user consults it.

One of our profession's historical tics has been to reflexively express policies in a *shall*-based future tense, as in "the Carrier **shall have no liability** for delays caused by inclement weather." This version of *shall* is, in essence, a hybridized blurring of future tense with a bogus duty signal. It's inapt and overwrought.

I'm using the word "policy" broadly to mean some truth or legal fact — perhaps a consequence or lack of consequence — that contracting parties have agreed to or that a legislature, agency, or board of directors has settled on. A drafter's default style should be present tense for these policy expressions.

Consider this redraft of my earlier example: "The Carrier **is not liable** for delays caused by inclement weather." The parties have agreed to this policy. And if, four years after the contract's signing, the carrier is delayed by a severe snowstorm, a party curious about the potential consequences will pick up the contract at that moment and see the answer: "The Carrier is not liable . . . ." This calls for present tense. There's no future about it. And because this provision does not impose a duty, no duty word (whether *shall* or *must*) should appear.

You'll see this present-tense preference from preeminent drafting experts. Consider Joseph Kimble's present-tense style in the federal rules. Under FRE 402, irrelevant evidence "**is** inadmissible" — not "shall be inadmissible" or "shall not be admissible." Under FRE 408, evidence of liability insurance "**is not** admissible" to prove negligence. Under FRCP 21, "[m]isjoinder of parties **is not** a ground for dismissing an action." Under FRCP 23(f), an appeal in a class-action case "**does not stay** proceedings in the district court unless the district judge or the court of appeals so orders."

Contract-drafting experts also embrace the present tense — and shun *shall* — when stating policies. Ken Adams advises, "Don't use *shall* in language of policy" because language of policy "doesn't impose obligations."[2] An example from his manual's sample contract:

- "The initial term of this agreement **ends** at midnight at the end of 31 December 20__ . . . ."[3] [*not* "shall end" or "will end" at midnight]

And in definitions:

- "'Continuing Director' **means** any person who . . . ."[4] [*not* "shall mean"]

Adams's sample contract uses *shall* only — only — for imposing

40 FORTY YEARS OF PLAIN LANGUAGE

"Plain Language," edited by Joseph Kimble, has been a regular feature of the *Michigan Bar Journal* for 40 years. To contribute an article, contact Prof. Kimble at Cooley Law School, 300 S. Capitol Ave., Lansing, MI 48933, or at kimblej@cooley.edu. For an index of past columns, visit www.michbar.org/plainlanguage.

duties.[5] As many have pointed out before me, if a drafter can't logically replace *shall* with "has a duty to" or "is required to," then the *shall* should go.[6]

Bryan Garner's manual shows the same present-tense approach, even when the parties' policy term concerns a future contingency:

- "If a court for any reason **holds** a provision . . . to be unenforceable, the rest **remains** fully enforceable."[7] [*not* "shall hold" or "shall remain"]
- "Melroy **is not** liable . . . for any incidental or consequential damages . . . ."[8] [*not* "shall not be liable"]

Another example from Garner's sample contract:

- "Information **is not** confidential if the disclosing party approves it for release without restriction . . . ."[9] [*not* "shall not be deemed confidential"]

For these reasons and the reasons you'll see below, the *shall*-free present tense is a sound default style for policy expressions. The sloppy, indiscriminate[10] use of *shall* only invites confusion.[11] Present tense allows documents to speak clearly about present truths and even future possibilities — and prevents inaccuracy and wordiness.

Consider a typical contract that I found in my research. It contains 78 *shall*s. But 44 of those 78 *shall*s are incorrect. That's 56% — more than half the *shall*s — that are incorrect for one reason or another. I'll stay on topic and tackle just the misuse of *shall* for expressing policies. (I've already addressed another *shall* error — its use in clauses meant to grant discretion — in my May 2023 column.)

Let's start with definitions. A definition reflects a policy decision concerning a term's meaning.[12] When we express that policy, it is a fact that holds true in the present whenever someone reads that definition or defined term. Nevertheless, we often see wordy, future-facing *shall* definitions: "'Pool Area' shall refer to the pool, patio, and pavilion."

Appropriate definitional verb choices are present-tense expressions: *means* (for a full definition); *includes* (for a partial, enlarging definition); *does not include* (partial, limiting). *Shall* has no place in any of them.[13]

Below are examples from the form contract I studied. With a few exceptions, my suggested edits are limited to the misused *shall*s:

- "'Edition,' as used in this Agreement, **shall refer to** the Work as published in any particular content, length, and format."

  [*Edit*: "Edition" **means** the Work as published in any . . . .]

- "'Electronic Edition,' as used in this Agreement, **shall refer to** any Edition of the Work that is sold, distributed, or accessed in an electronic or digital format . . . ."

  [*Edit*: "Electronic Edition" **means** any Edition of the Work that is . . . .]

For other types of policy expressions, we can cure false *shall*s by using the main verb's present tense or by using an *is* construction:

- "The Author acknowledges and confirms that the Publisher **shall have no liability** of any kind for the loss or destruction of . . . ."

  [*Edit*: The Publisher **is not liable** for . . . .]

- "The date of publication as designated by the Publisher . . . **shall be** the 'Publication Date' for all purposes under this Agreement."

  [*Edit*: . . . **is** the "Publication Date" for all purposes . . . .]

- "Nothing contained in this section **shall be construed as** limiting, modifying, or otherwise affecting . . . ."

  [*Edit*: Nothing in this section limits, modifies, or otherwise affects . . . .]

  [*Edit*: Nothing in this section **alters** . . . .]

- "This Agreement **shall be binding on** the heirs, executors, administrators, successors, and assigns of the Author . . . ."

  [*Edit*: This Agreement **binds** the Author's heirs . . . .]

- "All rights not expressly granted to the Publisher **shall be** wholly reserved by the Author."

  [*Edit*: . . . **are** wholly reserved . . . .]

  [*Better (active voice)*: **The Author reserves** [retains?] all rights not granted to the Publisher.]

- "[T]he Publisher has no obligation to initiate litigation on such claims, and **shall not be** liable for any failure to do so."

  [*Edit*: The Publisher . . . **is not** liable for . . . .]

- "Upon the expiration or termination of this Agreement, any rights reverting to the Author **shall be subject to** all licenses and other grants of rights made by the Publisher . . . ."

  [*Edit*: . . . **are subject to** . . . .]

Sometimes a misused *shall* is surplus in the truest sense. Removing the *shall* is an easy first edit in these examples (which desperately need more edits beyond that):

- "The provisions of this Agreement **~~shall~~** apply to each revision of the Work by the Author . . . ."
- "Any and all rights of the Publisher under such licenses and grants of rights . . . **~~shall~~** survive the expiration or termination of this Agreement."
- "Notwithstanding any editorial changes or revisions by the Publisher, the Author's warranties and indemnities under this Agreement **~~shall~~** remain in full force and effect."
- "[A]nd upon such repayment, all rights granted to the Publisher under this Agreement **~~shall~~** revert to the Author."

Although I've focused on policy expressions here, my best advice for *shall* adherents is more broad-sweeping: if you aren't imposing a duty, don't use *shall*. Experts who tout *shall* as a legitimate term of art give the same advice.[14] Every misused *shall* burdens a document with more words and less clarity.

