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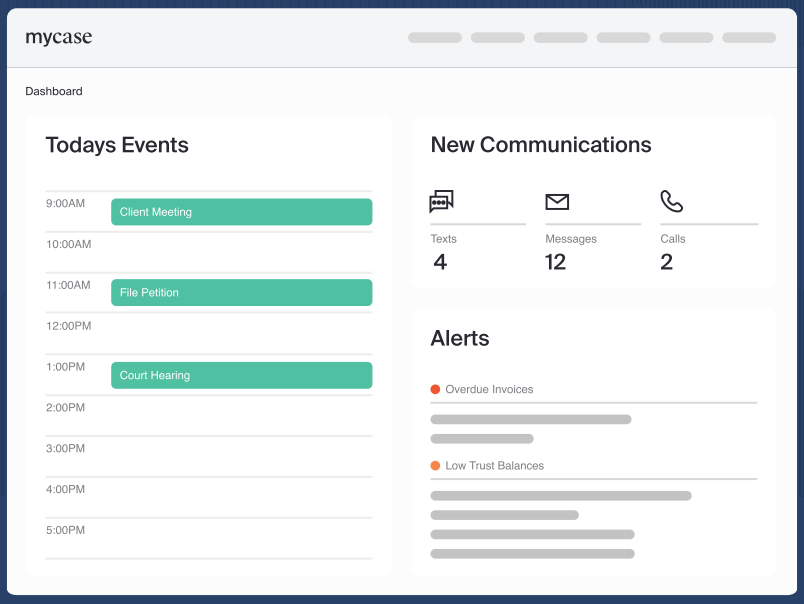

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DECEMBER 2024 | VOL. 103 | NO. 11

OF INTEREST

MICHIGAN
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OFFICIAL JOURNAL OF THE STATE BAR OF MICHIGAN
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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 July 1, 2024, is 4.359%. This rate includes the statutory 1%.

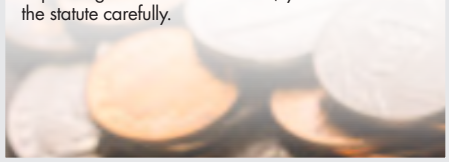
A different rule applies for a complaint filed after June 30, 2002, that is based on a written instrument with its own specific interest rate. The rate is the lesser of:

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.

SBM
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BOARD OF COMMISSIONERS MEETING SCHEDULE

JANUARY 24, 2025
MARCH 7, 2025
APRIL 25, 2025
JUNE 13, 2025
JULY 25, 2025
SEPTEMBER 2025 (TBD)

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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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CIRCUIT 54
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CIRCUIT 55
Mark Toaz

CIRCUIT 56
Timothy Hilton Havis
Adam Hunter Strong

CIRCUIT 57
Christina L. DeMoore

OF INTEREST

Michigan prisons institute new requirements for legal mail

BY SCOTT ATKINSON

The Michigan Department of Corrections (MDOC) is instituting a policy that will directly impact attorneys communicating with incarcerated clients via regular mail.

Beginning Jan. 13, 2025, attorneys sending mail to any Michigan prison will be required to register with a new program that creates QR codes that allow MDOC officials to confirm that the package is legitimate legal mail. MDOC will begin rejecting legal mail without a QR code issued by TextBehind after Jan. 13.

Attorneys can sign up to use TextBehind at textbehind.com/docs.

The policy is aimed at reducing the amount of contraband that makes its way into correctional facilities. Prisons have long had problems with drugs and other contraband, and mail is one of the chief ways drugs are smuggled inside. For example, paper can be laced with different drugs that inmates are able to extract and use.

Officials say that impersonating attorneys is one way people have sought to smuggle drugs into prisons, and some are skilled at doing so.

Currently, MDOC officials photocopy all mail that inmates receive to prevent drugs or contraband from coming in, but any mail designated as needing "special handling" is the exception. That includes what is commonly referred to as "legal mail" — mail from an attorney, law firm, legal service organization, and court and prosecutors' offices. Such mail can't be opened by officials without the recipient inmate present.

To verify mail, MDOC has had to contact attorneys on a case-by-case basis for every piece of legal mail, a process they say is cumbersome and can delay delivery.

TextBehind will create a unique QR code for each piece of mail. That QR code can be printed directly on an envelope or printed and attached anywhere on the outside of the package, according to the MDOC. When the facility receives the legal mail, officials can scan it, verify that it is legitimate, and deliver it to the prisoner.

Attorneys registering for TextBehind will need to provide a copy of their state-issued photo identification and their Bar card.

The new requirements apply to mail sent to all state prisons, but not county jails.

The State Bar of Michigan was not involved in the decision to use TextBehind, nor is it involved in the implementation of the new system. The Bar is sharing information as a service to Michigan attorneys to help them prepare for the MDOC change.

For more information, visit michigan.gov/corrections/textbehind.

Scott Atkinson is communications specialist for the State Bar of Michigan.

IN MEMORIAM

KENNETH L. BLOCK, P10894, of Grand Rapids, died Oct. 22, 2024. He was born in 1940, graduated from Wayne State University Law School, and was admitted to the Bar in 1965.

ROBERT BRYNJELSEN, P71532, of Chicago, Illinois, died May 3, 2024. He was born in 1978 and was admitted to the Bar in 2008.

REYNOLDS H. CAMPBELL, P11560, of Mount Pleasant, died Oct. 28, 2024. He was born in 1937, graduated from Detroit College of Law, and was admitted to the Bar in 1968.

JOSEPH F. DILLON, P12781, of Grosse Pointe Woods, died Oct. 22, 2024. He was born in 1938, graduated from University of Virginia Law School, and was admitted to the Bar in 1968.

SHAUNTA' LAUREN HAGGERTY, P76240, of Detroit, died July 15, 2024. She was born in 1985, graduated from University of Detroit Mercy School of Law, and was admitted to the Bar in 2012.

KAREN H. JACOBS, P15401, of Kalamazoo, died Oct. 16, 2024. She was born in 1938, graduated from University of Michigan Law School, and was admitted to the Bar in 1968.

DAVID C. JAUNESE, P24480, of Fremont, died Oct. 23, 2024. He was born in 1947, graduated from Detroit College of Law, and was admitted to the Bar in 1974.

RICHARD E. JOSEPH, P39924, of Charlevoix, died July 30, 2024. He was born in 1957, graduated from Detroit College of Law, and was admitted to the Bar in 1987.

ROBERT J. KANTER, P24993, of Livonia, died Aug. 12, 2024. He was born in 1949, graduated from Wayne State University Law School, and was admitted to the Bar in 1975.

ALLEN M. KRASS, P16218, of Troy, died March 17, 2024. He was born in 1931, graduated from Wayne State University Law School, and was admitted to the Bar in 1956.

JAMES R. MILLER, P17761, of Bay City, died Jan. 27, 2024. He was born in 1936, graduated from Wayne State University Law School, and was admitted to the Bar in 1965.

JOHN PATRICK RALEIGH, P19202, of Berkley, died Feb. 2, 2024. He was born in 1933, graduated from University of Detroit School of Law, and was admitted to the Bar in 1961.

JOHN M. ROCHE, P19537, of Naples, Florida, died Oct. 8, 2024. He was born in 1930, graduated from University of Detroit School of Law, and was admitted to the Bar in 1958.

KARL W. SCHETTENHELM JR., P27098, of Rochester Hills, died Sept. 14, 2024. He was born in 1949, graduated from University of Detroit School of Law, and was admitted to the Bar in 1976.

WALTER J. SKOTYNSKY, P28900, of Toledo, Ohio, died July 17, 2024. He was born in 1946 and was admitted to the Bar in 1978.

WALTER P. STEWART, P21021, of Bloomfield Hills, died May 18, 2024. He was born in 1943 and was admitted to the Bar in 1968.

RAYMOND O. STURDY JR., P24507, of Plymouth, died Oct. 19, 2024. He was born in 1944, graduated from Wayne State University Law School, and was admitted to the Bar in 1974.

LARRY D. VANDE VREDE, P21737, of Clinton Township, died Oct. 17, 2024. He was born in 1944, graduated from Wayne State University Law School, and was admitted to the Bar in 1969.

CHRISTOPHER WORFEL, P22555, of Englewood, Florida, died Oct. 18, 2024. He was born in 1940, graduated from Detroit College of Law, and was admitted to the Bar in 1972.

ROBERT A. YINGST, P22624, of Santa Fe, New Mexico, died Oct. 13, 2024. He was born in 1943 and was admitted to the Bar in 1973.

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

NEWS & MOVES

ARRIVALS AND PROMOTIONS

ELENA DJORDJESKI has joined the Bloomfield Hills office of Plunkett Cooney.

JENNIFER H. ELOWSKY has joined Adkison, Need, Allen, & Rentrop in Bloomfield Hills.

KATIE DUCKWORTH has joined the Grand Rapids office of Varnum.

TAMMY L. HELMINSKI of Grand Rapids has joined Earth & Water Law.

CHARLES L. LASKY has joined the Lansing office of Fraser Trebilcock.

KATIE A. STEARNS has joined Collins Einhorn Farrell in Southfield.

NICOLE WISNEWSKI has joined Harvey Kruse in Troy.

L. JEFFREY ZAUBERMAN has joined Plunkett Cooney in Bloomfield Hills.

AWARDS AND HONORS

The Detroit Bar Association named Third Circuit Court Chief Judge **PATRICIA PEREZ FRESARD** as the recipient of its Dennis W. Archer Public Service Award.

THOMAS A. KABEL with Butzel in Troy was recognized by Michigan Lawyers Weekly as a member of its Leaders in the Law class of 2024.

The Historical Society of Michigan presented **LYNN LIBERATO** with a State History Award at its annual meeting in September in St. Joseph's. Her article "Con-Con's Petticoat Revolt: Women at the 1961 Constitutional Convention" was honored as the best to appear in the society's Chronicle Magazine in 2024.

ELAINE M. POHL, a partner with Plunkett Cooney in Bloomfield Hills, was recognized by Michigan Lawyers Weekly as a member of its Leaders in the Law class of 2024.

J. DALLAS WINEGARDEN JR., an adjunct professor at Michigan State University College of Law, was honored by the university with a Lifetime Achievement in Teaching award.

LEADERSHIP

MICHAEL R. STILLMAN of Stillman Law Office in Farmington Hills was sworn in as president of the National Creditors Bar Association.

KURTIS T. WILDER with Butzel in Detroit has been appointed to the board of directors of Hastings Insurance.

The **STATE BAR OF MICHIGAN HEALTH CARE LAW SECTION** thanked its outgoing chair, Deborah J. Williamson; welcomed incoming chair Becky Glitman; honored Mercedes Dordeski as a fellow; and recognized outgoing council members Reesa Benkoff, Laura Napiewocki, and Rose Willis at its annual meeting on Sept. 19.

PRESENTATIONS, PUBLICATIONS, AND EVENTS

The **INGHAM COUNTY BAR ASSOCIATION** hosts its annual Meet the Judges event on Thursday, Jan. 9.

SBM's SHARLOW RECEIVES AVERN COHN AWARD

Carrie Sharlow, an administrative assistant at the State Bar of Michigan, was presented with the 2024 Avern Cohn Award for excellence in the collection, preservation, and interpretation of Michigan legal history by the Court Historical Society for the Eastern District of Michigan.

The award recognizes Sharlow's outstanding contributions through her "Michigan Lawyers in History" articles in the Michigan Bar Journal. Sharlow's first article was published in September 2011. She has since written 52 articles informing readers about attorneys who have won landmark cases, broken through social barriers, and helped shape the legal landscape in Michigan.

Sharlow received the award at the society's annual meeting and luncheon on Nov. 13 at the Atheneum Hotel in Detroit.

HAVE A MILESTONE TO ANNOUNCE?

Send your information to News & Moves at **newsandmoves@michbar.org.**

OF INTEREST

Access to justice depends on you!

BY CRAIG LUBBEN

"I will never reject, from any consideration personal to myself the cause of the defenseless or oppressed … "

As I reflect on my second term as president of the Michigan State Bar Foundation, this excerpt from our Lawyer's Oath reminds me that lawyers have promised to seek justice for our neighbors no matter the cost to ourselves. Those who went before us recognized that establishing a Michigan State Bar Foundation committed to access to justice would make it easier for lawyers to serve that principle. Through gifts to the Access to Justice Campaign, Michigan lawyers have established a tradition of helping to meet the ongoing and pressing need for access to justice in the state. Once again, we are asking for your financial support for this cause. Access to Justice in Michigan depends on you.

Right now, thousands of Michigan low-income residents are facing civil legal challenges that are simply beyond their capacity to address without the help of a lawyer. In my column from the December 2023 Michigan Bar Journal, I reminded you of the Access to Justice Campaign, a collaborative centralized campaign administered by the Michigan State Bar Foundation in partnership with the State Bar of Michigan to increase resources for 14 civil legal aid programs in the state. Those programs provide the necessary legal help for our neediest neighbors. Those programs also need our financial support. Contributing to the Access to Justice Campaign is the best way to provide that support because 100% of every donation received is distributed directly to these programs.

The need is great. In 2023, nearly 1.7 million low-income Michigan residents were eligible to receive free legal help. However, despite having great lawyers committed to service, civil legal aid programs had sufficient resources to meet only a small percentage of that need. Specifically, the civil legal aid programs supported by the Access to Justice Campaign provided legal assistance to more than 131,000 households, which included almost 60,000 children, and closed more than 55,000 cases.

Supporting the Access to Justice Campaign is a worthwhile investment. According to the 2019-2020 Social Economic Impact and Social Return on Funding Investment report by the Michigan Justice for All Commission, every $1 invested in Michigan's civil legal organizations resulted in $6.69 in immediate and long-term consequential financial benefits.

Perhaps you want your law firm to be one of the leaders in meeting this need. If so, it is helpful to know that in 2023, 43 law firms were recognized as leadership firms for providing annual gifts of $300-$1,000 per attorney and 56 firms and corporate legal departments gave total gifts ranging between $1,000 and $100,000.

Overall, approximately 12% of Michigan attorneys supported the campaign with a statewide giving rate of $35 per attorney. Since the voluntary pro bono standard adopted by the State Bar of Michigan Representative Assembly recommends a minimum gift of $300 per lawyer, we have room to improve.

Improving access to justice is one of the most noble traditions of the legal profession. This holiday season, I urge every lawyer in Michigan to make a meaningful contribution to the Access to Justice Campaign.

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

MICHIGAN STATE BAR FOUNDATION MSBF

Access to Justice Campaign

YOUR DONATION

Changes Lives

Ensure access and fairness for all in the justice system by giving to the Access to Justice Campaign this holiday season.

Please give a gift to the Campaign here or by scanning the QR code.

100% of your gift to the Access to Justice Campaign supports 14 regional and statewide civil legal aid programs throughout the state.

www.atjfund.org

PUBLIC POLICY REPORT

2023-2024 LEGISLATION

HCR 6 (Wilson) A concurrent resolution to approve the State Officers Compensation Commission determinations.

POSITION: Support.

IN THE HALL OF JUSTICE

Proposed Amendments of Rules 2.107 and 3.203 of the Michigan Court Rules (ADM File No. 2020-08) – Service and Filing of Pleadings and Other Documents; Service of Notice and Court Documents in Domestic Relations Cases.

STATUS: Comment period expires Jan. 1, 2025; public hearing to be scheduled.

POSITION: Support ADM File No. 2020-08 with an amendment to provide that, while parties represented by counsel should be required to *opt out* of electronic service, parties proceeding pro se should be required to *opt in* to electronic service.

