MICHIGAN
BAR JOURNAL
JANUARY 2025

Intellectual Property Law

- Thinking ahead: What attorneys should know about termination and reversion of copyright
- Trade secret damages should not follow the patent damages model
- Trade dress: The IP litigator's secret weapon
- The Supreme Court continues to reshape patent law
- Copyright fair use: Focusing on the purpose and character of a work

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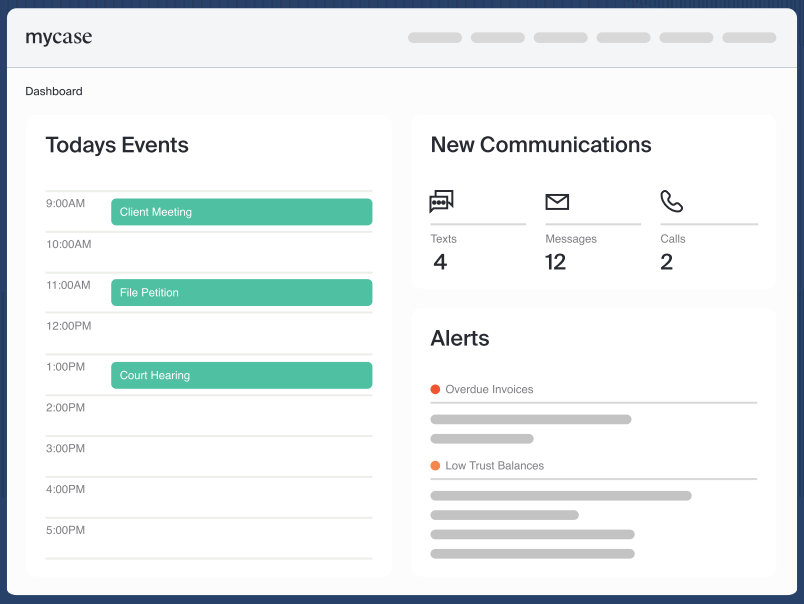

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All Michigan attorneys are reminded of the reporting requirements of **MCR.9120(A)** when a lawyer is convicted of a crime

WHAT TO REPORT:
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

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

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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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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 4.016% was the average high yield paid at auctions of five-year U.S. Treasury notes during the six months preceding January 1, 2025.

TIME PERIOD	INTEREST RATE	TIME PERIOD	INTEREST RATE
1/1/2025	4.016%	7/1/2006	4.815%
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%

IN MEMORIAM

DAVID D. BEAUDRY, P10594, of Grand Blanc, died June 11, 2024. He was born in 1939, graduated from Detroit College of Law, and was admitted to the Bar in 1966.

JEFFREY BRIAN BERSHAD, P66277, of Farmington, died Nov. 22, 2024. He was born in 1978, graduated from Michigan State University College of Law, and was admitted to the Bar in 2003.

HON. THOMAS LEO BROWN, P11303, of East Lansing, died Oct. 13, 2024. He was born in 1931, graduated from University of Detroit School of Law, and was admitted to the Bar in 1962.

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

PAUL Z. DOMENY, P12851, of Rock Hill, South Carolina, died Oct. 7, 2024. He was born in 1933, graduated from Detroit College of Law, and was admitted to the Bar in 1968.

MICHAEL J. HODGE, P25146, of Lansing, died Nov. 14, 2024. He was born in 1948, graduated from Detroit College of Law, and was admitted to the Bar in 1975.

PAUL S. JANCHA, P23738, of Saint Joseph, died Nov. 17, 2024. He was born in 1949 and was admitted to the Bar in 1974.

JAMES K. JESSE, P15498, of Buchanan, died Nov. 3, 2024. He was born in 1944 and was admitted to the Bar in 1970.

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.

PAIGE J. MALCOM, P58157, of Los Angeles, California, died May 2, 2024. She was born in 1968, graduated from University of Michigan Law School, and was admitted to the Bar in 1998.

JOHN J. MALLON, P17026, of Rochester Hills, died April 10, 2024. He was born in 1940, graduated from University of Detroit School of Law, and was admitted to the Bar in 1973.

DALE J. McLELLAN, P26791, of Farmington Hills, died Aug. 10, 2024. He was born in 1949, graduated from Wayne State University Law School, and was admitted to the Bar in 1976.

MITCHELL R. MEISNER, P36804, of Detroit, died June 20, 2024. He was born in 1943, graduated from University of Michigan Law School, and was admitted to the Bar in 1984.

MICHAEL J. MOQUIN, P27304, of Haslett, died July 12, 2024. He was born in 1950, graduated from Wayne State University Law School, and was admitted to the Bar in 1977.

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.

LEWIS C. RUDEL, P24360, of East Tawas, died July 28, 2024. He was born in 1942, graduated from University of Detroit School of Law, and was admitted to the Bar in 1974.

NICHOLAS J. SCHABERG, P19945, of Kalamazoo, died July 30, 2024. He was born in 1946, graduated from Wayne State University Law School, and was admitted to the Bar in 1971.

BERNARD D. TALON, P21251, of West Bloomfield, died Nov. 18, 2024. He was born in 1925, graduated from Wayne State University Law School, and was admitted to the Bar in 1949.

LESTER N. TURNER, P21632, of Harbor Springs, died Nov. 7, 2024. He was born in 1933, graduated from University of Michigan Law School, and was admitted to the Bar in 1960.

GERALD D. WAHL, P26511, of Bloomfield Hills, died Sept. 24, 2024. He was born in 1948, graduated from University of Detroit School of Law, and was admitted to the Bar in 1976.

JAMES A. WHITE, P22252, of Lansing, died Nov. 17, 2024. He was born in 1939, graduated from University of Michigan Law School, and was admitted to the Bar in 1964.

STEVEN ZARNOWITZ, P25840, of Ann Arbor, died Oct. 19, 2024. He was born in 1946, graduated from University of Michigan Law School, and was admitted to the Bar in 1975.

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

REEM S. ABURUKBA and **YASMINE H. CHOUCAIR** have joined the Troy office of Bodman, and **CARSON V. GARGUILO**, **TATIANNA A. GORE**, **GRACE N. HEIDORN**, and **TARA L. ZREPSKEY** have joined Bodman's Detroit office.

KATHRYN AHLBRAND has joined Varnum as an associate in its Birmingham office.

NOLAN DE JONG and **JONATHAN SOLLISH** have joined Maddin Hauser in Southfield as associates.

SYDNEY M. JACKSON has joined Plunkett Cooney in Bloomfield Hills.

JAMES Y. RAYIS has joined Kostopoulos Rodriguez in Birmingham. He also serves as of counsel to the Atlanta and Washington, D.C., offices of Sapronov & Associates.

AWARDS AND HONORS

TERRY BONNETTE, a partner with Nemeth Bonnette Brouwer in Detroit, was recognized by Michigan Lawyers Weekly as a member of its Leaders in the Law class of 2024.

DENNIS G. COWAN, a partner with Plunkett Cooney in Bloomfield Hills, was recognized by Crain's Detroit Business as one of its Notable Nonprofit Board Leaders for 2024.

CHARLIE GOODE, a partner with Warner Norcross + Judd in Grand Rapids, was recognized on the Michigan Go-To Lawyers Power List by Michigan Lawyers Weekly.

BARBARA MANDELL, a partner with Fishman Stewart in Troy, received 2025 Lexology Client Choice honors. Honorees, who can only be nominated by their clients, are recognized for excellent client care, quality of service, and ability to add value to their clients' businesses.

JOHN PREW, a managing partner with Harvey Kruse in Troy, was recognized on the Michigan Go-To Lawyers Power List by Michigan Lawyers Weekly.

MICHAEL STEWART, a partner with Fishman Stewart in Troy, was honored as 2024 Mentor of the Year by the American Intellectual Property Law Association.

