MICHIGAN
BAR JOURNAL
JUNE 2024

Alternative Dispute Resolution

- Proposed advancements in mediation practices: Placing clients at the center of mediation
- Early dispute resolution: Practices and principles for early settlement
- Witness statements in arbitration
- Michigan case law concerning use of emails in alternative dispute resolution

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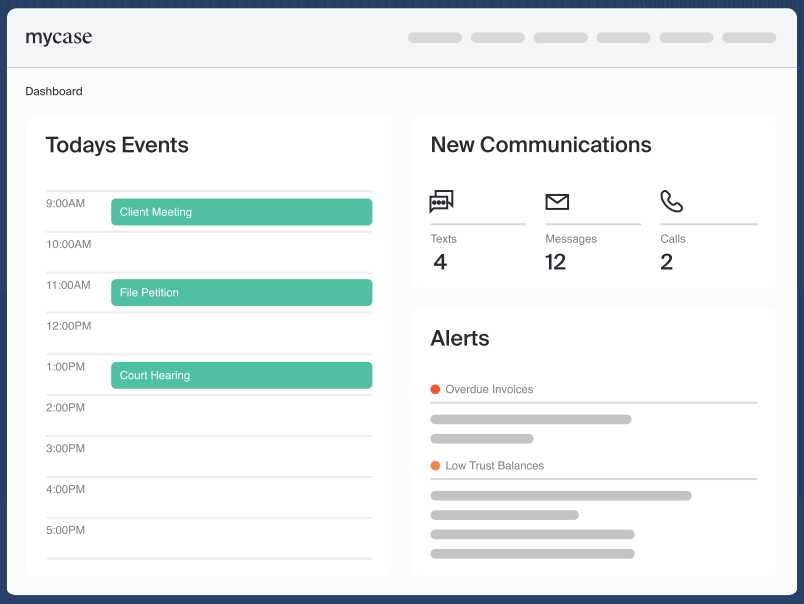

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MICHIGAN
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JUNE 2024 | VOL. 103 | NO. 06

OF INTEREST

ON THE COVER: The Grand Hotel on Mackinac Island hosts the Great Lakes Legal Conference — the State Bar of Michigan's premier continuing education and leadership development event — on Friday-Saturday, June 14-15.

MICHIGAN
BAR JOURNAL

JUNE 2024 • VOL. 103 • NO. 06

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

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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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IN MEMORIAM

ROBERT J. ALPINER, P40423, of West Bloomfield, died April 6, 2024. He was born in 1947, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1987.

HON. JAMES L. BANKS, P10405, of Lake Odessa, died May 18, 2023. He was born in 1942, graduated from Wayne State University Law School, and was admitted to the Bar in 1969.

PATRICIA A. D'ITRI, P58726, of Mears, died April 12, 2024. She was born in 1960, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1998.

JAMES L. GAULT, P75928, of Greenbrae, California, died May 21, 2023. He was born in 1928, graduated from University of Michigan Law School, and was admitted to the Bar in 1953.

ROYDEN E. JONES JR., P15593, of Hamilton, died April 22, 2024. He was born in 1943, graduated from Wayne State University Law School, and was admitted to the Bar in 1968.

STEPHEN L. LANGELAND, P32583, of Kalamazoo, died April 4, 2024. He was born in 1955 and was admitted to the Bar in 1981.

KENNETH F. LARITZ, P23711, of Clinton Township, died March 20, 2024. He was born in 1950, graduated from Detroit College of Law, and was admitted to the Bar in 1974.

ERIC S. POLAN, P73811, of White Lake, died Feb. 27, 2024. He was born in 1962, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 2010.

HON. JOSEPH P. SWALLOW, P21187, of Alpena, died April 20, 2024. He was born in 1932 and was admitted to the Bar in 1962.

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.

LEGAL NOTICE

NOTICE OF APPOINTMENT OF INTERIM ADMINISTRATOR

The 6th Circuit Court has ordered that:

The State Bar of Michigan
Attorney **April Alleman,** P81156
306 Townsend Street
Lansing, MI 48933
517.346.6392

is hereby appointed Interim Administrator to serve on behalf of:

Attorney **Shawn K. Ohl**, P57972
195 Windsor Road
Rochester Hills, MI 48307
248.670.2680

Ordered by 6th Circuit Court on May 29, 2024.
Case no. 2024-207709-PZ.

NEWS & MOVES

BOARD OF COMMISSIONERS SEEKS CANDIDATES FOR AGENCY VACANCIES

The State Bar Board of Commissioners seeks names of persons interested in filling the following agency vacancies:

Institute of Continuing Legal Education Executive Committee

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

Michigan Indian Legal Services Board of Trustees

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

DEADLINE FOR RESPONSES IS JULY 12.

Applications received after the deadline indicated will not be considered. Applicants for an agency appointment should submit a résumé and a letter outlining their background and nature of interest in the position via email to the secretary of the State Bar in care of Marge Bossenbery at mbossenbery@michbar.org. Please do not send via U.S. mail.

ARRIVALS AND PROMOTIONS

ANDREW T. BLUM has joined the Grand Rapids office of Bodman.

CLOIE Y. CHIDIAC and **COURTNEY A. LAVENDER** have joined the Bloomfield Hills office of Plunkett Cooney as associates.

NANCY SAMIR-HADDAD DERLETH has joined the Midland office of Warner Norcross & Judd as an associate.

MATTHEW W. FRANK has joined Kemp Klein Law in Troy.

BRANDON J. HAYES has joined the Grand Rapids office of Warner Norcross & Judd as an associate.

MEGAN MITCHELL has joined the Lansing office of Abdnour Weiker as a special education attorney.

ADOMAS N. RAUCKIS and **RYAN C. WASHBURN** have joined the Ann Arbor office of Bodman as senior associates.

RICHARD WARREN has joined the Detroit office of Ogletree Deakins as a shareholder.

AWARDS AND HONORS

ROBERT S. BICK, a shareholder with Williams Williams Rattner & Plunkett in Birmingham, was recognized on the Michigan Lawyers Weekly list of 2024 Go-To Lawyers in business transactions.

CHARLIE GOODE, a partner with Warner Norcross & Judd in Grand Rapids, was recognized on the Michigan Lawyers Weekly list of 2024 Go-To Lawyers in business transactions.

JAMES J. MURRAY, a partner with Plunkett Cooney in Petoskey, was recognized on the Michigan Lawyers Weekly list of 2024 Go-To Lawyers in business transactions.

COURTNEY L. NICHOLS, a partner with Plunkett Cooney in Bloomfield Hills, was recognized by DBusiness magazine as one of its 30 in Their Thirties honorees.

ERIN PAWLOWSKI with Dickinson Wright in Troy was recognized on the Michigan Lawyers Weekly list of 2024 Go-To Lawyers in business transactions.

SHANIKA A. OWENS with Butzel in Detroit received the Detroit Bar Association Pro Bono Service Award.

LEADERSHIP

MICHAEL D. HANCHETT with Plunkett Cooney in Bloomfield Hills was selected by the Lawyers for Civil Justice as a member of its 2024 class of fellows.

UPCOMING

The **INGHAM COUNTY BAR ASSOCIATION** hosts its 19th annual Memorial Golf Classic on Thursday, Aug. 1, at Hawk Hollow Golf Course in Bath Township.

A softball game pitting **MDTC vs. THE MICHIGAN ASSOCIATION FOR JUSTICE** benefiting the Detroit Police Athletic League takes place on Thursday, Aug. 22, at the Corner Ballpark in Detroit.

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

FROM THE PRESIDENT

DANIEL D. QUICK

Not waving but drowning

I was much too far out all my life
And not waving but drowning.[1]

When I was a young lawyer, an opposing counsel killed himself. The details don't matter, but it was dramatic and impactful. You know all those articles you've seen about how the legal profession suffers from higher levels of stress, depression, suicide, and substance abuse than other jobs?[2] Well, that hits a little different when it's someone you know.

Since that time, I've seen what I think are signs of distress. Most people did not do anything dramatic (that I know of) but suffering always bears bitter fruit somewhere. I've known the alcoholics, the esteemed colleague slowly degrading from old age, the person destroyed by the loss of a loved one, the workaholic unable to get off the hamster wheel. Unfortunately, too many of us know someone who has been in distress and spiraled downward.

When someone is in trouble, do you care? I can't answer that question for you or tell you how to feel. But I believe a lot of people do care. And some of those people still don't help. I haven't. I've doubted my ability to serve as a roving clinician and do not want to impinge upon the privacy and sovereignty of another person. And even the part of me that does want to help doubts that I really know how without coming off as awkward, nosy, or perhaps even making things worse.

I know this from personal experience but also from hard data. These obstacles to helping are certainly not unique to the legal profession. But they live here. The State Bar of Michigan Lawyers and Judges Assistance Program (LJAP) receives several calls each week from concerned parties who don't know how to ask if a colleague, friend, or family member needs help. LJAP Director Molly Ranns and her two clinicians regularly walk people through these types of conversations, helping folks formulate thoughts, challenge their own irrational fears that asking will make something worse, and provide specific ways to actively listen without judgment.

I took my own advice; I asked Molly for some help. Perhaps a reader just had this experience or will in the near future. Where can they start?

Daniel D. Quick: First and foremost, what are some signs and/or symptoms that might be displayed if someone needs help?

Molly Ranns: In the most general terms, one common indicator of an issue is noticing a change. Change can present itself in many different forms. It can be physical with a change in appearance or extreme tiredness/fatigue. It could also be a change in behavior such as withdrawing from friends, family, and social events or perhaps losing interest in activities they once enjoyed. Symptoms can also manifest as increased drug/alcohol use, mood swings, or bursts of anger.[3]

Additional Resources

- This article summarizes 10 signs that might be apparent when someone is struggling: https://perma.cc/AE4P-MZ85.[4]
- This article is a solid source and though written more for an individual wondering if they personally need help, it echoes what the prior article says and provides helpful information: https://perma.cc/TM98-U5DH.[5]

DDQ: How do we go about asking someone if they're struggling?

MR: Now that we know some of the signs, the next step is having a delicate conversation. We may feel awkward or uncomfortable, but by taking this step we can try to help colleagues down the path of addressing any issues.

Molly previously wrote an article for the *Michigan Bar Journal* that suggests we use the acronym ASK as a guide in these conversations.

ASK
Ask the question (are you okay?)
Seek more information (non-judgmentally)
Know where to find resources (LJAP, of course).[6]

While her article focused on suicide prevention, it provides an excellent overview for any conversation concerning well-being and mental health.

Being thoughtful and preparing for your conversation can help create a positive outcome. One of my favorite pieces of advice is to ask the individual twice. The conversation might be difficult, but for many it is even more difficult to admit they need help.[7]

Additional resources

- This article walks through how to ask a friend or colleague if they are struggling — including more reasoning behind why you should ask more than once: https://perma.cc/KQ7Z-5996.[8]
- Molly's column appears in the April 2022 *Michigan Bar Journal*: https://www.michbar.org/journal/Details/Suicide-prevention-in-the-legal-community?ArticleID=4410.[9]

DDQ: Finally, how can we help someone who is struggling?

MR: The State Bar of Michigan offers virtual support groups, clinical assessments, training on practicing wellness, and referrals to mental health providers through the Lawyers and Judges Assistance Program. Contact us at 1-800-996-5522 or contactLJAP@michbar.org, or visit www.michbar.org/LJAP for more information.

Molly notes that we cannot truly help others without shaming or judging them until we are able to ask for help ourselves without judgement or self-criticism.

Additional resource:

- Here is a short video of Oprah Winfrey interviewing Brené Brown, a clinical social worker and academician renowned for her work on vulnerability and shame, among a number of other topics: https://perma.cc/YE9T-4TFH.[10]

ENDNOTES

1. Smith, *Not Waving but Drowning* (1972, reprinted New Directions Pub Corp, 1988).
2. Simon Sherry, *Why are Lawyers at Greater Risk of Suicide?*, Psychology Today <https://www.psychologytoday.com/au/blog/psymon-says/202304/why-are-lawyers-at-greater-risk-of-suicide> (posted April 12, 2023) (all websites accessed May 9, 2024); American Bar Association, *New study on lawyer well-being reveals serious concerns for legal profession* <https://www.americanbar.org/news/abanews/publications/youraba/2017/december-2017/secrecy-and-fear-of-stigma-among-the-barriers-to-lawyer-well-bei/> (posted December 2017).
3. Clearview Treatment Programs, *10 Signs Your Loved One Needs Help* <https://clearviewtreatment.com/resources/blog/10-signs-your-loved-one-needs-help> [https://perma.cc/AE4P-MZ85] (posted May 24, 2021).
4. *Id.*
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IN FOCUS

ALTERNATIVE DISPUTE RESOLUTION

BY JENNIFER M. GRIECO

It is my privilege to introduce the Alternative Dispute Resolution theme edition on behalf of the State Bar of Michigan ADR Section. If you are an ADR professional or a litigator who utilizes ADR services, we hope you find the articles to be interesting, innovative, and beneficial to your practice. But let me use this opportunity to shamelessly promote the section.

If you are a litigator and not a member of the ADR Section, why not? According to the Michigan Supreme Court, less than 1.5% of civil cases filed in the state's circuit courts are resolved through trial.[1] Most cases are ordered to mediation at some point if the parties have not already agreed to do so. And more and more contracts include mandatory arbitration provisions for employment, construction, consumer transactions, or corporate relationships. As such, the number of disputes resolved in mediation or arbitration has increased and will only continue to increase in the future. Obtaining the best results for clients through ADR is a necessary skill for any litigator, and the ADR Section provides valuable education and training to assist litigators and neutrals.

Programs designed for mediators include the Mediator Forum, where mediators share their favorite techniques, experiences, interventions, and approaches to mediating money issues.[2] The ADR Section Annual Conference and other offerings provide Supreme Court Administrative Office-approved advanced mediation training credits necessary to remain on court-appointed mediation rosters.

There are also plenty of programs for advocates who use ADR services. For example, the ADR Section recently hosted two arbitration presentations — "Achieving the Goals of Arbitration: Working with the Administration, the Arbitrator, and your Opponent"[3] and "Comparing International and Domestic Arbitrations: Tips for Advocates, Clients, and Arbitrators."[4] The section recently collaborated with the Business Law, Labor, Employment Law, and Young Lawyers sections to present "Mediation Advocacy: A Best Practices Review."[5]

If these programs sound relevant to your practice but you missed them, the ADR Section web page includes content and presentations from prior conferences, summits, the section's Lunch and Learn series, and other webinars; it also includes all written materials maintained over the years. For the $40 annual membership fee, there is an abundance of resources available online for ADR professionals and those who utilize ADR. These resources are especially valuable for newer litigators.