Proposed Amendments of Rules 3.207 and 3.210 of the Michigan Court Rules (ADM File No. 2021-27) – Ex Parte, Temporary, and Protective Orders; Hearings and Trials.

STATUS: Comment period expires Jan. 1, 2025; public hearing to be scheduled.

POSITION: Support ADM File No. 2021-27 with the following amendments:

1. **Strike "If a hearing date was set in the order, the court may cancel the hearing" from proposed MCR 3.207(B)(5)(a).**

2. **Reword MCR 3.207(B)(6) to read as follows: "3. The ex parte order will automatically become a temporary order if you do not file a written objection or motion to modify or rescind the ex parte order. The hearing scheduled in the order will take place regardless of whether an objection or motion is filed. Even if an objection or motion is filed, the ex parte order will remain in effect and must be obeyed unless changed by a later court order."**

3. **Reword MCR 3.207(B)(5)(b) as follows: "If a party files a motion to rescind or modify the ex parte order without filing an objection, the court must hold an evidentiary hearing and resolve the dispute within 21 days of the motion to rescind or modify being filed or on the hearing date specified in the ex parte order, if any."**

4. **Reword MCR 3.207(B)(1)(a) as follows: "(a) A verified motion or pleading that requests an ex parte custody or parenting time order or that requests a change of custody or parenting time must include the following information: (i) facts establishing whether the child has an established custodial environment with either parent, or both parents, or neither parent; and"**

Proposed Amendment of Rule 6.302 of the Michigan Court Rules (ADM File No. 2022-59) – Pleas of Guilty and Nolo Contendere (See *Michigan Bar Journal* October 2024, p 56).

STATUS: Comment period expires Jan. 1, 2025; public hearing to be scheduled.

POSITION: Support ADM File No. 2022-59 with an amendment striking "after" and inserting "before" in the proposed language of MCR 6.302(G).

Proposed Amendment of Rule 6.433 of the Michigan Court Rules (ADM File No. 2023-07) – Documents for Postconviction Proceedings; Indigent Defendant (See *Michigan Bar Journal* October 2024, p 56).

STATUS: Comment period expires Jan. 1, 2025; public hearing to be scheduled.

POSITION: Oppose.

Proposed Amendment of Rule 6.509 of the Michigan Court Rules (ADM File No. 2022-51) – Appeal.

STATUS: Comment period expires Jan. 1, 2025; public hearing to be scheduled.

POSITION: Support.

Proposed Amendments of Rules 6.508 and 6.509 of the Michigan Court Rules (ADM File No. 2022-57) – Procedure; Evidentiary Hearing; Determination; Appeal.

STATUS: Comment period expires Jan. 1, 2025; public hearing to be scheduled.

POSITION: Support.

Proposed Amendments of Rules 7.212, 7.305, and 7.312 of the Michigan Court Rules (ADM File No. 2023-04) – Briefs; Application for Leave to Appeal; Briefs and Appendixes in Calendar Cases and Cases Argued on the Application.

STATUS: Comment period expires Jan. 1, 2025; public hearing to be scheduled.

POSITION: Support ADM File No. 2023-04 with the following amendments:

1. **Eliminate the limit of 3,200 words proposed in MCR 7.305(F) and MCR 7.312(A)(2)(c);**

2. **replace "in support of or in opposition to" in MCR 7.305(F) with "in response to;"**

3. **add tribal governments, the Legal Services Association of Michigan, the Michigan State Planning Body, and legal services programs that are annual grantees of the federal Legal Services Corporation or the Michigan State Bar Foundation to the list of those who are not required to file a motion for leave or receive an invitation to file an amicus brief in MCR 7.212 and 7.312.**

Proposed Amendment of Rule 1.6 and Comment of the Michigan Rules of Professional Conduct (ADM File No. 2023-25) – Confidentiality of Information (See *Michigan Bar Journal* October 2024, p 57).

STATUS: Comment period expires Jan. 1, 2025; public hearing to be scheduled.

POSITION: Oppose ADM File No. 2023-25 as drafted but support the concept.

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Property insurance, the bad-faith exception to the American rule, and the destructive legacy of *Burnside v. State Farm*

BY DOUGLAS G. McCRAY

A few months ago, I received a call from a woman, who we'll refer to as Ms. Smith, regarding a weather-related homeowners insurance claim of around $30,000. As it turned out, her insurer had acknowledged coverage and made a small payment, but in dispute was whether most of the damage she claimed was caused by the storm.

Fortunately, MCL 500.2833 provides a mechanism for resolving these amount-of-loss disputes known as appraisal — essentially limited arbitration — which has been referred to as "a simple and inexpensive method for the prompt adjustment and settlement of claims" that is a "substitute for judicial determination of a dispute concerning the amount of loss."[1] Furthermore, while Ms. Smith and her insurer disagreed about which damage was caused by the storm, at least a dozen legal authorities indicate that such disputes are part of the amount of loss assessment for the appraisers.[2] Unfortunately, the adjuster in this instance asserted that the disagreement regarding causation of *some* of damage was a non-appraisable coverage dispute and refused to proceed, leaving the insured with a check for a couple thousand dollars, a $30,000 loss, and no option but to start calling attorneys.

From a liability standpoint, this was an easy win because the insurer's position was legally indefensible. Unfortunately, one third of $30,000 is generally not enough to support a document-intensive lawsuit on a contingent basis, even if the insurer's position is at odds with decades of Michigan law. Accordingly, without something more, Ms. Smith was out of luck. We declined the case — just as we had done with hundreds of insureds with rock-solid but smallish claims.

In many jurisdictions, the "something more" that facilitates contingency fee-based lawsuits for smaller claims is the potential for attorney fees, which are often awarded in connection with bad-faith insurance denials. However, no Michigan statute provides for attorney fees in this context. Furthermore, in 1995 the Michigan Court of Appeals decided in *Burnside v. State Farm Fire and Cas. Co.*[3] that the "American rule" precluded aggrieved insureds from seeking attorney fees, even if a denial was in bad faith.

As we'll discuss, *Burnside* is at odds with the U.S. Supreme Court cases that gave rise to the American rule and the Michigan Supreme Court's statements, both of which recognize an exception providing that attorney fees *are* recoverable when a party has acted in bad faith. Nonetheless, subsequent cases have treated *Burnside* as sacrosanct, allowing insurers denying claims in bad faith to avoid attorney fees and capitalize on the economic realities of litigation to escape their contractual obligations entirely.

The author submits that three decades of blind deference to this incorrect, destructive decision is enough. It is time for the Michigan Supreme Court to recognize the applicability of the American rule exception for bad faith and overrule *Burnside*.

LEGAL BACKDROP FOR *BURNSIDE*

Burnside was not decided in a vacuum. Rather, the court's analysis involved the interplay between two much older rules.

The first rule governs consequential damages and was initially set forth in 1854 in an English case, *Hadley v. Baxendale*.[4] The *Hadley* court held that when a party breaches a contract,

> the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, *or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.*[5]

In *Kewin v. Massachusetts Mut. Life Ins. Co.*, a 1980 case involving a claim for mental distress resulting from the insurer's breach, the Michigan Supreme Court addressed the *Hadley* rule in the context of disability insurance. The Court stated:

IN PERSPECTIVE

DOUGLAS G. McCRAY

> Under the rule of *Hadley* ... the damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made. 5 Corbin, Contracts, § 1007.[6]

In its decision, the Court observed that "a disability income protection insurance policy contract is a commercial contract, the mere breach of which does not give rise to a right to recover damages for mental distress." Because no proof had been offered establishing that such damages "arose naturally from the breach" or were in the "contemplation of the parties," the court ruled for the insurer.[7]

Further, in a footnote, the Court stated that "[w]e do not address a question not raised: Whether compensation for attorney's fees or other items of pecuniary loss caused by a breach of the insurer's contractual obligation to process claims in good faith might be recoverable if properly pleaded," at least implying such damages might be recoverable.[8]

Intuitively, it seems obvious that the breach of an insurance contract necessitates litigation — and attorney fees. In short, such damages "arise naturally from the breach" or, at a minimum, are in the "contemplation of the parties at the time the contract was made." Consequently, it was not surprising that three years later in *Murphy v. Cincinnati Ins. Co.*, the U.S. District Court for the Eastern District of Michigan relied on *Kewin* to hold that an insurer's bad-faith "failure to investigate the claim 'fairly and reasonably' caused the plaintiffs to incur the expense of this litigation"; those damages (i.e. attorney fees) arose naturally from the breach; and actual attorney fees were recoverable.[9] The Sixth Circuit agreed, stating:

> A contract to insure against fire loss is a commercial contract, and damages for its breach are generally limited to the monetary value of the contract ... However, Michigan law follows the rule of *Hadley* ... that "the damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made."[10]

Thus, the district court was correct in deciding that "the expenditure of attorney fees arose naturally from the breach."[11]

Finally, in the 1987 case of *Wendt v. Auto Owners Ins. Co.*, the Michigan Court of Appeals relied on *Hadley*, *Kewin*, and *Murphy* to conclude that "the breadth of an insurer's obligation to process a claim in good faith renders an insurer liable for pecuniary losses which are not otherwise compensated for by statute."[12] In *Wendt*, damages included lost profits, loss of use of the insured vehicle, and costs arising from default on the note it secured, all of which were the natural consequence of the insurer's failure to pay the claim.

THE AMERICAN RULE

Burnside purportedly also relied on the American rule. In that regard, "[a]s early as 1278, the courts of England were authorized to award counsel fees to successful plaintiffs in litigation" and beginning in 1607, such fees could be awarded to defendants as well.[13] This practice, known as the "English rule," has been rejected in the United States. Rather, beginning in 1796 with *Arcambel v. Wiseman*, federal courts generally hold that attorney fees are not to be awarded.[14]

Arcambel is short, but later U.S. Supreme Court decisions fleshed out the details of what would become known as the American rule (to distinguish it from the English rule). In particular, several SCOTUS cases decided in the 1970s summarized previous American rule jurisprudence. In *Hall v. Cole*, the Court stated:

> Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, *in the exercise of their equitable powers, may award attorneys' fees* when the interests of justice so require. Indeed, the power to award such fees "is part of the original authority of the chancellor to do equity in a particular situation," and federal courts do not hesitate to exercise this inherent equitable power whenever "overriding considerations indicate the need for such a recovery."
>
> Thus, it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted "in bad faith[.]" In this class of cases, the underlying rationale of "fee shifting" is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of "bad faith" on the part of the unsuccessful litigant.[15]

The *Hall* Court later stated that "[i]t is clear ... that 'bad faith' may be found, *not only in the actions that led to the lawsuit*, but also in the conduct of the litigation."[16] Other SCOTUS cases have awarded fees based on prelitigation conduct and/or favorably cited the above passage.[17]

A year later, the U.S. Supreme Court decided *F.D. Rich. Co. v. United States ex rel. Indus. Lumber Co.* in which it stated that "[t]he so-called 'American rule' governing the award of attorneys' fees in litigation in the federal courts is that attorneys' fees 'are not *ordinarily* recoverable in the absence of a statute or enforceable contract providing therefore.'"[18] However, the Court added that "[t]he federal judiciary has recognized several exceptions to the general principle that each party should bear the costs of its own legal representation. We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith ... or where a successful litigant has conferred a substantial benefit on a class of persons[.]"[19]

Most important with respect to this article (for reasons discussed later) is the 1975 SCOTUS decision in *Alyeska Pipeline Service Co. v. The Wilderness Society*,[20] in which environmental groups challenged an oil pipeline permit. After dissecting both the English and American rules, the Court declined to award attorney fees, indicating it was hesitant to do so unless authorized by statute. However, it also recognized three judicially created exceptions to the American rule which were "unquestionably assertions of inherent power in the courts to allow attorneys' fees — the common fund exception; "willful disobedience of a court order"; and "*when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons*[.]"[21]

THE MICHIGAN SUPREME COURT AND THE AMERICAN RULE

At the risk of stating the obvious, the American rule is an American rule; it is contrary to the English rule and evolved in the U.S. Supreme Court and lower federal courts. Consequently, state courts interpreting it generally look to federal decisions, and Michigan is no exception.

In 1998, three years after *Burnside*, the Michigan Supreme Court decided *Nemeth v. Abonmarche*, which concerned violations of a state environmental law.[22] In an attempt to establish a recognized exception to the American rule, the plaintiffs advanced what they described as the "'well-established' private attorney general exception" to the basic rule. However, after carefully analyzing several SCOTUS decisions, including *Hall* and *Alyeska*, the Court rejected the plaintiff's position as a "not-so-well established common-law doctrine."[23] The Court also stated that in *Alyeska*:

> [T]he Supreme Court acknowledged the existence of two common-law exceptions to the American rule — the bad-faith exception and the common-benefit exception — but reversed the federal court of appeals holding that litigants who vindicate important statutory rights of all citizens were entitled to attorney fees.[24]

Lastly, in a footnote, the Michigan Supreme Court observed that lower federal courts "also recognized the same two exceptions acknowledged by the Supreme Court in *Alyeska*."[25] In short, the state Supreme Court (looking to SCOTUS) recognizes that there are perhaps two established exceptions to the American rule, one of which is the bad-faith exception.

BURNSIDE v. STATE FARM

Burnside v. State Farm Fire and Casualty Company was a Michigan Court of Appeals case decided in 1995 that concerned the insurer's refusal to compensate its insureds for a fire six years earlier, purportedly based on arson and misrepresentation.[26] Following the jury's determination that State Farm breached the contract in bad faith, the Burnsides made a request for attorney fees which the trial court refused as "not authorized by court rule, statute, or controlling case law."[27]

When the Burnsides appealed, *Kewin* had already hinted that attorney fees might be recoverable for a bad-faith denial, the federal *Murphy* opinions had held they were, and both *Wendt* and *Salamey* had ruled that economic injuries were generally recoverable as consequential damages. Accordingly, there was every reason to expect the court to rule attorney fees were recoverable as consequential damages and no reason to talk about the American rule. Consistent with this, the Burnsides' 39-page brief cited the "consequential damages" cases but did not use the phrase "American rule."[28]

While *State Farm* also focused primarily on consequential damages, it did devote a half-page to the American rule, or at least a version of it. Specifically, it cited two Michigan cases, neither of which addressed the bad-faith exception, for the principle that "Michigan adheres to the 'American rule' that attorney fees are not awarded either as an element of the costs of the suit or as an item of damages, unless allowance of the fees is expressly authorized by statute, court rule, or recognized exception."[29] It then stated that "[a]n insurer's failure to 'act fairly and reasonably in investigating and refusing to pay an insured's claim' is not a recognized exception to the American rule."[30] This was remarkable, since by this point *Hall*, *F.D. Rich*, *Alyeska*, and various lower court cases had established the bad-faith exception, which is not limited to any particular type of case (e.g. insurance) as one of the two or three recognized exceptions.