OTHER

PLUNKETT COONEY will select three law school students who participate in its Laurel F. McGiffert Diversity, Equity & Inclusion Essay Program for $2,500 diversity scholarships. More information is available at plunkettcooney.isolvedhire.com/jobs/1367277.

PRESENTATIONS, PUBLICATIONS & EVENTS

MDTC hosts its ninth annual Legal Excellence Awards on Thursday, March 20, at the Gem Theatre in Detroit.

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

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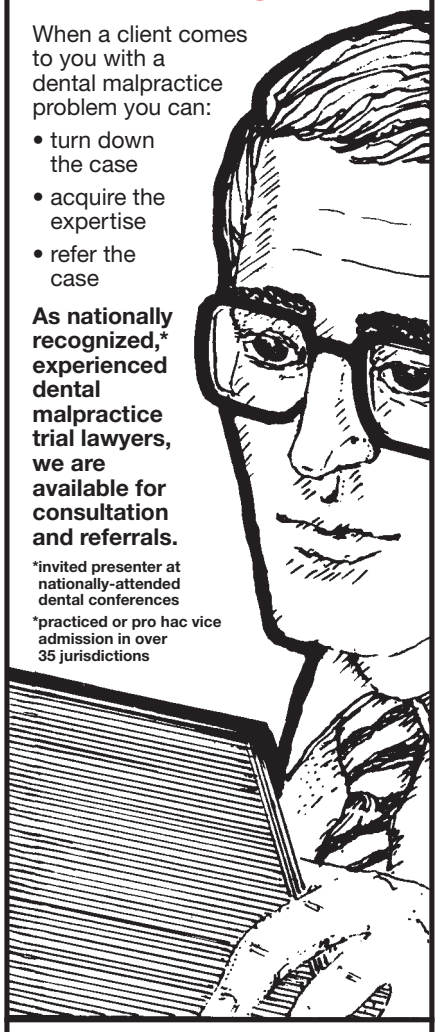

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FY 2024 SBM ANNUAL FINANCIAL REPORT

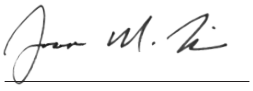
FULL REPORT AVAILABLE AT MICHBAR.ORG/GENERALINFO

December 10, 2024

Honorable Elizabeth T. Clement
Chief Justice
Supreme Court of Michigan
Hall of Justice
925 W. Ottawa Street
Lansing, MI 48915

Pursuant to Rule 7 of the Rules Concerning the State Bar of Michigan, please accept the State Bar of Michigan's FY 2024 Annual Financial Report, which covers the fiscal year that ended on September 30, 2024. The Annual Financial Report contains audited financial statements and other information required by accounting standards as well as information that highlights the operations and effectiveness of the State Bar of Michigan as a public body corporate operating pursuant to statute and rules set forth by the Michigan Supreme Court.

The State Bar of Michigan's management is responsible for the information provided in this FY 2024 Annual Financial Report. The basic financial statements and related notes are audited by the independent accounting firm of Andrews Hooper Pavlik PLC in accordance with auditing standards generally accepted in the United States of America. Their opinion is provided as part of this report. Questions or comments about this report should be directed to the executive director of the State Bar of Michigan.



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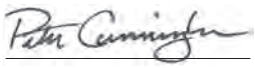
President



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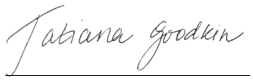
Executive Director

Thomas H. Howlett
Treasurer



Tatiana Goodkin
Chief Financial Officer

The State Bar of Michigan works to promote the professionalism of lawyers; advocates for an open, fair, and accessible justice system; and provides services to members that enable them to best serve their clients.

OVERVIEW OF THE STATE BAR OF MICHIGAN

The State Bar of Michigan was established in 1935 by public act and is regulated by the Michigan Supreme Court. The State Bar of Michigan exists to aid in promoting improvements in the administration of justice and advancements in jurisprudence, improving relations between the legal profession and the public, and promoting the interests of the legal profession in Michigan. By law, all persons licensed to practice law in Michigan constitute the State Bar of Michigan's membership. The State Bar of Michigan is a public body corporate, funded by licensing fees and revenue generated by bar activities. It receives no appropriations from the state of Michigan.

GOVERNANCE

By integrating the Bar into the regulatory structure of the legal profession, the state of Michigan adopted a modified form of the self-governance of the legal profession common to England and commonwealth countries. Pursuant to Rule 5 of the Rules Concerning the State Bar of Michigan (State Bar Rules), the State Bar is governed by a Board of Commissioners. The president, president-elect, vice president, secretary, and treasurer are the officers of the State Bar, elected by the Board of Commissioners.

State Bar Rule 6 provides for a 150-member Representative Assembly as the final policymaking body of the State Bar. Its elected officers are the chair, vice chair, and clerk.

STRUCTURE

The State Bar of Michigan helps lawyers, as officers of the court, fulfill their ethical obligations to improve the quality of legal services and assist in the regulation of the legal profession. The State Bar of Michigan accomplishes a substantial portion of this work through its volunteers, led by the Board of Commissioners and Representative Assembly.

There are also 21 standing committees of the State Bar, created to advance the work of the State Bar as defined by court rule. Over 420 attorneys served on State Bar of Michigan committees, task forces, and work groups in FY 2024. The State Bar's 43 sections focus largely on excellence in specific practice areas, and each operates with its own bylaws approved by the Board of Commissioners. The work of the Young Lawyers Section and the Judicial Section is funded by the State Bar of Michigan, and the other 41 sections are funded through membership dues.

To carry out its mission, the State Bar of Michigan employs a paid staff that operates under the supervision of the executive director, who is appointed by the Board of Commissioners. The State Bar of Michigan employed 74 full-time equivalent employees (FTEs) at the end of FY 2024.

FINANCIAL & MEMBERSHIP SUMMARY

FINANCIAL SUMMARY

As of September 30, 2024, the State Bar of Michigan's net position in the Administrative Fund totaled $16,066,845, an increase of $3,315,720 or 26.0%. Excluding the net restricted assets associated with the retiree healthcare trust, the Administrative Fund totaled $12,164,008, an increase of $2,503,471 or 25.9%. The Administrative Fund increase was driven by positive net operating and non-operating revenue for the year. The Client Protection Fund's net position totaled $3,125,627, an increase of $603,634 or 23.9%. The sections' net position, calculated separately because it consists of voluntary section dues and other section funds, totaled $2,874,683, a decrease of $9,158 or 0.3%. The State Bar operates with no outstanding debt.

APPROVED FY 2025 BUDGET

The State Bar of Michigan Board of Commissioners approved an FY 2025 Administrative Fund budget in July 2024 totaling $12,972,933, resulting in a projected surplus of $200,782. The budget is aligned with the State Bar's strategic plan. A summary of the FY 2025 approved budget can be found on the State Bar's website at michbar.org/generalinfo.

MEMBERSHIP AND AFFILIATE STATISTICS

A total of 773 new attorneys joined SBM in FY 2024, an increase over the 736 that joined in FY 2023. The overall number of State Bar of Michigan attorney members increased from FY 2023 by 110 (0.2%); however, the number of fee-paying attorneys dropped by 558 (-1.4%), which includes a decrease in active attorneys by 716 (-1.8%) and an increase in inactive attorneys by 158 (15%). Members who have been in good standing for 50 years or more do not pay the SBM portion of their license fees. The number of active 50-year attorneys increased by 158 (8.4%). Similarly, attorneys who choose emeritus status (after reaching the age of 70 or having a minimum of 30 years of licensure) no longer pay any license fees but are still considered members of the State Bar. The number of emeritus attorneys increased by 512 (13.8%). Below are the totals for the each membership category in fiscal years 2023 and 2024.