As many of us know, the practice of law is much different than it was 20-plus years ago. There is certainly an increase in ADR and a decrease in jury trials. But the next generation of lawyers is learning to practice law in the Zoom environment. There are concerns about the loss of the experience of arguing motions live in the courthouse. However, another byproduct of the Zoom courthouse is the lack of in-person interactions with opposing counsel. Couple that with the increased reliance on e-mail rather than picking up the phone to communicate and the next generation of lawyers will not have the experience, skillset, or perhaps even the desire to attempt to settle cases directly with opposing counsel. Accordingly, they will likely rely heavily on neutrals to resolve cases. And, as noted by the article in this edition entitled "Proposed Advancements in Mediation Practices: Placing Clients at the Center of Mediation," mediation has become more crucial because of the decline in civility — another reality of practicing law today. These factors highlight that the ADR Section training and materials, including The Michigan Dispute Resolution Journal, are necessary tools for every litigator.

The ADR Section mission is to encourage conflict resolution by:

- providing training and education for ADR professionals;
- giving professionals the tools to empower people in conflict to create optimal resolutions;
- promoting diversity and inclusion in the training, development, and selection of ADR providers and encouraging elimination of discrimination and bias;
- advancing the use of alternative dispute resolution processes in our courts, government, businesses, and communities; and
- building and preserving public confidence in ADR.

While each of these objectives is central to the mission, the last point was recently added by the ADR Council, and its importance

cannot be overstated. For many litigants, their engagement with the justice system will end with ADR. The goal for all litigants, especially those ordered to participate, is feeling that they had an opportunity to be heard and obtain a just resolution not tainted by the impression that ADR is a "secretive corner of the legal world."[6] This objective has been a component of the section's previous work; it is now specifically part of the mission to ensure it is regularly considered by each of our committees. The section should lead the discussion to ensure fair and impartial neutrals and the quality and integrity of the process to preserve public confidence in ADR.[7]

Those who use ADR services are a necessary voice at the table. I again encourage litigators to join the ADR Section and engage in the discussion. We can, and should, continue to evaluate how we can improve mediation and arbitration for the benefit of an efficient, fair, and just process.

Jennifer M. Grieco, a partner at Altior Law in Birmingham, is the chair of the State Bar of Michigan Alternative Dispute Resolution Section.

ENDNOTES

1. Michigan Courts, *Guide to ADR Processes* <https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/guide-to-adr-processes/> [https://perma.cc/M5FC-UMDX] (all websites accessed May 16, 2024).
2. The next Mediator Forum is scheduled for June 27 from noon-1:30 p.m. and is entitled "Show Me the Money – a Mediator Forum Where Mediators Learn From Each Other." Cost is $10 for section members and $40 for non-members. Zena D. Zumeta and Sheldon Stark will serve as administrators.
3. The panel for this program included Iman Hyder-Eliz, vice-president of construction at the American Arbitration Association; Larry Saylor of Miller Canfield; and moderator Michael Lieb of Lieb ADR. The presentation is available to members in the ADR Section Library at <https://connect.michbar.org/adr/communityresources/ourlibrary>.
4. The panel for this program included Frederick Acomb and James Woolard of Miller Canfield; international disputes attorney, arbitrator, and mediator Harshitha Ram, and moderator Larry Saylor of Miller Canfield. The presentation is available to members in the ADR Section Library at <https://connect.michbar.org/adr/communityresources/ourlibrary>.
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Proposed advancements in mediation practices: Placing clients at the center of mediation

BY TOM McNEILL

Our group of 11 experienced commercial litigation mediators and trial lawyers[1] commenced a project to envision mediation enhancements, innovations, and creative strategies. From a blank slate, we gravitated to a conclusion that commercial litigation mediations benefit from mediators engaging more directly with client decision makers supported by increased mediator-facilitated direct communication between opposing counsel.

Applicable to mediation in a wide range of litigation disciplines and subject matters, our proposals are outlined here for consideration, comment, and adoption by mediators and lawyers. Our goal is promoting a more efficient mediation process with an increased focus on client participants, thereby increasing frequency of resolution on objectively reasonable terms earlier in the mediation process.

A CRUCIAL FORUM FOR RESOLUTION

Based on our experiences and anecdotal evidence from colleagues and peers, mediation is increasing in prevalence due to a variety of factors. Among them:

- With post-pandemic court dockets still backlogged, judicial officers are more frequently directing parties to mediate and making that recommendation earlier in cases.

- We have observed that there seems to be fewer and/or less

IN PERSPECTIVE

TOM McNEILL

opportunities for trials, and many practitioners in commercial litigation/business do not have extensive trial experience. Counsel's self-evaluative concerns in this regard may make settlement more attractive.

- The frequency and quality of counsel-to-counsel negotiations seems to be decreasing. Communication between lawyers is dominated by email with settlement discussions in person or by phone on the wane.

- Bilateral settlement discussions are becoming a lost art: counsel-to-counsel negotiations often reflect the well-documented decline in civility. Negotiations are often premised solely upon arguing merits ad nauseum without finding common ground upon which compromise and resolution can be achieved.

Mediators meet client and practitioner needs created by these factors, underscoring that mediation is a key forum for resolution.

BASELINE: THE TRADITIONAL MEDIATION FORMAT

There exists a wealth of publications describing variations on the mediation process and mediator and party strategies. Even before selecting a mediator, counsel should discuss with clients the mediation process and begin developing goals and objectives to be achieved in a mediated resolution.

Generally, the traditional mediation format for commercial/business litigation and prelitigation disputes encompasses the following elements:

- Selecting the mediator.

- The initial conference with counsel and the mediator to discuss the case generally and familiarize the mediator with key issues.

- Mediation statements, where each side submits to the mediator (and typically exchanges with opposing counsel) an advocacy statement of the merits of their positions including procedural history/status and factual, legal, and practical issues that drive adjudication risk and provide impetus for a resolution. Statement advocacy forms the bedrock of mediation.

- On mediation day, the mediator convenes the party's counsel (external and in-house counsel), clients/business decision makers, and sometimes liability and damages experts and financial or business advisors. This takes place in person, via technology (Zoom, Teams, etc.), or a combination of both. The mediator may start with a joint meet-and-greet session for an overview of the process or begin with each side in separate conference or Zoom rooms.

- The mediator works back and forth between parties to discuss positions, merits, risks, and opportunities (also referred to as caucus sessions or shuttle diplomacy.) The mediator advances the process by guiding the parties in making a series of settlement offers and counteroffers.

- A resolution is set forth in a signed document in the form of a term sheet or full-blown settlement agreement with provisions making it final, binding, and enforceable.

- If the parties do not reach resolution on mediation day, mediators typically follow up to advance the cause of settlement. Mediator practices in this phase vary greatly.

This format largely depends on the mediator discussing the dispute with the lawyers, which tends to leave clients observing the discussion. When the mediator leaves the room, counsel and client discuss the meaning and import of what just occurred and develop strategies for the next mediator visit and settlement move.

Within each element of the traditional format, we see immense opportunities for the mediator to engage directly with the client (after all, it is *their* case) and moderate interactions between opposing counsel and even experts — with clients observing as the mediator sees fit. And sometimes, it is wise for the mediator to moderate direct client-to-client negotiations with the lawyers observing.

The following observations and proposals are presented with the goal of encouraging mediators and party counsel to put clients more clearly and definitively at the center of the experience.

OPPORTUNITIES AND BEST PRACTICES FOR MEDIATION ENHANCEMENT

Selecting a mediator

There are many factors to consider in choosing a mediator — the business, the clients, and the subject matter are just a few. We recommend counsel fully involve clients in the due diligence and selection process rather than counsel selecting the mediator for the client.

Initial conference

Mediators typically convene an initial conference with litigation counsel a few weeks before mediation day to learn the basics of the case — key factual and legal issues, procedural posture, status of discovery, potential dispositive motion practice, and future dates, including trial.

The initial conference is an excellent opportunity for counsel to engage with the mediator and one another. Opportunities for expanding and enhancing the initial conference should include submission of operative pleadings, joint submission for the pretrial conference, the scheduling order, initial disclosures, and pending discovery or summary disposition briefing. Avoid attaching exhibits other than perhaps excerpts of the contract or an email admission. At this juncture, less is more.

In advance of the initial conference, we recommend counsel submit a two- to three-page summary of the key factual, legal, and practical issues impacting resolution (with subtle advocacy to advance your client's cause.) A more detailed summary comes later.

In our experience, the initial conference discussion only involves the mediator and litigation/trial counsel. In the right circumstances, we favor including clients/business decision makers and/or in-house counsel to provide the opportunity for further familiarity and rapport with the mediator very early in the process. Presently in commercial cases, it is rare for mediators to include clients in the initial conference; we think it should become common practice.

Prepping for mediation day

Preparing for mediation day may be the most critical step for clients and for the prospects of resolution.

It is crucial that counsel meets with their clients to review all submitted materials and prepare for negotiating a resolution. Counsel and clients must work together to set goals and objectives and develop strategies for achieving them, and clients must review and understand mediation statements submitted by opposing parties.

In our experience, there are varying levels of counsel and client preparation for mediation day. Clients frequently are well-versed in their own positions but less apprised of the opposing party's positions and strengths. A client's first full and accurate appreciation of the risk in their own position often occurs when the mediator explains the other side's position, which makes it exceedingly difficult to reach a resolution on mediation day.

Premediation day session with mediator and client/counsel team

This is a centerpiece proposal. It is rarely used by mediators in commercial cases/disputes but is effective in mediating disputes in other subject matters, particularly family law. Convened a few days before mediation day, these sessions provide an important, even critical, opportunity for clients, counsel, and mediators.

Our recommendation is that between submission of mediation statements and mediation day, mediators meet separately with each side (lawyers and clients). Ideally, these sessions are held in person but can occur via Zoom. The mediator should apply confidentiality to these sessions, creating a safe environment for clients to discuss their perspective on the case and share their vision for resolution.

The mediator does not push risk buttons, cross-examine, or play devil's advocate. That will change on mediation day when the mediator tests the client's positions and becomes a purveyor of risk.

A premediation session with each side:

- Provides an opportunity for clients to talk directly with the mediator and for counsel to discuss key points in a way they may not have during mediation statement advocacy;
- Allows clients/counsel and the mediator to develop rapport and trust;
- Gives participants a head start on mediation day by replacing the first set of caucus sessions;
- Accelerates discussion of core issues that embody risk and drive resolution; and
- Results in earlier exchanges of initial positions. Under the traditional mediation format, the first set of offers and counters typically are exchanged mid-afternoon on mediation day; by the third round, clients are often worn out and frustrated.

Premediation sessions present an excellent opportunity for the mediator to make sure clients understand all aspects of the case and for the client/counsel team to gently evaluate whether the mediator knows and understands their team's strengths and the other side's weaknesses.

Counsel-only sessions

Many mediators conduct counsel-only sessions for direct interaction without the need for performance art in the client's presence. These may occur before mediation day, on mediation day before clients arrive, or from time to time during mediation day.

These sessions create a forum for discussing factual, legal, damage, or practical issues that drive the case and create common ground for settlement framework, elements, cash consideration, non-monetary provisions, and creative solutions. Counsel then reports back to clients on progress.

We added these sessions as best practice so counsel can prepare for them and inform clients that they may occur.

Mediation day checklist

- Should your damages expert attend mediation? Increasingly, practitioners say yes. An expert presentation or rebuttal — to the mediator, the opposing side, or the opposing expert — helps sharpen risk issues for reaching an agreement.

- Ensure that insurance coverage is addressed. The mediator will want to know coverage issues and whether an insurer may be the source of settlement funding, even in part. Will the claims representative and/or insurer's counsel participate? If not accomplished previously, counsel should obtain an applicable policy and, if there is one and the insurer and insured are willing, the reservation of rights letter. In the event of a coverage dispute that could derail resolution, counsel may request that the mediator engage with the insurer's counsel and representative.

- Explore tax advantages and disadvantages. The gap between settlement positions can be narrowed if a party payor or payee can construct a tax advantage or avoid a tax disadvantage while achieving at least tax neutrality for the other party. Prior to mediation day, clients and/or counsel should consult with a qualified tax advisor to explore minimization. Doing so on mediation day is often too late.

- For mediation day, prepare a draft term sheet and/or full settlement agreement. Surprisingly, few lawyers do this. The golden rule is that parties sign an enforceable resolution document, but hours can elapse between reaching a verbal agreement in principle and drafting and negotiating the final document. Client patience wanes, frustrations rise, closing the deal becomes more difficult, and the threat of a client walking out grows. Arming yourself with a beginning term sheet/settlement agreement can avoid protracted settlement papering from scratch in a limited timeframe.

Mediator opportunities during mediation day

Under the traditional format, the key mediation day players are the mediator and party counsel, who engage in debate and dialogue as clients observe. When the mediator leaves the room, counsel and clients discuss what just happened and what that means for movement in their settlement position.

We encourage mediators to be creative and bring clients into the center of the process. Steps can include:

- Frequent mediator drop-in visits to the other conference rooms during shuttle diplomacy. Clients become worried, frustrated, bored, and angry while the mediator is working in other rooms. Stopping by with updates and encouragement is a best practice.

- Direct counsel debate of key issues in which the mediator moderates and clients observe. This can be effective later in the day when tightly moderated by the mediator and directed to discrete settlement fulcrum issues.

- Direct client negotiations moderated by the mediator. Business clients are comfortable negotiating their own deals; that can be employed in mediation. In our experience, this approach is most frequently applied in cases in which an existing business is modified or where there are prospects for future or additional business, but it can be used in a broader context.

- "Hot tubbing" experts while counsel and clients observe. This is an emerging best practice where opposing experts debate their opinions and, typically, ask one another questions, crystallizing risk in a very practical way.

- Counsel's mock argument of key issues in a pending summary disposition motion where clients observe. This is rarely employed but effective in helping clients understand the risk of not prevailing on an issue central to their litigation and settlement positions.

Post-mediation day opportunities

Mediation is no longer a one-day event; it is a process. If a case is not resolved on mediation day, it is critical that mediators apply specialized skills and approaches in the ensuing days and weeks. The dedicated persistence in continuing dialogue sustains momentum for clients and counsel to find a resolution.

CONCLUSION

Mediation is a critical forum for parties to resolve litigation disputes, and there are tremendous opportunities to ensure clients are fully engaged and central in making the decision to resolve or litigate. From experience, a client-centric mediation process materially improves efficiency, efficacy, and resolution outcomes and generates a more stable peace post-mediation.

To contribute to the group's goals of developing and adopting mediation practice enhancements, please offer your experiences, proposals thoughts, comments and ideas at www.MediationEnhancements.com or contact any of the group members directly.