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ENDNOTES

1. Garner, *Garner's Guidelines for Drafting & Editing Contracts* (St. Paul: West Academic Publishing, 2019), pp 205–207.
2. Adams, *A Manual of Style for Contract Drafting* (5th ed) (Chicago: ABA Publishing, 2018), p 107.
3. *Id.* at 577 (emphasis added).
4. *Id.* at 580 (emphasis added).
5. *Id.* at 64 ("This manual recommends not using *shall* in contract drafting to express any other meaning" than to impose a duty.), and at 69 ("Using *shall* to mean only 'has a duty to' . . . is a big step toward curing the ailment" of "chaotic verb structures" in contracts.).
6. *Id.* at 69–72; *Garner's Guidelines for Drafting & Editing Contracts*, p 156; Kimble, *The Many Misuses of* Shall, 3 Scribes J Legal Writing 61, 64 (1992).
7. *Garner's Guidelines for Drafting & Editing Contracts*, *supra* n 1, p 205 (emphasis added).
8. *Id.* at 513 (emphasis added).
9. *Id.* at 511 (emphasis added).
10. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan: West Group, 2012), p 112.
11. *See, e.g.*, *S End Enterprises, Inc v City of York*, 913 A2d 354, 358–59, 360 (Pa Cmmw 2006) (refusing to find a duty in this seemingly clear duty language because *shall*'s general overuse clouds its meaning: "'[T]he code official shall employ the necessary labor and materials to perform the required work.'").
12. *A Manual of Style for Contract Drafting*, *supra* n 2, p 194.
13. *Id.*
14. *Id.* at 64 ("This manual recommends not using *shall* in contract drafting to express any other meaning" than to impose a duty.), and at 69 ("Using *shall* to mean only 'has a duty to' . . . is a big step toward curing the ailment" of "chaotic verb structures" in contracts.); Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* (2d ed) (Frederick: Aspen Publishing, 2014), p 183 ("[Y]ou should use *shall* only to signal an obligation. But drafters incorrectly use *shall* so frequently that they think they are using it correctly, even when they are not.").

THE CONTEST RETURNS!

After a long hiatus, the contest is back. I'll send a free copy of *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law* (new 2d edition) to the first two readers who submit an "A" revision of the sentence below, which appeared in an old Federal Rule of Evidence. (No fair looking for the current rule.) Hint: start with the active voice (you'll need to name a subject that's only implied in the sentence) and use a three-item vertical list. It will take a little ingenuity to create a list, but you can do it.

> Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

Send your revision to kimblej@cooley.edu. I have to be the sole judge of the winners. The deadline is June 15, but the sooner, the better.

PUBLIC POLICY REPORT

AT THE CAPITOL

HB 5392 (Lightner) **Criminal procedure: sentencing; Law: sunset.** Criminal procedure: sentencing; sunset on certain costs that may be imposed upon criminal conviction; modify. Amends sec. 1k, ch. IX of 1927 PA 175 (MCL 769.1k).

POSITION: Support.

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

HB 5534 (Breen) **Criminal procedure: sentencing; Law: sunset.** Criminal procedure: sentencing; supreme court to determine court operation costs and funding; require. Creates new act.

POSITION: Support.

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

SPOTLIGHT

Mark Teicher seeks to help wronged clients – and uphold the legal profession's reputation

BY SCOTT ATKINSON

Here's something Mark Teicher wants people to know: For every bad lawyer people have ever heard about, there's an army of good lawyers working to make things right. Teicher is part of that force working for good as a member of the State Bar of Michigan Client Protection Fund Committee.

His volunteer work is inspired by a desire to both help clients and uphold the integrity of the legal profession. "I know it sounds hokey, but I believe it's an honor and a privilege to be a lawyer, and then here are these lawyers who are making us all look bad," Teicher said.

The Client Protection Fund was established in 1966 by the SBM Board of Commissioners and approved by the Michigan Supreme Court the same year. Created to provide restitution to clients who have suffered due to attorney theft, Teicher has been a part of the committee for more than 15 years.

Teicher first heard of the Client Protection Fund in 2006 as a hearing officer for Attorney Discipline Board. After one particular case in which a lawyer had stolen money from a client, he and the other members discussed how the client might get their money back. That was when a colleague mentioned in passing that the client could also go to the Client Protection Fund.

"This sounds very appropriate," he remembers thinking at the time, "but what is it?"

Teicher has been a member of the SBM Representative Assembly since 1986 and at a meeting following that incident, he decided to sign up to be a part of the Client Protection Fund Committee. "Next thing I knew, I was on it," he said with laugh. "They couldn't get rid of me."

He's been a part of it ever since, serving in that time as an advisor, co-chair, and chair. (He has also been known for many years as the chairperson of the ad hoc committee on dessert, making sure there are always tasty treats on hand for meetings.) During his tenure on the committee, it has approved more than 835 claims and put more than $8 million back in the hands of clients who have been wronged.

As a member of the committee, his work has included developing rule changes, amending subrogation agreements, and communicating to courts and attorneys on behalf of the

"Spotlight" features a Michigan attorney who provides important volunteer service to the State Bar of Michigan and highlights the variety of work being done to support Michigan attorneys and the administration of justice.

Client Protection Fund. He is particularly proud of the committee's efforts to increase its diversity — not just in terms of race, gender, and ethnicity, but also geographically by getting more members from across Michigan and from different areas of legal expertise.

"The Client Protection Fund Committee's work is extremely important because it protects the public from bad acting lawyers, and I think it reassures the public in general … that the system does work. And when it doesn't work, there are attorneys there and the system is there to help them as much as possible," he said.

Teicher wants more Michigan attorneys to know the Client Protection Fund exists and that there is real value in volunteering your time and talents with the State Bar of Michigan. In 2017, he was honored with the Representative Assembly's Michael Frank Award. In his acceptance speech, he spoke about, among other things, the importance of his work with the Client Protection Fund and left his peers with a lesson he learned along the way.

"Just get involved in some way," he said. "Whether or not it's to sit on the Representative Assembly, whether or not it's to sit on a committee, whatever it might be."

Scott Atkinson is communications specialist at the State Bar of Michigan

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MICHIGAN LAWYERS IN HISTORY

First African-American woman to practice before the Michigan Supreme Court? It's a mystery

BY CARRIE SHARLOW

Do you know the name of the first African-American man to practice before the Michigan Supreme Court? It's D. Augustus Straker.

What about the name of the first woman to practice before the Court? That's Martha H. Strickland.

How about the first African-American woman to practice before the Court? No?

Neither do I.

But I can make a couple educated guesses.

Michigan's first African-American woman lawyer was Grace C. Murphy.[1] She was most likely born in the late 1880s, although her death certificate lists her birthdate as Aug. 11, 1892.[2] Thanks to marriage records, we know that Grace G. Wilson, the daughter of Albert and Harriet (Hannah) Wilson of Virginia, married Henry Murphy in 1914 in Detroit.[3] And based on her death certificate, we know that Grace moved to Detroit in 1910 and most likely didn't speak much about her family because her husband — who was the informant on the certificate — listed her parents as "unknown."[4]

In the 1920s, Murphy — who had already attended Norfolk Mission College — decided to enroll in the Detroit College of Law. This was a revolutionary decision, as there was no guarantee she could make a living at it. Surely, Murphy had heard of Charlotte Ray, the first African-American woman to practice law in the United States; while Ray was admitted to the bar and had argued "a case before the District of Columbia Supreme Court," she couldn't support herself "due to prejudice against both women and African Americans" and had to abandon the law.[5] Murphy may have also known about the Roxboroughs, a family of lawyers — Charles Sr. was "one of Detroit's first" African-American attorneys,[6] Charles Jr. graduated from Detroit College of Law in 1914, and Charles Jr.'s wife attended law school — who were a bit more successful. Whatever her reason for her decision, Murphy followed through on her plan and graduated in 1923, practicing law in Michigan until her death in 1932.[7]

That's a career of less than 10 years, but she just might be the first African-American woman to practice before the Michigan Supreme Court. There's one case — *Sidney H. Jones v. Adolph T. Marschner, Wayne Circuit Judge* (236 Mich. 313) — where a "Grayce G.W. Murphy" is listed as of counsel with African-American lawyer Benjamin F. Dunning.

The spelling of the names is different, obviously, but it doesn't take much of a leap to make the connection. How many female attorneys in Detroit at the time were named Grace?

Unfortunately, the Court calendar book listing all the events involved in the case doesn't include Murphy as one of the plaintiff's attorneys, so perhaps she wasn't there at all but assisted offsite. Wouldn't it be perfect, though, if the first African-American woman to practice before the Michigan Supreme Court also happened to be the first female African-American attorney in the state? Rarely does history tie up so neatly.