	2023	2024
PAYING		
ACTIVE	40,115	39,399
ACTIVE	1,059	1,217
TOTAL PAYING	41,174	40,616
NON PAYING		
50-YEAR ACTIVE	1,870	2,028
50-YEAR INACTIVE	47	45
EMERITUS	3,733	4,245
TOTAL NONPAYING	5,650	6,318
TOTAL	**46,824**	**46,934**

NOTE: These figures reflect members and affiliates in good standing and do not include those disciplined, disbarred, resigned, deceased, or suspended for nonpayment of license fees.

CONGRATULATIONS

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50-YEAR HONOREES CONTINUED ON NEXT PAGE

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Morton L. Noveck
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50 YEAR

STATE BAR OF MICHIGAN

CELEBRATION LUNCHEON

HONORING ATTORNEYS WITH 50 YEARS OF MEMBERSHIP

SAVE THE DATE

THURSDAY, MAY 29 • NOON — 2 P.M.

SAINT JOHN'S RESORT • PLYMOUTH, MICHIGAN

FORMAL INVITATIONS WILL BE SENT VIA EMAIL AND REGISTRATION WILL OPEN BY MARCH

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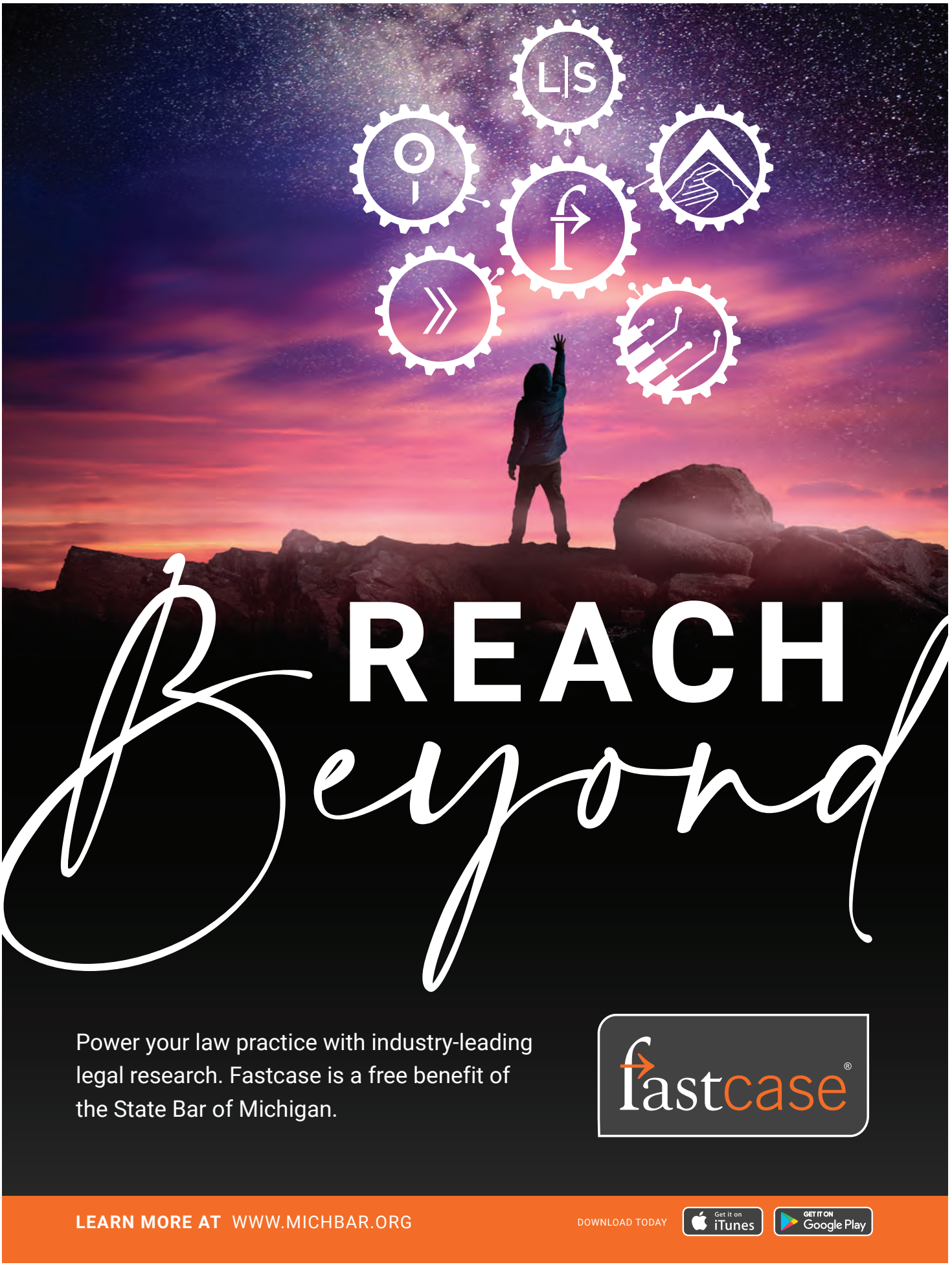
Ad space must be reserved no later than April 4.

Reserve your ad by contacting Stacy Ozanich at 517-346-6315 or advertising@michbar.org.

Advertising is also available in the Michigan Bar Journal. For rates and additional information, please contact Stacy Ozanich.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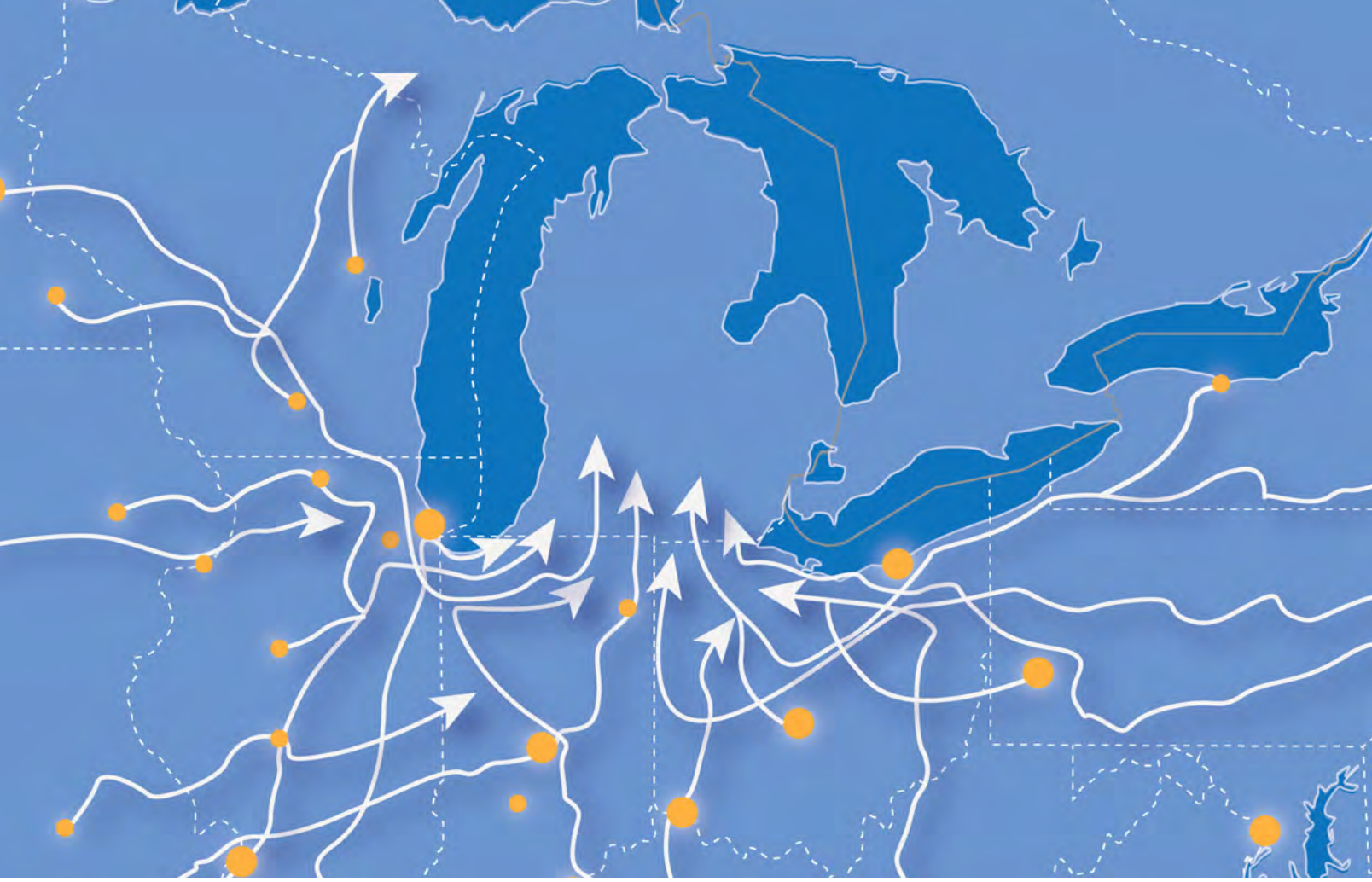