Nearly two years later, State Farm filed a long supplemental brief in which it again argued consequential damages with copious references to *Hadley* and *Kewin*, and the Burnsides filed a response.[31] Neither addressed the American rule; by the time the filings were completed, that topic comprised just one half-page of the 102 pages submitted. Accordingly, one would have expected the court's opinion to be limited to consequential damages. However, the first paragraph of the *Burnside* opinion states:

> We affirm. In doing so, we hold that the application of the American rule precludes the recovery of attorney fees incurred as the result of an insurer's bad-faith refusal to pay a claim.[32]

In explaining its ruling, the Court of Appeals stated:

> In Michigan, it is well-settled that the recovery of attorney fees is governed by the "American rule." Under the American rule, attorney fees are generally not allowed, as either costs or damages, unless recovery is expressly authorized by statute, court rule, or a recognized exception. ...
>
> * * *
>
> Implicit in the holding in *Kewin*, and reaffirmed in *Valentine v. General American Credit, Inc*, 420 Mich. 256, 362 N.W.2d 628 (1984), however, was the willingness of our Supreme Court to apply less than scrupulously the foreseeability test stated in *Hadley v. Baxendale* in the face of another controlling point of law. In *Valentine*, the Supreme Court held that although mental distress damages are foreseeable within the rule of *Hadley v. Baxendale* for virtually all breach of contract actions, the general rule in most jurisdictions is to deny recovery. As a rationale for its decision to deny recovery, the Court explained that the rule barring the recovery of mental distress damages is "a gloss on the generality of the rule stated in *Hadley v. Baxendale* [and] is fully applicable to an action for breach of an employment contract ..."
>
> * * *
>
> After applying these principles in the present case, we reject the Sixth Circuit's decision in *Murphy* and hold that the recovery of attorney fees incurred as a result of an insurer's bad-faith refusal to pay an insured's claim is governed by the American rule. Like the Court in *Valentine*, we conclude that the American rule is a "gloss on the generality" of the foreseeability test stated in *Hadley v. Baxendale*.
>
> We find unavailing plaintiffs' argument that the American rule is inapplicable when an insurer acts in bad faith. In general, breach of contract damages are not awarded to punish a wrongdoer. We see no reason to carve out an exception in this instance *when none exists*. [A]n insured's right to recover attorney fees as an element of damages is not triggered by the foreseeability of loss. Instead, attorney fees are recoverable only when expressly authorized by statute, court rule, or a recognized exception[.][33]

To quickly recap:

(1) The court acknowledged that scrupulous application of the *Hadley/Kewin* rule warranted both attorney fees and mental anguish damages; but
(2) the rule would be applied "less than scrupulously" (i.e. those damages were not recoverable) if some other rule, referred to as a "gloss on the generality," barred their recovery;
(3) the American rule, which dictated that "attorney fees are generally not allowed, as either costs or damages,

unless recovery is expressly authorized by statute, court rule, or a recognized exception" was such a "gloss;" and

(4) the court would not "carve out an exception in this instance when none exists."

The problem, of course, is that even in 1995, three years before *Nemeth*, the bad-faith exception had become well-established as one of a few recognized exceptions. Thus, if the American rule (including its bad-faith exception) provided any sort of gloss on the consequential damages rule, it affirmed that attorney fees *are* recoverable for a bad-faith breach.

To further support its ruling, the *Burnside* court noted that MCL 500.2006 provided for the payment of interest on claims that were not "reasonably in dispute" which "intended to provide a penalty to be assessed against recalcitrant insurers who procrastinate in paying or are dilatory in paying meritorious claims in bad faith."[34] In short, it claimed the Michigan Legislature had already created a statutory remedy for bad-faith conduct, which did not include attorney fees. The problem was that the statute did not provide a special remedy for bad-faith denials, at least in the context of first-party insurance claims. Rather, penalty interest was owed if payment was late regardless of whether the claim was "reasonably in dispute" or denied in bad faith (i.e. the interest obligation has nothing to do with the insurer's good or bad faith), as an en banc panel of the Court of Appeals would later confirm.[35]

In short, the entire rationale for the *Burnside* ruling was demonstrably wrong.

THE *BURNSIDE* LEGACY

Burnside was decided before *Nemeth*, which affirmed the existence of the bad-faith exception. One would think that after *Nemeth*, courts would have acknowledged it was decided incorrectly, ignored it, or declared a conflict panel. However, that has not happened. Instead, most opinions have uncritically accepted the *Burnside* ruling without mentioning *Nemeth*, the U.S. Supreme Court cases it cited, or the bad-faith exception.[36] Consequently, insureds able to obtain counsel and sue have had to bear the cost of dealing with their insurer's bad-faith conduct, resulting in net payments of around two-thirds of the insurance proceeds to which they are legally entitled. What's worse is that due to the economics governing contingency-based litigation, attorneys have turned away thousands of insureds with rock-solid claims for roughly three decades solely because they are not large enough to support a lawsuit.

It is time to straighten out the 29-year train wreck that began with *Burnside*. While it could be fixed legislatively, if that does not occur, the Michigan Supreme Court should step in and overrule this incorrect and destructive decision.

Douglas G. McCray has been practicing law for nearly 30 years. Since 2012, he has run McCray Law Office in Brighton, where he has exclusively represented property owners in disputes with insurance companies and agents.

ENDNOTES

1. *See, e.g.*, *Cantina Enters. II v. Property-Owners Ins. Co.*, Ct. App. 363105, p. 6 (1-18-2024; for publication) (citations omitted).
2. *Id.* at 6-9 (review of several such authorities).
3. 208 Mich.App. 422, 528 N.W.2d 749 (1995).
4. 9 Exch. 341, 156 Eng.Rep. 145 (1854).
5. (id., emphasis added)
6. 409 Mich. 401, 295 N.W.2d 50, 52-53 (1980).
7. 409 Mich at 419.
8. *Id.* at 421 n. 2.
9. 576 F. Supp. 542 (ED Mich. 1983).
10. 772 F.2d 273, 277 (6th Cir. 1985, citing *Kewin*).
11. *Id. Murphy* was consistent with *Salamey v. Aetna Cas. & Surety Co.*, 741 F.2d 874 (6th Cir. 1984), decided after the district court issued its opinion but before the 6th Circuit did so. As in *Murphy*, *Salamey* held that pursuant to the rule from *Hadley* and *Kewin* an insured's economic loss (here, loss of business income beyond the policy limits) was recoverable.
12. 156 Mich App 19, 27-30, 401 NW 2d 375 (1987).
13. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 US 714, 717 (1967).
14. 3 U.S. (3 Dall.) 306 (1796).
15. 412 U.S. 1, 4-5 (1973) (emphasis added; footnotes and citations omitted).
16. Id. at 15. *See also* Chisper, *Attorney's Fees and the Federal Bad Faith Exception*, 29 Hastings L.J. 319, 324-325 (1977) (exception encompasses "situations in which a party has without justification refused to recognize the clear legal rights of another, thereby forcing that person to bring a lawsuit"); Root, *Attorney-Fee Shifting in America: Comparing, Contrasting and Combining the "American rule" and "English rule,"* 15(3) Indiana International and Comparative Law Review 583, 586 (2005).
17. *See, e.g.*, *Vaughan v. Atkinson*, 369 U.S. 527 (1962) (bad-faith failure to pay "maintenance and cure," forcing plaintiff to sue); *Roadway Express v. Piper*, 447 US 752, 766 (1980) (exception "is not restricted to cases where the action is filed in bad faith. '[B]ad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation"). In *Shimman v. Intl. Union of Operating Engineers*, 744 F. 2d 1226, 1230 (6th Cir (Ohio), 1984), which has been cited in some later cases, the Sixth Circuit acknowledged "[t]he bad faith considered by courts construing this exception generally falls within one of three categories: (1) bad faith occurring during the course of the litigation; (2) bad faith in bringing an action or in causing an action to be brought; and (3) bad faith in the acts giving rise to the substantive claim." However, it then ruled the exception "does not allow an award of attorney fees based only on bad faith in the conduct giving rise to the underlying claim," effectively nullifying the third category (id. at 1233). While the author agrees with the dissent in *Shimman*, it is irrelevant as to first-party insurance cases, which generally turn on the insurers' defenses. Specifically, if an insurer denies coverage, its affirmative defenses are generally limited to the bases listed in its denial letter *(see, e.g., Lee v. Evergreen Regency Co-op.*, 151 Mich.App. 281, 285 (1986); *Smith v. Grange Mut. Fire. Ins.*, 234 Mich 119 (1926)). And no, the second category is not limited to bad faith in "bringing an action." Per the USSC "it has long been held that a federal court may award counsel fees to a successful plaintiff where a *defense* has been maintained 'in bad faith'[.]" (*Newman v. Piggie Park Ent.*, 390 US 400, 402, n. 4). Furthermore, if litigated, defenses in the denial letter always make a second appearance in the insurers' affirmative defenses. Thus, even if an insurer first raises a bad-faith defense before suit is filed, *Shimman* categories 2 and 3 will both be satisfied.
18. 417 U.S. 116, 126 (1974) (citations and footnotes omitted; emphasis added).
19. Id. at 129-130.
20. 421 US 240 (1975).
21. Id. at 257-260.

22. 457 Mich 16, 576 NW 2d 641 (1998).
23. 576 NW 2d at 654.
24. Id. at 652.
25. Id., n. 13.
26. 208 Mich App 422, 424-425, 528 NW 2d 749 (1995).
27. 208 Mich App at 426.
28. Brief of Plaintiffs-Appellants Harlan and Margaret Burnside, *Burnside v. State Farm Fire and Cas. Co.* (Mich. Ct. App. no. 147884L) (May 26, 1992).
29. Brief of Defendant-Appellee State Farm Fire and Cas. Co., pp. 13-14, *Burnside v. State Farm Fire and Cas. Co.* (Mich. Ct. App. no. 147884L) (July 28, 1992). One of those cases was *Matras v. Amoco Oil Co.*, 424 US 675 (1986), which described the American rule but did not name it.
30. Id.
31. State Farm's Supplemental Brief, *Burnside v. State Farm Fire and Cas. Co.* (Mich. Ct. App. no. 147884L) (Jan. 7, 1994); Burnside's response (Mich. Ct. App. no. 147884L) (April 14, 1994)
32. 208 Mich App 422, 424.
33. Id. at 426, 428-431 (citations and footnotes omitted; emphasis added).
34. Id. at 431.
35. *Griswold Properties, LLC v. Lexington Ins. Co.*, 276 Mich App 551, 741 N.W.2d 549 (2007).
36. *See, e.g., Arco Indust. Corp. v. American Motorists Ins. Co.*, 232 Mich App 146, 594 NW 2d 61, 72 (1999); *Hartford Ins. Co. v. Miller*, Case No. 2:04-cv-10314, Doc. 53, pp. 24-25 (ED Mich., Sept. 30, 2006); *No Limit Clothing v. Allstate Ins. Co.*, Case No. 09-13574 (ED Mich. Jan. 12, 2011); *Travier v. ACGIS*, Mich. Ct. App. No. 301122 (2-23-2012; unpublished).

Artificial intelligence and the insurance industry

BY NATASHA L. RAO, NICHOLAS T. BADALAMENTI, AND NICOLE E. WILINSKI

The 21st century has seen rapid growth in technology. At the forefront of this growth is artificial intelligence (AI).

Defined as "the capability of computer systems or algorithms to imitate intelligent human behavior,"[1] AI technology is becoming more commonly used by businesses to increase marketability, cost savings, and customer engagement; expand data analysis; and enhance decision-making. The insurance industry is no exception to this trend.

Now that AI is being used by the insurance industry with increased frequency, learning more about it is critical. This poses the question: What is AI, and how can we expect it to affect the insurance industry?

HOW IS THE INSURANCE INDUSTRY IMPLEMENTING AI?

One example of insurance companies taking advantage of AI technology is the use of chatbots. Originally intended to "give basic advice, check billing information, and address common inquiries and transactions,"[2] chatbots have become an online interface for current and potential customers. For instance, Progressive Insurance launched a specialized chatbot allowing consumers to interact with Flo, the company's well-known commercial spokesperson. As AI technology has improved, chatbots allow insureds and customers to interact with a virtual assistant to discuss questions and concerns spanning from applying for a new policy to filing a claim under an existing policy.[3]

By 2022, "more than forty insurers ha[d] incorporated chatbots into their daily business" in an effort to enhance "the customer experience by helping customers explore and purchase policies, check billing, make payments, and file claims quickly."[4]

Creating Personalized Policies, Pricing, and Coverage

As AI evolved, insurance companies were quick to embrace its uses. It is now utilized in "claims processing, underwriting, [and] fraud detection [efforts]."[5] One AI model that plays a particularly useful role is machine learning, a tool that uses sensors to collect data and create an information base from which it draws certain analyses. Examples of machine learning include fitness trackers, home assistants, smartphones, and smartwatches.[6] Sensors on these tools collect and respond to data in large quantities. In an insurance context, data collected by these tools is analyzed and implemented to provide customers with personalized pricing, coverage options, and optimized service.[7]

Another example from the automotive insurance industry is the installation of sensors in insureds' vehicles. The sensors collect drive-related data which is processed through AI machine learning and then used to assess the safety and speed of the insured and issue personalized policies and determine premiums. By tracking an insured's "behavior behind the wheel, auto insurance companies have been able to encourage more responsible driving and try and help reduce risky behavior."[8]

Smart home technology is also being used by the insurance industry.[9] Sensors installed throughout insureds' homes collect data, which is then compiled and analyzed through AI machine learning, helping providers draft policies and premiums tailored to specific risks. However, AI technology not only benefits the insurance providers, but also the homeowners. The same sensors often detect risks, such as flooding, well before any damage becomes known.[10] Additionally, by "gathering and aggregating post-event data from numerous instances over time," AI helps predict and reduce various property losses.[11]

In the life insurance industry, AI tools are being used to "customize coverage options and automate the underwriting process, helping to allow for flexible plans designed to fit consumer's needs."[12]

AI in Claims Handling

Insurance providers have incorporated AI into claims processing and handling, "which involve decisions traditionally made by human intelligence that are tightly regulated by state insurance laws."[13]

AI tools enable providers to condense claim processing times. By using AI, insurance companies stand to save time and money and minimize errors in these processes.[14] AI may allow insurers to "provide recommendations based on quick data analysis, arming agents with the right information."[15] Notably, by analyzing images, sensors, and past data, AI tools allow insurers to quickly review claims and predict potential costs.

For insurance companies, AI provides the opportunity to improve the expediency of issuing policies and handling and resolving claims.

AI's Prominent Role in the Industry

Given the various uses of this technology, it is no surprise that AI use is being embraced by the insurance industry. Surveys conducted by the National Association of Insurance Commissioners show that in 2022 and 2023, 88% of auto insurance companies, 70% of home insurance companies, and 58% of life insurance companies were currently using or planned to use AI in their operations.[16] Clearly, AI use is on the rise, and we should expect its presence to continue to expand.

POTENTIAL BENEFITS AND SETBACKS

As AI becomes more popular, it becomes more apparent that it is here to stay. Consumers and businesses alike are benefiting from this integration. However, like most new technology, AI isn't problem-free. There are also glitches and potential downsides to its use. For anyone in or adjacent to the insurance industry, the time to consider the capabilities of AI — and its shortcomings — is now. AI's introduction into the insurance industry has already resulted in litigation.

In 2022, a class action lawsuit was filed against State Farm in the United States District Court for the Northern District of Illinois.[17] The complaint alleged that through the use of AI in claims processing and fraud detection, State Farm discriminated against Black policyholders in violation of the Fair Housing Act.[18]

For background, State Farm is alleged to have collected data about policyholders, including characteristics such as sex, race, gender, and education. From this data, State Farm created profiles for its policyholders that reflected their preferences, characteristics, psychological trends, and intelligence. Those profiles were then used in claims processing. Initial claims were automated through AI, which uses predictive modeling or rules-based decision making to determine whether to pay claims immediately or trigger further investigation. The AI tool learns from the data and considers how prior claims were handled to provide recommendations for handling current claims. However, as the lawsuit alleges, this process inadvertently resulted in Black claimants being subjected to more scrutiny than white claimants.

Ultimately, it was alleged that State Farm violated Section 3604(b) of the Fair Housing Act, which prohibits racial discrimination in services connected with the sale of a dwelling. The court reasoned that

because some housing lenders require borrowers to have homeowners insurance, issuing homeowners insurance is a service in connection with the sale of a dwelling. This action remains pending but regardless of the outcome, it provides an example of unanticipated problems resulting from AI use.