Tom McNeill has spent 40 years as a litigation and trial advocate and litigation practice director for Dickinson Wright and has served as a business litigation mediator since 2017. In 2023, he established Tom McNeill ADR, which is exclusively dedicated to mediation resolution.

ENDNOTE

1. In addition to the author, the group is comprised of Brian Akkashian of Paesano Akkashian; Lisa Brown of Dykema Gossett; David Devine of Butzel Long; Pat Hickey of Hickey, Hauck, Bishoff, Jeffers & Seabolt; Angela Jackson of Hooper Hathaway; Anthony Kochis of Wolfson Bolton Kochis; E. Powell Miller of the Miller Law Firm; Matt Mrkonic of Honigman, Miller, Schwartz & Cohn; Arthur O'Reilly of Jones Day; and Doug Toering of Mantese Honigman.

Early dispute resolution: Practices and principles for early settlement

BY LISA W. TIMMONS

Early dispute resolution (EDR) is a form of alternative dispute resolution that, as the name implies, occurs early on in a claim, dispute, or case or even prior to litigation. Unlike a typical facilitative mediation that may span several hours, EDR is a longer process — over the course of several days, a trained neutral walks parties through stages that include case assessment, discovery, and risk analysis with the potential of a complete settlement within 30 days.

EDR fosters cost effectiveness by minimizing expenses associated with formal litigation such as attorney fees, court costs, and expert witness fees. Parties often retain greater control over the outcome of the dispute, making EDR particularly appealing to individuals and businesses seeking to manage their legal expenses efficiently.

There are a few mediation models with an early resolution theme. One process offered by the American Arbitration Association (AAA), early neutral evaluation (ENE),[1] is used in several federal district courts[2] to identify and clarify issues in disputes and provide a road map for discovery. However, the ENE model is limited in that while settlement is a possibility, it is not the primary goal.

Another EDR process is planned early dispute resolution (PEDR), which came out of the American Bar Association Section of Dispute Resolution.[3] The section appointed a task force to promote PEDR as a method for parties to utilize the services of neutral dispute resolution professionals at the earliest practical point.[4] Unlike ENE, PEDR contemplates settlement as an outcome. Some practitioners think so highly of PEDR that they are encouraging it to be incorporated as a standard term in contract clauses — if a dispute arises, PEDR is automatically one of the processes used to try to arrive at a resolution.

This article focuses on EDR as provided for under the auspices of the EDR Institute and as outlined in its protocols.[5] The author attended a two-day EDR training session last year co-sponsored by the

AAA and the EDR Institute. Framed as a way to analyze risk, value cases, and settle early, attendees learned that EDR process has four steps: initial dispute assessment; information and document exchange; risk analysis; and principled resolution.

EDR Institute protocols assert that, as in facilitative mediation, the process works best when parties retain a neutral trained in its protocols.[6] Other key elements of EDR include a signed agreement that allows for permissive withdrawal of parties at any point; permissive and mandatory withdrawal guidelines for the neutral; and ethical cornerstones of the process, including confidentiality.[7]

INITIAL DISPUTE ASSESSMENT

Initial dispute assessment requires the neutral to assist the parties in clarifying their core claims, defenses, and issues. To keep the process on a 30-day track, it is suggested that the initial dispute assessment occur within six days of the agreement to participate in EDR. The process involves each party gathering all necessary information on the case internally, researching the basic applicable legal principles, interviewing witnesses, and determining which information and documents are needed from the other side to analyze the case. This stage lays the foundation for the ensuing information and document exchange.

INFORMATION AND DOCUMENT EXCHANGE

Michigan litigators rely heavily on protracted discovery, which leads to filing numerous discovery motions. Because of this, some hesitate to try EDR because it is specifically timed to take place prior to extensive discovery. This reluctance to relinquish extensive discovery is not new. Although it may be counterintuitive, EDR success often rests on the fact that many claims are ripe for resolution without engaging in extensive discovery.

EDR is based on a model that capitalizes on limited litigation expenses at the early stage of the dispute. The goal of information and document exchange in EDR is not the broad swath of discovery allowed in Michigan jurisprudence; it requires the neutral to help the parties decide what constitutes sufficient information to make an informed valuation of the case.[8] In determining sufficient information, the neutral will ask counsel to take a narrowly tailored focus that considers both the scope and expense of litigation to move the dispute to resolution in the 30-day window.

The EDR Institute offers a guideline for informal information exchange with the following:

> There are different ways to obtain information, and the process doesn't require that one particular method be used. There are four basic methods: (1) simply ask the other side for the information and documents, and their counsel responds; (2) along with requesting the information and documents, ask for a response by affidavit from a corporate representative who has inquired as to the answers and searched for the documents; (3) interview the other party's corporate representative or person(s) with knowledge; and (4) take limited depositions.[9]

For example, rather than having each party's expert write a full report and be subject to a lengthy deposition, EDR could shorten the process by compelling one attorney to meet or talk with opposing counsel and ask for the general nature of their expert's opinion. Once that question is answered, attorneys might hold another session to discuss verifying the expert's summary opinion by affidavit or otherwise. The neutral's role is to continue holding or encouraging mini-sessions to keep them on track to reach a facilitated settlement.

RISK ANALYSIS

One of most powerful EDR tools is using formulae to view dispute resolution through the lens of risk analysis. For example, mediators have long used the bracketing method to move parties in bargaining; the simplest form of bracketing "follows a mathematical formula, with each side moving by the same percentage of its previous number, or by the same absolute number of dollars."[10] In his book "Formulas for Calculating Damages". Mark S. Guralnick suggests a more nuanced approach to using formulae to resolve conflict, writing that a formulaic assessment of the case can help reach presuit or early-suit settlement by asking the following questions:

- Will the cost of litigation substantially erode the value of the case?
- Is the evidence necessary to prove a particular formula admissible in this particular court or should we apply our formulas outside of court as a negotiating device only?
- How long will litigation take? Will the time value of money reduce the ultimate benefit to be achieved?[11]

EDR risk analysis contemplates reviewing factors such as collectability/risk tolerance; reasonable settlement range(s); and expected value of the case. The neutral utilizes software, decision trees, and other tools to project settlement outcomes based on factors the parties have identified as relevant in the dispute. There is a transformative power when parties and counsel see a visual presentation of settlement ranges and where those ranges may differ or intersect based on select variables. A risk analysis presentation makes a stronger case for bargaining than any fixed or formulaic approach.

FINAL RESOLUTION

EDR protocols provide that final dispute resolution be based on a settlement that reflects the informed ranges given each parties' risk tolerance. While the process has largely played out in separate sessions at this point, it is now up to the neutral to decide if a joint conference is the best way to reach a conclusion. One strength of this process lies in the ability to instruct the parties about best practices to incorporate EDR clauses into the settlement agreement, minimizing the need to constantly market the process to new or experienced disputants.

MICHIGAN'S LANDSCAPE

Michigan's domestic relations bar has used a form of early dispute resolution for years. Collaborative law, codified in Michigan as the Uniform Collaborative Law Act,[12] follows a team-like approach to resolving domestic relations disputes (even divorces) where attorneys, tax professionals, therapists, and realtors collaborate to craft settlement agreements prior to litigation.

However, EDR differs from collaborative law in that "[t]he early dispute resolution process is not as client driven as the collaborative law process. The process is a blend of cooperation with advocacy. Positional bargaining is not uncommon in the process, whereas interest-based negotiations are the distinctive characteristic of the collaborative process."[13]

As reflected in state court civil filings, EDR may be gaining popularity as a cost- and time-effective means to resolve disputes. In their recent book, "What is Happening to State Trial Court Civil Filings?," authors Alan Carlson and John Greacen document a decline in trial court civil filings.[14] While not drawing a conclusion, Carlson and Greacen posit that the decline should be recognized when it impacts the legal profession.

> In any sector of our economy, a decline in the public's interest in its service or product is a matter for concern. The filings decline we document clearly marks a declining importance of civil lawsuits in the economic life of our country. If it denotes that our citizens have found better, cheaper ways to resolve civil disputes, we should celebrate. If it denotes declining public trust and confidence in our system of justice, the conclusions are much darker and foreboding.[15]

The EDR Institute lists four Michigan licensed attorneys who have completed their training. Dennis M. Barnes of Barnes ADR has written about his early experiences with the process:

> I have engaged with parties and counsel as an EDR neutral in several cases, some through a private engagement, and some on court referrals. I must say, the early returns have been overwhelmingly positive. The only case that we were unable to get to a successful early resolution was one that turns on a question of law that is presently before the Sixth Circuit (and I'm hopeful we can get to a resolution promptly after the Sixth Circuit issues its decision.) Each of the other engagements have yielded successful settlements, have been economical (somewhat surprisingly, the cost has been lower than an average "normal" mediation), and have yielded highly positive feedback from the parties, counsel, and courts involved.[16]

Hon. Stephen J. Murphy III of the U.S. District Court for the Eastern District of Michigan has utilized EDR neutrals in his cases and has a practice guideline that strongly encourages parties to participate in alternative dispute resolution.[17] After consulting with the parties, this court may refer cases to a private mediator.

RESOURCES

Here are more resources on EDR:

- The EDR Institute provides its protocols, training, and resources at edrinstitute.org.
- ABA Planned Early Dispute Resolution at www.americanbar.org/groups/dispute_resolution/resources/planned_early_dispute_resolution_pedr.
- ABA Guide to Early Dispute Resolution at www.americanbar.org/content/dam/aba/administrative/dispute_resolution/leadership/lira-book-pedr-guide.pdf.
- Ellie K. Vilendrer, "Introducing EDR: The Future of ADR" at www.vilendrerlaw.com/wp-content/uploads/2023/09/Introducing-EDR_-The-Future-of-ADR_Edited-1.pdf [https://perma.cc/EV6Q-T6U8].
- Dennis Barnes, "Early Returns on Early Dispute Resolution" at www.americanbar.org/groups/dispute_resolution/publications/JustResolutions/june-2023/early-returns-early-dispute-resolution/.
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- Richard Erhard, "An Incremental Paradigm Shift in Special Education Dispute Resolution: Early Dispute Resolution" at www.americanbar.org/groups/dispute_resolution/publications/JustResolutions/june-2023/an-incremental-paradigm-shift.
- Felicia Harris Hoss, "A Former Litigator's Perspective on Early Mediations" at www.americanbar.org/groups/dispute_resolution/publications/JustResolutions/june-2023/former-litigators-perspective-early-mediations/.

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ENDNOTES

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2. See, e.g., *Early Neutral Evaluation (ENE)*, United States District Court Northern District of California <https://www.cand.uscourts.gov/about/court-programs/alternative-dispute-resolution-adr/early-neutral-evaluation-ene> [https://perma.cc/7HMV-444F].
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Witness statements in arbitration

BY JEROME F. ROCK AND TROY L. HARRIS

Arbitration is proven to be more efficient and cost effective than conventional judicial litigation. Because it is consensual and a matter of contract between parties, arbitration is flexible and easily adaptable to a case's particular needs. Arbitration offers a range of tools — such as agreements to shorten schedules, limit discovery, enforce deadlines, and streamline evidentiary hearings — that can make it a preferred choice for resolving business and construction disputes. These advantages help account for the "strong federal policy in favor of arbitration."[1]

While the parties (and, more specifically, their counsel) acknowledge the flexibility of the arbitration process and commit to improving its efficiency and cost effectiveness, there nonetheless exists a deep-seated reluctance to vary from the conventional pretrial discovery practice of judicial proceedings and, specifically, prehearing deposition. But there are unmistakable advantages to significantly reducing or even eliminating the use of prehearing depositions in arbitration.

Arbitration administrators responded to industry demands to improve efficiency and reduce costs by implementing changes to arbitration rules. For example, the expedited procedures of the commercial arbitration rules and the fast-track option for the construction industry arbitration rules and administrative procedures of the American Arbitration Association (AAA) provide that "[t]here shall be no discovery, except as ordered by the arbitrator in exceptional cases."[2]

This article suggests that when parties agree to use witness statements as a replacement for direct oral testimony at evidentiary hearings, counsel can confidently eliminate the need for prehearing depositions of many witnesses. Cost reduction is an obvious direct benefit and, as we'll explain, the effectiveness of the prehearing discovery process and the evidentiary hearing will improve.

WHAT ARE WITNESS STATEMENTS?

Presenting evidence through witness statements is a common practice in international arbitration[3] and an emerging trend in domestic

arbitration.[4] For those unaccustomed to the practice, let's describe the features, benefits, and challenges of using witness statements as a vehicle for introducing direct testimony as evidence in the arbitration hearing.

Witness statements are used to present direct testimony of witnesses under the control of a party. This applies to witnesses presented by the claimant as well as those offered by the respondent to support a defense. Since these statements are only available for witnesses under a party's control, some witnesses may still be presented by direct examination at the hearing.

The biggest difference between live direct testimony and witness statements is the timing. Unlike conventional proceedings where counsel's effort in preparing witnesses to testify typically occurs near the latter stages of arbitration, witness statements are usually introduced at an earlier stage of the case, making the testimony available much earlier in the process — an advantage to both sides since issues are identified earlier, eliminating the need for wide-ranging and often wasteful discovery. Under most conditions, the time it takes to draft witness statements is less than that needed to prepare for live direct testimony.

Since witness statements are available electronically, documents or exhibits referenced within them can be incorporated into the file via hyperlinks. This efficient feature keeps testimony organized and offers the tribunal easier access to the statements.

At hearing, counsel introduces the witness with several introductory or background questions, asks them to affirm under oath the accuracy of the statement, and moves to introduce the written statement as evidence. Unless otherwise agreed upon, all witnesses providing statements must appear at the hearing in person or by video conference and be available for cross examination. At the conclusion of cross examination, typical redirect follows.

Witness statements reduce the length of hearings compared to the hours or days of hearings required to introduce direct testimony of live witnesses under the conventional format. Parties reap the benefit of cost savings due to fewer hearing days which, in complex cases, can amount to thousands of dollars. In addition, in situations in which transcripts are not requested, the witness' written statements (incorporating the documents by hyperlink) and the hearing notes from cross examination are valuable resources to the tribunal when preparing the award.

USING WITNESS STATEMENTS

An understanding of the dynamics involved in adopting the use of witness statements for a particular case is also required. The preliminary hearing is where the parties and the arbitrator can customize the process to address the needs of their case. Under the AAA commercial[5] or construction industry arbitration rules and mediation procedures,[6] the rules pertaining to the preliminary hearing — specifically the preliminary hearing P-1 and the P-2 checklist — guide the effort.[7] The P-2 checklist contains options or topics that the parties and tribunal should address at the preliminary hearing. Of particular note to this discussion is section xii (a) of the checklist, which provides that:

> (xii) whether, according to a schedule set by the arbitrator, the parties will:
>
> (a) Identify all witnesses, the subject matter of their anticipated testimonies, exchange written witness statements, and **determine whether written witness statements will replace direct testimony at the hearing.**[8]

This leads to a discussion with the arbitrator on the desirability of witness statements in the context of the particular case.