Of course, the answer to our question might be Luvenia D. Dockett.

We know a little bit more about Dockett than we do about Murphy … but not much.

Luvenia Dockett is a mystery in many ways. We know when she was born, but not when she died. We know where she was born, but not why she came to Michigan. We know she was well-educated, but not

the reason why. Most frustratingly, we don't even know the correct spelling of her name. In some records, it's "Luvenia." In others, it's "Louvenia" or "Louvina." Can you imagine the confusion when no one can consistently spell your first name?

Another source of frustration in researching Dockett's past is that her last name changed constantly. She married Robert Wynn in 1928; they divorced in 1939. She married Herbert Dockett in 1942; he died in 1963. Then in the 1970s, she married someone with the last name of Johnson. So you have to search for Luvenia Dorsey, Luvenia D. Wynn, Luvenia D. Dockett, and Luvenia Dockett-Johnson plus all the variations of her first name.

However her name was spelled or misspelled, Dockett was incredibly smart. By age 31, she had already graduated from Clark College and the Atlanta University School of Social Work.[8] Her thesis focused on providing public welfare to families in Fulton County, Georgia, which is where Atlanta is located. With all those degrees, a law degree must have seemed like the next logical step.

Dockett graduated from the Detroit College of Law in 1950,[9] passed the bar exam the following April,[10] and was admitted to the Bar two months later. She was joined in the legal community by Geraldine Bledsoe Ford less than a year later, and their careers would run parallel at times. In fact, Dockett ran against Ford in the 1966 race for a seat on the Detroit Recorder's Court, the election that earned Ford her designation as the first African-American woman elected as a judge.[11] Ford was considered "preferred and well qualified" and Dockett "qualified"[12] for the post, and though Dockett was defeated in the primary, she did receive more than 11,200 votes.[13]

By that time, Dockett was already serving "as an assistant Wayne County [p]rosecutor, which would cause her presence before the Court regularly."[14] But less than year after she was admitted to the Bar, Dockett is listed as counsel for Iva Isabell in the case of *George A. Isabell v. Iva S. Isabell* (333 Mich. 519), which *might* make her the first to argue before the Michigan Supreme Court. Of course, just to make things difficult, there are no records that *Isabell v. Isabell* was actually argued before the Court. It might have been decided by the submitted briefs. Does that count?

There is one other possibility, however. In October 1961, Jesse Pharr Slaton argued in front of the Michigan Supreme Court in *Lorena Fields and Ernest Fields v. Monte Korn and Eleanor Korn* (366 Mich. 108). I know Slaton well; she was an incredibly intelligent, ground-breaking, involved-in-everything lady who I've already written about. You can read more about her in a Michigan Lawyers in History article published in the August 2020 issue of the Michigan Bar Journal. It would be extremely ironic if, after all this searching for the first African-American woman to argue in front of the Michigan Supreme Court, she was sitting right under my nose, someone I already knew.

The first African-American man to argue a case before the Court was a bit lucky that his case — *William W. Ferguson v. Edward G. Gies* — was one of great importance. Most everyone knows Michigan's "first case of racial discrimination"[15] and many know the names of those involved: D. Augustus Straker, the attorney, and William Ferguson, who would become Michigan's first African-American state representative. The three cases Murphy, Dockett, and Slaton are connected to — *Jones v. Marschner*, *Isabell v. Isabell*, and *Fields v. Korn* — were ordinary, everyday cases: a money judgment, a messy divorce, a real estate issue. They were nothing that would really capture anyone's fancy.

Back to the original question: Who was the first African American woman to argue before the Michigan Supreme Court? Perhaps Murphy was the first to have her name connected to a case, Dockett was the first to bring a case up to the Court under her own name, and Slaton was the first to argue a case. If you know anything different, let me know.

The author thanks Hon. Terrance Keith for his assistance with research and review.

Carrie Sharlow is an administrative assistant at the State Bar of Michigan and assistant executive director of the Michigan Supreme Court Historical Society.

ENDNOTES

1. Littlejohn & Hobson, *Black Lawyer, Law Practice, and Bar Associations—1844 to 1970: A Michigan History* (Detroit: Wolverine Bar Association, 1987), p 49.
2. Ancestry.com, *Michigan, U.S., Death Records, 1867-1952* <https://www.ancestry.com/search/collections/60872/> [https://perma.cc/N8L2-2GL7] (all websites accessed May 1, 2024).
3. Ancestry.com, *Michigan, Marriage Records, 1867-1952* <https://www.ancestry.com/search/collections/9093/> [https://perma.cc/5ZBP-PUM3].
4. Ancestry.com. *Michigan, U.S., Death Records, 1867-1952*.
5. Lamphier & Welch, eds., *Women in American History: A Social, Political, and Cultural Encyclopedia and Document Collection: Precolonial North America to the Early Republic* (Santa Barbara: ABC-CLIO, 2017) p 346.
6. *Ex-Senator, City Aide Dies at 75*, Detroit Free Press (October 10, 1963), p A16.
7. *Black Lawyer, Law Practice, and Bar Associations*, p 49.
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10. *List of Those Who Passed Bar Exam,* Detroit Free Press (June 29, 1951), p 25.
11. *Order in the Court: Recorder's Court to Get 13 Judges*, Detroit Free Press (June 17, 1966), p D12.
12. *How Searchlight Rates Candidates,* Detroit Free Press (July 24, 1966), p C3.
13. *Recorder's Incumbents Win Health Vote of Confidence,* Detroit Free Press (August 4, 1966), p B6.
14. *Promotion Goes to Court Aide,* Detroit Free Press (October 31, 1962), p 5D.
15. Michigan Department of Education, *Michigan Legislative Biography: William Webb Ferguson* <https://mdoe.state.mi.us/legislators/Legislator/LegislatorDetail/1204> [https://perma.cc/TV52-99FU].

FROM THE MICHIGAN SUPREME COURT

ADM File No. 2023-21
Adoption of Local Court Rule 2.518 for the 20th Circuit Court and the Ottawa County Probate Court

To read this file, visit https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/local-court-rules/.

ADM File No. 2022-10
Proposed Alternative Amendments of Rule 8.126 of the Michigan Court Rules

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

ADM File No. 2021-50
Addition of Rule 2.421 of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following addition of Rule 2.421 of the Michigan Court Rules is adopted, effective May 1, 2024.

[NEW] Rule 2.421 Notice of Bankruptcy Proceedings

(A) Applicability. This rule applies to all state court actions in which a party is a named debtor in a bankruptcy proceeding under 11 USC 101 *et seq.*

(B) Party Subject to Bankruptcy Proceeding. Any party in a state court action who is a named debtor in a bankruptcy proceeding must

(1) file a notice of the bankruptcy proceeding in the state court action no later than 3 days after becoming subject to such bankruptcy proceeding, and

(2) serve the notice on all other parties in the state court action as provided in MCR 2.107.

(C) Other Parties. If a party to a state court action learns that another party in such action is a named debtor in a bankruptcy proceeding and notice of the bankruptcy proceeding in subrule (B) has not previously been filed and served by the debtor, then such party may

(1) file a notice of the bankruptcy proceeding in the state court action, and

(2) serve the notice on all other parties in the state court action as provided in MCR 2.107.

(D) Notice Contents. Notice of a bankruptcy proceeding filed under this rule must, at a minimum, include all of the following:

(1) name(s) of the debtor(s) described in subrule (A);

(2) the court name and case number(s) of the bankruptcy proceeding(s); and,

(3) if available, the name, telephone number, physical address, and email address for the debtor's attorney in the bankruptcy proceeding(s).