New pro hac vice rules aim to increase access to justice

CASE LIMITS AND FEES ARE WAIVED IN CERTAIN INSTANCES

BY LINDA RAWLS

New rules governing pro hac vice licensure that are designed to improve the process and increase access to justice in Michigan went into effect Jan. 1, 2025. The amendments to Rule 8.126 of the Michigan Court Rules, adopted in ADM 2022-10, include major shifts by eliminating the cap on cases and waiving certain fees for out-of-state attorneys working in the public sector or legal aid. The rules also include clarifications on the pro hac vice application process and required application materials.

Under the previous rules, out-of-state attorneys (now referred to as foreign attorneys in MCR 8.126) could appear in a maximum of five cases in any 365-day period.[1] Under the new rules, out-of-state attorneys can appear in an unlimited number of cases so long as they have a pending application for admission without examination to the State Bar of Michigan.[2]

In addition, out-of-state attorneys pay an initial $155 fee for temporary admission, but all subsequent fees will be waived so long as the attorney has applied for admission without examination *and* they are employees of public defender's offices, prosecutor's offices, a legal services program that is a grantee of the federal Legal Services Corporation or the Michigan State Bar Foundation, or law school clinics providing indigent services.[3]

AT A GLANCE

Because MCR 8.126 requires that out-of-state attorneys have Michigan attorneys sponsor when seeking temporary admission to practice law under pro hac vice, all Michigan attorneys should know and understand the changes to pro hac vice rules.

Before adopting the new rules, the Michigan Supreme Court accepted public comment on the proposed changes. Karen Tjapkes, director of litigation for Legal Aid of Western Michigan, told the Court during the public hearing that the changes would allow her organization to hire more out-of-state attorneys and fill a crucial need.

"While we offer an excellent work environment and interesting and important work, we don't offer the highest paid positions in the legal community. And in the last several years, we've had more openings than applicants, and recruitment and retention have become much more difficult," she said. "This puts us in the tremendously difficult position of wanting to hire these out-of-state attorneys who will bring tremendous value to our programs and clients but having to use them as — at best — paralegals for four to six months."

The State Bar of Michigan Board of Commissioners took a public policy position in support of the updates.

"This change is crucial to addressing the documented, significant need for legal aid and aligns with the Court's Justice For All Commission's goal of ensuring 100% access to Michigan's civil justice system," SBM Executive Director Peter Cunningham said in a letter to the Court.

In addition, an out-of-state attorney's temporary admission remains in effect for the entirety of a case including appeals, remands, mediation, or arbitration.[4] However, if temporary admission is granted by an administrative agency or arbitrator, the admission does not apply if the case goes to court.[5] In those instances, the out-of-state attorney would need to apply for temporary admission to appear in court.[6]

An out -of-state attorney is required to notify the State Bar of Michigan if their application for admittance is denied or withdrawn and they are no longer eligible to appear in unlimited cases and are again limited to five cases in a 365-day period.[7]

APPLICATION CHANGES

Under the old rule, it was not clear where to file the application. The new rule requires the application to be filed with the State Bar of Michigan before filing it with the court, tribunal, or administrative agency.[8] Once the pro hac vice motion is granted or denied, the out-of-state attorney (instead of the sponsoring attorney) must then submit the order to the State Bar of Michigan.

The attorney also must notify the State Bar of Michigan if the case is dismissed or closed before the court grants or denies the pro hac vice application.

Other changes to the application include:

- **Certificate of good standing:** Must be issued within the last 30 days.[9]
- **Affidavit from applying attorney:** A statement that the attorney has applied for admission under Michigan Board of Law Examiners (BLE) Rule 5 and has an application pending before the BLE.[10]
- **Sponsoring attorney statement:** Must include that the sponsoring attorney has read the affidavit and disciplinary disposition, that the sponsoring attorney believes the representation to be true, and that the sponsoring attorney will ensure that the court rules are followed.[11]

REVOKING SPONSORSHIP AND ADMISSION

With the revised rule, a court, tribunal, administrative agency, or arbitrator can revoke an out-of-state attorney's temporary admission because of misconduct and is required to revoke admission upon learning that the attorney is no longer in good standing.[12] If temporary admission is revoked, the court, tribunal, administrative agency, or arbitrator must immediately notify the State Bar of Michigan, Attorney Grievance Commission, and the attorney's state bar association.[13]

Sponsoring attorneys also are allowed to withdraw their sponsorship under the new rules. If the court, tribunal, administrative agency, or arbitrator allows the withdrawal, then another sponsoring attorney must appear with the attorney. The sponsoring attorney has the authority to handle the case if a temporarily admitted attorney is unable to do so.[14]

Linda Rawls is unauthorized practice of law counsel for the State Bar of Michigan. She has been a practicing attorney for 16 years and is a member of the SBM Litigation Section.

ENDNOTES

1. MCR 8.126(A).
2. MCR 8.126(B)(3).
3. MCR 8.126(B)(4).
4. MCR 8.126(D)(1).
5. MCR 8.126(D)(2).
6. *Id.*
7. MCR 8. 126(B)(3).
8. MCR 8.126(C)(2).
9. MCR 8.126(C)(1)(a).
10. MCR 8.126(C)(1)(b)(v).
11. MCR 8.126(C)(1)(d).
12. MCR 8.126(E).
13. *Id.*
14. MCR 8.126(F).

PRO HAC VICE IN MICHIGAN:

A STEP-BY-STEP OVERVIEW FOR OUT-OF-STATE ATTORNEYS

1. Secure a sponsoring attorney who is licensed to practice in the State of Michigan.

2. Create an account at **michbar.org/professional/prohacvice**.

3. Complete online application, which includes:
   - An appearance and motion seeking the out-of-state attorney's temporary admission.
   - Certificate of good standing issued within 30 days by the out-of-state attorney's state bar.
   - Waiver request if applicable.
   - Out-of-state attorney affidavit.
   - Sponsoring attorney affidavit.
   - Payment of applicable fees.

4. Within seven days after receiving the application, the State Bar of Michigan must report to the court, tribunal, administrative agency, arbitrator, sponsoring attorney, and the foreign attorney:
   - The jurisdiction in which the attorney is licensed,
   - Notice that the application fee is paid or waived
   - Whether the attorney is subject to the five-case limit.

5. The attorney must submit the order granting or denying temporary admission to the State Bar of Michigan (instead of the sponsoring attorney).