Witness statements are particularly well-suited to situations in which:

- the claimant has control over evidence likely to be presented at the hearing and desires to present the case in chief quickly in order to achieve a prompt ruling,
- neither counsel anticipates a need for third-party information to present its case,
- either the claimant or respondent has multiple witnesses and witnesses' statements, or
- counsel considers its case suitable for summary disposition after witness statements are submitted.

Once the parties have agreed that witness statements are preferable to live direct testimony, at least with respect to witnesses under their control, the next step is developing a schedule for submission. As part of a schedule established at the preliminary hearing, statements of witnesses under the claimant's direct control are provided to the respondent well before the hearing date and, as will be explained later, prior to any discovery cutoff.

The timing for exchange of witness statements is important. Some attorneys attempt to keep their testimony vague for as long as possible, perhaps to gain an advantage when testimony is finally pre-

sented at hearing. This is the type of risk attorneys attempt to avoid when requesting broad oral deposition prehearing discovery. Early in the statement exchange process, trial strategy is adjusted in ways that promote efficiency and economy and eliminate any advantage of dilatory practices.

From the respondent's perspective, the focus of the claims set forth in the claimant's witness statements should be clear and unambiguous. There should be little anxiety about the vagueness of notice or alternative pleadings or the uncertainty of how a witness will testify at the hearing. With the claimant's testimony in hand, the respondent is not dealing with a moving target; there's no need to delve into peripheral topics to avoid surprise testimony. The witness statement is direct testimony, and the respondent has adequate time to evaluate its strategy for cross-examination and prepare rebuttal witnesses.

Witness statements are exchanged in sequential order. The claimant's witness statements are provided first, and the respondent prepares its statements having the benefit of prior review of what the claimant has submitted. The expected content of the respondent's witness statements will be in line with the clearly delineated issues and defenses. When the respondent witness statements are provided, the claimant has the same opportunity to develop its cross-examination strategy and prepare rebuttal witnesses as appropriate. The luxury of extended time to prepare for cross-examination is a significant benefit to using witness statements.

In more complicated cases where a counterclaim is asserted, separate schedules are set for the orderly exchange of witness statements relating to the counterclaim. When warranted, the arbitrator can establish further procedures for contingencies such as updating or supplementing witness statements, including live testimony at the hearing.

UNLOCKING GREATER EFFICIENCIES: ACTIVE ARBITRATOR MANAGEMENT

Like any procedure, substituting witness statements for live direct testimony at hearing requires active management by the arbitrator to be effective. However, experience with witness statements in international arbitration shows that they can be very effective tools if the arbitrator is clear from the outset about the purpose of the statement; outlines what is permissible in a witness statement; and emphasizes that each witness is subject to cross-examination based on the contents of their statements.

Concerns about using written witness statements in lieu of live direct testimony highlighted by international arbitration practitioners include:

- Overly lawyered statements that result in witnesses losing independent recollection of facts,[9] statements becoming legal arguments rather than evidentiary submissions,[10] and the cost of preparing statements outweighing the savings in hearing time.[11]
- Statements that add little to what is already proven by contemporaneous documents.[12]
- Statements that include comments on documents provided to the witness by the assisting lawyer of which the witness had no knowledge prior to preparing the statement.[13]

Of course, these same concerns may arise in domestic arbitration. And yet, using written witness statements in international practice provides lessons to address those concerns:

- Arbitrators should give specific directions in their procedural orders on what may and may not be included in the statement. It should be based on personal knowledge; contain only facts relevant to the issues in dispute; avoid speculation or comment on another witness's purported knowledge and not be argumentative; not repeat facts contained in documents in the record which speak for themselves; refer only to documents the witness received or was aware of before the dispute arose; and disclose any documents used to refresh the witness's recollection.[14]
- The format for the statement can be an affidavit or a narrative following the question-and-answer structure standard for in-person direct examination. The witness is expected to state facts within their personal knowledge and establish the necessary foundation for reference to documents or other information in their testimony. When finalizing the statement, the attorney is therefore confident that the witness's complete, well-organized, coherent testimony is available to enter as the record. Statements are affirmed by the witness under oath and submitted as direct evidence.
- Arbitrators should make clear that witness statements failing to comply with the arbitrator's directions will be given little, if any, weight, and non-compliance may be considered in rendering awards.[15]
- Arbitrators may adopt a memorial approach in which the parties submit all evidence upon which they rely (witness statements, documents, expert reports, etc.) in response to a defined issues list. This method is typical in civil law jurisdictions and differs from the pleading approach of common law jurisdictions where the parties begin with general allegations of claims and defenses followed by document exchange and the merits hearing.[16] The advantage to the memorial approach is that it requires the parties to identify issues in the dispute early and affords less opportunity to "hide the ball" by submitting vague and unfocused witness statements.
- When appropriate, arbitrators may permit limited live direct testimony in addition to submitting written statements.[17]

While no process is foolproof or incapable of abuse, the potential challenges of using witness statements in lieu of live direct testimony can be overcome with thoughtful management by the arbitrator.

CONCLUSION

Planning for arbitration using witness statements requires a commitment to getting witness testimony on the record as soon as possible so the other side can respond with the same commitment to candor and efficiency. Reducing the cost of prehearing discovery without sacrificing quality is one objective of the timely exchange of witness statements as it eliminates the need and expense of prehearing oral depositions.

Though controlling discovery costs may be a motivating factor in using witness statements, there are other tangible benefits including providing early focus to the claims and issues; eliminating peripheral discovery; reducing the time from filing the arbitration demand to the hearing on the merits; reducing the time and length of the hearing; and creating a solid record of the testimony for the tribunal.

The best practices of international arbitration should be incorporated into the domestic arbitration toolkit to improve its quality, efficiency, and cost effectiveness. Replacing direct testimony of witnesses with witness statements exchanged in a timely manner is a time-tested approach that deserves consideration.

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Michigan case law concerning use of emails in alternative dispute resolution

BY LEE HORNBERGER

This article discusses Michigan case law concerning the use of emails in arbitrations, mediations, and settlement discussions.

WORDING OF EMAIL DID NOT CREATE BINDING SETTLEMENT AGREEMENT WITH PUBLIC BODY

Citizens Ins Co of Am v. Livingston Co Rd Comm[1] involved an alleged settlement agreement negotiated via email. There was an unsuccessful mediation with subsequent email correspondence from the mediator to the attorneys for the parties and among the attorneys for the parties. The defendant government argued that a series of emails which plaintiffs claimed constituted a settlement agreement were not binding. Because discovery was ongoing, the circuit court declined to rule on whether there was an enforceable settlement agreement. The Michigan Court of Appeals held that the series of emails constituted a binding agreement.

The defendant filed an application for leave to appeal to the Michigan Supreme Court. In lieu of granting leave to appeal, the Supreme Court vacated the portion of the Court of Appeals judgment that held that there was a valid settlement agreement.[2] The Supreme Court held that the parties did not enter into a binding settlement agreement and the circuit court should have granted the defendant government motion for summary disposition. According to the Supreme Court, emails between the parties showed that the alleged settlement agreement was subject to approval by the Livingston County Road Commission, which had yet to do so.

In a concurring opinion,[3] Justice Brian Zahra, joined by Justice Elizabeth Welch, agreed with the majority that there was no binding settlement agreement. But he also believed the Court should have specifically held that there cannot be a settlement agreement with a public

body without approval made in an open meeting in light of *Presnell v. Wayne Bd of Co Rd Comm'rs*[4] and the Open Meetings Act.[5]

NO TYPED NAME AT BOTTOM OF EMAIL CAN MEAN NO AGREEMENT

Dabash v. Gayar[6] involved a settlement agreement negotiated via email. The defendants filed a motion to enforce the purported agreement. The circuit court granted the motion, but the Court of Appeals reversed, holding that the parties had not reached an enforceable agreement and when a case involves an agreement to settle pending litigation, the settlement must comply with MCR 2.507(G). Because no version of the settlement agreement or purchase agreement had the plaintiff's signature at the bottom, neither document was enforceable against plaintiff, and nothing in the exchange of emails demonstrated that the plaintiff ever accepted the defendants' offer. The lesson from this case: email acceptance of an offer is not effective unless there is a signature at the bottom of the email.

TYPED NAME AT END OF EMAIL CAN CREATE MCR 2.507(G) AGREEMENT

In *Kloian v. Domino's Pizza LLC*,[7] the Court of Appeals affirmed the circuit court's decision that an enforceable settlement agreement existed between the parties. The original settlement agreement — contained in email messages from March 18, 2005 — satisfied the subscription requirement of MCR 2.507(G). The 2005 email containing the terms of the settlement offer was subscribed by the plaintiff's attorney because he typed his name at the end of the email, and it also contained the defendant attorney's name at the end of the email.

The modification of the settlement agreement did not satisfy the requirement because there was no "evidence of the agreement … in writing, subscribed by the party against whom the agreement was offered or by that party's attorney" per MCR 2.507(G).[8] However, a March 21, 2005, email from the plaintiff's attorney requesting a mutual release had that attorney's name at the top of the email; subscription requires a signature at the bottom. The original settlement agreement, and not the modified settlement agreement, complied with MCR 2.507(G).

The circuit court correctly enforced the original settlement agreement; the modified agreement was unenforceable. If a modification of a settlement agreement is unenforceable under MCR 2.507(G), the original agreement remains enforceable. Furthermore, the parties entered into a binding settlement agreement that was set forth in a series of email messages exchanged between the parties' attorneys.

COURT CANNOT CREATE CONTRACT WHEN EMAILS DO NOT

Deep Harbor Condo Ass'n v. Marine Adventure, LLC[9] involved a settlement agreement negotiated via email. The attorneys exchanged emails about a potential settlement; the issue before the Court of Appeals was whether the emails resulted in an enforceable settlement agreement.

One of the attorneys moved to enforce the settlement agreement, claiming the emails represented a settlement enforceable under MCR 2.507(G), the terms of which included a global release of all claims by all parties. The other parties opposed the motion, contending that the emails represented mere negotiations and not an enforceable settlement. The circuit court concluded that the emails were an enforceable agreement, reasoning that the settlement proposed the attorney who moved to enforce it was accepted by the other attorneys on behalf of their clients. However, the circuit court did not enter into a settlement agreement because the parties had not agreed to specific terms. Instead, the circuit court ordered the parties to submit proposed settlement documents and agreed to hold a hearing to resolve the issue. The appellants contended that the emails did not show a meeting of the minds on all essential terms and instead represented mere negotiations among the parties.

The Court of Appeals sided with the appellants, deciding that no agreement was set forth on the record in open court. The purported agreement was set forth in an email chain among the attorneys. Emails can form a contract in compliance with MCR 2.507(G) — provided the emails evince a meeting of minds and are subscribed by the party against whom the agreement is offered or that party's attorney. When an email chain purports to reflect a settlement agreement, the emails must contain indisputable proof that it is a final agreement of the parties and include terms on which the parties settled.

MEDIATOR RESPONDING TO PARTIES REQUEST FOR INTERPRETATION

Mediation in *In re Edmund Talawanda Trust*[10] resulted in the parties consenting to the mediator making a proposal for resolution of remaining issues. The mediator's proposal became the settlement agreement. The appellants argued that the mediator lacked authority to make a binding post-mediation ruling pertaining to the interpretation of a certain paragraph. Prior to the closing, the parties emailed the mediator inquiring who would be responsible for the cost of replacing a roof, and the mediator provided a response. The Court of Appeals agreed with the mediator's interpretation of the settlement agreement but did not address the issue of whether it was binding; interpretation of an agreement is subject to de novo review.

ATTORNEY SIGNATURE CAN CREATE BINDING CONTRACT

In *Turner v. Turner*,[11] a case that involved settlement without mediation, the Court of Appeals stated that negotiations and settlement are part of any civil lawsuit, including domestic relations matters, and agreements signed by the party or the party's attorney are binding under MCR 2.507(G).

The parties negotiated a consent judgment of divorce in person and through a series of emails. At the close of negotiations, the wife's attorney drafted the necessary documents and signed them, as did the husband and his attorney. The judgment was a contract binding

on both parties despite the wife's later disagreement, and the circuit court properly entered the consent judgment.

A party's attorney can bind the party to a settlement or consent even where the party does not give the attorney actual authority to do so. Where the attorney has apparent authority to enter into an agreement on the client's behalf, it would be unjust to the opposing party to set it aside. When a client hires an attorney and holds the attorney out as counsel representing them in a matter, the client clothes the attorney with apparent authority to settle claims. The opposing party is generally entitled to enforce the settlement agreement even if the attorney was acting contrary to the client's express instructions unless the opposing party has reason to believe the attorney has no authority to negotiate a settlement. The court and parties in a divorce action are bound by settlements in writing and signed by the parties or their representatives. The client's remedy is not against the opposing party but against the attorney in malpractice.

EXCULPATORY LANGUAGE IN EMAIL SIGNATURE BLOCK CAN PREVENT SETTLEMENT

In *Haqqani v. Brandes*,[12] the Court of Appeals reversed the circuit court's enforcement of a settlement agreement negotiated via emails, holding that email signature block language that said, "Signature: Nothing in this communication is intended to constitute an electronic signature. This email does not establish a contract or engagement."[13] precluded it from being binding acceptance of an offer. The lesson here is that a signature block can prevent an email from establishing a contract.

MEDIATOR SHOULD CONFIRM DOMESTIC VIOLENCE PROTOCOL

Pohlman v. Pohlman[14] was a split decision in which the Court of Appeals affirmed circuit court enforcement of a mediated domestic relations settlement agreement. Because the plaintiff wife did not allege or show that she was prejudiced by the mediator's alleged failure to screen for domestic violence, any noncompliance with MCR 3.216(H)(2) was harmless. In her dissent, Hon. Elizabeth Gleicher argued that the circuit court was obligated to hold a hearing to determine whether the wife was coerced into the settlement.[15]

The Michigan Supreme Court directed the circuit court to hold an evidentiary hearing and submit findings concerning the wife's allegation that her signature on the settlement agreement was involuntary,[16] and the circuit court found that the mediator had complied with the obligation to screen for domestic violence per MCR 3.216(H)(2) and MCL 600.1035(2). After the Supreme Court received the findings, the application for leave to appeal was denied.[17]

There are a number of lessons from *Pohlman*. There should be email confirmation from the mediator to the advocates that the domestic violence protocol was followed; advocates should share the parties' mediation summaries with their clients; and iron-clad language regarding compliance with the protocol should be included in the mediated settlement agreement.