(E) Effect of Notice. If a notice is filed under this rule, the court may hold in abeyance any further proceedings and may schedule a status conference to consider the administrative closure of all or a portion of the state court action. To the extent that all or a portion of the state court action is administratively closed under this subrule or otherwise, it may be reopened if, on the motion of a party or on the court's own initiative, the court determines that the automatic stay has been lifted, removed, or otherwise no longer impairs adjudication of all or a portion of the state court action.

(F) This rule does not abridge, enlarge, or in any way modify existing rights and procedures under federal law, including bankruptcy proceedings under 11 USC 101 *et seq.*

Staff Comment (ADM File No. 2021-50): The addition of MCR 2.421 provides a process for filing a notice of a bankruptcy proceeding that affects a state court action.

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

ADM File No. 2020-08
Rescission Of Administrative Order No. 2020-17 and Amendment of Rule 4.201 of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having

been provided, and consideration having been given to the comments received, Administrative Order No. 2020-17 is rescinded and the following amendment of Rule 4.201 of the Michigan Court Rules is adopted, effective May 1, 2024.

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

Rule 4.201 Summary Proceedings to Recover Possession of Premises

(A)-(B) [Unchanged.]

(C) Summons.

(1) The summons must comply with MCR 2.102, except that it must command the defendant to appear for trial in accord with MCL 600.5735(2), unless by local court rule the provisions of MCL 600.5735(4) have been made applicable. If a court adopts a local court rule under MCL 600.5735(4), both of the following apply:

(a) Pursuant to subrule (G)(1)(b), the defendant must be allowed to appear and orally answer the complaint on the date and time indicated by the summons.

(b) The court must abide by the remaining requirements of this rule.

(2)-(3) [Unchanged.]

(D)-(P) [Unchanged.]

Staff Comment (ADM File No. 2020-08): The rescission of AO 2020-17 reflects the Court's review of the public comments received in this same ADM file regarding prior amendments of MCR 4.201. The amendment of MCR 4.201 derives from AO 2020-17 and ensures that courts with a local court rule under MCL 600.5735(4) implement their local court rule in accordance with the other provisions of MCR 4.201, including the requirement that a defendant be allowed to appear and orally answer the complaint.

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

ADM File No. 2022-33
Amendment of Rule 4.303 of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 4.303 of the Michigan Court Rules is adopted, effective May 1, 2024.

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

Rule 4.303 Notice

(A)-(C) [Unchanged.]

(D) Dismissal for Lack of Progress.

(1) On motion of a party or on its own initiative, the court may order that a case in which no progress has been made within 91 days after the last action be dismissed for lack of progress.

(2) The court must serve notice of the proposed dismissal on the parties at least 14 days before the court orders the case dismissed.

(3) A dismissal under this subrule is without prejudice unless the court orders otherwise.

Staff Comment (ADM File No. 2022-33): The amendment of MCR 4.303 adds a new subrule (D) to allow courts to dismiss, without prejudice, small claims cases for lack of progress 91 days after the last action and after serving notice of the proposed dismissal.

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

ADM File No. 2023-06
Retention of the Amendments of Rules 6.001 and 8.119, and the Addition of Rule 6.451 of the Michigan Court Rules

Additional Amendments of Rules 6.451 and 8.119 of the Michigan Court Rules

On order of the Court, notice and an opportunity for comment at a public hearing having been provided, the Court retains the amendment of Rule 6.001 adopted in its order dated March 29, 2023, and effective immediately, Rules 6.451 and 8.119 are amended further as indicated below.

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

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

Rule 6.451 Reinstatement of Convictions Set Aside Without Application

A conviction that was ~~automatically~~ set aside by operation of law under MCL 780.621g must be reinstated by the court only as provided in MCL 780.621h. The court must:

(A)-(C) [Unchanged.]

An order for reinstatement of a conviction that was improperly or erroneously set aside as provided in MCL 780.621h(2) must advise the individual whose conviction is being reinstated that he or she may object to the reinstatement by requesting a hearing. The request must be filed with the court on a form approved by the State Court Administrative Office.

Rule 8.119 Court Records and Reports; Duties of Clerks

(A)-(G) [Unchanged.]

(H) Access to Records. Except as otherwise provided in subrule (F), only case records as defined in subrule (D) are public records, subject to access in accordance with these rules.

(1)-(9) [Unchanged.]

(10) Set Aside Convictions. Access to iInformation on set aside convictions ~~is nonpublic and access~~ is limited to a court of competent jurisdiction, an agency of the judicial branch of state government, the department of corrections, a law enforcement agency, a prosecuting attorney, the attorney general, and the governor upon request and only for the purposes identified in MCL 780.623. Access may also be provided to the individual whose conviction was set aside, that individual's attorney, and the victim(s) as defined in MCL 780.623. The court must redact all information related to the set aside conviction or convictions before making the case record or a court record available to the public in any format.

(I)-(L) [Unchanged.]

Staff Comment (ADM File No. 2023-06): The amendment of MCR 6.451 clarifies the court's duties for reinstatement of convictions set aside without an application. The amendment of MCR 8.119 establishes a similar level of access to set aside information contained in court records as MCL 780.623 establishes for accessing set aside information contained in Michigan State Police records.

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

ADM File No. 2023-06 Amendments of Rules 6.110 And 8.119 of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 6.110 and 8.119 of the Michigan Court Rules are adopted, effective July 2, 2024.

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

Rule 6.110 The Preliminary Examination

(A)-(F) [Unchanged.]

(G) Return of Examination. Immediately on concluding the examination, the court must certify and transmit to the court before which the defendant is bound to appear the case file, any recognizances received, and a copy of the register of actions.

i. The court need not transmit recordings of any proceedings to the circuit court.

ii. If an interested party requests a transcript of a district or municipal court proceeding after the case is bound over, the circuit court shall forward that request to the district or municipal court for transcription as provided in MCR 8.108. The circuit court shall forward this request only if the circuit court case record is publicly accessible~~prosecutor's authorization for a warrant application, the complaint, a copy of the register of actions, the examination return, and any recognizances received.~~

(H)-(I) [Unchanged.]

(J) Remand. If the circuit court remands the case to the district or municipal court for further proceedings, the circuit court must transmit to the court where the case has been remanded the case file, any recognizances received, and a copy of the register of actions.

i. The circuit court need not transmit recordings of any proceedings to the district or municipal court.

ii. If an interested party requests a transcript of a circuit court proceeding after the case is remanded, the district or municipal court shall forward that request to the circuit court for transcription as provided in MCR 8.108. The district or municipal court shall forward this request only if the district or municipal court case record is publicly accessible.

Rule 8.119 Court Records and Reports; Duties of Clerks

(A)-(G) [Unchanged.]

(H) Access to Records. Except as otherwise provided in subrule (F), only case records as defined in subrule (D) are public records, subject to access in accordance with these rules.

(1)-(8) [Unchanged.]

(9) Circuit Court Bindover or Remand. For cases bound over to the circuit court on or after July 2, 2024, all case records and court records maintained by the district or municipal court become nonpublic immediately after entry of the order binding the defendant over to the circuit court. The circuit court case record, which includes the records transmitted under MCR 6.110(G), and court records remain accessible as provided by this rule.

For cases bound over to the circuit court and remanded to the district or municipal court on or after July 2, 2024, all case records and court records maintained by the circuit court become nonpublic immediately after entry of the order to remand. The district or municipal court case record, which includes the records transmitted under MCR 6.110(J), and court records become accessible after an order to remand as provided by this rule.

As used in this subrule, "nonpublic" means that term as defined in MCR 1.109(H)(2).

(I)-(L) [Unchanged.]

Staff Comment (ADM File No. 2023-06): The amendments of MCR 6.110(G) and 8.119(H) require all case and court records maintained by a district or municipal court to become nonpublic immediately after bindover to the circuit court. Similarly, upon remand to the district or municipal court, all case and court records maintained by a circuit court would become nonpublic.