PROS AND CONS OF AI IN THE INSURANCE INDUSTRY

On the one hand, AI use in the insurance industry provides undeniable benefits. AI can sift through substantial datasets to identify fraud-related risks. In fact, some believe that its "ability to predict fraud is unparalleled."[19] Additionally, AI has the potential to provide for a more efficient underwriting process. By automating the collection of customer data, AI reduces the time spent developing competitive and personalized insurance policies.[20] Further, AI can provide more efficient claims processing. Decisions are no longer delayed through inevitable human errors but are handled through virtual assistants like chatbots that are available around the clock and can be better suited to answer customers' questions.[21]

On the other hand, the increased use of AI gives rise to concerns. AI may not be bias free. Additionally, as insurance companies (and other businesses) continue to pool customer data through AI, they risk inadvertently disclosing sensitive and private information. As more data gathering occurs through AI, the incentive for hacks increases.[22]

HOW WILL THESE CHANGES AFFECT THE INDUSTRY?

The insurance industry is large and impacts nearly every segment of our society. Most individuals and businesses want to ensure their possessions are protected. To assist the insurance industry in providing the best service it can, we all have a role to play. Here, we call on customers, insurance providers, state legislators, and attorneys involved in insurance-related litigation to adopt procedures and best practices aimed at optimizing AI's safe and ethical use in the industry.

All of us must be encouraged to use and test available AI tools. Only through engagement with the technology can its pitfalls and shortcomings be identified so fixes and improvements can follow.

For insurance providers and anyone using AI, establishing a proper AI risk management framework is a must. In January 2023, the National Institute of Standards and Technology released the first version of its AI Risk Management Framework,[23] a great starting place for any AI user.

Proper risk management frameworks will consider the following risks:[24]

- Robustness: risk of AI failing under unanticipated circumstances or cybersecurity attacks;
- Bias: risk of AI discriminating against certain individuals on the basis of race, sex, gender, or other demographics;
- Privacy: risk that AI discloses private or sensitive data;
- Transparency: risk that customers are confused and uninformed throughout the claims process due to AI involvement;
- Efficacy: risk that the AI's intended uses will not be achieved in practice.

If a framework is established with consideration of these five risks in mind, insurance providers are more likely to achieve AI's desired outcomes and avoid falling victim to any one of the AI-related concerns.

Legislators are also getting involved in the regulation of AI. In 2023, Colorado enacted SB21-169, entitled Restrict Insurers' Use of External Consumer Data.[25] This act prohibits an insurer from using "external consumer data and information source, algorithm, or predictive model" with regard to any insurance practice that unfairly discriminates on the basis of race, color, disability, or sex, among others.[26] Under SB21-169, insurers must advise the commissioner of insurance about the uses of external consumer data and AI.[27] This type of legislation may help provide guidance and regulation on AI's use, but will also add a layer of compliance that the insurance industry and their legal advisors must address.

Lawyers will also be tasked with determining how to utilize AI in their practices as well as how to address issues related to the use of AI in claims processing from both customer and provider perspectives.

CONCLUSION

Both insurers and insureds stand to benefit from the insurance industry's use of AI. Lawyers working in the insurance industry are wise to learn about AI and stay up to date on how AI is used by insurance companies (as well as other industries) and the extent to which that use is controlled or legislated. Much is unknown and much is to be learned about AI. But one thing is clear, AI is here to stay, and its uses are potentially endless.

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Trial objections

BY JAMES A. JOHNSON

"Preparation is the be-all of good trial work."[1]

— *Louis Nizer, New York trial lawyer*

Mastering trial objections requires one to be conversant with the rules of evidence. The reasons for objecting are to shape the testimony heard by the jury and preserve the record for a directed verdict, judgment notwithstanding the verdict, motion for a new trial, and appellate review.

Many lawyers are oblivious to the pitfalls of bringing law school methodology into the courtroom. This is not a law school examination where an objection must be raised to every technical violation of the rules of evidence. The consummate trial lawyer considers whether to object at all, deciding in a split second the overall effect the proffered evidence and potential objection will have on the judge, the jury, and the appellate record.

For example, objecting to leading questions on undisputed and preliminary facts on direct examination is a waste of time. Do not make repetitive objections; asking for a running objection is sufficient. Repetitive objections are annoying when a single objection to a line of questioning will suffice. In addition, repetitive objections signal to the jury that you are attempting to hide information from them. Do not make any objection without a good reason. Unless it is necessary to preserve the record or unless you believe you will be sustained, it is usually unwise to object. Finally, do not make objections when the evidence is harmless.

OBJECTIONS AT TRIAL

An objection must be timely and specific, otherwise it is waived.[2] To be effective, the opponent must specify both what they object to and why they are objecting. The opponent should identify the word, phrase, or question they object to and state the specific legal ground for their objection.

For example, I usually state:

- "Your honor, I object to the admission of exhibit A on the ground that there has been insufficient authentication."
- "Objection, your honor, relevancy, Rule 401 or leading."
- "Your honor, counsel is putting words in the mouth of the witness or unreliable hearsay."

Michigan Rule of Evidence 103(a) (1), which is identical to Federal Rule of Evidence 103, requires that the opponent state "the specific ground of objection, if the specific ground was not apparent from the context[.]"

REQUEST TO TAKE A WITNESS ON VOIR DIRE

Voir dire, an Old French phrase that means "to speak the truth," is functionally a cross-examination during the proponent's direct examination. It applies when there is a question of preliminary fact such as authentication of a document, best evidence rule, hearsay, opinion, competency of a witness, and other matters. The opponent interrupts by requesting the judge's permission to take the witness on voir dire. The opponent asks the witness a series of questions to determine the authenticity of a document, whether the witness has personal knowledge of a fact, or whether the witness qualifies as an expert. The questions depend on the issue.

Michigan Rule of Evidence 104(a), which is identical to Federal Rule of Evidence 104, provides that the trial judge make the final decision, such as whether a witness qualifies as an expert, the authentication of a document, and other preliminary questions.[3]

MOTION TO STRIKE

A motion to strike applies when a witness answers a question so rapidly that the opponent does not have a fair opportunity to interpose an objection, or the answer is improper. In these instances, the opponent should move to strike rather than object. The motion to strike must be timely and specific, and it must be particularized. If the answer contains nonresponsive hearsay, the motion should be based both on nonresponsiveness and hearsay to protect an appeal.

OFFER OF PROOF

When the trial judge sustains an objection, he precludes the proponent from a line of inquiry. The proponent should make an offer of proof stating what the witness would have testified to and why the proponent wanted to elicit that testimony.[4] Michigan Rule of Evidence 103(a)(2) regarding offer of proof requires that the proponent ensure that "the substance of the evidence was made known to the court by offer[.]" The court may direct the making of an offer in question-and-answer form.[5] The proponent should make the offer of proof out of the presence of the jury. The judge may reconsider and change the ruling, and you have protected the record for appellate review.

MOTION IN LIMINE

Trial attorneys must master procedural rules pertaining to presenting and excluding evidence. If counsel anticipates an evidentiary issue at trial, they need not wait until the trial to object; the attorney may raise the objection by a pretrial motion in limine to get an advance ruling of the evidence's admissibility.

MRE 103(c) encourages the use of motion in limine by providing:

> In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

A motion in limine can be used in both civil and criminal cases to obtain an advanced ruling to offer or exclude evidence. It must state the grounds with the same specificity as a trial objection.

For example, the opponent may use the motion in limine to prevent mention of liability insurance, the defendant's prior criminal record convictions, evidence of subsequent remedial measures, evidence of compromise or offers to compromise, or to offer or exclude video evidence. It is preferable to determine the issue before the trial and preclude the proponent from even mentioning prejudicial evidence during the trial.

Further, the opponent may need an advance ruling to make strategy decisions for trial. For example, if the judge grants a pretrial motion in limine to exclude the defendant's convictions, defense counsel can consider placing the defendant on the stand.

Judges like to move proceedings along without delay or interruptions. Lengthy objections in open court are counterproductive. Provide the judge and opposing counsel with a trial brief outlining your position and significant evidentiary issues that are likely to arise. Do not include anything in your trial brief or motion in limine that might alert your opponent to something that they otherwise may have overlooked.

CONCLUSION

Trial attorneys must master two sets of procedural rules: how to present evidence and how to exclude evidence. If counsel anticipates

an evidentiary issue at trial, they need not wait until trial to voice an objection. The attorney may raise the objection by pretrial motion in limine to obtain an advance ruling of the evidence's admissibility. A motion in limine can be used to offer or exclude evidence.

Effective pretrial discovery, preparation, and mastery of the rules of evidence enhances your credibility with the judge and the jury. Counsel should anticipate potential evidentiary problems, both offensive and defensive, and how to address them. Enter the trial brief, motion in limine, and offer of proof.

If you want to stay in good standing with the judge through a trial, limit objections. Only object to the most important issues. The notion that a trial objection must be raised to every technical violation should be discarded. When it is important to object, your objection must be timely and specific. You cannot raise your objection for the first time on appeal.

Read Michigan Rules of Evidence and Federal Rules of Evidence 103, 104, 401, 403, 801, 803, 804, and 901 in their entirety. Know the distinctions between state and federal courts. Attend seminars on evidence and trial practice and read the many sources of excellent information on the subject.[6] This knowledge is priceless.

The ability to make and meet objections well is one of the hallmarks of a consummate trial lawyer. Eventually, you will gain confidence and skill in the courtroom.

James A. Johnson is an accomplished trial lawyer and transactional attorney with more than 40 years of experience. An active member of the Michigan, Massachusetts, Texas, and federal court bars, he concentrates his practice on serious personal injury, complex civil litigation, sports and entertainment law, and criminal defense. Johnson can be reached through his website at JamesAJohnsonEsq.com.

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BEST PRACTICES

Three considerations when working with low-income parties

BY MICHAEL KIEHNE

There is a tremendous need for civil legal assistance for indigent populations. Likewise, thousands of Michiganders who are not categorized as indigent still cannot afford to hire an attorney. In an effort to bridge the gap between legal needs and limited resources, the Michigan Supreme Court (through its Justice for All Commission), the State Court Administrative Office, and the State Bar of Michigan have worked to enact changes to the Michigan Court Rules and the Michigan Rules of Professional Conduct that make legal services more accessible to those unable to pay for access. This column highlights some of those recent changes and spotlights unique challenges to consider when serving clients with low incomes.

CHANGES TO THE MICHIGAN RULES OF PROFESSIONAL CONDUCT

In May 2024, Rule 1.8 of the Michigan Rules of Professional Conduct covering attorney transactions prohibited by conflict of interest was amended to increase the level of financial assistance attorneys may offer pro bono clients.[1] This change helps remove practical barriers that indigent litigants may face, such as transportation to hearings. The previous iteration of Rule 1.8 allowed lawyers representing indigent clients to "pay court costs and expenses of litigation on behalf of the client" but made providing court-appropriate clothing a breach of professional conduct.[2] The recent amendments support a more holistic view of court access and recognize the day-to-day struggles of individuals living in poverty. The new rule allows lawyers who engage in critically needed pro bono work to provide transportation, lodging (if it is less costly than providing transportation for multiple days), meals, and clothing.

Assistance may be provided under this subrule even if the indigent client's representation is eligible to be paid by the losing party under a fee-shifting statute.[3] The rule also outlines restrictions on attorneys who choose to provide additional financial support to low-income clients, stating that:

> Any assistance provided under subrule (3) must be delivered at no fee to the indigent client, and the lawyer may not:
>
> i. promise, assure, or imply the availability of such assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention;
>
> ii. seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and
>
> iii. publicize or advertise a willingness to provide such assistance to prospective clients.[4]

These changes will undoubtedly have a significant positive impact on low-income clients. Ensuring that clients can attend in-person hearings by covering their transportation or lodging costs could be the difference between maintaining housing stability and eviction. Similarly, the ability to assist clients with purchasing court-appropriate clothes can help them feel less like outsiders in court settings, reduce levels of anxiety, and result in judges and juries having a more positive impression of the litigants.

LEGAL AID ORGANIZATIONS MAKE PRO BONO WORK EXCEEDINGLY EASY

The changes to MRPC 1.8 are specific to attorneys serving pro bono clients. If you are considering doing pro bono work for the first time or for the first time in several years, connect with your lo-

"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 gstramder@yahoo.com

cal legal aid/legal services office. Michigan has six regional legal aid programs:

- Lakeshore Legal Aid
- Legal Service of South Central Michigan
- Legal Aid of Western Michigan
- Legal Service of Eastern Michigan
- Legal Services of Northern Michigan
- Michigan Indian Legal Services

Each program has a pro bono coordinator or a similar staff member dedicated to connecting clients in need of pro bono assistance with private attorneys. You can tailor your pro bono experience by identifying what types of cases you would like to work on (family, consumer, housing, etc.), the level of complexity you are comfortable with, and time commitment you are willing to give. Many legal aid offices also provide training and support so you feel more confident practicing in an unfamiliar area of law or if you are new to the profession.

In addition to direct representation opportunities, legal aid offices organize legal clinics or fairs that need volunteers. These events allow private attorneys to volunteer a few hours of time on a specific day without committing to anything more than giving clinic participants advice or helping draft simple documents. Some of the most common legal clinics focus on expungements, driver's license restoration, and giving basic advice in family law cases. Offices have participants sign waivers that eliminate the liability of volunteer attorneys, address and remove concerns related to conflicts of interest, and, of course, set expectations appropriate for the particular clinic so participants know that no attorney-client relationship is created between a volunteer attorney and a clinic participant.

BENEFITS OF LIMITED SCOPE REPRESENTATION

Another significant change for low-income clients who cannot hire a lawyer to litigate the entirety of their case are the amended limited scope representation (LSR) rules — MCR 2.117(D) and MRPC 1.2(b) — that went into effect in January 2018. The expansion on an attorney's ability to unbundle services can be transformative for clients. It allows litigants to access a lawyer's skill and expertise for a critical moment in their case at a fraction of the cost.

Now, attorneys can provide limited scope document drafting services to clients, which can have a significant outcome in a case. Pro se documents can be confusing, and important facts or arguments are omitted because the drafter lacks legal experience and knowledge. That is why limited scope document drafting is mutually beneficial to the attorney (who is getting paid) and clients. Courts can also benefit by receiving better quality documents.

Attorneys may enter into LSR agreements with clients if doing so is reasonable under the circumstances and with the informed consent of the client. In the majority of cases, potential clients (and the courts) benefit from having an attorney's assistance with even just one aspect of the case.

For an LSR relationship to be a fruitful one, it is always important to communicate clear expectations. For this reason, initial consultations focusing on understanding a client's objectives, their budget, your LSR work in their case, and a plan for the client to represent themselves once LSR has ended are critical. The State Bar of Michigan has a limited scope toolkit for attorneys to use. It includes forms like engagement letters, retainers, and an end of representation letter. It can be found at michbar.org/limited-scope/toolkit.

REMINDERS ABOUT NOTICE AND WITHDRAWAL

Under MCR 2.117, limited appearance must include or be accompanied by a notice that identifies the scope of the limited appearance by date, time period, and/or subject matter.[5] Notice of entry of a limited scope appearance follows the same rules as filing a notice of appearance with the court and serving all interested parties. It is important to remain within the scope defined by the notice of limited appearance.

When you have fulfilled your obligations under the limited scope agreement, you must file a notice of withdrawal with the court and serve it on all parties of record.[6] The notice must state that you have fulfilled all obligations required by the LSR agreement and you are now withdrawing from the case. The notice must also state the client's current service address and phone number.