6. The court, tribunal, administrative agency, or arbitrator may issue an order granting the motion for temporary admission.

7. The attorney must submit the order to the State Bar of Michigan within seven days.

8. The attorney must notify the State Bar of Michigan if the case is dismissed or closed before the court, tribunal, administrative agency, or arbitrator grants or denies temporary admission.

Note: The attorney must notify the State Bar of Michigan and the court, tribunal, administrative agency, or arbitrator within seven days of learning that they are not in good standing in any jurisdiction. The attorney also consents to Michigan's attorney discipline system by seeking permission to appear in a case.

KEY CHANGES TO MCR 8.126

EFFECTIVE JAN. 1, 2025:

- Case limits lifted for those applying for admittance to the State Bar of Michigan under Rule 5 (admission without exam)
- Annual fees eliminated for attorneys working in areas of public need
- Temporary admission granted for the entirety of a court case
- Applications must first be filed with the State Bar of Michigan
- Application and reporting requirements for attorneys and sponsors clarified
- Process established for sponsoring Michigan attorneys to withdraw
- Court authorized to revoke temporary admission

COPYRIGHT FAIR USE

Focusing on the purpose and character of a work

BY COLETTE E. VERCH AND GLENN E. FORBIS

The Copyright Act encourages creativity by granting an author or owner of an original work certain exclusive rights.[1] These include the right to reproduce the copyrighted work, the right to prepare derivative works, and the right to display the copyrighted work publicly.[2] The doctrines of fair use and derivative works balance rights of the copyright owner with public interest in promoting creativity. Recent case law provides new guidance on the fair use analysis by focusing on a degree of transformation relative to the purpose of an adapted work as compared to the original. Now, the degree of transformation required for the fair use defense must go beyond what is required to qualify as a derivative work.

WHAT IS FAIR USE?

Fair use under 17 U.S.C. §107 is an affirmative defense to copyright infringement.[3] The doctrine of fair use purports to balance creativity with the rights conferred to a copyright owner by providing some flexibility to an otherwise rigid prohibition on copying an original work.[4] The fair use defense may apply, for example, when a work is reproduced for purposes such as:

- Criticism and commentary: quoting portions of an original work in a review, comment, or critique;
- News reporting: summarizing or quoting a portion of an article, book, speech, etc. in a news article or report;
- Teaching, scholarship, and nonprofit education: using portions of an original work for purposes of research or teaching; and
- Parody: comically imitating an original work.[5]

In evaluating a fair use defense, courts consider the following factors:

1. the purpose and character of the use, including whether such use is of a commercial nature or for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.[6]

While none of the above factors are dispositive in a given case, courts have found that more transformative works tip the scale in favor of fair use, effectively decreasing the significance of the other factors.[7]

With respect to the first factor — the purpose and character of the use — courts consider the reason for the new use, such as if it has a further purpose or is of different character than the original work.[8] Put another way, courts consider if the *use* of a portion of an original work is different from, or transformative relative to, that of the original work.

WHAT IS TRANSFORMATIVE USE?

In copyright law, transformation is not unique to the fair use defense. The concept is also rooted in the principles of derivative works. A "derivative work" is a work based upon one or more preexisting works and is afforded copyright protection separate from that of the preexisting work.[9] Under 17 U.S.C. § 103(a), copyright protection of a derivative work extends only to the material contributed by its author and is distinguished from the preexisting material it employs.[10]

Derivative works include new original material "recast, transformed, or adapted" from the original work.[11] While transformative use in fair use is "a use that has a further purpose or different character,"[12] transformation for a derivative work must be "more than a minimum contribution" of original work.[13] For example, derivative works can include translations, musical arrangements, dramatizations, fictionalizations, motion picture versions, sound recordings, art reproductions, abridgements, and condensations.[14]

TRANSFORMATIVE USE MUST GO BEYOND THAT OF A DERIVATIVE WORK

As mentioned above, courts have generally analyzed the first factor of fair use by examining the transformative use of a work.[15] For example, in the landmark case *Google v. Oracle*, a court found fair use where the defendant copied a portion of code (e.g., the user interface) and its organizational structure. Even though both works were used commercially, the defendant's use was transformative because it added code that altered the original copyrighted work enough to make it "something new and important."[16] Until recently, however, the practical differences between transformative use for the purposes of the fair use defense versus the protections afforded

to derivative works has been ambiguous, leading copyright owners and practitioners alike to ask: How much transformation is really required to be considered fair use?

In 2023, the Supreme Court clarified the distinction with its decision in *Andy Warhol Foundation for the Visual Arts v. Goldsmith*. In this case, celebrity photographer Lynn Goldsmith took a photograph of the musician Prince that was licensed to Vanity Fair for one-time use.[17] Artist Andy Warhol created a silkscreen rendition of the photograph, which was published in the magazine.

Warhol later derived 15 additional works, one of which was licensed to another publisher.[18] Goldsmith challenged the subsequent pieces and commercial license, alleging copyright infringement of her photograph.[19] Here, the commercial use of the subsequently licensed image shared "substantially the same purpose" as Goldsmith's photographs, thus weighing against a finding that the use was fair.[20]

Figure 1. A black and white portrait photograph of Prince taken in 1981 by Lynn Goldsmith.

Figure 2. A purple silkscreen portrait of Prince created in 1984 by Andy Warhol to illustrate an article in Vanity Fair.

Figure 3. An orange silkscreen portrait of Prince on the cover of a special edition magazine published in 2016 by Condé Nast.

In analyzing the fair use defense, the Court looked at the specific use of the original work and compared it to the use in which the work at issue appeared.[21] Ultimately, the Court found that transformativeness is a matter of degree.[22] To constitute fair use, "the degree of transformation required to be transformative must go beyond that required to qualify as a derivative."[23] The Court reasoned that because an owner of a derivative work owns a copyright in its original transformations of a preexisting work, fair use transformation cannot be so broad that it encroaches on this right.[24] The relevant inquiry now is whether and to what extent the specific use at issue has a purpose or character different from the original.[25]

While *Warhol* reaffirmed landmark fair use cases *Campbell v. Acuff-Rose*[26] and *Google v. Oracle*,[27] it does not provide explicit guidance in how to measure what is beyond the transformation of a derivative work. But it is clear that the fair use inquiry centers on the purpose and character of use such that the degree of transformativeness is balanced against the commercial nature of the use.[28] Future application of *Warhol* by lower courts will likely provide additional direction.

As generative AI and content creation on social media continue to gain popularity, the *Warhol* case could be considered a win for artists and creators, protecting works that are altered and used on similar platforms and for commercial purposes.[29] On the other hand, critics are concerned about stifling creativity and freedom of expression by limiting the adaptation of copyrighted materials.[30] *Warhol* acknowledges this careful balance between promoting the arts and upholding rights of copyright owners in further defining the scope the fair use defense.

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Glenn Forbis is a principal at Harness IP in Troy specializing in intellectual property litigation. As the firm's litigation practice group leader, he has successfully led more than 200 cases, including significant copyright infringement suits. Forbis recently secured a jury verdict for willful copyright infringement for French software company Dassault Systemes and has a strong track record in enforcing software copyrights.

ENDNOTES

1. US Const, art I, §8, cl 8; *Harper & Row, Publishers, Inc v Nation Enterprises*, 471 US 539, 546; 105 S Ct 2218; 85 L Ed 2d 588 (1985).
2. 17 USC 106.
3. 17 USC 107.
4. *Campell v Acuff-Rose Music, Inc*, 510 US 569, 577; 114 S Ct 1164; 127 L Ed 2d 500 (1994); *See also, Andy Warhol Founation For the Visual Arts, Inc v Goldsmith*, 598 US 508; 143 S Ct 1258, 1274; 215 L Ed 2d 473 (2023).
5. 17 USC 107; *See also, Campell, supra* n 4 at 569.
6. *Id.*
7. *Campell,* supra n 4 at 579.
8. *Andy Warhol Foundation, supra* n 4 at 1274.