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

VIVIANO, J. (*concurring in part and dissenting in part*). I agree with the amendments to MCR 6.110, but I disagree with the addition of MCR 8.119(H)(10). Court records maintained by district and municipal courts after a felony case is bound over to circuit court have always been accessible to the public unless the records are later suppressed under an applicable law.[1] I oppose MCR 8.119(H)(10) because it impedes access to court records and imposes an unnecessary burden on court clerks and staff.

The new requirements will make it more difficult to obtain court records that have always been accessible to the public up until now. This Court has a duty to ensure that court records are easily accessible by members of the public. See *In re Leopold,* 448 US App DC 77, 79 (2020) ("The public's right of access to judicial records is a fundamental element of the rule of law."). For many Michiganders, local district or municipal courts may be the easiest place to access a court record. See Michigan Manual 2023-2024, p 544 ("The district court is often referred to as 'The People's Court,' because the public has more contact with the district court than with any other court in the state ... "). I see no good reason to force individuals wishing to access information about a felony case to obtain that information from the circuit court. If the case is public and the local court has the relevant records or information sought, the public should have a right to access it at that court.

MCR 8.119(H)(10) also creates additional work for court clerks and staff by requiring them to make all records nonpublic simply due to *the possibility* that some cases may later become nonpublic. Circuit court staff will be further burdened because any requests for records of bound-over felonies that could have previously been made in the district or municipal court will now have to be made in the circuit court. It is noteworthy that of the three comments the Court received on this proposal, one was from a district court administrator and the other was from a county clerk. Both highlighted the unnecessary nature of the change and the problems that are likely to result.

For these reasons, I respectfully dissent from the inclusion of MCR 8.119(H)(10) in this set of amendments.

1. See, e.g., Holmes Youthful Trainee Act, MCL 762.11 **et seq.** (closing records regarding criminal offenses by young adults to public inspection under MCL 762.14(4)); MCL 333.7411(2) (closing certain records regarding proceedings for first-time controlled substance offenses). Likewise, court records maintained by circuit courts have always been accessible to the public after a remand to the district or municipal court unless the records are later suppressed.

ADM File No. 2024-05
Proposed Amendment of Rule 7.306 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.306 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford inter-

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

ested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 7.306 Original Proceedings

(A)-(B) [Unchanged.]

(C) An action for judicial review under MCL 168.46 or MCL 168.845a must be initiated only in the Supreme Court as an original proceeding and in accordance with this rule.

(DC) What to File. Service provided under this subrule must be verified by the clerk. To initiate an original proceeding, a plaintiff must file with the clerk all of the following:

(1) 1 signed copy of a complaint prepared in conformity with MCR 2.111(A) and (B). and entitled, for eExample, titles include:

"[Plaintiff] v [Court of Appeals, Governor [NAME], Board of State Canvassers, Board of Law Examiners, Attorney Discipline Board, Attorney Grievance Commission, or Independent Citizens Redistricting Commission]."

The clerk shall retitle a complaint that is named differently.

(2) 1 signed copy of a brief conforming as nearly as possible to MCR 7.212(B) and (C).;

(3) Pproof that the complaint and brief were served on the defendant, and,

(a) for a complaint filed against the Attorney Discipline Board or Attorney Grievance Commission, on the respondent in the underlying discipline matter;

(b) for purposes of a complaint filed under Const 1963, art 4, § 6(19), service of a copy of the complaint and brief shall be made on any of the following persons:

(i1) the chairperson of the Independent Citizens Redistricting Commission,;

(ii2) the secretary of the Independent Citizens Redistricting Commission, or

(iii3) upon an individual designated by the Independent Citizens Redistricting Commission or Secretary of State as a person to receive service. Service shall be verified by the Clerk of the Court; and

(c) for purposes of a complaint filed under MCL 168.46, service of a copy of the complaint and brief shall be made on the defendant(s) and all of the following persons if not named as a defendant:

(i) the candidates who were declared the winners of the office of President or Vice President of the United States,

(ii) the chairperson of the board of state canvassers,

(iii) the attorney general, and

(iv) the secretary of state.

A complaint filed under MCL 168.46 must be filed with the Court within 24 hours after the governor's certification of the completed recount but no later than 8:00 a.m. on the day before the electors of President and Vice President are required to convene pursuant to MCL 168.47.

(d) for purposes of a complaint filed under MCL 168.845a, service of a copy of the complaint and brief shall be made on the defendant(s) and all of the following persons if not named as a defendant:

(i) the candidates who were declared the winners of the office of President or Vice President of the United States,

(ii) the governor,

(iii) the attorney general, and

(iv) the secretary of state.

A complaint filed under MCL 168.845a must be filed with the Court within 48 hours after the certification or determination of the results of a presiden-

tial election and must name the board of state canvassers as a defendant.

(4) Tthe fees provided by MCR 7.319(C)(1) and MCL 600.1986(1)(a).

Copies of relevant documents, record evidence, or supporting affidavits may be attached as exhibits to the complaint.

(ED) Answer.

(1) [Unchanged.]

(2) A defendant challenging a certification or ascertainment after recount under MCL 168.46 must file the following with the clerk within 24 hours of the complaint being filed or by 12 p.m. on the day before the electors of President and Vice President are required to convene pursuant to MCL 168.47, whichever is earlier, unless the Court directs otherwise:

(a) 1 signed copy of an answer in conformity with MCR 2.111(C);

(b) 1 signed copy of a supporting brief in conformity with MCR 7.212(B) and (D); and

(c) Proof that a copy of the answer and supporting brief was served on the plaintiff.

(3) A defendant in an action filed under MCL 168.845a must file the following with the clerk within 48 hours after service of the complaint and supporting brief, unless the Court directs otherwise:

(a) 1 signed copy of an answer in conformity with MCR 2.111(C);

(b) 1 signed copy of a supporting brief in conformity with MCR 7.212(B) and (D); and

(c) Proof that a copy of the answer and supporting brief was served on the plaintiff and any intervenors.

(2) [Renumbered as (4) but otherwise unchanged.]

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

(GF) Reply Brief. 1 signed copy of a reply brief may be filed as provided in MCR 7.305(E). In an action filed under Const 1963, art 4, § 6(19), a reply brief may be filed within 3 days after service of the answer and supporting brief, unless the Court directs otherwise. In an action filed under MCL 168.845a, a reply brief may be filed within 1 day after service of the answer and supporting brief, unless the Court directs otherwise. A plaintiff may not file a reply brief in an action for judicial review under MCL 168.46.

(H) Notice of Intervention and Brief. In an action filed under MCL 168.845a(1), the governor, attorney general, secretary of state, and the winner of the presidential election may intervene by filing a notice of intervention and brief in support of or opposition to the complaint within 48 hours after service of the complaint and supporting brief.

(G)-(I) [Relettered as (I)-(K) but otherwise unchanged.]

(LJ) Decision. The Court may set the case for argument as a calendar case, grant or deny the relief requested, or provide other relief that it deems appropriate, including an order to show cause why the relief sought in the complaint should not be granted. To have conclusive effect in an action for judicial review under MCL 168.46, the Court's final order must be issued no later than 4 p.m. the day before the electors for President and Vice President of the United States convene under MCL 168.47. To have conclusive effect in an action for judicial review under MCL 168.845a, the Court's final order must be issued no later than the day before the electors for President and Vice President of the United States convene under MCL 168.47.

Staff Comment (ADM File No. 2024-05): The proposed amendment of MCR 7.306 would establish a procedure for two new original actions in the Supreme Court related to presidential elections in conformity with MCL 168.46 (as amended by 2023 PA 269) and MCL 168.845a (as adopted by 2023 PA 255).

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

A copy of this order will be given to the secretary of the State Bar and the state court administrator so they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by July 1, 2024, by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2024-05. Your comments and the comments of others will be posted under the chapter affected by this proposal.

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

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 9.131 of the Michigan Court Rules is adopted, effective May 1, 2024.

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

Rule 9.131 Investigation of Member or Employee of Board or Commission, or Relative of Member or Employee of Board or Commission; Investigation of Attorney Representing Respondent or Witness; Other Investigations Creating the Possible Appearance of Impropriety; Representation by Member or Employee of Board or Commission

(A)-(C) [Unchanged.]