If the notice of withdrawal is signed by the client, it is effective immediately. If the notice is not signed by the client, it becomes effective 14 days after its filing and service.[7] Be aware that clients can object to the withdrawal on the grounds that you did not complete the agreed-upon services. Communication throughout the case, such as reminding the client of your limited role and when your services terminate, is a great tool to reduce potential confusion regarding your eventual withdrawal.

UNIQUE CHALLENGES WHEN SERVING LOW-INCOME PEOPLE

Clients with low incomes face unique challenges. These challenges often lead to actions that can be mistaken for non-cooperation, neglect, laziness, stupidity, lack of capacity, or defiance. Every seasoned legal aid attorney has had to respond to allegations leveled by opposing counsel seeking to weaponize our client's poverty.

It is critical for practitioners and courts alike to step back and check our biases when confronted with the challenges faced by clients with low incomes. Developing court orders that account for finite access to resources, the need for accommodations, and realistic limitations on time are key.

A classic example is frequent adjournments. A common hardship indigent litigants (particularly single parents who are hourly wage earners) face when having to attend multiple hearings is a lack of paid time off. Taking multiple days off from work for multiple hearings could not only put a single parent on a path towards increased instability by leading to utility shutoffs and eviction because they lack the money to pay for all their bills, but even simply requesting time off could jeopardize their job if the employer is not flexible when it comes to schedules.

Similarly, low-income litigants (particularly older adults) unfairly have capacity concerns levied against them despite only struggling with lack of money or resources. Nicole Shannon, systemic advocacy attorney with the Michigan Elder Justice Initiative, authored the article "Poverty Masquerading as Incapacity"[8] published by the American Bar Association. Shannon highlights the struggles indigent individuals face when simply seeking to retain their civil rights because of implicit biases about age, disability, and access to resources.

One way to combat the challenges outlined above is increasing the number of attorneys who assist with cases involving low-income people. The more attorneys who help with these cases, the more likely it is that our judicial system will change to become accessible to all. It is essential for the private bar to continue to increase its involvement in cases involving clients with low incomes so just outcomes are achieved for all, not just those who can afford legal assistance.

Michael Kiehne is supervising attorney for Legal Services of South Central Michigan.

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PLAIN LANGUAGE

Flimsy claims for legalese and false criticisms of plain language: A 30-year collection (Part 2)

BY JOSEPH KIMBLE

Author's note: Last month, I addressed five flimsy claims and six false criticisms. This month, I continue with 19 more false criticisms. As I said last month, my responses to the criticisms are necessarily short because there are so many. More detailed responses are available in the cited sources. Readers will perhaps forgive the many citations to my own books, but I have been answering these claims and criticisms for a long time (including in this column, as far back as May 1990).

CONSTRICTED VIEWS OF PLAIN LANGUAGE

12. "Typically, there are lists of 10 or 12 [plain-language] rules."[1]

    Actually, there are dozens of guidelines (not rules), and they are flexible and varied.[2] Just because you can find top-10 lists, say, of especially important guidelines doesn't mean that that's all there are.

13. "[P]lain language . . . often requires compressing what might be a complex policy into a small number of words."[3]

    Plain language doesn't *require* fewer words, but that will usually be the result.[4]

14. Advocates "command that short sentences be used."[5]

    We don't "command." We typically say to prefer short and medium-length sentences. Or we say to break up long sentences. I'm waiting for critics to put forward an ultralong legal sentence that can't be turned into a list or otherwise broken up.[6] And by the way, research does show that as sentences increase in average length, they increase in difficulty for readers.[7]

15. Advocates have a rule to address readers as *you* in statutes.[8]

    Again, there's no such "rule." Rather, we recommend using *you* in consumer documents — including regulations — when it works. Doing so engages readers by putting them directly into the picture.[9]

16. "The most damaging Plain Language rule is to write only words that are commonly used by laypeople in ordinary speaking and writing."[10]

    Says who? Every reputable advocate makes it emphatically clear: use a longer, less familiar word if you think it's more precise or accurate, or you have a good stylistic reason.[11]

17. The plain-language movement "has degenerated into a verbal witch hunt . . . in which the goal seems to be to . . . attack harmless phrases in any legal writing with the vigor of Moses crushing the golden calf." The time it takes to comprehend a few extra words is trivial.[12]

    Phrase-crushers? Us? It's true that some advocates have taken aim at particular words and phrases, mostly as a kind of spur to action. But vocabulary is just one part of the push for plain

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language. (See #12.) And just because we offer lists of alternatives to wordy phrases and inflated diction doesn't mean that we insist on the alternatives (see #16), although some are worse — more clumsy and stodgy — than others. Finally, while a few extra words here and there won't matter, the cumulative effect of a lot of extra words surely will.[13]

18. For advocates, clarity is measured by readability formulas.

In the 1980s, many states in the U.S. passed insurance regulations that did incorporate readability formulas. But advocates know, and have repeatedly said, that they are only one way of assessing clarity — or, more accurately, lack of clarity.[14] User testing is, of course, the gold standard for public documents — when it's possible.

OTHER DISTORTIONS AND MISCONCEPTIONS

19. Advocates believe that "it is more important to be clear . . . than to be accurate."[15]

Utter nonsense. We may not always say or emphasize that plain language doesn't change the meaning — because we take the need for accuracy as blindingly obvious. What's more, clarity and accuracy are complementary — not competing — goals. By striving for clarity, you invariably improve accuracy.[16]

20. Plain language generates errors. It's not accurate or precise.[17]

Here we have the illegitimate offspring of #19. Here is the great myth that traditional style is precise and plain language isn't. Actually, plain language is *more* precise than legalese and officialese. It brings error and ambiguity and confusion to light.[18] How many projects and examples does it take to prove that? Critics love to dig up a possible mistake or uncertainty in some piece of a plain-language document. They would be quite deflated if they applied the same scrutiny to old-style documents.[19] Down would go the claim for greater certainty in those documents — and with it a prime excuse for drafting deficiencies that are manifest and manifold.[20]

21. "A concept expressed in plain language will not always carry a clear and unambiguous meaning. . . . Some words are designedly imprecise and permit of a subjective interpretation by a third party such as a judge. Examples . . . are: *satisfactory*, *necessary*, *fair*, *reasonable*, and *viable*."[21]

We know, and we don't suggest replacing terms like those (except maybe *viable*). We perfectly understand that language is full of vague terms. Some may benefit from a little more explanation, and some may not. But they do not render a document unplain. (Ambiguity, by the way, is something else; those terms above are not ambiguous.)[22]

22. "Most of the advocates are not professional drafters but academics and others who may never have drafted a bill."[23]

That would be news to the more than 2,500 members of the Commonwealth Association of Legislative Counsel — a group that, according to a past president, "has helped promote plainer drafting across the world."[24] Another expert drafter said recently that "the writing of laws has substantially improved over the last 30 years from a plain language perspective" (although not, sadly, in the U.S. federal government).[25] In short, a good many professional drafters have taken plain language to heart.

23. Advocates believe that citizens read statutes and that everyone has a right to understand them.[26]

Not exactly. We know that statutes are used by many people — such as administrators and small-business owners — who are not lawyers, and we think that drafters should make them intelligible to the greatest possible number of potential readers, especially those who are directly affected. Shouldn't people who want or need to read laws be able to understand them without travail (or having to pay someone else to explain them)?[27] At the same time, though, advocates should have reasonable expectations and measure success in terms of the great majority of readers.

24. The primary audience for our laws is lawyers. We should concentrate on making them clear to lawyers.[28]

In most instances, I think it's arguable whether there is — or should be — a great difference between making laws clear to lawyers and citizens, except perhaps for the occasional use of technical terms. (See #3 in Part 1.) Besides, if you strive to make statutes as clear as possible to lawyers, you'll probably make them clear to most other literate citizens.[29] And in any event, the traditional style of legislative drafting hasn't exactly been successful in making statutes clear even to lawyers.

25. The way to make statutes clear to citizens is to provide separate explanatory guides.[30]

Why shouldn't the law be as clear as possible to begin with? Why make this an either/or choice?[31]

26. Readers expect to see legalese and officialese in those kinds of documents.

If so, then shame on the writers who have conditioned readers to expect it. Readers detest complexity and overwhelmingly prefer plain language.[32]

27. "Plain style is . . . no[t] more consistently effective . . . than other styles."[33] "The rules for employing Plain English remain a grab bag of [unsupported] admonitions."[34]

    The case studies prove otherwise: readers strongly prefer plain language in public and legal documents, understand it better than bureaucratic and legalistic style, find it faster and easier to use, are more likely to comply with it, and are more likely to read it in the first place.[35] As for all the individual plain-language guidelines, there is considerable research to support the validity of those that have been studied.[36]

28. Plain language is dull and drab, it dumbs down, it's simpleminded, etc. We advocate "the writing style of a fourth grader."[37]

    And legalese is scintillating and eloquent, right? (We're back where we started.) People don't read a contract or a phone bill for fun. And they are delighted if — contrary to expectations — it's easy to understand. What's more, plain language can, in the right context, be lively and expressive. It has a long literary tradition.[38]

29. Advocates "assume that all writing is the same. That's moronic. Elizabethan sonnets are not written like telephone directories."[39]

    So absurd that it doesn't deserve a response.

30. Anybody can write in plain language. It's easy.

    If that were true, you'd see a lot more of it. Writing clearly and plainly and directly just looks easy. Only the best minds and best writers can accomplish it — writers who have taken stock and freed themselves from the bad habits that plague professional writing everywhere.

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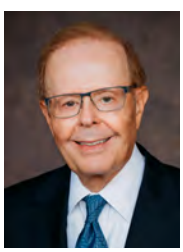

Joseph Kimble taught legal writing for 30 years at Cooley Law School. His fourth and latest book is *Essentials for Drafting Clear Legal Rules* (with Bryan Garner). He is a senior editor of *The Scribes Journal of Legal Writing*, editor of the Redlines column in *Judicature*, and a drafting consultant on all federal court rules. He led the work of redrafting the Federal Rules of Civil Procedure, Federal Rules of Evidence, and Michigan Rules of Evidence. In 2023, he won a Roberts P. Hudson Award from the State Bar of Michigan. This year, he won the Golden Pen Award from the Legal Writing Institute.

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3. Hunt, *Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal?*, Paper for the Fourth Biennial Conference of PLAIN (Sept 27, 2002), p 11, <http://en.copian.ca/library/research/plain2/legdraft/legdraft.pdf> (accessed June 6, 2024), also available at <https://perma.cc/6LUW-6N3A>.
4. *See, e.g.*, *Seeing Through Legalese*, *supra* n 2 at pp 5, 69, 75–78, 101, 109, along with countless other examples that advocates have put forward for decades.
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11. Kimble, *Lifting the Fog of Legalese: Essays on Plain Language* (Durham: Carolina Academic Press, 2006), pp 163–64; *Seeing Through Legalese*, *supra* n 2 at pp 151–52.
12. Goldman, *The War Against Words*, 83 Mich B J 42, 42 (Nov 2004).
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15. Stark, *supra* n 1.
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17. Hunt, *supra* n 3 at p 10; Stark, *supra* n 1.
18. For examples, see *Lifting the Fog of Legalese*, *supra* n 11 at pp 40–44, 121–22, 137–43, 145–49; *Seeing Through Legalese*, *supra* n 2 at pp 4–12, 29–30, 43–44, 107 n 7, 114 n 8, 115 nn 9 & 15, 129, 135–40.
19. *Lifting the Fog of Legalese*, *supra* n 11 at pp 37–47; *Writing for Dollars, Writing to Please*, *supra* n 2 at pp 37–43; *Seeing Through Legalese*, *supra* n 2 at pp 141–47; *see also* the examples referenced in note 18.
20. *See Seeing Through Legalese*, *supra* n 2 at pp 35–126 (showing an array of examples from the Federal Rules of Civil Procedure and Federal Rules of Evidence before they were redrafted), 106 (describing the old Rules of Evidence as "riddled with inconsistencies, ambiguities, disorganization, poor formatting, clumps of unbroken text, uninformative headings, unwieldy sentences, verbosity, repetition, abstractitis, unnecessary cross-references, multiple negatives, inflated diction, and legalese").
21. Hunt, *supra* n 3 at pp 6, 9.
22. *Lifting the Fog of Legalese*, *supra* n 11 at pp 119–22.
23. Stark, *supra* n 1.
24. *Seeing Through Legalese*, *supra* n 2 at p 148.
25. Piper, *What If There Was a Revolution and No One Knew About It?*, Commonwealth Ass'n of Legis Couns Newsl, July 2017, pp 44, 56, <http://www.calc.ngo/publications> (accessed June 6, 2024), also available at <https://perma.cc/S7XR-9VRR>.
26. Hunt, *supra* n 3 at pp 3–6; Stark, *supra* n 1.
27. *Writing for Dollars, Writing to Please*, *supra* n 2 at pp 30–32; *Seeing Through Legalese*, *supra* n 2 at pp 146–47.
28. Hunt, *supra* n 3 at p 13.
29. For examples, see *Lifting the Fog of Legalese*, *supra* n 11 at pp 145–49 (using the terms *civil damages*, *immunity*, and *gross negligence*); Cooney, *Emergency!*, 91 Mich B J 50 (Nov 2012) (using the terms *immunity* and *gross negligence*).
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37. Phillips, Letter to the Editor, 83 Mich B J 9 (Sept 2004).
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LAW PRACTICE SOLUTIONS

The basics of lawyer podcasting

BY JONATHAN SPENCER

In its infancy, podcasting was a daunting endeavor. Generating a quality product required specialized equipment, expensive microphones, sound mixers, and recording software, and distribution was cumbersome. Since then, affordable equipment, more intuitive recording and syndication tools, and the explosion of social media and video-sharing platforms have nearly flattened the learning curve and dramatically lowered the cost of entry.

However, just because anyone can now produce an audio or video podcast doesn't mean everyone should.

WHY PODCAST?

Many lawyers see podcasting as a way to build awareness for their practices, promote thought leadership, and attract new business. With so many ways to achieve those aims, why choose podcasting over other marketing vehicles?

In addition to communicating subject matter expertise, podcasts provide an opportunity to personally introduce yourself to a potentially wide-ranging audience. Listeners get to know, trust, and like you. When someone hears or sees your podcast, you're making a one-on-one connection such that when they later connect with you directly, they're meeting you for a second time.

Additionally, a podcast can show potential clients and referral sources what it's like to work with you. How you demystify legal concepts, discuss trends, and treat your co-hosts and guests demonstrates your style and approach as well as your firm's values and culture.

WHAT'S THE RIGHT PODCAST FORMAT?

Podcasts generally fall into three formats:

- shorter, one-voice podcasts that provide a brief overview of a topic or share breaking news;
- deeper-dive podcasts that delve into a subject; and
- interview-style podcasts where you and one or more guests discuss a topic as a group in a Q&A or roundtable setup.

The short-form podcast allows you to get the message out quickly and help build an audience that will turn to you for the latest insights. If you're the only voice, you don't have to coordinate guests' schedules and you determine the content. But if you want to be the go-to podcaster with the latest updates, you need to be ready to record and release your podcast as quickly as possible. Even a concise, well-constructed, information-rich episode about a recent change in the law won't have the same impact if you're talking about it two months later.

The longer-form podcast lets you analyze subjects more thoroughly, spending more time on its intricacies and its effect on your audience. Without the demands of "hot off the press" content, you may have more time to record and edit, or you might divide an extended recording into a series. With an inventory of episodes and advance planning, you can schedule podcast releases weeks or months into the future.