9. 17 USC 103(a).
10. *Id.*
11. 17 USC 101; 17 USC 106(2).
12. *Andy Warhol Foundation, supra* n 4 at 1275.
13. *Feist Publications, Inc v Rural Tel Serv Co*, 499 US 340, 363; 111 S Ct 1282; 113 L Ed 2d 358 (1991).
14. 35 USC 101.
15. *Campell, supra* n 4; *Google v Oracle*, 593 US 1; 141 S Ct 1183; 209 L Ed 2d 311 (2021).
16. *Google, supra* n 15 at 15-17.
17. *Andy Warhol Foundation, supra* n 4 at 1266.
18. *Id.*
19. *Id.*
20. *Id.* at 1275.
21. *Id.* at 1273. *See also, Larson v Perry*, 693 F Supp 3d 59, 79 (D Mass 2023) (analysis of the first fair use factor starts with "the medium of the work" and ends with "the broader framework in which the work ultimately appeared.")
22. *Andy Warhol Foundation,* supra n 4 at 1275.
23. *Id.*
24. *Id.*
25. *Id.* at 1279.
26. *Campell, supra* n 4.
27. *Google, supra* n 15.
28. *Andy Warhol Foundation, supra* n 4 at 1277. *See also, Keck v Mix Creative Learning Ctr, LLC*, ___ F3d ___, ___ (CA 5 2024) (distinguishing from the *Warhol* case where both works were used commercially in a magazine and finding that the first factor of fair use favored Defendants where Defendant's use was educational and not commercial).
29. *See, e.g., Griner v King*, ___ F3d ___, ___ (CA 8 2024) (Finding that a meme adapted and used for commercial purposes did not add a further purpose or different character to the original purpose of the copyright owner. "Due to the lack of a further purpose, a different character, or a compelling justification and the undisputed commercial use," the first factor weighed against the fair use defense.).
30. Chloe Veltman, *Supreme Court sides against Andy Warhol Foundation in copyright infringement case*, NPR <https://www.npr.org/2023/05/18/1176881182/supreme-court-sides-against-andy-warhol-foundation-in-copyright-infringement-cas> [https://perma.cc/QWM4-KUFX] (posted May 18, 2023) (all websites accessed December 13, 2024); Richard Meyer, *The Supreme Court Is Wrong About Andy Warhol*, The New York Times <https://www.nytimes.com/2023/06/05/opinion/supreme-court-andy-warhol.html> (posted June 5, 2023).

TRADE SECRET DAMAGES

Different from the patent damages model

BY JOSEPH W. BARBER

The protection of intellectual property has undergone a shift. For years, patents and patent litigation were the preferred way for companies to protect and enforce their valuable intellectual property rights. Recently, however, patent litigation has declined and trade secret litigation is on the rise. This is due to many factors including the client view that patents are readily invalidated in inter partes reviews at the U.S. Patent and Trademark Office Patent Trial and Appeal Board and the reduction of patent damages awards by the court after jury verdicts, especially for patents comprising a less-than-whole part of a salable product.

Historically, trade secret litigation does not have either of these problems. Not surprisingly, some defendants have pushed the theory that trade secret damages should be limited using the same theories applied to patent litigation.[1] This attempt by companies potentially liable for large trade secret misappropriation damage awards unmoors trade secret damages from the justification for trade protection in the first place.

Trade secrets protect different intellectual property interests than patents and should be viewed differently when it comes to damages for remedying the harm from misappropriation. A trade secret is information, including a formula, pattern, compilation, program, device, method, technique, or process, that derives independent economic value from not being generally known and not being readily ascertainable by proper means and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[2] Misappropriation occurs when:

- a trade secret is acquired directly or indirectly through improper means,
- the acquirer should know it was obtained by improper means, or
- it is disclosed without authorization by one who knows or should know of the existence of the trade secret that was obtained by improper means or under a duty of confidentiality.[3]

Under Michigan law, a trade secret owner has a wide array of available damages against a misappropriator. These include a reasonable royalty, the trade secret owner's lost profits, and the unjust enrichment of the defendant.[4] Michigan's regime is consistent with the federal Defend Trade Secrets Act and the vast majority of states, almost all of which have adopted the Uniform Trade Secrets Act.[5]

One form of unjust enrichment remedy available to a trade secret misappropriation plaintiff is disgorgement of the profits obtained by the defendant through the misappropriation.[6] It is the "best measure of damages" (along with any plaintiff lost profits) in a misappropriation of trade secrets case in Michigan.[7] Disgorgement of the defendant's profits is a remedy for trade secret misappropriation not available to patent infringement plaintiffs.[8] Patent infringement damages are awarded as plaintiff's lost profits or a reasonable royalty.[9]

Disgorgement of the defendant's profits reflects the fact that misappropriation generally destroys the trade secret through public disclosure — secrecy being a prerequisite for trade secret protection.[10] Disgorgement of wrongfully gained profits accounts for the uncertainty of plaintiff's lost profits when its improperly disclosed secret is no longer secret.[11] When seeking disgorgement, the trade secret owner only has the burden of showing the defendant's revenue generated from misuse of the trade secret, and the defendant has the burden of establishing any portion of sales not attributable to the trade secret and any permissible deductible allowances.[12] This burden shifting exists because the defendant has the necessary knowledge to rebut the presumption that the defendants' profits were derived from the misappropriation.

In the context of trade secrets, it is proper to calculate damages for the entire product that includes a trade secret as a component when the trade secret makes such profits possible.[13] This is consistent with apportionment in trademark infringement cases where the plaintiff's burden is only to prove revenue driven by the infringing mark; it is the defendant's burden to prove deductions, costs, and offsets.[14] Trademark infringement damages are analogous because in both trade secret misappropriation and trademark infringement, damages are awarded only if the defendant took wrongful action.[15] Misappropriation of trade secrets (or trademark infringement) is an intentional tort that requires improper conduct by the defendant to obtain monetary damages.[16]

In contrast, patent infringement is strict liability and no intent on the part of the defendant is necessary for the plaintiff to recover mone-

tary damages.[17] Patent damages protect the right to exclude others from using the disclosed invention[18] and the reasonable value of this exclusion is measured in any damages awarded because the infringer uses the disclosed invention without authorization.[19] The damages awarded reflect the loss to the owner of this unauthorized use through a reasonable royalty payment.

The doctrine of apportionment arose to protect strict liability patent infringement defendants from overcompensating a patent holder when the patented invention did not derive all of the benefits to the infringer; for example, if the patented invention is part of a larger product that had selling points in its favor unrelated to the patented invention or if the invention was only a small improvement on a publicly available device.[20]

Apportionment is relevant in calculating a reasonable royalty the patent infringer would theoretically pay to the owner because the larger the patented component to the product as a whole, the higher the royalty to be paid for its use.[21] The burden of apportionment in patent cases is on the plaintiff to show its right to exclude use of the patented invention is significant.[22] Therefore, as one can see, apportionment in the context of patent infringement damages effectively balances a reasonable royalty to compensate for the right to exclude with the scope of the patent exclusion itself.[23] A patent holder's damages under a reasonable royalty compensates the patent holder for what it would have made if not for the infringement.[24] This is different than the compensation for trade secret misappropriation, which compensates the plaintiff for the loss of the intellectual property itself.