PREHEARING FILING OF EXHIBITS VIA EMAIL WITH ARBITRATOR

In *Fette v. Peters Constr Co*,[18] the Court of Appeals found that the record did not support the plaintiffs' contention that an arbitrator considered exhibits that the defendant shared electronically before the hearing in making the award determination. Even if the award was against the great weight of the evidence or not supported by substantial evidence, the Court of Appeals was precluded from vacating it. Allowing parties to electronically submit evidence prior to the hearing did not affect the plaintiffs' ability to present the desired evidence at the hearing.

INADVERTENT EMAIL SENT BY ARBITRATOR

During the course of arbitration in *Thomas v. City of Flint*,[19] the neutral arbitrator inadvertently sent an email to the plaintiff's counsel that was intended for one of the arbitrator's own clients. The plaintiff's counsel then requested that the arbitrator recuse herself; the arbitrator declined. The plaintiff then moved that the neutral arbitrator be disqualified. The circuit court granted the plaintiff's motion to disqualify the neutral arbitrator, and the defendant appealed.

The Court of Appeals reversed the order, ruling that the unintentional email did not give rise to an objective and reasonable perception that serious risk of actual bias existed per MCR 2.003(C)(1)(b). In her concurrence, Hon. Kathleen Jansen added that if the plaintiff wished to challenge the impartiality of the neutral arbitrator, the plaintiff was required to wait until after the award was issued.[20]

CONCLUSION

Here are some best practices concerning the use of emails in alternative dispute resolution:

- Emails meant to become a contract must have the sender's signature at the bottom.
- Type the sender's signature at the bottom of the email rather than relying on the signature embedded in the email signature block.
- Settlement-related emails must not have signature blocks that contain exculpatory "this is not a contract" language.
- Do not send emails to the wrong people.
- Clarify whether exhibits emailed pre-hearing to the arbitrator are in evidence.

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ENDNOTES

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4. *Presnell v Wayne Bd of Co Rd Comm'rs*, 105 Mich App 362; 306 NW2d 516 (1981).
5. MCL 15.261 *et seq*.
6. *Dabash v Gayar*, 343 Mich App 285: 997 NW2d 463 (2022).
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15. *Id.* (Gleicher, E., dissenting).
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18. *Fette v Peters Constr Co*, 310 Mich App 535; 871 NW2d 877 (2015).
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PLAIN LANGUAGE

Readable contracts (Part 1)

BY WAYNE SCHIESS

Here I report on a study of contract language and offer comments and recommendations. The study is *Poor Writing, Not Specialized Concepts, Drives Processing Difficulty in Legal Language*.[1]

The three authors (two linguists and a lawyer/linguist) used corpus analysis to discover why contract language "remain[s] notoriously inaccessible" to nonlawyers. They asked which of these two causes could account for the difficulty:

- Is it the specialized and complex content?
- Is it the form of expression — the way contracts are written?

The authors concluded that the cause was the form of expression.

They compared a corpus (think "database") of contracts with a corpus of standard English — newspapers, magazines, blogs, webpages, and TV and movie scripts. The two corpora[2] contained more than 10 million words, and the authors assessed five variables: frequency of all-caps text, frequency of passive voice, frequency of center-embedded sentence structure, frequency of everyday words, and frequency of words with higher-frequency synonyms (fancy words that could've been simpler).

The authors found that "all of the metrics we looked at were prevalent to a greater degree in contracts than in the standard English corpus."[3] Let's start with the first two variables: contracts use all-caps text and passive voice more than everyday writing does.

ALL-CAPS TEXT

I'm not surprised that contracts use more all-caps text than other writing, but the question is, why?

Three possible reasons and a recommendation: First, all caps are a vestige of the typewriter, which couldn't produce boldface or italics, so some form contracts retain all caps because they've never been updated. Second, all caps really do stand out if the rest of the contract is in regular type. Third, some lawyers mistakenly assume that statutes require all caps for conspicuousness; but even though some statutes mention all caps, they almost always give other options.[4]

Recommendation: Convert all-caps text to boldface — and maybe even increase the type size. Blocks of all-caps text are difficult to read[5] and are nowadays perceived as shouting.

PASSIVE VOICE

Why do contracts have more passive voice than ordinary writing? Two possible reasons: Passive voice is preserved because "it's in the form." Many contract drafters are wary of changing form language, especially if that form was the basis for numerous contracts that have closed and been performed without a glitch.

And passive voice just sounds more formal — more lawyerly. But if that's a source of excessive passive voice, we can let it go. Consider these examples of passive voice that are clearer in the active:

1. Permits must be secured before work commences.

    - By whom? Better in active voice:

1a. The owner or contractor must secure permits before work commences.

2. The Purchase Price shall be paid by wire transfer of immediately available funds.

    - Who pays? Certainly, the contract earlier stated the buyer's obligation to pay the Purchase Price, but I still prefer this active-voice version:

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.

2a. The Buyer shall [must?] pay the Purchase Price by wire transfer of immediately available funds.

Recommendation: Unless you have a legitimate reason for using the passive voice (and legitimate reasons do exist[6]), your contract prose will be clearer in the active voice — especially for obligations.

THREE MORE FINDINGS — WITH ADVICE

In the study comparing contract language with everyday written English, the authors offered three more findings: Contract language has higher frequencies of:

- center-embedded sentence structure
- words used rarely in everyday English
- words with higher-frequency synonyms (fancy words that could've been simpler)[7]

"Center-embedding" means inserting a phrase or clause within another phrase or clause. Here's an example from the authors:

> In the event that any payment or benefit by the Company (all such payments and benefits, including the payments and benefits under Section 3(a) hereof, being hereinafter referred to as the "Total Payments"), would be subject to excise tax, then the cash severance payments shall be reduced.[8]

In a sentence of 47 words, placing a clause of 22 words in the middle makes for difficult reading. An easy fix is to place the embedded definition clause in a separate sentence:

> In the event that any payment or benefit by the Company would be subject to excise tax, then the cash severance payments shall be reduced. All such payments and benefits, including the payments and benefits under Section 3(a) hereof, are hereinafter referred to as the "Total Payments."

[Note that further editing is needed: *in the event that* = *if*; *shall be* = *are* in this instance; no *hereof*; probably no *hereinafter referred to as*.]

Drafters would do their readers a favor by seriously cutting down on center-embedding.

Now we approach a thornier topic. Let's take the second and third findings together. Even without this study, any lawyer and anyone else who has read a contract could've told you that contracts use words that are rare in everyday English as well as words that have simpler or more readable synonyms. But is that a problem?

On this topic, I won't offer recommendations for using shorter or simpler words in every contract. Yes, doing so could make contracts more readable, but I'll propose three reasons that *always* doing so might not be ideal.

1. The studied contracts were commercial contracts entered by sophisticated parties represented by counsel.

In my review of the contracts in the corpus, I didn't see a single consumer contract: apartment lease, credit-card agreement, software-user agreement, car-insurance policy.

So the studied contracts don't necessarily need to be read and understood by someone without legal training. For the contracts in the corpus, those who need to read and understand the language are lawyers, and those lawyers — we hope — can explain the contract language to those who need to understand it.

2. Contracts contain some legal terms that either cannot or should not be simplified.

Yes, contracts use words and phrases unique to legal language or with a different meaning from the everyday-English meaning. But replacing each of those words and phrases to enhance readability could introduce risk, or it could require the drafter to use even more words to explain what the legal term means.

Still, the number of terms of art or unique legal terms is fairly small — smaller than some legal drafters claim. In one study, only 3% of the words found in a standard real-estate-purchase agreement had ever been construed or defined by a court.[9] So even if we might choose not to replace every archaic, long, or fancy legal word, we can certainly drop or replace some.

3. Revising lengthy, complex contracts for readability might not be cost-effective.

Given that the commercial contracts in the study were prepared by, were reviewed by, and could (I assume) be explained by transactional lawyers, how would we justify the cost of revising them? We'd need to replace rare words with everyday words and replace or explain legal terms. Who's going to pay for it?

These contracts were certainly based on forms or precedents from previous transactions, a practice that saves time and money. Add to that fact the reality that very few contracts result in "disputes" (as high as 9%, according to one commercial source[10]) and that even fewer end up in litigation (fewer than 0.1%, by one estimate[11]). So the incentives to revise for readability are small.

But remember: consumer contracts are a different matter altogether.

Wayne Schiess is a senior lecturer in the David J. Beck Center for Legal Research, Writing, and Appellate Advocacy at the University of Texas School of Law.

ENDNOTES

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11. *Id.*

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LIBRARIES & LEGAL RESEARCH

Contracting with the State of Michigan: Preferences and guidance

BY JANE MELAND

The State of Michigan provides a wide range of essential services to the public. From health care to education to support for Michigan businesses, the state plays a key role in ensuring public safety, welfare, and economic growth. In its role as a service provider, the state depends on external contractors to assist with their delivery. The process of identifying, evaluating, and selecting external contractors is known as state procurement or state contracting.

One of the primary goals of state contracting is selecting the best service provider at the most reasonable cost point — reassuring taxpayers that their dollars are being spent wisely while simultaneously delivering high-quality services. But it's not just about fiscal responsibility. State contracting also serves as a significant economic driver, particularly for local businesses. It stimulates local economies through job creation, stable revenue streams, and increased economic opportunities. As Gov. Gretchen Whitmer aptly stated in Executive Directive 2023-1, "State contracting is ... an important economic engine for businesses of all sizes."[1] By participating in state contracting, Michigan-based businesses can tap into these benefits and contribute to the state's overall economic growth.

STATE CONTRACTING AUTHORITY AND LOCAL BUSINESS PREFERENCES

The Department of Technology, Management and Budget (DTMB) is the key authority overseeing Michigan's procurement activities. It has the legal authority to make all discretionary decisions concerning the solicitation, award, amendment, cancellation, and appeal of state contracts.[2] However, this authority is not absolute. The statutory framework that grants this authority also includes provisions to ensure equity and competition in the contracting and bidding process.[3] Furthermore, the statute includes special provisions that offer Michigan-based businesses preferential consideration in the contracting process — often referred to as in-state preferences.[4] Taken together, these statutory provisions ensure that state contracting overseen by the DTMB is fiscally responsible and supports and creates economic opportunities in Michigan.

Providing advantages to Michigan-based businesses in awarding state contracts has been a high priority for Gov. Whitmer and state legislators. As mentioned previously, the preference for in-state businesses is not just a suggestion, but an obligation under a statutory law that has existed since 1984.[5] Additionally, Michigan legislators continue to seek ways to provide advantages for state businesses as evidenced by legislation introduced in 2023.[6] Referred to as the Buy Michigan bills, this legislation would "give Michigan businesses an additional window of time to resubmit a lower bid for a state contract if the initial lowest bid came from an out-of-state company."[7] While the legislation has not made its way out of committee, it demonstrates a bipartisan interest in supporting local businesses and economies through increased access to government contracts for in-state businesses.

Since taking office, expanding state contracting prospects for Michigan businesses has been a critical focus of Gov. Whitmer's strategic agenda. In 2019, Whitmer issued Executive Directive 2019-08 to further expand contracting opportunities for in-state businesses.[8] The directive aims to boost economic activity in low-income communities and underutilized business zones by requiring the DTMB to adopt policies that increase contracts with geographically disadvantaged business enterprises (GDBEs).[9] The directive defines GDBEs as businesses certified by the federal Small Business Administration as HUBZone businesses[10] or located in Internal Revenue Service Opportunity Zones.[11] This program has been successful and, on average, the DTMB has awarded 11% of its annual expenditures to GDBEs over the last three years.[12]

GUIDANCE FOR BUSINESSES INTERESTED IN STATE CONTRACTING

Navigating the state contracting process can be daunting and discouraging for busy entrepreneurs focused on running their businesses. This is particularly true for those seeking to qualify under one of the aforementioned preference programs where businesses must meet specific criteria and provide documentation demonstrating that they meet these criteria.

One helpful starting point for business owners interested in pursuing state procurement opportunities is the DTMB's Let's Do Business web page, which is intended to be a one-stop shop for vendors interested in bidding on state contracts. The website is designed as a vendor toolkit and provides instructional content from the initial step of registering a business to researching active contract opportunities.

Some vendors may feel comfortable working their way through the state's online system without assistance. However, others may appreciate (and need) the advice and counsel of government contracting experts such as the Michigan Alliance of APEX Accelerators (MIAPEX).[14] The MIAPEX staff provides a wide range of services including individualized business counseling, identification of bid opportunities, and support in drafting proposals. Additionally, it can assist with registrations and certifications at both the state and federal levels, which is particularly helpful for businesses seeking to qualify for preferences. Preregistration preparation is a crucial step in qualifying for preferences and the MIAPEX staff can guide business owners through this important process.

There are ten MIAPEX offices throughout Michigan that serve various geographic regions of the state.[15] Most of the services provided by MIAPEX are free or low-cost, making them an affordable option for in-state businesses seeking to enter the government contracting marketplace. Additionally, the MIAPEX staff regularly partners with the DTMB to offer informational seminars and other events related to government contracting.

One last source that deserves mention is the Michigan Procurement Policy Manual.[16] Chapter 1 of the manual provides short summaries of Michigan laws, executive directives, and policies impacting state procurement activities with links to source documents. The simplified descriptions of the various statutory provisions are particularly helpful for navigating and understanding the intricate provisions of the Management and Budget Act.

CONCLUSION

State contracting plays an essential role in supporting Michigan's economy. In fact, at any one time, the DTMB manages more than 800 multi-year contracts valued at more than $105 billion[17] — contracts that provide jobs, steady revenue streams, and increased economic growth within the state. Entering the state contracting marketplace may require time and patience. Still, it can provide lucrative opportunities; fortunately, low-cost services such as MIAPEX are available to guide businesses through this complex process.[18]

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2. MCL 18.1261(2).
3. See generally, The Management and Budget Act, MCL 18.1101 et seq.
4. MCL 18.1261(1). For the purposes of this article, I'll be focusing on preferences given to Michigan businesses. The Management and Budget Act provides for other types of preferences, and a list of these preferences is available at <https://www.michigan.gov/dtmb/procurement/contractconnect/programs-and-policies> [https://perma.cc/3NXX-7TEF].
5. MCL 18.1261(1). The statute states "all other things being equal, preference shall be given to products manufactured or services offered by Michigan-based firms. ..."
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18. I'd like to thank attorney William J. Soloy (P20780) for reading my articles. I've known Mr. Soloy since I was in elementary school and I'm grateful and honored to have his support.

BEST PRACTICES

Pulling the rabbit out of the eye of the perfect storm

BY DANIEL J. McCARTHY

Every seasoned trial lawyer and litigator has experienced what I describe as the "perfect storm" in handling a matter. In my view, the perfect storm consists of the following:

- an unappreciative client who expects nothing less than a miraculous result;
- bad facts, including undisclosed damaging facts;
- rude and discourteous opposing counsel; and
- an impatient judge focused solely on docket control.