The interview-style podcast can vary in length and include multiple topics. Because interviews are essentially conversations, they are more engaging to your audience. Unless you're an incredibly dynamic speaker, a long, single-voice podcast can seem like a lecture. Talking with someone else makes the podcast more dynamic and engaging.

Other advantages of a multi-voice podcast are efficiency and leverage. A co-host or guest could be a current or prospective client, referral source, firm colleague, business professional, co-counsel, or even opposing counsel. Tapping their knowledge frees you from being the sole expert. Plus, when a cohost or guest shares your podcast episodes with their social media followers and connections (who may, in turn, like, comment, and reshare them), you ex-

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pand your reach even further and make yourself a candidate for guesting on other podcasts.

Your podcast doesn't need to strictly follow one of these formats. Feel free to combine them or go in a different direction. The challenge is identifying your audience and determining what resonates with them. Will they listen to your podcast on the treadmill or during their daily commute, or will they set aside a longer block of time? When in doubt, reach out to contacts you want in your target audience and get their thoughts about format, duration, and content.

What about audio versus video? Recording and editing audio is far easier because sound is the only medium — there's no need for lighting, onscreen effects, or other visual elements. But video can enhance your presence, allowing your audience to see and hear you, creating stronger chemistry and rapport. Video podcasts are arguably more shareable; you can upload episodes and shorter clips to blogs, YouTube, Instagram, TikTok, and other sites.

WHERE TO RECORD?

When it comes to recording, sound quality is paramount. Fortunately, you have choices.

The simplest, most trouble-free route is hiring a dedicated studio with acoustic tiles, high-end equipment, and an on-site sound engineer. However, this comes at the cost of the sound engineer's schedule, studio availability and fees, travel time, and production turnaround.

Alternatively, the do-it-yourself approach nearly always saves you money and offers greater flexibility for recording. These days, there's no need for foam padding or noise attenuation; a good microphone and headphones and inexpensive recording software will yield studio-quality sound. The downside is that you are your own tech support. It's up to you to ensure the audio is good and that everything works correctly.

A hybrid option is acquiring the microphone and headphones while working with an off-site podcast engineer to manage recording, editing, and production responsibilities. You'll still pay a fee, but it won't include studio rental or travel time.

WHAT DO YOU NEED TO RECORD A PODCAST?

If you purchase your own equipment, you usually get what you pay for, but you don't have to break the bank. A USB microphone plugs into your computer, alleviating the need and expense of a separate mixer. Stick with a name brand (i.e., Shure) and do your research. For headphones, choose wired over wireless and over-the-ear rather than in-the-ear or earbuds. Expect to pay $100 to $400 or more for a mic and perhaps less for headphones, but you can certainly find deals, so shop around. Using a built-in microphone from a computer, mobile phone, or smart device is not an option.

You may want to consider a few accessories. A desk-mount microphone boom lets you bring the mic closer to your face instead of leaning into a stand. A shock mount attached to the boom isolates the mic and prevents unwanted noise from bumping, tapping, and vibration. A windscreen is a foam cover placed on top of the mic itself, and a pop filter is a mesh screen secured in front of the mic.

Depending on your podcast format (single- or multi-voice), you'll need different recording software. If you're the only talent on your show, you could use free software like Windows Sound Recorder or Apple GarageBand. If you're recording yourself and one or more guests, you'll need a multichannel platform like SquadCast, which captures each person's audio track separately and locally before mixing them automatically. This differs from Zoom, Google Meet, or Teams, which record the entire session and all guests as one track without correcting any buffering or connectivity issues.

Unless you have an engineering degree, Descript is the most user-friendly, feature-rich editing software available and it works on both audio and video. It can transcribe raw audio, detect and name different speakers, and automatically remove filler words and phrases such as "uh," "um," "you know," and "like." Users can move and remove words, sentences, paragraphs, or whole sections by highlighting the text on the screen and deleting, cutting and pasting, or dragging and dropping. You can easily import music files to add intros and outros, too. Studio Sound is a must-have Descript tool that eliminates background noise and room echo and the need for more expensive microphones, foam tiles, and a professional studio arrangement.

SquadCast and Descript are available in packaged monthly subscriptions with pricing ranging from free to $40 based on transcription/editing hours and add-ons.

HOW DO YOU RECORD?

Before you hit the record button, you must do three things: prepare, prepare, and prepare. This is especially true if you decide to do a long-form or interview-style podcast.

Whether your podcast is a two-minute update or an hour-long deep dive, draft an outline or rough script, then review and edit it to focus the material on your audience's interests. Your objective is sounding natural, so avoid creating an exhaustive script you might be tempted to recite word for word.

Finding, booking, and preparing guests for an interview-style podcast can be a challenge. Research candidates online or through their appearances on other podcasts and reach out to gauge their

interest in your show. This step is a win-win regardless of their answer. If they say yes, you have a guest and move forward; if they're not interested, you have made a new contact for your networking and business development efforts.

Rather than proceeding directly to recording, schedule a discovery call with your guest to introduce yourself, get familiar, and collaborate on discussion points. Your guest is your expert, so be open to their suggestions and talk about the direction you have in mind. Conduct the meeting on the recording platform you selected to test audio levels, internet connections, and other technical elements. Another reason to delay scheduling a recording until after the discovery call is to determine if the person's demeanor or delivery is a fit for your podcast. It is better to turn them away politely and respectfully rather than produce a lackluster episode.

CONCLUSION

Now that you have your technology set up, your outline ready, and your guest lined up, it's finally time to record! Turn off your phone, close all the apps you don't need, pour yourself a large glass of cold water (no ice), and settle in. By creating a relaxed, distraction-free environment, you will be less stressed and put yourself, your guest, and your audience at ease. Now you can press the record button and have fun!

In the next issue of the Michigan Bar Journal, we'll explore launching and promoting your podcast; distributing episodes on Apple Podcasts, Spotify, YouTube, and other popular directories; engaging with your audience; and sustaining your podcasting energy and momentum.

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PRACTICING WELLNESS

Chronic stress: It's bad for your health

BY MOLLY RANNS

We've all been there — sitting in traffic watching the minutes tack on to our estimated time of arrival. One of those days where it seemed like you started out running behind and an unexpected traffic jam has complicated an already stressful morning. A packed day with back-to-back meetings and a to-do list that feels a mile long looms. Your heart starts racing, your palms begin sweating, and you notice your breathing becomes more rapid. Your brain has given the order — send in the stress hormones! Adrenaline and cortisol are released, and the body's fight or flight response is activated.[1]

While mild, short-term stress enables individuals to flee from physically dangerous situations or protect oneself from psychologically dangerous ones, chronic stress can negatively impact mood and have dire consequences for our bodily systems.[2] For some, stress may make them feel like their heart is going to explode, while others may exhibit stress by way of irritability or a skin rash that doesn't seem to go away. And though many may minimize their stress response or rationalize symptoms by identifying an alternate source — that eye twitch must be related to allergies! — when it comes to lawyers, the fact remains that they experience stress at greater rates than the general population.[3] With 23% of attorneys saying they struggle with stress,[4] this column looks at how stress impacts one's physiology.

Though many are able to identify stress that occurs "in one's head," stress also has significant impacts from the neck down.[5] Although mild stress is a normal part of life and, at times, can even be motivating, simulating, or enjoyable,[6] chronic stress is maladaptive and detrimental to overall health and well-being.[7] And though adrenaline and cortisol may be beneficial in preparing your muscles, heart, and other organs for an emergency, stress that persists over an extended period of time doesn't allow the body to reset after the perceived threat is gone.[8] The trouble with that perceived threat? It could be a looming deadline, overly full caseload, lack of civility from opposing counsel, or just a general overcommitment to work. Let's take a closer look at how and where stress impacts the body.

CARDIOVASCULAR

With elevated rates of stress amongst legal professionals,[9] it's important to understand the link between stress and cardiovascular health. Stress can increase blood pressure, plaque rate, clot formation, and even arterial constriction, which can lead to heart disease, heart attack, or stroke.[10]

GASTROINTESTINAL

Have you ever been so stressed that you experience a stomachache? Feel nauseous? Have issues with constipation or diarrhea? Stress-induced changes to the gut can lead to inflammation, infection,[11] and other tummy troubles. With cortisol, the natural stress hormone responsible for managing the body's metabolism, too much of it can cause certain bodily functions to stop and your metabolism to slow down,[12] impacting weight gain.

MUSCULOSKELETAL

Stress makes muscles tense up which can, acutely, be helpful; however, prolonged muscle tension can lead to tension headaches and back pain.[13] It can lead to tightness in the neck and jaw, knots and spasms in your neck and shoulders, and even contribute to temporomandibular joint (TMJ) disorders.[14] When you're fighting off the persistent throb from a debilitating headache, don't forget to take a look at the role stress may play in your life.

IMMUNE

Struggling to kick the common cold? Not surprisingly, prolonged stress and elevated

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cortisol levels can actually suppress immune function,[15] making it much harder to fight off illness. By increasing infection susceptibility, delaying wound healing, and exacerbating autoimmune diseases and inflammatory disorders,[16] stress can make it much harder to stay healthy because it weakens the body's defenses. With the cold winter months right around the corner, is your body managing stress in order to fight off germs this holiday season?

MENTAL

Practicing law is stressful. With 28% of attorneys reporting struggles with depression and 19% saying they deal with anxiety,[17] it's no surprise to learn that stress can impact mental health significantly. Stress can reduce enthusiasm for activities one typically enjoys and, simply put, wear you down emotionally.[18] Because it can lead to excessive worry and other psychological disorders, stress can even impact cognitive function. With 40-70% of disciplinary proceedings and malpractice claims in the field of law involving substance use and/or depression, it's more important than ever for attorneys to manage their stress in healthy ways.

CONCLUSION

Struggling to manage stress is not a personal failure. Statistics for legal professionals alone tell us that nearly 30% of attorneys are impacted by stress, depression, and/or anxiety.[19] For professional help or even for tips on how to better manage stress, contact the State Bar of Michigan Lawyers and Judges Assistance Program by calling our confidential helpline at (800) 996-5522 or sending a confidential email to contactljap@michbar.org.

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ENDNOTES

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3. National Task Force on Lawyer Well-Being, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* <https://www.americanbar.org/groups/professional_responsibility/committees_commissions/standing-committee-on-professionalism/the-path-to-lawyer-well-being-practical-recommendations-for-pos>.
4. *Id.*
5. *10 Strange Things Stress Can Do to Your Body*, Cleveland Clinic <https://health.clevelandclinic.org/things-stress-can-do-to-your-body>[perma.cc/46NM-N4DU] (posted February 8, 2023).
6. *Pietrangelo*, *supra* n 2.
7. *Id.*
8. *Id.*
9. National Task Force on Lawyer Well-Being, *supra* n 3.
10. Karen Lamoreux, *The Link Between Stress and Heart Disease*, Medical News Today <https://www.medicalnewstoday.com/articles/stress-and-heart-disease#effects-on-the-heart>[perma.cc/GGK2-69PQ] (posted March 14, 2023).
11. Chu, *supra* n 1.
12. *10 Strange Things Stress Can Do to Your Body*, *supra* n 5.
13. *Pietrangelo*, *supra* n 2.
14. *10 Strange Things Stress Can Do to Your Body*, *supra* n 5.
15. Chu, *supra* n 1.
16. *Id.*
17. National Task Force on Lawyer Well-Being, *supra* n 3.
18. *10 Strange Things Stress Can Do to Your Body*, *supra* n 5.
19. National Task Force on Lawyer Well-Being, *supra* n 3.

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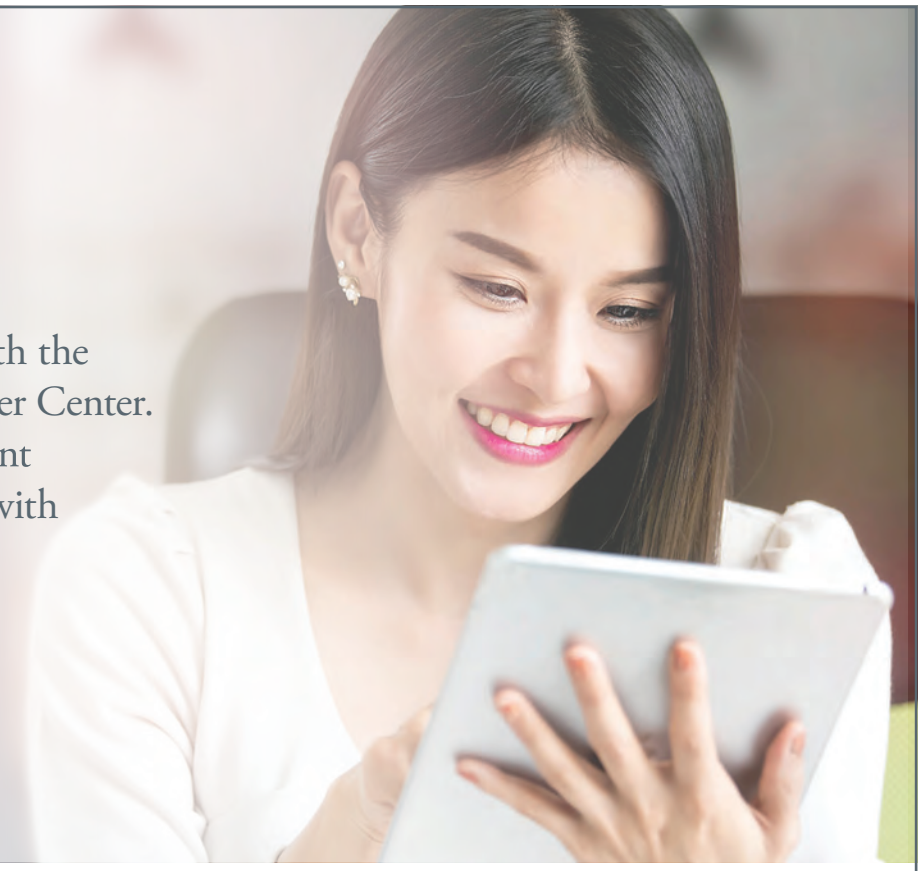

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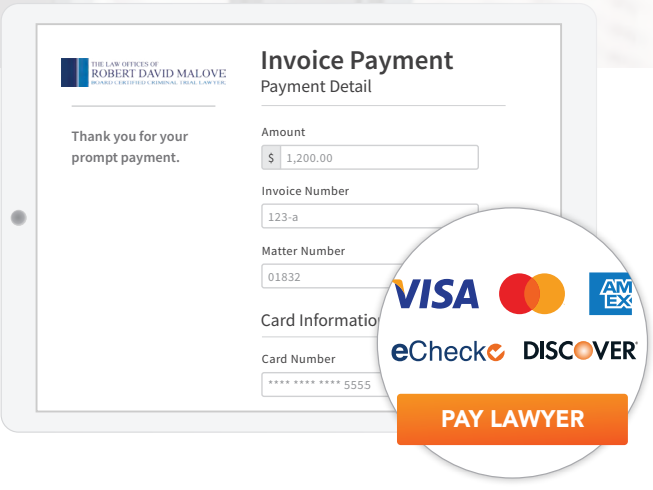

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FROM THE MICHIGAN SUPREME COURT

ADM File No. 2022-23
Amendment of Rule 7.306 of the Michigan Court Rules

To read this file, visit perma.cc/8VB6-GQML

ADM File No. 2017-29
Proposed Amendment of Rule 4.4 of the Michigan Rules of Professional Conduct

On order of the Court, the proposed amendment of Rule 4.4 of the Michigan Rules of Professional Conduct having been published for comment at 501 Mich 1264 (2018), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendment. This administrative file is closed without further action.