Apportionment in the context of trade secret misappropriation is different from patent damages apportionment. As we have seen for patent infringement, damages are only awarded for the plaintiff's lost profits or set as a reasonable royalty because the plaintiff lost its right to exclude others from using the patent during the patent term.[25] Patent holders have no risk of losing patent rights through public disclosure — public disclosure is required to obtain the exclusionary patent right in the first place. A patent infringer is liable even if it is not aware of the patent holder's rights.[26] For trade secret misappropriation, damages should be awarded to compensate the plaintiff for the loss of its intellectual property in its entirety. There is no strict liability for trade secret infringement. To be liable, a trade secret misappropriator must know or have reason to know that the trade secret contains secret information.[27] When a trade secret is misappropriated, the wrongdoer takes intentional action to destroy the existence of the intellectual property right.[28] This is because unauthorized disclosure exposes the trade secret to the public, thereby destroying its secrecy and value.

Any apportionment of trade secret damages is the wrongdoer's burden to show what percentage of its sales is not the result of trade secret misappropriation, similar to trademark and copyright law, because the wrongdoer is the source of the relevant information and the bad actor.[29] There are no unjust enrichment disgorgement remedies or similar assignments of burdens for patent infringement because patent rights protect different interests.

Patent remedies are quite different because patent holders are limited by law to a reasonable royalty or the patent owner's lost profits. Patent rights are also different — a limited right to exclude in exchange for public disclosure. In contrast, trade secrets last indefinitely as long as the information remains secret. When a trade secret is misappropriated, the defendant necessarily took wrongful action to disclose and/or steal the secret information. As a result, damage awards are to compensate for the loss of the intellectual property itself. Trade secret misappropriation damages should not follow patent damages apportionment theory placing the burden on the plaintiff to justify the benefit of the stolen information. This is contrary to law and basic principles of equity underling trade secret protection in the first place. Trade secret misappropriation defendants must have the burden of demonstrating the extent, if any, its profits are not derived by the misappropriation. One that misappropriates trade secrets must not be permitted to steal technology and avoid disgorging the profit it made therefrom. Not only would this be unfair, it would also embolden wrongdoers to act unfairly.

Joseph Barber is a member at Howard & Howard Attorneys litigation group in Royal Oak. He litigates patent, trademark, and trade secret matters in federal courts throughout the country and before the United States Patent and Trademark Office as a registered patent attorney.

ENDNOTES

1. *See Texas Advanced Optoelectronic Solutions, Inc v Renesas Electronics America, Inc*, 895 F3d 1304, 1323-1324 (CA Fed, 2018); *Ford Motor Co v InterMotive, Inc*, opinion of the United States District Court for the Eastern District of Michigan, issued Oct 17, 2023 (Case No. 4:17-cv-11584), p 2-3; *Ford Motor Co v Versata Software Inc*, opinion of the United States District Court for the Eastern District of Michigan, issued July 9, 2018 (Case No. 15-cv-10628), p 10; *MSC Software Corp v Altair Engineering, Inc*, opinion of the United States District Court for the Eastern District of Michigan, issued Nov 9, 2014 (Case No. 07-cv-12807), p 4.
2. MCL 445.1902(d).
3. MCL 445.1902(b).
4. MCL 445.1904; Restatement, 3d—Unfair Competition, § 45, comment f.
5. *See, e.g.*, 765 Illinois Uniform Trade Secrets Act § 1065/4(a); Nevada Revised Statute 600A.050; 18 USC § 1836(b)(3)(B)(i)(II).
6. 4 Milgrim on Trade Secrets § 15.02(3)(f)(*ii*)(B); Restatement, 3d—Unfair Competition, *supra* n 4 at comment d.
7. *Mid-Michigan Computer Sys, Inc v Marc Glassman, Inc*, 416 F3d 505, 510 (CA 6, 2005)
8. Donald Chisum, *6A Chisum on Patents*, § 20.02 (Matthew Bender & Company, Inc, 2024) (remedy of disgorgement removed by statute in 1946).
9. *See* 35 USC § 284; *Transocean Offshore Deepwater Drilling, Inc v. Maersk Drilling USA, Inc*, 699 F3d 1340, 1357 (CA Fed, 2012).
10. *See* MCL 445.1902(d).
11. Restatement, 3d—Unfair Competition, *supra* n 4 at comment c.

12. *Motorola Solutions, Inc v Hytera Communications. Corp Ltd.*, ___ F4th ___ (CA 7, 2023); *Injection Research Specialists, Inc v. Polaris Indus, LP*, 168 F3d 1320 (CA Fed, 1998); *Phillips North America LLC v Summit Imaging, Inc*, opinion of the United States District Court for the Western District of Washington, issued May 25, 2021 (Case No. C19-1745JLR), p 9; Milgrim *supra* n 46 at § 15.02[3][c][1].
13. *Mishawaka Rubber & Woolen Mfg Co v SS Kresge Co*, 316 US 203, 206-207; 62 S Ct 1022; 86 L Ed 1381 (1942); *Copper Harbor Co v Central Garden & Pet Co*, unpublished opinion of the California Court of Appeals, issued May 30, 2019 (Case No. A149709), p 16 (Trade secret was the driving force behind the entire process); *Jet Spray Cooler, Inc v Crampton*, 377 Mass 159, 174 (1979); *Julius Hyman & Co v Veliscol Corp*, 123 Colo 563; 233 P2d 977, 1009 (1951) (net profits, without apportionment, appropriate measure of damages in trade secret misappropriation and breach of confidentiality agreement); Restatement, 3d—Unfair Competition, *supra* n 4.
14. 15 USC § 1117(a); *Max Rack, Inc v Core Health & Fitness,* LLC, 40 F4th 454, 473 (CA 6, 2022).
15. *Max Rack*, *supra* n 14 at 475; J Thomas McCarthy, *McCarthy on Trademarks*, 5th ed, § 30:58 (Thompson West, 2024); MCL 445.1902(b).
16. See, e.g. MCL 445.1902(b).
17. Milgrim, *supra* n 6.
18. *Dowagiac Mfg Co v Minnesota Moline Plow Co*, 235 US 641, 648; 35 S Ct 221; 59 L Ed 398 (1915); *Seymour v McCormick*, 57 US 480, 489; 14 L Ed 1024 (1853).
19. *Georgia-Pacific Corp v US Plywood Corp*, 318 F Supp 1116, 1127-1128 (SDNY, 1970).
20. *Dowagiac Mfg*, *supra* n 16 at 646; *Seymour*, *supra* n 16 at 490.
21. *Chisum on Patents*, *supra* n 8 at § 20.07(g).
22. *Lucent Tech, Inc v Gateway, Inc*, 580 F3d 1301, 1324 (CA Fed, 2009).
23. *Id.* at 1332.
24. *Id.* at 1324.
25. *See* 35 USC § 284
26. *Commil USA, LLC v Cisco, Sys Inc*, 575 US 632, 638-639; 135 S Ct 1920; 191 L Ed 2d 883 (2015) (direct patent infringement is strict liability).
27. MCL 445.1902(b).
28. Milgrim, *supra* n 6.
29. *Id.*

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Trade dress: The IP litigator's secret weapon

BY BRIAN D. WASSOM WITH MARK A. ZUCCARO

Over my 25 years as an intellectual property and media litigation attorney, no cause of action has proven more versatile and useful in protecting clients' commercial goodwill than trade dress infringement. It is made even more useful for litigators by virtue of the fact that so few attorneys truly understand it and fewer still have had the opportunity to put it to good use. Whether you are a business owner or a lawyer representing one, mastering the basics of this area of law is certain to improve your ability to nurture and defend the business's goodwill and reputation.