Most recently, despite being caught in the raging eye of the perfect storm, I somehow managed to find sunny refuge. To protect confidentiality, client information and other revealing facts have been changed.

The storm began early last year when I was somehow roped in to take on a great "can't-lose" contingency-fee case involving more than $500,000 in property damages, clear liability, and an insurance carrier that was bound to pay up. The case at first blush, or at least as it was described to me, appeared to have great value and merit. Little did I know that storm clouds were forming beyond the horizon.

On its surface, the case was a simple breach of contract action involving property damage. Liability appeared to be obvious. The suit was filed, and the defendant tendered the defense to its insurance carrier which, coincidentally, was the same carrier for my client.

At first, the case appeared to be rather simple. Defense counsel "Alan" and I agreed to mediate after exchanging some basic written discovery. We each would get an expert and take the case to mediation for resolution. Not too hard. Having no idea of what was about to happen, I convinced the client to agree to an hourly arrangement going forward. I honestly believed the case would settle quickly and the client would pay far less in hourly fees rather than a contingency percentage of about $500,000 in damages.

Not too long thereafter, the storm grew angry. Alan switched firms; I was now dealing with "Richard," who had taken over the defense. Suddenly, the case took on a life of its own. Contrary to the professional understanding that I had reached with Alan, I was hit with numerous document subpoenas. Depositions were scheduled unilaterally without any cooperation. In one instance, Richard refused to reschedule a deposition date to allow me to attend a medical procedure.

During one deposition, Richard served me with a baseless discovery motion in which he falsely stated that I had denied concurrence. I tried to resolve the issue, but Richard refused to discuss it with me. Of course, we were sent to the discovery mediator, where I explained that I had already provided what he requested well before the hearing.

While juggling the adjustment to Butzel, handling many other cases and appeals, and navigating the unilateral scheduling and cancellation of multiple depositions, I was then hit with certain "facts" and "documents" — none of which I knew about previously. Let's just say that the facts were damaging, almost to the point of potentially

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

rendering the action frivolous. Richard was practically salivating at a sanctions motion.

I almost withdrew, but I persisted in exploring one additional avenue of discovery to mitigate the damage. A break of sunlight seemed to appear when an independent expert hired by the carrier confirmed liability. But little did I know that another blow was coming.

Despite having that good report on my side, subsequent depositions, unfortunately, damaged the good stuff contained in my report. We would be lucky if we were offered a nickel. The client, likewise, understood that monetary recovery was highly unlikely — at least that is what the client led me to believe.

We proceeded to mediation, which turned into a multiple-day affair. With self-righteous confidence mixed with arrogance, Richard attempted to channel Michael Corleone from The Godfather Part II: "My offer is this. Nothing." My client, on the other hand, had somehow managed to find a renewed, yet displaced, sense of confidence in the case despite the damaging facts.

A resolution did not look promising, to say the least. But I had done some reconnaissance work on Richard and learned that he had not tried a case in more than 10 years. I used that to my advantage at the mediation. Despite the damaging facts, I pounded the table (yes, I literally did this) advocating for my independent liability report.

In an attempt to make this too-long of story short and honor mediation confidentiality, Richard turned into Fredo Corleone and put an offer of more than $100,000 on the table to settle only with the carrier, leaving his client exposed for further liability. Richard also agreed to dismiss the case without prejudice only because the judge refused to give us any further time to settle. Once Richard was out of the picture, the defendant had to hire a new lawyer out of pocket and is trying to offer us additional benefits. Somehow, the rabbit had surprisingly popped its head out of the eye of the storm, and I feel like I had nothing to do with setting up the trick.

I had survived this perfect storm, but learned some good lessons, a few of which are rudimentary, but have become distant after many years of practice:

- Before you file a case, don't just take your client's word. Explain that time will be needed to thoroughly research and review documents, emails, and more, especially since such materials are likely to be produced in discovery. New discovery rules provide for early disclosure, so you might as well perform as much discovery work before filing as possible to avoid the fret of deadlines.

- Follow every phone call with opposing counsel with a confirmation email. Most good lawyers honor their word; better practice requires documentation. This is especially true when opposing counsel violates your trust. Document. Document. Document.

- For the first status conference, always ask for as much time as possible. You're going to need that time and it's going to be much harder to get a judge to cooperate later on, even if extra time is needed to complete a settlement. Cases today are document intensive, especially with emails, texts, and social media. No matter how simple you think a case might be, there really is no such thing as a simple case anymore.

- Get help when you start to feel overwhelmed. To paraphrase noted trial lawyer Joe Jamail, a lawyer who is not emotionally invested with his or her client is not effective. I believe that statement, but only to a certain degree. I perhaps overthought this case and focused too much on what I thought were damaging facts. More often than not, it's a good idea to have a second pair of eyes look at your case, especially after you've become entrenched in its handling. As much respect as I had for the late, great Joe Jamail, becoming too emotionally involved is not always a good thing.

- Remember that perception is everything, especially at mediation. Even a bad case has one sliver of a good fact. Dig deep, find that fact, and use it. It could be your proverbial rabbit.

Daniel J. McCarthy is a shareholder in Butzel's Troy office. He concentrates his practice in appellate and commercial litigation for both state and federal courts.

PRACTICING WELLNESS

A primer on sympathy and empathy

BY THOMAS J. GRDEN

When the first "Cars" movie was released in 2006, I didn't pay it much attention. Even if that boneheaded high school senior version of myself had been capable of paying attention to things, it's still a movie about talking cars aimed at a much younger audience — hard pass. And such was the case for both sequels.

That is, until my children came along.

The never-ending search for animated content that is both wholesome and colorful enough to hold kids' attention led me back to "Cars" and for that, I'm grateful. The film espouses virtuous themes such as friendship, humility, integrity, and, most importantly for the purposes of this column, accountability.

For those who haven't seen it, here's a quick primer: Arrogant rookie race car Lightning McQueen, through a succession of mishaps, destroys the only paved road in a dying desert town along Route 66 called Radiator Springs. The audience is treated to Lightning's journey of personal growth as he works to repair the road. The lessons aimed at children are delivered through Lightning's actions, but a much more subtle lesson is aimed at adults and delivered by the town's residents. Led by a retired race car, the townsfolk force Lightning to fully repair the road he damaged before he is allowed to leave.

What a perfect way to enforce accountability and encourage responsibility — it's an arduous task without a hint of punishment. Certainly, it would have been much faster and easier for Radiator Springs' residents to simply expel Lightning from town and fix the road themselves. After all, he immediately demonstrates an uncooperative demeanor, is inept at road construction, and the townsfolk don't owe any type of effort to help him address his character flaws. Such a decision might have been viewed as sympathetic, yet the townsfolk offer no sympathy, and all parties involved benefit from that decision.

What exactly is the danger of sympathy? Sympathy, at its best, is a feeling of compassion for another person, but at its worst, it's a feeling of pity. Most of us could never imagine comfortably saying "I feel bad for you" but "You have my deepest sympathies" is perfectly acceptable. This isn't to say sympathy is always a bad thing — feeling sympathetic towards a person with an ailment is a good indication that you don't associate their ailment with any kind of stigma. It's the feeling that motivates us to get out and try to *help* other people. Yet it's also sympathy that often keeps us from *actually* helping other people by discouraging accountability. A common word for that is "enabling." Within the context of mental health, substance abuse, and overall well-being, sympathy is support without accountability. On the other side of the problematic spectrum, we have punishment, which entails accountability without support. The goal, then, is to develop empathy, the combination of support and accountability.

These are the two pillars upon which the State Bar of Michigan Lawyers and Judges Assistance Program stand. Support is easy — anyone who's carved out a fulfilling career in the service industry can attest to how good it feels to help other people. Accountability, though equally important, is a different animal altogether. It takes a rare relationship to hold a person accountable for their actions without eliciting anger and denial in return. Without that relation-

"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

ship, the temptation is to show leniency. Take a moment and think about the people in your life whom you would accept calling out your mistakes. Accountability is uncomfortable (just ask any politician) for both the one holding and the one being held. And yet, when it comes to wellness, support without accountability just becomes sympathy, which is problematic; sympathy is antithetical to any meaningful behavioral change (such as eliminating toxic work habits or integrating wellness-promoting behaviors into your routine).

Empathy, like change, is uncomfortable. Doing it right forces us to occasionally experience painful emotions in the name of making a connection with another person feeling those emotions in that moment. Sympathy makes no such effort and seeks to avoid discomfort as much as possible. It's also uncomfortable because it demands we hold people accountable. Sympathy demands we make a struggling person as comfortable as possible, personal growth be damned.

Going back to the "Cars" example, when the supporting characters begin to empathize with Lightning, they begin to understand the depth at which he yearns to be a champion. Doc Hudson, being a former champion himself, sees his potential and rather than punishing him without a second thought (which would have been much easier for Doc), he demands accountability. In true Disney fashion, Lightning applies the lessons he learned in the pivotal finale.

Here are a few steps loosely adapted from the work of psychology icon Brene` Brown to improve your ability to empathize, make connections with others, and be more confident about expecting accountability from those around you:[1]

- **Put yourself in their shoes.** Most of us are taught this as children, but it's a good reminder to consider the wants and needs of the other person.

- **Listen thoroughly and completely.** If you catch yourself cutting someone off, talking over them, or waiting for your turn to speak, you're doing it wrong.

- **Identify what emotion they are feeling.** Be specific — for a profession obsessed with wordsmithing, "They're probably feeling *bad*" doesn't cut it.

- **Recall what that emotion feels like.** This requires vulnerability and, often, some level of discomfort, especially if the other person is distressed.

- **Communicate that you recognize the emotion.** Every good storyteller knows the rule is "show, don't tell." If you use phrases like "I understand," "I know how you feel," or the cringe-worthy "I empathize with your situation," people won't believe you. Instead, for example, if you know the person is feeling annoyed, try "I can see how irritated this is making you."

And as a bonus, here are some tips from psychology icon Thomas Grden on how to respectfully hold people accountable for their actions:

- **Empathize with the discomfort you are causing them.** Often, a bit of empathy in the situation will take the wind right out of their sails. But if it doesn't ...

- **Prepare for the backlash.** Most people feel uncomfortable being held accountable and that discomfort usually manifests itself into anger. Don't take that anger personally.

- **Stay firm and resist the urge to relent.** Remember, sympathy is patronizing. I can certainly understand the lawyerly instinct to consider mitigating factors, but people in the habit of behaving poorly tend not to stop behaving poorly after receiving sympathy. If you absolutely can't resist the urge, then at the very least say the understood part out loud: "I'm giving you a break *because I feel bad for you.*"

- **Make expectations crystal clear.** If the rules are nebulous, they will inevitably be manipulated.

Whether you're interested in exploring the themes of empathy and accountability further or just want to connect with other attorneys about mental health and wellness, I invite you to check out the weekly virtual support group facilitated by the Lawyers and Judges Assistance Program (LJAP). LJAP also offers a variety of other services such as consultation, assessment, monitoring, and referrals to licensed therapists familiar with the stressors of the legal profession.

Thomas Grden is clinical case manager for the SBM Lawyers and Judges Assistance Program.

ENDNOTE

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LAW PRACTICE SOLUTIONS

Enhancing cybersecurity with legal accounting software

BY JOANN L. HATHAWAY

The legal profession, like many others, grapples with internet threats and the heightened need for security protections.

Recent statistics from the American Bar Association detail the number of lawyers victimized by security breaches. Specifically, the 2023 ABA Cybersecurity TechReport found that 29% of the lawyers it surveyed experienced a security breach, while 19% reported that they were unsure if their organizations had suffered a breach.

Attorneys must remain informed about potential threats to security and commit to safeguarding sensitive information. Legal accounting software can play an important role in helping law firms in this area by not only enhancing efficiency and ensuring compliance, but also by protecting sensitive information with its strong security features.

As we dig into the specifics of these features, it's important to recognize that legal accounting software can be deployed in various ways.

Some firms choose an all-in-one solution by utilizing practice management software with integrated accounting functionality to streamlines workflows, letting attorneys and staff manage financial transactions, client billing, and compliance on a unified platform. Accounting software can also be linked separately to practice management systems, or it can operate as a standalone application.

Let's explore the critical security features legal accounting software offers. Note that the availability of these safeguards may vary across different platforms.

AUDIT TRAILS

From user logins to data modifications and financial transactions, audit trails provide a detailed record of every action. Suspicious activities can be traced back to the source, allowing for necessary actions to be taken promptly, thereby ensuring accountability and maintaining the integrity of financial processes.

AUTOMATED RECONCILIATION

Automated reconciliation is a powerful tool that compares transactions recorded in the system with those in the bank statement. Any discrepancies — whether due to errors or potential fraud — are flagged for review. By identifying inconsistencies, the likelihood of fraudulent activities going unnoticed or unreported is reduced significantly.

DUAL AUTHORIZATION

Dual authorization requires multiple authorized users to approve a transaction before it is processed. This additional layer of security makes sure no single individual can unilaterally make transactions. Whether transferring funds or approving payments, this collective oversight reduces the risk of unauthorized or fraudulent actions.

TRANSACTION LIMITS

Designated administrators can set transaction limits within the software to prevent unauthorized transfers or withdrawals above certain thresholds. It's an effective way to limit the amount of money that can be accessed at once. Whether it's daily withdrawal limits or maximum transaction amounts, these software settings act as a deterrent to large-scale fraudulent activities.

MULTI-FACTOR AUTHENTICATION

Multi-factor authentication (MFA) is a robust security feature that requires users to provide multiple credentials from different categories to verify their identities during login or other critical transactions. Typically, this involves a combination such as passwords, security questions, or biometric verification. MFA significantly enhances system security, making it more resilient against unauthorized access.

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.

ADVANCED USER AND TEAM PERMISSIONS

This feature allows administrators to customize access levels within the software based on specific roles and responsibilities. Limiting data access to only those who need it helps maintain confidentiality and reduces the risk of inadvertent data exposure.

IP, TIME, AND LOCATION LOCKS

These locks act as additional barriers against unauthorized access by restricting user logins to specific IP addresses, approved times of the day, or designated geographic locations. When set properly, users can only access the system from pre-approved locations during authorized time windows, significantly reducing the risk of malicious actors gaining entry from unexpected sources.

ONE-CLICK USER LOCKOUT

In the event of a security breach or suspicious activity, administrators can take swift action by revoking a user's access rights with just one click. Immediate lockout prevents any potential misuse of the system due to compromised credentials or other security concerns.