(D) Other Investigations Creating a Possible Appearance of Impropriety. If the administrator determines that an appearance of impropriety would arise if a request for investigation is handled in the manner prescribed by MCR 9.112(C), the administrator must submit the request for investigation to the Michigan Supreme Court along with a written explanation as to why the administrator believes an appearance of impropriety would arise. If the Court agrees with the administrator's determination under this subrule, the Court will notify the administrator and direct that the procedures in subrule (A) be followed. If the Court disagrees with the administrator's determination under this subrule, the Court will return the request for investigation to the administrator for an investigation in accordance with MCR 9.112(C).

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

Staff Comment (ADM File No. 2022-45): The amendment of MCR 9.131 requires that the Attorney Grievance Commission (AGC) submit to the Supreme Court for review any requests for investigations received that involve allegations of attorney misconduct where the AGC administrator believes that an appearance of impropriety would arise if the AGC handled the investigation.

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

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

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 702 and 804 of the Michigan Rules of Evidence are adopted, effective May 1, 2024.

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

Rule 702 Testimony by Expert Witnesses

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

(a)-(c) [Unchanged.]

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

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

(a) [Unchanged.]

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

(1)-(3) [Unchanged.]

(4) Statement Against Interest. A statement that:

(A) [Unchanged.]

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

(5)-(6) [Unchanged.]

Staff Comment (ADM File No. 2022-30): The amendment of MRE 702 requires the proponent of an expert witness's testimony to demonstrate that it is more likely than not that the factors for admission are satisfied and clarifies that it is the expert's opinion that must reflect a reliable application of principles and methods to the facts of the case. The amendment of MRE 804(b)(4)(B) requires

corroborating circumstances of trustworthiness for any statement against interest that exposes a declarant to criminal liability.

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

ADM File No. 2024-01
Appointment of Chief Judge of the 16th District Court

On order of the Court, Hon. Sean P. Kavanagh is appointed as chief judge of the 16th District Court for a term beginning on Jan. 1, 2025, and ending on Dec. 31, 2025.

ADM File No. 2024-01
Appointment of Chief Judge of the 44th Circuit Court and the 53rd District Court

On order of the Court, Hon. Matthew J. McGivney is appointed as chief judge of the 44th Circuit Court and the 53rd District Court for a term beginning on March 18, 2024, and ending on Dec. 31, 2025.

ADM File No. 2024-01
Assignment of Business Court Judge in the 44th Circuit Court

On order of the Court, effective March 18, 2024, the Hon. Matthew J. McGivney is assigned to serve as a business court judge in the 44th Circuit Court for a term expiring April 1, 2025.

ADM File No. 2024-01
Appointment to the Judicial Education Board

On order of the Court, pursuant to Mich CJE R 3 and effective immediately, Hon. Cynthia M. Ward is appointed to the Judicial Education Board to fill the remainder of a term ending on Dec. 31, 2025.

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by Aug. 1, 2024. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The committee proposes a new instruction, M Crim JI 5.14a (screening of witness) where the court has permitted a witness to be screened from viewing the defendant at trial. The instruction is entirely new.

[NEW] M Crim JI 5.14a
Screening of Witness

You [will hear/are about to hear/have heard] testimony from a witness who [will testify/has testified] with the use of a screen. The use of a screen in this manner is authorized by law, and you must disregard it when deciding this case. Your decision must be based solely on the evidence presented. You may not consider the witness's testimony to be any more or less credible because of the screen. You must not allow it to influence your decision in any way.

Use Note

By adopting this jury instruction, the Committee on Model Criminal Jury Instructions does not take any position whether the use of a screen outside of the provisions of MCL 600.2163a is authorized. (Where the court determines that procedures under MCL 600.2163a are allowed, this instruction would be unnecessary because there would be no change in the courtroom setup between witnesses pursuant to (19)(b) of the statute.) Some Michigan cases appear to implicitly permit the use of a screen. See *People v. Rose,* 289 Mich App 499; 808 NW2d 301 (2010), finding no Confrontation Clause or Due Process Clause constitutional bar to the use of a screen, and allowing the use of a screen under the court's inherent ability to control courtroom proceedings. However, no case involving the use of a screen has discussed MCL 763.1, the last phrase of which could be considered as prohibiting the use of a screen between a witness and a defendant (" ... the party accused shall be allowed to ... meet the witnesses who are produced against him face to face.")

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by August 1, 2024. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The committee proposes amending jury instruction M Crim JI 7.6 (Duress) to comport with discussions of the defense in *People v. Reichard,* 505 Mich 81, 96 n 32 (2020), and *People v. Lemons* 454 Mich 234, 248 n 21 (1997). A question remains which party bears the burden of proof relative to the defense of duress, so alternative paragraphs are provided. Deletions are in ~~strike-through~~, and new language is underlined.

[AMENDED] M Crim JI 7.6
Duress

(1) The defendant says that [he/she] is not guilty because someone else's threatening behavior made [him/her] act as [he/she] did. This is called the defense of duress.

(2) The defendant is not guilty if [he/she] committed the crime while acting under duress. ~~Under the law, there was duress~~ The defendant acted under duress if ~~[~~four~~/five]~~ things were true:

(a) One, the threatening or forceful behavior would have made a reasonable person fear that he or she was facing immediate death or serious bodily harm~~;~~.

~~(b)~~ Two, the defendant actually was afraid of death or serious bodily harm~~;~~

(c) ~~Three, the defendant had this fear~~ at the time [he/she] acted~~;~~.

(d) ~~Four~~ (c) Three, the defendant committed the act to avoid the threatened harm~~;~~.

~~[(e)~~ ~~Five~~ (d) Four, the situation did not arise because of the defendant's fault or negligence.~~]~~[†]

(3) The defendant has forfeited the defense of duress if you find [he/she] did not take advantage of a reasonable opportunity to escape, without being exposed to death or serious bodily injury, or if [he/she] continued [his/her] conduct after the duress ended.

(4) In deciding whether duress made the defendant act as [he/she] did, think carefully about all the circumstances as shown by the evidence.

Think about the nature of any force or threats. Think about the background and character of the person who made the threats or used force. Think about the defendant's situation when [he/she] committed the alleged act. Could [he she] have avoided the harm [he/she] feared in some other way than by committing the act? Think about how reasonable these other means would have seemed to a person in the defendant's situation at the time of the alleged act.[1]

[(5) The prosecutor must prove beyond a reasonable doubt that the defendant was not acting under duress. If [he/she] fails to do so, you must find the defendant not guilty.

Or

(5) You should consider the elements of duress separately. If you find that the defendant has proved all of these elements by a preponderance of the evidence, you must find [him/her] not guilty. If the defendant has failed to prove all of these elements or has forfeited the defense, [he/she] was not acting under duress.][2]

Use Notes

This instruction should be used only when there is some evidence of the essential elements of duress.

~~1. Use (e) only where there is some evidence that the defendant found himself in the position of having to commit the crime through his own fault or negligence. Michigan law is unclear on whether a defendant can claim duress only where the defendant is completely free of fault.~~

~~2.~~ 1. In escape cases, the special factors listed in M Crim JI 7.7 should also be given if they are supported by competent evidence.

2. The question whether the burden is on the defendant to establish duress by a preponderance of the evidence, or on the prosecutor to disprove duress beyond a reasonable doubt, was avoided by the Michigan Supreme Court in both *People v. Reichard,* 505 Mich 81, 96 n 32; 949 NW2d 64 (2020), and *People v. Lemons* 454 Mich 234, 248 n 21: 562 NW2d 447 (1997). Another affirmative defense — self-defense — places the burden of proof on the prosecutor to disprove the defense once evidence of self-defense has been introduced. The burden being on the defendant to establish an insanity defense is statutorily determined, but there is no statute relative to the duress defense. The Committee on Model Criminal Jury Instructions takes no position on the question of who has the burden of proof but provides alternative paragraphs (5).