ADM File No. 2024-03
Proposed Amendment of Rule 2.003 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.003 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 2.003 Disqualification of Judge

(A)-(C) [Unchanged.]

(D) Procedure.

(1)-(3) [Unchanged.]

(4) If Disqualification Motion is Granted.

(a) For courts other than the Supreme Court, when a judge who is not a business court judge is disqualified, the action must be assigned to another judge of the same court, or, if one is not available, the state court administrator mustshall assign another judge.

(b) When a judge who is a business court judge is disqualified, the action must be assigned to another business court judge of the same circuit, or if one is not available, the state court administrator must assign a business court judge from a different circuit.

(b) [Relettered as (c) but otherwise unchanged.]

(E) [Unchanged.]

Staff Comment (ADM File No. 2024-03): The proposed amendment of MCR 2.003 would clarify the assignment procedures when a business court judge has been disqualified from a case.

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

A copy of this order will be given to the secretary of the State Bar and the state court administrator so they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by Feb. 1, 2025, by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2024-03. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2022-08
Proposed Amendment of Rule 7.206 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.206 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 7.206 Extraordinary Writs, Original Actions, and Enforcement Actions

(A)-(F) [Unchanged.]

(G) Petition for Review or Extension of Time for County Apportionment Plan.

(1) Petition. To obtain review of an apportionment plan as provided in MCL 45.505(5) or 46.406, or to obtain an extension of time to submit an apportionment plan under MCL 45.505(5) or 46.407, the petitioner must file with the clerk within the time limit provided by law:

(a) a petition concisely stating the basis for relief and the relief sought;

(b) a copy of the apportionment plan;

(c) as may be applicable, a sworn statement from a qualified expert attesting to the expert's opinion as to the factual basis for the petitioner's claim that the challenged apportionment plan violates the law;

(d) a supporting brief conforming to MCR 7.212(B) and (C) to the extent possible;

(e) proof that a copy of each of the filed documents was served on the respondent, the county commission, and any other interested party; and

(f) the entry fee.

(2) Answer. A respondent or any other interested party must file with the clerk within 21 days of service of the petition:

(a) an answer to the petition;

(b) a supporting brief conforming to MCR 7.212(B) and (D) to the extent possible; and

(c) proof that a copy of each of the filed documents was served on the petitioner, the county commission, and any other interested party.

(3) Preliminary Hearing. There is no oral argument on preliminary hearing of a petition. The court may deny relief, grant peremptory relief, or allow the parties to proceed to full hearing on the merits in the same manner as an appeal of right. However, if the preliminary hearing on the complaint shows that either party's pleadings or briefs demonstrate that a genuine issue of material fact exists that must be determined before a resolution can be reached as to whether the reapportionment violates the law, or that there is a need for discovery and the development of a factual record, the court must proceed to full hearing on the merits in the same manner as an appeal of right. If the court must proceed to full hearing under this subrule, the panel must first refer the suit to a judicial circuit to hold pretrial proceedings, conduct a hearing to receive evidence and arguments of law, and issue a written report for the panel setting forth proposed findings of fact and conclusions of law. The proceedings before the circuit court must proceed as expeditiously as due consideration of the circuit court's docket, facts, and issues of law requires. Following receipt of the circuit court's report, the court of appeals clerk must certify the order allowing the case to proceed and notify the parties of the schedule for filing briefs in response to the circuit court's report and of the date for oral argument, which must be on an expedited basis.

(4) Full Hearing. If the case is ordered to proceed to full hearing,

(a) the time for filing a brief by the petitioner begins to run from the date the clerk certifies the order allowing the case to proceed;

(b) the petitioner's brief must conform to MCR 7.212(B) and (C); and

(c) an opposing brief must conform to MCR 7.212(B) and (D).

Staff Comment (ADM File No. 2022-08): The proposed amendment of MCR 7.206 would require the Court of Appeals to engage in certain procedures if it receives a county reapportionment challenge.

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

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

A copy of this order will be given to the secretary of the State Bar and the state court administrator so they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by Feb. 1, 2025, 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. 2022-08. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2022-48
Proposed Amendment of Canon 3 of the Michigan Code of Judicial Conduct

On order of the Court, this is to advise that the Court is considering an amendment of Canon 3 of the Michigan Code of Judicial Conduct. 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.]

Canon 3. A Judge Should Perform the Duties of Office Impartially and Diligently.

The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities:

(1)-(3) [Unchanged.]

(4) A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard.

(4)-(14)[Renumbered as (5)-(15) but otherwise unchanged.]

B.-D. [Unchanged.]

Staff Comment (ADM File No. 2022-48): The proposed amendment of MCJC 3 would allow a judge to make reasonable efforts to facilitate the ability of all litigants to be fairly heard.

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

A copy of this order will be given to the secretary of the State Bar and the state court administrator so they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by Feb. 1, 2025, 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. 2022-48. Your comments and the comments of others will be posted under the chapter affected by this proposal.

ADM File No. 2023-32
Amendment of Administrative Order No. 2023-2

On order of the Court, the following amendment of Administrative Order No. 2023- 2 is adopted, effective immediately.

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

Administrative Order No. 2023-2 – Independent Audit of the Judicial Tenure Commission

On June 13, 2023, the Judicial Tenure Commission announced its intention to undergo an "independent review of the racial composition of the judges about whom the Commission receives complaints, and the Commission's dispositions of those com-

plaints, for the period 2008 through 2022." The Commission's press release stated:

> Though the Commission believes its case dispositions show no actual or deliberate racial disparity, the Commission recognizes that this is a very important issue and that the public will have more faith in the fairness of its decisions if their racial composition is reviewed by an independent auditor. Of course, if an independent auditor identifies an actual racial disparity in the Commission's actions that we have overlooked and that is not explained by the choices made by the judges under investigation, the Commission certainly wants to know about that and understand the reasons for it.

However, under MCR 9.261, the files of the Judicial Tenure Commission are confidential and absolutely privileged from disclosure, effectively preventing an independent audit. Nonetheless, Const 1963, art 6, § 30 establishes the Judicial Tenure Commission and provides this Court with the authority to make rules to implement this constitutional provision and provide for confidentiality and privilege of its proceedings.

The Commission has requested that this Court authorize disclosure of otherwise confidential and privileged information to facilitate the independent audit.

Accordingly, to facilitate the independent audit that the Judicial Tenure Commission has committed to undertaking, this Court authorizes the Commission to disclose otherwise confidential and privileged information in its files only as necessary to complete the independent audit and subject to the following conditions:

(1-3) [Unchanged.]

(4) The Judicial Tenure Commission must share the results of the independent auditor's review with the Michigan Supreme Court no later than July 31, 2025~~one year from the date of this order~~.

Staff Comment (ADM File No. 2023-32): The amendment of AO 2023-2 extends the timeframe for which the independent auditor must share its results with the Michigan Supreme Court.

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.

ORDERS OF DISCIPLINE & DISABILITY

SUSPENSION WITH CONDITION (BY CONSENT)

Scott R. Baker, P69106, Novi. Suspension, 120 days, effective Oct. 19, 2024.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Discipline pursuant to MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by Tri-County Hearing Panel #67. The stipulation contained the respondent's admissions to all factual allegations set forth in paragraphs 1-60 and his no-contest plea to the allegations of professional misconduct set forth in paragraph 61 of the formal complaint filed by the grievance administrator, specifically, that the respondent committed professional misconduct by engaging in an inappropriate relationship with a defendant while acting as a prosecuting attorney for the City of Novi.

Based upon the respondent's admission, no contest plea, and the parties' stipulation, the panel found that the respondent engaged in a conflict of interest in violation of MRPC 1.7(b); failed to provide fairness to opposing party in violation of MRPC 3.4; communicated with an opposing party represented by counsel without authorization in violation of MRPC 4.2; provided a false statement within his answer to a request for investigation in violation of MCR 9.104(6) and MRPC 8.1(a)(1); engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of 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 prejudicial to the proper administration of justice in violation of MCR 9.104(1); engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); and engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent's license to practice law in Michigan be suspended for 120 days and that he be subject to a condition relevant to the established misconduct. Total costs were assessed in the amount of $920.16.

NOTICE OF HEARING ON PETITION FOR REINSTATEMENT

Notice is given that **Jarrod A. Barron, P55353,** has filed a petition for reinstatement in the Supreme Court of the State of Michigan and with the Attorney Grievance Commission seeking reinstatement as a member of the bar of this state and restoration of his license to practice law.

On May 22, 2014, the petitioner and the grievance administrator filed a stipulation for a consent order of discipline in accordance with MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by the hearing panel. Based on the petitioner's no contest plea, the hearing panel found that the petitioner withdrew advanced legal fees and expenses from a client trust account without the fees having been earned in violation of MRPC 1.15(g); knowingly made a false statement of material fact in connection with a disciplinary matter in violation of MRPC 8.1(a); engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b); made knowing misrepresentations of facts or circumstances surrounding a request for investigation in violation of MCR 9.104(6); and failed to file an answer to a request for investigation which fully and fairly discloses all facts and circumstances in violation of MCR 9.113. The panel also found that the petitioner violated MRPC 8.4(a) and (c) and MCR 9.104(1)-(4).

In accordance with the stipulation of the parties, the hearing panel ordered that the petitioner be disbarred from the practice of law in Michigan effective Aug. 13, 2014,

and pay restitution in the aggregate amount of $7,490. Costs were assessed in the amount of $799.37.

Pursuant to MCR 9.123(B), the petitioner is required to establish the following by clear and convincing evidence:

1. He desires in good faith to be restored to the privilege of practicing law in Michigan;

2. The term of the suspension ordered has elapsed or five years have elapsed since his disbarment or resignation;

3. He has not practiced or attempted to practice law contrary to the requirement of his suspension or disbarment;

4. He has complied fully with 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. Taking into account all of the attorney's past conduct, including the nature of the misconduct that led to the revocation or suspension, he nevertheless can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to 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. He is in compliance with the requirements of subrule (C), if applicable; and,

9. He has reimbursed the client security fund of the State Bar of Michigan or has agreed to an arrangement to reimburse the fund for any money paid as a result of his conduct.

A Zoom hearing is scheduled for Thursday, Jan. 16, 2025, at 10 a.m. with the State of Michigan Attorney Discipline Board.

Any interested person may appear at such hearing and be heard in support of or in opposition to said petition for reinstatement. Any person having information bearing on the petitioner's eligibility for reinstatement should contact:

Caitlin O. Fleming, Associate Counsel
Attorney Grievance Commission
PNC Center
755 W. Big Beaver, Suite 2100
Troy, MI 48226
(313) 961-6585

SUSPENSION

Carl L. Collins III, P55982, Southfield. Suspension, three years, effective Nov. 16, 2022.

The respondent was convicted by a federal jury of five counts of making a false tax return, a felony, in violation of 26 USC § 7602(1) in the matter titled *United States v. Carl L. Collins III,* Federal District Court, Eastern District of Michigan, Case No. 19-cr-20685. In accordance with MCR 9.120(B)(1), the respondent's license to practice law in Michigan was automatically suspended, effective Nov. 16, 2022, the date of the respondent's conviction.

Based on the respondent's conviction, Tri-County Hearing Panel #60 found that the respondent engaged in conduct that violated a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615 in violation of MCR 9.104(5) and engaged in conduct involving a 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 ordered that the respondent's license to practice law in Michigan be suspended for three years, effective Nov. 16, 2022. Costs were assessed in the amount of $3,469.27.

REINSTATEMENT

On Sept. 6, 2024, Tri-County Hearing Panel #63 entered an Order of Suspension (By Consent) in this matter, suspending the respondent from the practice of law in Michigan for 30 days, effective Sept. 15, 2024, and ordering him to pay costs in the amount of $750. On Oct. 8, 2024, the respondent filed an affidavit pursuant to MCR 9.123(A) attesting that he has fully complied with all requirements of the panel's order and will continue to comply with the order until and unless reinstated. The grievance administrator did not file an objection to the respondent's affidavit pursuant to MCR 9.123(A) and the board being otherwise advised;

NOW THEREFORE,

IT IS ORDERED that the respondent, **Timothy P. Dugan, P41135**, is **REINSTATED** to the practice of law in Michigan, effective **Oct. 17, 2024.**

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

REPRIMAND (BY CONSENT)

John A. Engman, P13198, Grand Rapids. Reprimand, effective Oct. 23, 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 Kent County Hearing Panel #3. The stipulation contained the respondent's admission to the factual allegations and his no contest plea to the allegations of professional misconduct as set forth in the formal complaint, namely that the respondent committed professional misconduct by misusing his IOLTA. Specifically, the complaint alleged that the respondent's IOLTA was overdrawn by several transactions that were business expenses and should have been paid out of his business account. The respondent admitted that all funds in his IOLTA were client funds and that upon learning of the overdrafts, he deposited funds from his general business account into his IOLTA to cover the insufficient funds.

Based upon the respondent's admission, no contest plea, and the parties' stipulation, the panel found that the respondent failed to hold property of clients or third persons in connection with a representation separate from the lawyer's own property in violation of MRPC 1.15(d); failed to safeguard client funds in his IOLTA in violation of MRPC 1.15(d); deposited funds into his IOLTA in an amount in excess of an amount reasonably necessary to pay financial institution service charges or fees in violation of MRPC 1.15(f); engaged in conduct that violates the Rules of Professional Conduct in violation of MRPC 8.4(a) and MCR 9.104(4); and engaged in conduct that exposes the legal profession to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2).

In accordance with the stipulation of the parties, the panel ordered that the respondent be reprimanded. Costs were assessed in the amount of $909.92.

SUSPENSION (PENDING REVIEW)

Ernest Friedman, P26642, Farmington Hills. Suspension, 180 days, effective Oct. 18, 2024.

Based on the evidence presented to Tri-County Hearing Panel #57 at hearings held in this matter in accordance with MCR 9.115, the hearing panel found that the respondent committed professional misconduct in two separate and unrelated counts, one pertaining to management of an IOLTA and the other relating to the respondent's suspension for misconduct found in *Grievance Administrator v. Ernest Friedman,* 18-37-GA.

Specifically, the panel found that the respondent failed to promptly pay or deliver

any funds or other property that the client or third person is entitled to receive except as stated in this rule or otherwise permitted by law or by agreement with the client or third person and, upon request by the client or third person, promptly render a full accounting regarding such property in violation of MRPC 1.15(b)(3) [count 1]; failed to hold property of clients or third persons in connection with a representation separate from his own property in violation of MRPC 1.15(d) [count 1]; deposited funds into the IOLTA in an amount in excess of the amount reasonably necessary to pay financial institution service charges or fees in violation of MRPC 1.15(f) [count 1]; failed to notify all active clients in writing by registered or certified mail, return receipt requested, of his suspension in violation of MCR 9.119(A) [count 2]; failed to file with the tribunal and all parties a notice of disqualification from the practice of law in violation of MCR 9.119(B) [count 2]; and filed a false reinstatement affidavit in violation of MCR 9.123(A) [count 2]. The panel also found the respondent's conduct to have violated MCR 9.104(1) [count 1]; MCR 9.104(2) [counts 1-2]; MCR 9.104(3) [count 2]; MCR 9.104(4) [counts 1-2]; MRPC 8.4(a) [counts 1-2]; and MRPC 8.4(c) [count 2].

The panel ordered that the respondent's license to practice law in Michigan be suspended for 180 days. Costs were assessed by the panel in the amount of $3,409.59.