ENCRYPTION

Legal accounting software employs strong encryption protocols to safeguard financial transactions and client information by converting sensitive information into a code that is unreadable without the proper decryption key. Encrypted data — user credentials, financial records, or confidential client information — remains indecipherable even if it falls into the wrong hands.

REMOTE AND THIRD-PARTY ACCESS CONTROLS

Controlling external access to the system is crucial. Remote and third-party access controls allow for regulation of external parties' interactions with the network. Whether it's employees working remotely, independent contractors, or partners, these controls restrict access to only trusted entities.

CLIENT PORTALS

Client portals play a pivotal role in securing communication. When coupled with practice management software, these online platforms allow for safe and efficient information and document sharing with clients. Portals have several advantages:

- Enhanced security: Portals create a secure environment for exchanging sensitive information. Unlike regular email, which can be intercepted or hacked, portals use encryption to protect messages and attachments. Whether sharing legal documents, contracts, or confidential case details, client portals ensure privacy.

- Attorney-client privilege: By using portals, lawyers are assured that communications remain confidential and are protected by attorney-client privilege. Clients can trust that their information is secure within this dedicated space.

- Recordkeeping: Portals create communications logs, making it easy to track interactions between lawyers and clients since records can be stored securely within the system.

- Ease of use: Clients can access portals conveniently to view messages and upload documents, simplifying communications while maintaining standards for privacy and data security.

CONCLUSION

Adopting secure portals ensures that law firms can communicate effectively with clients while focusing on confidentiality and compliance. But remember that not all legal accounting software platforms offer the same level of security. It's important to evaluate your firm's specific needs, consider integration options, and choose a solution that aligns with your priorities.

By understanding these features and tailoring your accounting software choice to your firm's unique needs, you can bolster security and protect both your clients and your practice.

JoAnn Hathaway is practice management advisor for the State Bar of Michigan and a designated registered professional liability underwriter and cyber professional liability practitioner. Author of the ABA publication *Legal Malpractice Insurance in One Hour for Lawyers,* Hathaway is a frequent speaker on legal technology, insurance, and risk and practice management.

ENDNOTE

1. American Bar Association, 2023 *Cybersecurity TechReport* <https://www.americanbar.org/groups/law_practice/resources/tech-report/2023/2023-cybersecurity-techreport/> (posted December 18, 2023) (website accessed May 6, 2024).

PUBLIC POLICY REPORT

AT THE CAPITOL

HB 5393 (Hope) **Juveniles: other; Juveniles: juvenile justice services; Courts: family division.** Juveniles: other; default maximum time for a juvenile to complete the terms of a consent calendar case plan; increase to six months. Amends sec. 2f, ch. XIIA of 1939 PA 288 (MCL 712A.2f).

POSITION: Support.

HB 5429 (Morse) **Children: services; Courts: circuit court; Children: child abuse or child neglect; Courts: family division; Courts: probate court.** Children: services; court-appointed special advocate program; create. Creates new act.

POSITION: Support.

HB 5431 (Andrews) **Civil procedure: remedies; Civil procedure: evidence**. Civil procedure: remedies; wrongful imprisonment compensation act; modify evidence requirements. Amends secs. 2, 4, 5 & 7 of 2016 PA 343 (MCL 691.1752 et seq.).

POSITION: Support.

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

SB 665 (Hoitenga) **Courts: district court; Courts: employees.** Courts: district court; magistrate qualifications; modify. Amends secs. 8501 & 8507 of 1961 PA 236 (MCL 600.8501 & 600.8507).

POSITION: Support in concept.

SB 688 (Chang) **Juveniles: juvenile justice services.** Juveniles: juvenile justice services; certain information sharing for research purposes in juvenile justice cases; allow. Amends sec. 9 of 1988 PA 13 (MCL 722.829).

POSITION: Support in concept with the following amendments:

- **Specific requirements for data-sharing agreements (specifically limitations on time and use of such records and security and record destruction requirements);**
- **An additional provision requiring courts to maintain comprehensive records identifying all entities that have made requests to see records and what records are released;**
- **A sanction provision (or extension of the sanction provision at MCL 722.829(4)) that would apply to researchers and their universities, agencies, or organizations who violate the data-sharing agreement required in subsection (2); and**
- **A definition of the term "researcher."**

IN THE HALL OF JUSTICE

Proposed Amendment of Rule 3.967 of the Michigan Court Rules (ADM File No. 2023-34) – Removal Hearing for Indian Child (See Michigan Bar Journal March 2024, p 63).

STATUS: Comment period expired May 1; public hearing to be scheduled.

POSITION: Support.

Proposed Amendment of Rules 3.937, 3.950, 3.955, 3.993, and 6.931 of the Michigan Court Rules (ADM File No. 2023-36) – Advice of Appellate Rights; Waiver of Jurisdiction; Sentencing or Disposition in Designated Cases; Appeals; Juvenile Sentencing Hearing (See Michigan Bar Journal March 2024, p 62).

STATUS: Comment period expired May 1; public hearing to be scheduled.

POSITION: Support.

Proposed Amendment of Rules 3.901, 3.915, 3.916, 3.922, 3.932, 3.933, 3.935, 3.943, 3.944, 3.950, 3.952, 3.955, 3.977, and 6.931 and Proposed Addition of Rule 3.907 of the Michigan Court Rules (ADM File No. 2023-36) – Applicability of Rules; Assistance of Attorney; Guardian Ad Litem; Pretrial Procedures in Delinquency and Child Protection Proceedings; Summary Initial Proceedings; Acquiring Physical Control of Juvenile; Preliminary Hearing; Dispositional Hearing; Probation Violation; Waiver of Jurisdiction; Designation Hearing; Sentencing or Disposition in Designated Cases; Termination of Parental Rights; Juvenile Sentencing Hearing; Screening Tools and Risk and Needs Assessments (See Michigan Bar Journal March 2024, p 62).

STATUS: Comment period expired May 1; public hearing to be scheduled.

POSITION: Support.

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ORDERS OF DISCIPLINE & DISABILITY

REPRIMAND WITH CONDITIONS (BY CONSENT)

Shaheen I. Imami, P54128, Chattanooga, Tennessee. Reprimand, effective May 2, 2024.

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

The stipulation contained the respondent's no contest plea to the factual allegations and allegations that he committed professional misconduct by misusing his IOLTA. Specifically, the respondent held a client's funds in his IOLTA long term and disbursement of these funds was unreasonably delayed because the respondent no longer had access to the client file and bank records. In addition, the respondent negligently transferred client funds to an operating account and at times the combined balance of the operating account and IOLTA was less than the amount due to his client.

Based upon the respondent's no contest plea and the stipulation of the parties, Tri-County Hearing Panel #2 found that the respondent failed to preserve complete records of account funds and other property for a period of five years after termination of the representation in violation of MRPC 1.15(b)(2); failed to promptly pay or deliver funds or other property that the client or third person is entitled to receive and/or, upon request by the client or third person, failed to promptly render a full accounting regarding such property in violation of MRPC 1.15(b)(3); failed to hold property of clients or third persons in connection with a representation separate from the lawyer's own property, failed to deposit all client or third-person funds in an appropriate IOLTA or non-IOLTA account, and/or failed to identify and appropriately safeguard other property in violation of MRPC 1.15(d); engaged in conduct that is prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1); and engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2).

In accordance with the stipulation of the parties, the panel ordered that the respondent be reprimanded and subject to certain conditions. Costs were assessed in the amount of $1,434.46.

REPRIMAND AND RESTITUTION (BY CONSENT)

Patrick M. O'Connell, P42605, Coldwater. Reprimand, effective April 19, 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 Ingham County Hearing Panel #5. Based on the parties' amended stipulation and the respondent's admissions, the panel found that the respondent committed professional misconduct during his representation of a client in a driver's license restoration matter filed with the secretary of state.

Specifically, the panel found that the respondent neglected a legal matter entrusted to him in violation of MRPC 1.1(c); acted without reasonable diligence and promptness in representing a client in violation of MRPC 1.3; failed to keep a client reasonably informed about the status of a matter or comply promptly with reasonable requests for information in violation of MRPC 1.4(a); and engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b). The panel also found that the respondent's conduct violated MCR 9.104(1)-(3).

In accordance with the amended stipulation of the parties, the panel ordered that the respondent be reprimanded and pay restitu-

tion totaling $1,500. Costs were assessed in the amount of $1,046.40.

DISBARMENT

Jennifer Michelle Paine, P72037, Novi. Disbarment, effective May 20, 2023.

After proceedings conducted pursuant to MCR 9.115, Tri-County Hearing Panel #59 found, based on the respondent's admissions to all of the misconduct set forth in both formal complaints, that the respondent committed professional misconduct during her representation of four different clients in their respective divorce and post-judgment divorce matters while representing a client in adoption proceedings and in her own criminal matter after she was charged with driving while license suspended in a matter filed in the 53rd District Court.

Based upon the respondent's admissions, the panel found that, as set forth in count 1 of Formal Complaint 22-3-GA, the respondent failed to deposit and maintain the tax refund check into a client trust account until her dispute over fees with her client was resolved in violation of MRPC 1.15(c); failed to hold the property of her client or third persons in connection with a representation separate from her own property by not depositing the check into a client trust account but rather commingling the funds by depositing them into her personal checking account in violation of MRPC 1.15(d); engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b); engaged in conduct that was in violation of the Rules of Professional Conduct in violation of MRPC 8.4(a) and MCR 9.104(4); engaged in conduct that was prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); and engaged in conduct that was contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3).

As set forth in count 2 of Formal Complaint 22-3-GA, the panel found that the respondent engaged in a conflict of interest by representing two adverse parties without proper consultation for consent in violation of MRPC 1.7; engaged in a conflict of interest by providing financial assistance to a client in violation of MRPC 1.8(e); engaged in conduct that was in violation of the Rules of Professional Conduct in violation of MRPC 8.4(a) and MCR 9.104(4); engaged in conduct that was prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); and engaged in conduct that was contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3).

As set forth in count 3 of Formal Complaint 22-3-GA, the panel found that the respondent engaged in incompetent representation in violation of MRPC 1.1(a); neglected a legal matter entrusted to her in violation of MRPC 1.1(c); made false statements of material fact to a tribunal in violation of MRPC 3.3(a)(1); failed to make reasonably diligent efforts to comply with a legally proper discovery request by opposing party in violation of MRPC 3.4(d); made false statements of material fact to the opposing attorney in violation of MRPC 4.1; engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b); engaged in conduct that was in violation of the Rules of Professional Conduct in violation of MRPC 8.4(a) and MCR 9.104(4); engaged in conduct that was prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); and engaged in conduct that was contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3).

As set forth in count 4 of Formal Complaint 22-3-GA, the panel found that the respondent neglected a legal matter entrusted to her in violation of MRPC 1.1(c); failed to act with reasonable diligence and promptness in representing her client in violation of MRPC 1.3; failed to keep her client reasonably informed about the status of her matter and comply promptly with reasonable requests for information in violation of MRPC 1.4; failed to protect her client's legal interests by refunding unearned fees or providing the client with the client file in violation of MRPC 1.16(d); engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b); engaged in conduct that was in violation of the Rules of Professional Conduct in violation of MRPC 8.4(a) and MCR 9.104(4); engaged in conduct that exposed the legal profession or the courts to oblo-

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

quy, contempt, censure, or reproach in violation of MCR 9.104(2); and engaged in conduct that was contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3).

As set forth in count 5 of Formal Complaint 22-3-GA, the panel found that the respondent neglected a legal matter entrusted to her in violation of MRPC 1.1(c); failed to keep her client reasonably informed about the true status of the matter in violation of MRPC 1.4(c); charged and attempted to collect a clearly excessive fee on work that was not performed in violation of MRPC 1.5(a); refused to withdraw after being discharged in violation of MRPC 1.16(a)(3); failed to make reasonable efforts to expedite litigation consistent with the interest of her client in violation of MRPC 3.2; engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b); engaged in conduct that was in violation of the Rules of Professional Conduct in violation of MRPC 8.4(a) and MCR 9.104(4); engaged in conduct that was prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); and engaged in conduct that was contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3).

As set forth in count 6 of Formal Complaint 22-3-GA, the panel found that the respondent violated a criminal law in violation of MCR 9.104(5); knowingly disobeyed an obligation under the rules of a tribunal by driving her car to court while her license was suspended in violation of MRPC 3.4(c); engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b); engaged in conduct that was in violation of the Rules of Professional Conduct in violation of MRPC 8.4(a) and MCR 9.104(4); engaged in conduct that was prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1); and engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2).

As set forth in count 1 of Formal Complaint 22-93-GA, the panel found that the respondent engaged in incompetent representation in violation of MRPC 1.1(a); neglected a legal matter entrusted to her in violation of MRPC 1.1(c); failed to act with reasonable diligence and promptness in representing her clients in violation of MRPC 1.3; knowingly disobeyed obligations under the rules of a tribunal in violation of MRPC 3.4(c); engaged in conduct that was in violation of the Rules of Professional Conduct in violation of MRPC 8.4(a) and MCR 9.104(4); engaged in conduct that was prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); and engaged in conduct that was contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3).

As set forth in count 2 of Formal Complaint 22-93-GA, the panel found that the respondent engaged in incompetent representation in violation of MRPC 1.1(a); neglected a legal matter entrusted to her in violation of MRPC 1.1(c); failed to act with reasonable diligence and promptness in representing her client in violation of MRPC 1.3; failed to keep her client reasonably informed about the status of the matter in violation of MRPC 1.4(a); engaged in undignified or discourteous conduct toward the tribunal in violation of MRPC 3.5(d); engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b); engaged in conduct that was in violation of the Rules of Professional Conduct in violation of MRPC 8.4(a) and MCR 9.104(4); engaged in conduct that was prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposed the legal profession or the

courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); and engaged in conduct that was contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3).

The hearing panel ordered that the respondent be disbarred. The respondent filed a timely petition for review and after conducting review proceedings in accordance with MCR 9.118, the board affirmed the panel's order of disbarment. Costs were assessed in the amount of $3,070.88.

1. On October 25, 2022, an order of suspension pursuant to MCR 9.115(F)(1) [failure to appear], was entered by the panel suspending respondent's license, effective November 1, 2022, and until further order of the panel or the Board. On November 22, 2022, the panel granted respondent's emergency petition for reinstatement and set aside the October 25, 2022, order. (See Notice Vacating Interim Suspension and Notice of Reinstatement, issued November 22, 2022.) On December 6, 2022, an order of interim suspension was re-entered, suspending respondent's license, effective December 13, 2022. (See notice of interim suspension, issued December 14, 2022.)

AUTOMATIC SUSPENSION FOR NON-PAYMENT OF COSTS

Clarice Y. Williams, P33415, Southfield, effective April 11, 2024.