ORDERS OF DISCIPLINE & DISABILITY

SUSPENSION

Tony L. Axam, P23925, Atlanta, Georgia, by the Attorney Discipline Board. Five-year suspension, effective March 28, 2024.

The grievance administrator filed a Combined Notice of Filing of Reciprocal Discipline and Filing of Formal Complaint that attached, in relevant part, a certified copy of an order entered by the Supreme Court of Georgia accepting the voluntary surrender of the respondent's license to practice law in Georgia on Oct. 5, 2015, in a matter titled *In the Matter of Tony L. Axam,* 297 Ga. 786; 786 SE2d 222 (2015).

An Order Regarding Imposition of Reciprocal Discipline and Holding Formal Complaint in Abeyance was issued by the board on July 7, 2023, ordering the parties to within 21 days from service of the order inform the board in writing (i) of any objection to the imposition of comparable discipline in Michigan based on the grounds set forth in MCR 9.120(C)(1) and (ii) whether a hearing was requested. The order also ordered the grievance administrator to serve the respondent with the July 7, 2023, order and formal complaint but the assignment of a hearing panel and the respondent's requirement to file an answer to the formal complaint were held in abeyance until further order of the board.

On Feb. 28, 2024, the board issued an order that suspended the respondent's license to practice law in Michigan for five years, effective March 28, 2024. Costs were assessed in the amount of $1,541.16. The board further ordered that the formal complaint be severed from the reciprocal discipline matter to be assigned to a hearing panel for further proceedings with regard to the formal complaint.

REPRIMAND (BY CONSENT)

Maria K. Barone, P53154, Plymouth, by the Attorney Discipline Board Tri-County Hearing Panel #12. Reprimand, effective March 22, 2024.

The respondent and the grievance administrator filed an Amended 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 amended stipulation contained the respondent's admission that she was convicted by guilty plea of operating while intoxicated, a misdemeanor, in violation of MCL/PACC 257.6251-A in *People v. Maria Kanjuparamban Barone*, 35th District Court, Case No. 22P1789-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' amended stipulation, the panel found that the respondent committed professional misconduct when she 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 amended stipulation of the parties, the hearing panel ordered that the respondent be reprimanded. Costs were assessed in the amount of $770.90.

SUSPENSION

Mark D. Goldman, P42697, Scottsdale, Arizona, by the Attorney Discipline Board Suspension. 30 days, effective April 3, 2024.

In a reciprocal discipline proceeding filed pursuant to MCR 9.120(C), the grievance administrator filed a certified copy of a Final Judgment and Order and Decision and Order Imposing Sanctions of the presiding disciplinary judge of the Arizona Supreme Court showing that the court suspended the respondent's Arizona law license on Sept. 18, 2023, for a period of 30 days in the matter captioned *In the Matter of a Member of the State Bar of Arizona, Mark D. Goldman,* Presiding Disciplinary Judge, Arizona Supreme Court, Case No. PDJ 2022-9059.

An order regarding imposition of reciprocal discipline was issued by the board and served on the parties on Jan. 10, 2024. The 21-day period referenced in MCR 9.120(C)(2)(b) expired without objection or a request for hearing by either party. As a result, the respondent was deemed to be in default with the same effect as a default in a civil action pursuant to MCR 9.120(C)(6).

On March 5, 2024, the Attorney Discipline Board ordered that the respondent's license to practice law in Michigan be suspended for 30 days. Costs were assessed in the amount of $1,500.

SUSPENSION AND RESTITUTION WITH CONDITION

Brandon John Janssen, P78132, Detroit, by the Attorney Discipline Board Tri-County Hearing Panel #3. Suspension, 180 days, effective March 19, 2024.

After proceedings conducted pursuant to MCR 9.115, the panel found that the respondent committed professional misconduct during his representation of four separate clients in their individual immigration-related matters, when he prepared and executed a quit claim deed for a fifth client, and when he failed to answer requests for investigations filed by two of the clients.

Based on the respondent's admissions and the evidence presented at the hearing, the hearing panel found that the respondent handled a legal matter without preparation adequate in the circumstances in violation of MRPC 1.1(b) (counts 3 and 5); neglected a legal matter entrusted to him in violation of MRPC 1.1(c) (counts 4-5); failed to act with reasonable diligence and promptness in representing a client in violation of MRPC 1.3 (counts 2, 4, and 5); failed to keep a client reasonably informed about the status of a matter and comply with reasonable requests for information in violation of MRPC 1.4(a) (counts 2, 4, and 5); failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation in violation of MRPC 1.4(b) (counts 3 and 5); failed to hold property of clients or third persons in connection with a representation separate from the lawyer's own property in violation of MRPC 1.15(d) (count 4); upon termination of representation, failed to take reasonable steps to protect a client's interests such as refunding unearned fees and client files in violation of MRPC 1.16(d) (counts 2 and 4); made a false statement of material fact or law to a tribunal or failed to correct a false statement of fact or law previously made in violation of MRPC 3.3(a) (count 5); failed to make reasonable efforts to supervise the conduct of a nonlawyer assistant in violation of MRPC 5.3 (counts 2, 4, and 5); 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 6); knowingly made a false statement of material fact or failed to disclose a fact necessary to correct a misapprehension known to him in connection with a disciplinary matter in violation of MRPC 8.1(a) (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 2-6); 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 2-6); and engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3) (counts 2-6).

The panel ordered that the respondent's license to practice law in Michigan be suspended for 180 days, effective March 19, 2024; that he pay restitution totaling $5,275; and that he be subject to conditions relevant to the established misconduct. Costs were assessed in the amount of $2,932.25.

SUSPENSION[1]

Kenneth B. Morgan, P34492, Farmington Hills, by the Attorney Discipline Board. Suspension, 180 days, effective March 19, 2024.

The grievance administrator filed a notice of filing of reciprocal discipline under MCR 9.120(C) that attached a certified copy of an order entered by the U.S. District Court for the Western District of Michigan suspending the respondent from practice before the U.S. District Court for the Western District of Michigan on July 14, 2022, for failing to comply with the terms of a disciplinary order entered by a three-judge panel of the court in a matter titled *In Re: Attorney Kenneth B. Morgan,* Administrative Order No. 22-AD-057. Although no term for the suspension imposed was referenced in the order, the administrator indicated that comparable discipline in Michigan would be a suspension of 180 days or more.

Pursuant to MCR 9.120(C)(2), an order regarding imposition of reciprocal discipline was issued by the board on Nov. 20, 2023, ordering the parties to inform the board in writing within 21 days from the service of the order (i) of any objection to the imposition of comparable discipline based on the grounds set forth in MCR 9.120(C)(1) and (ii) whether a hearing was requested. The

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

21-day period set forth in the board's Nov. 20, 2023, order expired without objection or request for hearing by either party.

On Feb. 19, 2024, the Attorney Discipline Board ordered that the respondent's license to practice law in Michigan be suspended for 180 days, effective March 19, 2024. Costs were assessed in the amount of $1,508.77.

[1] Formal Complaint 23-89-GA was discontinued by the board. See Order Regarding Imposition of Reciprocal Discipline issued on Nov. 20, 2023.

DISBARMENT AND RESTITUTION WITH CONDITIONS

Donald J. Neville, P60213, Taylor. Disbarment, effective July 7, 2023.

The grievance administrator filed a combined Notice of Filing of Judgment of Conviction and an eight-count formal complaint against the respondent. The notice filed in accordance with MCR 9.120(B)(3) stated that the respondent was convicted of the misdemeanor offense of impaired driving on July 20, 2021, in violation of MCL/PACC Code 257.625(3)-A in a matter titled *State of Michigan v. Donald J. Neville*, 53rd Judicial District Court, Case No. 21-0038-SD. The eight-count formal complaint alleged that the respondent committed professional misconduct during his representation of six separate clients when he attended two separate court appearances and when he failed to respond to a subpoena issued by the grievance administrator.