On Oct. 10, 2024, the respondent timely filed a petition for review pursuant to MCR 9.118 and a petition for stay pursuant to MCR 9.115(K). The respondent's petition for a stay was denied by the board on Oct. 17, 2024. The respondent's petition for review is currently pending before the board.

REPRIMAND

Zachary Hallman, P78327, Dearborn. Reprimand, effective Oct. 23, 2024.

A hearing was held on the grievance administrator's motion for order to show cause regarding why discipline should not be increased for the respondent's failure to comply with an order of 45-Day Suspension (By Consent) issued by Tri-County Hearing Panel #1. The hearing panel found that the respondent committed professional misconduct when he was not in complete compliance with the order of discipline previously entered.

Specifically, the panel found that the respondent's participation in a phone call with the court while his license to practice law was suspended and building signage and website content holding himself out as an attorney after his suspension constituted violations of MCR 9.119(E)(3) and (4). The panel also found that the respondent provided false statements in his affidavit in violation of MCR 9.123(A); engaged in conduct prejudicial to the administration of justice in violation of MCR 9.104(1) and MRPC 8.4(c); engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3); engaged in conduct that violates the standards or rules of professional misconduct in violation of MCR 9.104(4); and violated an order of discipline in violation of MCR 9.104(9).

On Oct. 1, 2024, the panel ordered that respondent be reprimanded, effective Oct. 23, 2024. Costs were assessed in the amount of $2,196.85.

AMENDED[1] ORDER OF REINSTATEMENT

On July 31, 2024, Tri-County Hearing Panel #6 entered an Order of Suspension and Restitution (By Consent) suspending the respondent from the practice of law in Michigan for 60 days, effective Aug. 22, 2024. On Oct. 16, 2024, the respondent filed an affidavit pursuant to MCR 9.123(A) attesting that he has fully complied with all requirements of the panel's order and will continue to comply with the order until and unless reinstated. Counsel for the grievance administrator did not file an objection within seven days pursuant to MCR 9.123(A), and the board being otherwise advised;

NOW THEREFORE,

IT IS ORDERED that the respondent, **George W. Hyde, P46885**, is **REINSTATED** to the practice of law in Michigan, effective **Oct. 28, 2024.**

1. Amended to reflect correct Case No. 23-60-GA.

DISBARMENT AND RESTITUTION

Brandon John Janssen, P78132, Detroit. Disbarment, effective Oct. 19, 2024.[1]

After proceedings conducted pursuant to MCR 9.115, Tri-County Hearing Panel #9 found that the respondent committed professional misconduct as alleged by the grievance administrator in a four-count formal

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

complaint. Counts 1-3 related to immigration matters and count 4 involved the respondent's failure to timely respond to requests for investigation related to the other three counts.

Based on the respondent's default and the evidence presented by the grievance administrator, the panel found that the respondent neglected a legal matter entrusted to him in violation of MRPC 1.1(c) [counts 1-3]; failed to act with reasonable diligence and promptness in representing a client in violation of MRPC 1.3 [counts 1-3]; failed to keep a client reasonably informed about the status of the matter in violation of MRPC 1.4(a) [counts 1-3]; charged an excessive fee in violation of MRPC 1.5(a) [count 2]; failed to take reasonable steps to protect a client's interests upon termination, such as returning unearned fees and client files in violation of MRPC 1.16(d) [counts 1 and 3]; made a false statement of fact to a tribunal in violation of MRPC 3.3(a)(1) [count 2]; failed to make reasonable efforts to supervise the conduct of a nonlawyer assistant in violation of MRPC 5.3 [count 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 in violation of MRPC 8.4(b) [count 2]; engaged in conduct that is prejudicial to the administration of justice in violation of MRPC 8.4(c) [all counts]; and failed to knowingly answer a request for investigation or demand for information in conformity with MCR 9.113(A)-(B)(2) in violation of MCR 9.104(7) and MRPC 8.1(a)(2) [count 4]. The panel also found the respondent's conduct to have violated MCR 9.104(1)-(3) [all counts].

The panel ordered that the respondent be disbarred and pay restitution in the total amount of $14,095. Costs were assessed in the amount of $2,615.11.

1. Respondent's license to practice law in Michigan has been continuously suspended since March 19, 2024. See Notice of Suspension & Restitution with Condition, issued March 20, 2024, in *Grievance Administrator v Brandon John Janssen*, 23-21-GA.

REINSTATEMENT

On August 13, 2024, Tri-County Hearing Panel #6 entered an Order of Suspension in this matter suspending respondent from the practice of law in Michigan for 45 days, effective September 4, 2024. On October 16, 2024, respondent filed an affidavit pursuant to MCR 9.123(A), attesting that he has fully complied with all requirements of the panel's order and will continue to comply with the order until and unless reinstated. Counsel for the grievance administrator informed the board's staff via email that the grievance administrator has no objection to the respondent's affidavit pursuant to MCR 9.123(A); and the board being otherwise advised;

NOW THEREFORE,

IT IS ORDERED that respondent, **Robert Louis Page, P70758,** is **REINSTATED** to the practice of law in Michigan, effective **Oct. 19, 2024.**

SUSPENSION (BY CONSENT)

John L. Runco, P39251, Birmingham. Suspension, 60 days, effective Oct. 23, 2024.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Discipline pursuant to MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by Tri-County Hearing Panel #13. The stipulation contained the respondent's admission that he was convicted of two counts of domestic violence, first offense, a misdemeanor, as set forth in the Notice of Filing of Judgment of Conviction and that his conviction constituted professional misconduct under MCR 9.104(5).

Based on the respondent's conviction, admission, and the parties' stipulation, the panel found that the respondent committed professional misconduct when he violated a criminal law of a state or of the United States, an ordinance, or tribal law in violation of MCR 9.104(5).

The panel ordered that the respondent's license to practice law be suspended for 60 days, effective Oct. 23, 2024. Costs were assessed in the amount of $1,071.47.

REPRIMAND (WITH CONDITIONS)

Carl C. Silver, P 26501, Ossineke. Reprimand, effective Oct. 23, 2024.

The grievance administrator filed a Notice of Filing of Judgment of Conviction in accordance with MCR 9.120(B)(3) showing that the respondent was convicted by guilty plea of operating while intoxicated, 2nd offense, a misdemeanor, in violation of MCL 257.6256(B) in the matter of the *People of the State of Michigan v. Carl C. Silver*, Case No. 21-0435-FD, 88th District Court-Alpena. Based on the respondent's conviction, Tri-Valley Hearing Panel #4 found that the respondent engaged in conduct that violated a criminal law of a state or of the United States, an ordinance, or a tribal law pursuant to MCR 2.615 in violation of MCR 9.104(5).

The panel ordered that the respondent be reprimanded and imposed conditions relevant to the established misconduct. Total costs were assessed in the amount of $1,874.18.

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

The Committee has adopted amendments to three jury instructions: M Crim JI 1.9 (Presumption of Innocence, Burden of Proof, and Reasonable Doubt), M Crim JI 2.5 (Presumption of Innocence, Burden of Proof, and Reasonable Doubt), and M Crim JI 3.2 (Presumption of Innocence, Burden of Proof, and Reasonable Doubt). For each instruction, the third paragraph has been amended to add the sentence, "Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt." The amended instructions are effective Dec. 1, 2024.

[AMENDED] M Crim JI 1.9
Presumption of Innocence, Burden of Proof, and Reasonable Doubt

(1) A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that [he/she] is guilty.

(2) Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove [his/her] innocence or to do anything.* If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty.

(3) Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that: a doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case.

Use Note

This instruction must be given in every case.

* For some affirmative defenses, a defendant must produce evidence. The court should instruct the jury on the defendant's burden of production of evidence where it is most appropriate to do so. The committee recommends that this be done when the court instructs on the nature and requirements of the affirmative defense itself.

[AMENDED] M Crim JI 2.5
Presumption of Innocence, Burden of Proof, and Reasonable Doubt

(1) A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that [he/she] is guilty.

(2) Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove [his/her] innocence or to do anything. If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty.

(3) Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that: a doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case.

[AMENDED] M Crim JI 3.2
Presumption of Innocence, Burden of Proof, and Reasonable Doubt

(1) A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that [he/she] is guilty.

(2) Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove [his/her] innocence or to do anything.* If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty.

(3) Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is

just that: a doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case.

Use Note

This instruction must be given in every case.

*For some affirmative defenses, a defendant must produce evidence. The court should instruct the jury on the defendant's burden of production of evidence where it is most appropriate to do so. The committee recommends this be done when the court instructs on the nature and requirements of the affirmative defense itself.

The Committee has adopted a new jury instruction, M Crim JI 5.14a (Screening of Witness), for when the court permits a witness to be screened from viewing the defendant at trial. The new instruction is effective Dec. 1, 2024.

[NEW] M Crim JI 5.14a
Screening of Witness

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

Use Note

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

The Committee has adopted an amendment to M Crim JI 7.6 (Duress) to comport with discussions of the defense in *People v. Reichard,* 505 Mich 81, 96 n 32 (2020), and *People v. Lemons*, 454 Mich 234, 248 n 21 (1997). A question remains which party bears the burden of proof relative to the defense of duress, so alternative paragraphs are provided. The amended instruction is effective Dec. 1, 2024.

[AMENDED] M Crim JI 7.6
Duress

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

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

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

(b) Two, the defendant actually was afraid of death or serious bodily harm at the time [he/she] acted.

(c) Three, the defendant committed the act to avoid the threatened harm.

(d) Four, the situation did not arise because of the defendant's fault or negligence.

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

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

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

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

[Or]

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS (CONTINUED)

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

Use Note

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

1. In escape cases, the special factors listed in M Crim JI 7.7 should also be given if they are supported by competent evidence.
2. The question whether the burden is on the defendant to establish duress by a preponderance of the evidence, or on the prosecutor to disprove duress beyond a reasonable doubt, was avoided by the Michigan Supreme Court in both *People v. Reichard*, 505 Mich 81, 96 n32; 949 NW2d 64 (2020), and *People v. Lemons,* 454 Mich 234, 248 n21; 562 NW2d 447 (1997). Another affirmative defense — self-defense — places the burden of proof on the prosecutor to disprove the defense once evidence of self-defense has been introduced. The burden being on the defendant to establish an insanity defense is statutorily determined, but there is no statute relative to the duress defense. The Committee on Model Criminal Jury Instructions takes no position on the question of who has the burden of proof, but provides alternative paragraphs (5).

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EVENTS, PRESENTATIONS, PUBLICATIONS

Attorney's Resource Conference—Attention personal injury, medical malpractice, and any attorney who works on cases involving medical records! Join the Attorney's Resource Conference from Aug. 12-14, 2025, at the Garden Theater in Detroit. This conference provides a dynamic and relaxing platform to build networks for case support while enhancing your skills and staying informed. Learn from top doctors, nurses, and attorneys. Enhance your expertise in medical issues, learn how they can impact your case, and be in the know so you are prepared and confident to present medical evidence. Whether you are an attorney concentrating on healthcare, personal injury, and medical malpractice; a nurse attorney; or a legal nurse consultant, you will be equipped with the knowledge and connections necessary to excel in your practice and provide the best possible representation for your clients while offering an opportunity to relax and attend to your own self-care. To register or to learn more, visit attorneysconference.com.

"Pilgrim" is a new book written to motivate older teens and people in their 20s. It is frank, honest, informative, and a comfortable read. I ask that you read it and if you deem it to be worthy, pass it along to your children or grandchildren. They are not apt to buy it, but they need to read it. Clark Cumings-Johnson, author. $12.49 online at Amazon, Barnes and Noble, or your favorite e-vendor.

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Sublease (Downtown Birmingham). Executive corner office, 16′ x 16′ with picture windows and natural light, in class A building on Old Woodward at Brown Street. Amenities include shared conference room, spacious kitchen, and staff workstation. Available secured parking in garage under building. $1,975/month. Contact Allan at Nachman@WillowGP.com or 248.821.3730.

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INTEREST RATES FOR MONEY JUDGMENTS

Subsection 6 of Section 6013, and Subsection 2 of Section 6455 of Public Act No. 236 of 1961, as amended, (M.C.L. Sections 600.6013and 600.6455) state the following:

Sec. 6013(6) Except as otherwise provided by subsection (5) and subject to subsection (11), for complaints filed on or after Jan. 1,1987, interest on a money judgment recovered in a civil action shall be calculated at six-month intervals from the date of filing the complaint at a rate of interest which is equal to 1% plus the average interest rate paid at auctions of five-year United States Treasury notes during the six months immediately preceding July 1 and Jan. 1, as certified by the state treasurer, and compounded annually, pursuant to this section.

Sec. 6455 (2) Except as otherwise provided in this subsection, for complaints filed on or after Jan. 1, 1987, interest on a money judgment recovered in a civil action shall be calculated from the date of filing the complaint at a rate of interest which is equal to 1% plus the average interest rate paid at auctions of five-year United States Treasury notes during the six months immediately preceding July 1 and Jan. 1 as certified by the state treasurer and compounded annually pursuant to this section.

Pursuant to the above requirements, the state treasurer of the State of Michigan hereby certifies that 4.359% was the average high yield paid at auctions of five-year U.S. Treasury notes during the six months preceding July 1, 2024.

TIME PERIOD	INTEREST RATE	TIME PERIOD	INTEREST RATE
7/1/2024	4.359%	1/1/2006	4.221%
1/1/2024	4.392%	7/1/2005	3.845%
7/1/2023	3.762%	1/1/2005	3.529%
1/1/2023	3.743%	7/1/2004	3.357%
7/1/2022	2.458%	1/1/2004	3.295%
1/1/2022	1.045%	7/1/2003	2.603%
7/1/2021	0.739%	1/1/2003	3.189%
1/1/2021	0.330%	7/1/2002	4.360%
7/1/2020	0.699%	1/1/2002	4.140%
1/1/2020	1.617%	7/1/2001	4.782%
7/1/2019	2.235%	1/1/2001	5.965%
1/1/2019	2.848%	7/1/2000	6.473%
7/1/2018	2.687%	1/1/2000	5.756%
1/1/2018	1.984%	7/1/1999	5.067%
7/1/2017	1.902%	1/1/1999	4.834%
1/1/2017	1.426%	7/1/1998	5.601%
7/1/2016	1.337%	1/1/1998	5.920%
1/1/2016	1.571%	7/1/1997	6.497%
7/1/2015	1.468%	1/1/1997	6.340%
1/1/2015	1.678%	7/1/1996	6.162%
7/1/2014	1.622%	1/1/1996	5.953%
1/1/2014	1.452%	7/1/1995	6.813%
7/1/2013	0.944%	1/1/1995	7.380%
1/1/2013	0.687%	7/1/1994	6.128%
7/1/2012	0.871%	1/1/1994	5.025%
1/1/2012	1.083%	7/1/1993	5.313%
7/1/2011	2.007%	1/1/1993	5.797%
1/1/2011	1.553%	7/1/1992	6.680%
7/1/2010	2.339%	1/1/1992	7.002%
1/1/2010	2.480%	7/1/1991	7.715%
7/1/2009	2.101%	1/1/1991	8.260%
1/1/2009	2.695%	7/1/1990	8.535%
7/1/2008	3.063%	1/1/1990	8.015%
1/1/2008	4.033%	7/1/1989	9.105%
7/1/2007	4.741%	1/1/1989	9.005%
1/1/2007	4.701%	7/1/1988	8.210%
7/1/2006	4.815%	1/1/1988	8.390%

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*
Virtual meeting
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.

West Bloomfield
THURSDAY 7:30 PM *
A New Freedom
Virtual meeting
(Contact Arvin P. at 248.310.6360 for Zoom login information)

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

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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