On July 25, 2023, an Order of Reprimand (By Consent) was issued by Tri-County Hearing Panel #58 in *Grievance Administrator v. Clarice Y. Williams,* 23-62-GA. Pursuant to that order, the respondent was ordered to pay $789.20 in assessed costs on or before August 16, 2023. The respondent's request for a payment plan to pay the assessed costs in installments was granted in an order issued on August 16, 2023. The plan was vacated on April 3, 2024, when the respondent defaulted on her installment payments and a certification of nonpayment of costs was issued in accordance with MCR 9.128(C).

In accordance with MCR 9.128(D), the respondent's license to practice law in Michigan was automatically suspended effective April 11, 2024. The suspension will remain in effect until the costs have been paid or the Attorney Discipline Board approves a suitable plan for payment and the respondent complies with MCR 9.119 and 9.123(A).

NOTICE OF HEARING ON PETITION FOR REINSTATEMENT

Notice is given that **David Chipman Venie (P68087)** has filed a petition with the Michigan Supreme Court, the Attorney Discipline Board, and the Attorney Grievance Commission seeking reinstatement as a member of the State Bar and restoration of his license to practice law in accordance with MCR 9.124(A). *In the Matter of the Reinstatement Petition of David Chipman Venie,* ADB Case No. 24-36-RP.

Effective Aug. 18, 2017, the petitioner was disbarred from the practice of law in Michigan. The Michigan action was a reciprocal proceeding filed under MCR 9.120(C) following an order of permanent disbarment in New Mexico in a case captioned *In re D. Chipman Venie,* No. S-1-SC-36175 (NM 2017). The New Mexico Supreme Court entered an order on Jan. 18, 2017, permanently disbarring the petitioner from practicing in New Mexico effective immediately, ordering him to pay restitution in the amount of $89,170.70, enjoining him from suing two clients, and ordering him to pay costs.

The petitioner was permanently disbarred from the practice of law in New Mexico for conduct that occurred in connection with representation of three clients. In one matter, the petitioner counseled his client to bribe witnesses and offered to deliver the bribery payment to the witnesses. He improperly revealed confidential information of a client; filed civil lawsuits that had no reasonable basis in law or fact; made false statements of fact to the tribunal; used evidence the lawyer knew was false; knowingly made false statement of material fact in a disciplinary matter; and engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. In the second matter, the petitioner converted money that belonged to his client's parents and was provided solely for the purpose of posting bond. In the third matter, the petitioner filed a prohibited nonconsensual lien against a client's mother's property for a fee to which he was not entitled. The hearing panel also concluded that the petitioner demanded the fee in retaliation for the client filing a disciplinary complaint.

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

The Attorney Discipline Board has assigned the reinstatement petition to Tri-County Hearing Panel #21. A hearing is scheduled for July 29, 2024, commencing at 9:30 a.m. at the Attorney Discipline Board, 333 W. Fort Street, Suite 1700, Detroit, Michigan 48226.

Any interested person may appear at the hearing and request to be heard in support of or in opposition to the petition for reinstatement.

Any person having information bearing on the petitioner's eligibility for reinstatement should contact:

Sarah C. Lindsey
General Counsel
Attorney Grievance Commission
755 W. Big Beaver Road, Suite 2100
Troy, MI 48084
(313) 961-6585

Requirements of the Petitioner

The petitioner is required to establish by clear and convincing evidence the following:

1. He desires in good faith to be restored to the privilege to practice law in this state;
2. The term of the revocation of his license has elapsed;
3. He has not practiced or attempted to practice law contrary to the requirement of his revocation;
4. He has complied fully with the terms of the order of discipline;
5. His conduct since the order of discipline has been exemplary and above reproach;
6. He has a proper understanding of and attitude toward the standards that are imposed on members of the Bar and will conduct himself in conformity with those standards;
7. He can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and represent them and otherwise act in matters of trust and confidence, and, in general, to aid in the administration of justice as a member of the Bar and as an officer of the court;
8. That, if he has been out of the practice of law for three years or more, he has been recertified by the Board of Law Examiners; and,
9. He has reimbursed or agreed to reimburse the Client Protection Fund any money paid from the fund as a result of his conduct. Failure to fully reimburse as agreed is ground for vacating an order of reinstatement.

In the interest of maintaining the high standards imposed upon the legal profession as conditions for the privilege to practice law in this state, and of protecting the public, the judiciary, and the legal profession against conduct contrary to such standards, the petitioner will be required to establish his eligibility for reinstatement by clear and convincing evidence.

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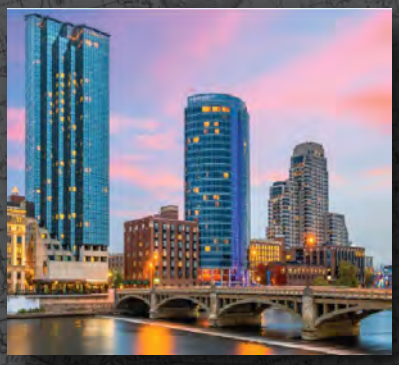

Grand Rapids

Kalamazoo

Ann Arbor

Metro Detroit

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

The committee has adopted a new jury instruction, M Crim JI 5.16 (Testimony Provided Through Videoconferencing Technology), where a witness' testimony was introduced via video rather than in court. The new instruction is effective June 1, 2024.

[NEW] M Crim JI 5.16
Testimony Provided Through Videoconferencing Technology

The next witness, [identify witness], will testify by videoconferencing technology. You are to judge the witness's testimony by the same standards as any other witness, and you should give the witness's testimony the same consideration you would have given it had the witness testified in person. If you cannot hear something that is said or if you have any difficulty observing the witness on the videoconferencing screen, please raise your hand immediately.

The committee has adopted a new jury instruction, M Crim JI 23.10a (Failure to Return Rental Property), for crimes charged under MCL 750.362a. The new instruction is effective June 1, 2024.

[NEW] M Crim JI 23.10a
Failure to Return Rental Property

(1) [The defendant is charged with/You may also consider the lesser offense of[1]] failure to return rental property with [a value of $20,000 or more/a value of $1,000 or more but less than $20,000/a value of $200 or more but less than $1,000/some value less than $200]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that there was a written lease or rental agreement for [identify property leased] between [identify complainant] and the defendant.

(3) Second, that the [identify property leased] was given or delivered to the defendant according to the agreement.

(4) Third, that the agreement called for the return of the [identify property leased] at a specific time and place.

(5) Fourth, that [identify complainant or agent] sent a written notice by registered or certified mail to the defendant at [his/her] last known address directing the defendant to return the property by [specify date].

(6) Fifth, that the defendant refused to return the [identify property leased] or willfully failed to return it by that date.

(7) Sixth, that the defendant intended to defraud [identify complainant].

(8) Seventh, that the [identify property leased] had [a value of $20,000 or more/a value of $1,000 or more but less than $20,000/a value of $200 or more but less than $1,000/some value less than $200].

[(9) You may add together the value of all leased property not returned in a 12-month period if you find it is part of a scheme or course of conduct.][2]

Use Notes

1. Use this where the value of the leased property is in dispute and the instruction is read as a lesser offense.
2. Use this paragraph only where applicable.

FROM THE MICHIGAN SUPREME COURT

ADM File No. 2023-11
Amendments of Rules 1.109, 2.412, 3.302, 3.716, 3.717, 3.718, 3.903, 3.965, 3.972, 4.002, 5.125, 5.501, 7.108, 7.205, 7.305, 9.125, 9.220, 9.315 of the Michigan Court Rules, Rule 1.17 of the Michigan Rules of Professional Conduct, and Rules 801, 803, 804, 1001, and 1102 of the Michigan Rules of Evidence

To read this file, visit https://perma.cc/N6HB-YC33.

ADM File No. 2022-46
Proposed Amendment of Rule 3.305 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.305 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 3.305 Mandamus

(A) Jurisdiction.

(1) Unless the constitution, a statute, or court rule requires a~~A~~n action for mandamus against a state officer to be brought in the Supreme Court, the action must~~may~~ be brought in the Court of Appeals or the Court of Claims.

(2) [Unchanged.]

(B)-(G) [Unchanged.]

Staff Comment (ADM File No. 2022-46): The proposed amendment of MCR 3.305 would clarify where to file a mandamus 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.

A copy of this order will be given to the secretary of the State Bar and to the state court administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by Aug. 1, 2024, by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2022-46. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2021-05
Proposed Amendment of Rule 6.302 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.302 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 6.302 Pleas of Guilty and Nolo Contendere

(A)-(C) [Unchanged.]

(D) An Accurate Plea.

(1) If the court engages in a preliminary evaluation of the sentence to be imposed, the court must:

(a) state that any sentencing range discussed at the plea hearing is a preliminary estimate and that the final sentencing range determined by the court may differ,

(b) advise the defendant whether they will be permitted to withdraw their plea if the preliminary estimate completed at the time of the evaluation is different than the final sentencing range determined by the court at sentencing, and

(c) include in the evaluation a numerically quantifiable sentence term or range. A quantifiable sentence range includes language such as "lower/upper half" or "lower/upper quarter."

(1)-(2) [Renumbered (2)-(3) but otherwise unchanged.]

(E)-(F) [Unchanged.]

Staff Comment (ADM File No. 2021-05): The proposed amendment of MCR 6.302 would require a court that has engaged in a preliminary evaluation of the sentence to inform the defendant that the final sentencing range may differ from the original estimate and, if different, advise the defendant about whether they would be permitted to withdraw their plea, and include in the evaluation a numerically quantifiable sentence term or range.

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

A copy of this order will be given to the secretary of the State Bar and to the state court administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by Aug. 1, 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. 2021-05. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2022-25
Proposed Amendment of Rule 7.103 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.103 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 7.103 Appellate Jurisdiction of the Circuit Court and Judicial Authority

(A)-(B) [Unchanged.]

(C) In courts with a concurrent jurisdiction plan, an appeal under this subchapter must be heard by a judge other than the judge that conducted the trial.

Staff Comment (ADM File No. 2022-25): The proposed amendment of MCR 7.103 would require that an appeal to circuit court be heard by a judge other than the judge that conducted the trial.

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

A copy of this order will be given to the secretary of the State Bar and to the state court administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by Aug. 1, 2024, by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2022-25. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2022-12
Proposed Amendment of Rule 7.118 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.118 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

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 7.118 Appeals from the Michigan Parole Board

(A)-(B) [Unchanged.]

(C) Access to Reports and Guidelines. Upon request, the prosecutor, the victim, counsel for the prisoner, and the prisoner shall receive the parole eligibility report, any prior parole eligibility reports that are mentioned in the parole board's decision, and any parole guidelines that support the action taken.

(D)-(E) [Unchanged.]

(F) Record on Appeal. The record on appeal shall consist of the prisoner's central office file at the Department of Corrections and any other documents considered by the parole board in reaching its decision.

(1) Within 14 days of being served with a prosecutor's application for leave to appeal, the parole board shall send copies of the record to the circuit court and the other parties.

(2) In all other appeals, within 14 days after being served with an order granting leave to appeal, the parole board shall send copies of the record to the circuit court and the other parties.

(3) The confidential portion of the parole board file, including victim information, shall be filed under seal and made available only to counsel for the parties and the court. The parole board shall provide a prisoner who is responding in propria persona with a copy of the confidential portion of the parole board file with any victim contact information redacted. The confidential portion of the parole board file shall not be otherwise distributed.

(4) Any of the prisoner's medical, psychological, and treatment records that are part of the record on appeal shall be filed under seal and shall be made available only to counsel for the parties, a prisoner who is responding in propria persona, and the court. The prisoner's medical, psychological, and treatment records shall not be otherwise distributed.

(5) In all other respects, the record on appeal shall be processed in compliance with MCR 7.109.

(F)-(G) [Relettered (G)-(H) but otherwise unchanged.]

(~~I~~H) Procedure After Leave to Appeal Granted. If leave to appeal is granted, MCR 7.105(E)(4) applies along with the following:

~~(1) Record on Appeal.~~

~~(a) The record on appeal shall consist of the prisoner's central office file at the Department of Corrections and any other documents considered by the parole board in reaching its decision.~~

~~(b) Within 14 days after being served with an order granting leave to appeal, the parole board shall send copies of the record to the circuit court and the other parties. In all other respects, the record on appeal shall be processed in compliance with MCR 7.109.~~

~~(c) The expense of preparing and serving the record on appeal may be taxed as costs to a nonprevailing appellant, except that expenses may not be taxed to an indigent party.~~

(2)-(4) [Renumbered (1)-(3) but otherwise unchanged.]

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

Staff Comment (ADM File No. 2022-12): The proposed amendment of MCR 7.118 would allow the prisoner's attorney access to the parole eligibility report(s) and guidelines, require MDOC to provide the record on appeal within 14 days of being served with a prosecutor's application for leave to appeal the parole board's decision, require in all other appeals that MDOC provide the record on appeal within 14 days of the court granting the application for leave to appeal, and require confidential portions of the record to be filed under seal with access limited to certain people.

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

A copy of this order will be given to the secretary of the State Bar and to the state court administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by Aug. 1, 2024, by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2022-12. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2024-01 Appointment to the Court Reporting and Recording Board of Review

On order of the Court, pursuant to MCR 8.108(G)(2)(a), Hon. Julie A. Gafkay, circuit court judge, is appointed to the Court Reporting and Recording Board of Review for a partial term beginning immediately and ending on March 31, 2025.

ADM File No. 2024-01 Appointments to the Michigan Judicial Council

On order of the Court, pursuant to MCR 8.128 and effective immediately, the following members are appointed to the Michigan Judicial Council for the remainder of terms ending on Dec. 31, 2025:

- Charity Mason (court administrator)
- Nora Ryan (on behalf of Justice For All Commission)

ADM File No. 2024-01 Appointment to the Justice For All Commission

On order of the Court, pursuant to Administrative Order No. 2021-1 and effective immediately, Nora Ryan, Michigan Legal Help interim managing attorney, will serve by virtue of that role on the Justice For All Commission.

Further, effective immediately, Nora Ryan is appointed as vice-chair of the Justice For All Commission for the remainder of a term ending on Dec. 31, 2025.

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LAWYERS & JUDGES ASSISTANCE
MEETING DIRECTORY

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

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

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

ALCOHOLICS ANONYMOUS & OTHER SUPPORT GROUPS

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

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

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

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

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

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

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

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

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

GAMBLERS ANONYMOUS

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

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

OTHER MEETINGS

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

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

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

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

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

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

Troy
FRIDAY 6 PM
The Business & Professional (STAG)
Closed Meeting of Narcotics Anonymous
Pilgrim Congregational Church
3061 N. Adams
2 blocks north of Big Beaver (16 Mile Rd.)

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