After proceedings conducted pursuant to MCR 9.115 and 9.120, Tri-County Hearing Panel #12 found that based on the respondent's conviction, 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).

Based on the respondent's default for failing to answer the formal complaint and the evidence presented at the hearing, the panel found that the respondent failed to represent a client competently in violation of MRPC 1.1(a) [count 2]; handled a matter without preparation adequate in the circumstances in violation of MRPC 1.1(b) [count 7]; neglected a legal matter entrusted to him in violation of MRPC 1.1(c) [counts 1 and 3-7]; failed to seek the lawful objectives of a client in violation of MRPC 1.2(a) [counts 1 and 3-7]; failed to act with reasonable diligence and promptness in representing a client in violation of MRPC 1.3 [counts 1-6]; 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) [counts 3-6]; 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) [counts 3, 4, 6, and 7]; charged an excessive fee that was not properly explained in violation of MRPC 1.5(a) and (b) [count 6]; engaged in a conflict of interest by allowing his personal interests to affect the representation of his client in violation of MRPC 1.7(b)(2) [count 1]; failed to promptly pay or deliver funds that the client or third person is entitled to receive in violation of MRPC 1.15(B)(3) [count 6]; failed to withdraw from the case prior to appearing due to his physical condition in violation of MRPC 1.16(a)(2) [counts 2 and 7]; upon termination of representation, failed to promptly refund an unearned fee in violation of MRPC 1.16(d) [counts 3-6]; failed to expedite litigation in violation of MRPC 3.2 [counts 2-5 and 7]; knowingly made a false statement of material fact to the tribunal in violation of MRPC 3.3(a)(1) [count 7]; engaged in inappropriate conduct towards the tribunal in violation of MRPC 3.5(d) [counts 2 and 7]; knowingly made a false statement of material fact in connection with a disciplinary matter in violation of MRPC 8.1(a)(1) [count 3]; failed to respond to a lawful demand for information from a disciplinary authority in violation of MRPC 8.1(a)(2) [count 8]; engaged in conduct that violates the Rules of Professional Conduct in violation of MRPC 8.4(a) and MCR 9.104(4) [counts 1-7]; 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) [counts 1 and 3-6]; engaged in conduct that is prejudicial to the administration of justice in violation of MRPC

8.4(c) and 9.104(1) [counts 1-5 and 7-8]; stated or implied that he possessed an ability to improperly influence the judge in his client's matter in violation of MRPC 8.4(d) [count 1]; engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2) [counts 1-7]; and engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3) [counts 1-7].

The panel ordered that the respondent's license to practice law be suspended for 181 days effective July 7, 2023, that he be subject to conditions relevant to the established misconduct, and pay restitution totaling $8,335. The grievance administrator filed a timely petition for review and after proceedings held in accordance with MCR 9.118, the board increased discipline from a 181-day suspension of the respondent's license to practice law in Michigan to disbarment and affirmed the restitution and condition provisions imposed by the panel. Additional costs incurred for the review proceedings were assessed totaling $3,389.39.

REINSTATEMENT

On April 5, 2023, Kalamazoo County Hearing Panel #1 entered an Order of Suspension with Conditions (By Consent) suspending the respondent from the practice of law in Michigan for 30 days, effective April 27, 2023. On March 18, 2024, the respondent filed an affidavit pursuant to MCR 9.123(A) attesting that he has fully complied with all requirements of the panel's order and will continue to comply with the order until and unless reinstated. The board was advised that the grievance administrator has no objection to the affidavit, and the board being otherwise advised;

NOW THEREFORE,

IT IS ORDERED that the respondent, Robert J. Pleznac, is **REINSTATED** to the practice of law in Michigan, effective March 27, 2024.

REPRIMAND WITH CONDITIONS (BY CONSENT)

Scott W. Powers, P59882, Highland, by the Attorney Discipline Board Tri-County Hearing Panel #67. Reprimand, effective March 29, 2024.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Reprimand (With Conditions) 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. 22, 2022, by no contest plea of Domestic Violence — Aggravated, a misdemeanor, in violation of MCL/PACC Code 750.81A2 in a matter titled *People v. Scott W. Powers,* Oakland County Circuit Court, Case No. 2022-279586-FH, as set forth in a Notice of Filing of Judgment of Conviction by the grievance administrator.

Based upon the respondent's conviction, admission, 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).

In accordance with the stipulation of the parties, the panel ordered that the respondent be reprimanded and subject to certain conditions. Costs were assessed in the amount of $961.88.

SUSPENSION

Omar Fahmi Shaaban, P80425, Toledo, Ohio, by the Attorney Discipline Board. Suspension, one year, effective April 3, 2024.

In a reciprocal discipline proceeding filed pursuant to MCR 9.120(C), the grievance administrator filed a certified copy of an order from the Supreme Court of Ohio suspending the respondent's license to practice law in Ohio for two years with one year stayed with conditions effective Oct. 11, 2023, in a matter titled *Disciplinary Counsel v. Omar Fahmi Shaaban,* Case No. 2023-0179.

An order regarding imposition of reciprocal discipline was issued by the board and served on the parties on Jan. 24, 2024. The 21-day period referenced in MCR 9.120(C)(2)(b) expired without objection or a request for hearing by either party. As a

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

result, the respondent was deemed to be in default with the same effect as a default in a civil action pursuant to MCR 9.120(C)(6).

On March 5, 2024, the Attorney Discipline Board ordered that the respondent's license to practice law in Michigan be suspended for one year. A stayed suspension is not included as a type of discipline available in Michigan under MCR 9.106 and the conditions ordered by the Ohio Supreme Court were deemed unnecessary in Michigan. Costs were assessed in the amount of $1,511.41.

REPRIMAND (BY CONSENT)

Jeffrey P. Thennisch, P51499, Clarkston, by the Attorney Discipline Board Tri-County Hearing Panel #71. Reprimand, effective March 27, 2024.

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 and the amended stipulation of the parties, the panel found that the respondent's IOLTA was overdrawn by a transaction that was a business expense and should have been paid out of his business account and that he knowingly deposited personal funds into his IOLTA and used his IOLTA to convey wire transfers of funds to acquaintances to avoid family scrutiny of his personal spending. More specifically, the panel found that the respondent commingled personal and client funds in a trust account in violation of MRPC 1.15(d) and kept his own funds in a client trust account beyond an amount reasonably necessary to pay financial institution charges or fees in violation of MRPC 1.15(f). The panel also found that the respondent's conduct violated MCR 9.104(2) and (3).

In accordance with the amended stipulation of the parties, the panel ordered that the respondent be reprimanded. Costs were assessed in the amount of $927.14.

REPRIMAND (BY CONSENT)

Kevin W. Weller, P56943, Cheboygan, by the Attorney Discipline Board Emmet County Hearing Panel #1. Reprimand, effective March 29, 2024.

The respondent and the grievance administrator filed an Amended 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 amended stipulation contained the respondent's admission that he drove a vehicle while under the influence of alcohol and pled guilty to operating while intoxicated on August 11, 2023, a misdemeanor, in violation of MCL/PACC Code 257.6251-A in a matter titled *People v. Kevin W. Weller,* 89th District Court Case No. 23-0345-SD, as set forth in a Notice of Filing of Judgment of Conviction by the grievance administrator.

Based upon the respondent's conviction, admission, and the stipulation of the parties, the panel found that the respondent committed professional misconduct when he 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 panel ordered that the respondent be reprimanded. Costs were assessed in the amount of $771.76.

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LAWYERS & JUDGES ASSISTANCE
MEETING DIRECTORY

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

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

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ALCOHOLICS ANONYMOUS & OTHER SUPPORT GROUPS

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

Detroit
MONDAY 7 PM*
Lawyers and Judges AA
St. Paul of the Cross
23333 Schoolcraft Rd.
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
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