DEFINING OUR TERMS

As the name implies, trade dress refers to the manner in which a good or service is "dressed up" when presented to the public. Originally, it only referred to product packaging — the box or wrapping in which a good was displayed on a shelf.[1] The modern understanding of the term, however, is much broader. The U.S. Court of Appeals for the Sixth Circuit has made clear that "because we can conceive of no thing inherently incapable of carrying meaning, any thing can come to distinguish goods in commerce and thus constitute a mark within the meaning of the Lanham Act. In short: any thing that dresses a good can constitute trade dress."[2]

Today, trade dress

> refers to the image and overall appearance of a product. It embodies that arrangement of identifying characteristics or decorations connected with a product ... that makes the source of the product distinguishable from another and pro-

> motes its sale. Trade dress involves the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques ... [It] is a complex composite of features including, inter alia, size, color, texture, and graphics, which must be considered together, not separately.[3]

LEVERAGING THE POWER OF TRADEMARK LAW

Trade dress is a subset of trademark law. A trademark "can be any word, phrase, symbol, design, or a combination of these things that identifies your goods or services. It's how customers recognize you in the marketplace and distinguish you from your competitors."[4]

Trademarks typically take the form of a word, phrase, or logo. But they are not limited to that or any other format; trademark law equally protects any designation or device that consumers perceive as signifying a particular source of goods or services. We see examples of this every day. The robin-egg blue jewelry box is all one needs to see to understand that what's inside it came from Tiffany. The iconic shape of a glass Coca-Cola bottle has long distinguished it from other sodas. And there are several restaurants whose architectural and decorative choices are unique enough that customers immediately recognize the brand merely from these cues.

The power of owning a trademark is the ability to prevent competitors from using not only the same mark, but also any other indicator likely to cause confusion with your mark.[5] Applied to trade dress, this means that if the color, shape, décor, or other features of your product or service are sufficiently distinct to act as a trademark, you can use trademark law to keep competitors from imitating these important aspects of your commercial goodwill.

CASE IN POINT: RESTAURANT DÉCOR

The example of restaurant décor, which I've had the chance to litigate, can be used to see what a plaintiff must show to prevail. To begin with, it is beyond question that restaurant décor can be protectable as trade dress.[6] And it doesn't have to be flamboyant or as nationally known as McDonald's golden arches in order to get protection — merely distinctive. No less than the U.S. Supreme Court has held that trade dress could protect a combination of décor features used by one Mexican restaurant from being copied by another.[7] The *Two Pesos vs. Taco Cabana* case demonstrates that a trade dress action can be successful when the plaintiff is able to specifically enumerate the elements of trade dress which, as a whole, are recognizable as a single source.

Courts must evaluate the overall look and feel of an establishment when defining its trade dress. The plaintiff's complaint "should ... [separate] out and identif[y] in a list ... the discrete elements which make up that combination [of elements that forms the trade dress.]"[8] But while the plaintiff "must provide a precise expression of the character and scope of the claimed trade dress so that courts can sensibly evaluate claims of infringement and fashion relief tailored to the distinctive combination of elements that warrant protection[,] [t]he trade dress itself is not the combination of words which a party uses to describe or represent its total image, but, rather, the trade dress is that image itself, however it may be represented in or by the written word."[9] "In the context of restaurants, all of the elements that make up the décor of the restaurant comprise the trade dress."[10] The elements that form "[a] restaurant's trade dress can include the shape and general appearance of the exterior of the restaurant, the identifying sign, the interior floor plan, the appointments and decor items, the equipment used to serve the food, and the servers' uniforms."[11]

Further, courts analyze these features together rather than as distinct elements — even if that combination incorporates elements separately registered as trademarks in their own right.[12] This combination, taken together, must be "distinctive in the marketplace, thereby indicating the source of the good it dresses."[13] Moreover, the plaintiff need not show that consumers can name the company associated with the dress; under the anonymous source rule, it only needs to show consumers associate it with a single company.[14]

Plaintiffs must also show that the trade dress is "primarily nonfunctional."[15] Goods that perform a function are the subject of patent, not trademark, law. Restaurant décor does not, in and of itself, perform a function other than identifying the source. A trade dress feature is only functional if it is "essential to the use or purpose of the article or it affects the cost or quality of the article, that is, if exclusive use of the feature would put competitors at a significant non-reputation-related disadvantage."[16]

A design of a folding chair that improves the user's view or provides certain back support, for example, "looks the way it does in order to be a better chair, not in order to be a better way of identifying who made it (the function of a trademark)."[17] By contrast, "an aesthetic design that merely communicates the *source* of the article — rather than anything about [its] use, purpose, cost, or quality — is not functional."[18] Even where individual elements such as cups or tabletops perform a function, they are claimed as part of the trade dress only for their appearance (e.g., the decorative symbols adorning a cup or the color of the tables). In this way, functional elements can form part of a non-functional trade dress.[19]

A VERSATILE TOOL

The ability to mix and match the elements of a trade dress hints at its utility for litigators. For one thing, it opens a back door into what would otherwise be the sole realm of patent law by allowing one to take advantage of the aesthetic aspects of even obviously functional goods. In one case, I lost a summary judgment motion in a case asserting trade dress in the knobs used to adjust the focus on an optical scope on the grounds that it was a clearly functional feature. But the Sixth Circuit Court of Appeals unanimously reversed, correctly separating the functionality of the knobs from the aesthetic

element in which we claimed trade dress — namely, the distinct pattern of the knurling on the knobs. While knurling itself clearly performs the function of enhancing grip, the choice of pattern that makes up the gripping surface can be an entirely subjective design decision and thus qualify for trade dress protection.

Similarly, design elements that are nothing special by themselves — such as colors, geometric shapes, and fonts — can be combined in unique ways that together form a distinctive and protectable design that is more than the sum of its parts.[20] This opens the door to protecting all manner of subtle and unremarkable product and packaging elements so long as they are distinctive.

Second, trade dress can be (and often is) defined retroactively. It isn't always obvious to business owners which aspects of their products, designs, or décor will end up resonating with customers. Some design elements only become distinctive after they've been used several times in various ways over the course of years — and that's okay. Armed with hindsight, elements that customers find distinctive about your company's design language can become clear.

Third, the definition of your trade dress need not stay the same from case to case. It's natural to emphasize certain elements of the dress in response to a particular infringer's design and other aspects as necessary in other cases. Of course, if you decide to obtain federal registration for your trade dress — which you can do exactly as you would for any other trademark — then you'll need to specify its elements. Otherwise, your dress need not be one unchangeable thing. You can have more than one combination of elements that combine into something distinctive, and it doesn't have to be the same combination you asserted in a prior dispute. I have even had cases in which I asserted both registered and unregistered aspects of a restaurant's trade dress at the same time.

Fourth, trade dress and other trademark rights can be asserted in either federal or state courts. Both courts have concurrent jurisdiction over Lanham Act claims. The Lanham Act statute offers nearly as strong of common law protection to unregistered trademarks as it does to those covered by federal registrations, and the Michigan common law of trademarks is essentially identical to federal law.

BEING PROACTIVE

As flexible and robust as trade dress law is when applied retroactively, it is much more likely to be useful for those who plan ahead. Businesses are well-advised to think carefully and creatively about which aspects of their goods, services, packaging, and décor are distinctive of their brand and put effort into protecting these valuable features *before* a competitor imitates it.

There are a number of proactive strategies that can put businesses in the best possible position to develop and protect their assets. Why not consult an experienced attorney to explore whether your company or client have trade dress that is currently going to waste?

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ENDNOTES

1. *See Wal-Mart Stores, Inc v Samara Bros*, 529 US 205, 209; 120 S Ct 1339; 146 L Ed 2d 182 (2000).
2. *Abercrombie & Fitch v American Eagle Outfitters*, 280 F3d 619, 629-30 (CA 6, 2002) (cleaned up).
3. *Id.* at 629-30.
4. US Patent& Trademark Office, *What is a trademark?* <https://wwwusptogov/trademarks/basics/what-trademark> (accessed July 22, 2024).
5. *Daddy's Junky Music Stores, Inc v Big Daddy's Family Music Ctr*, 109 F3d 275, 283 (CA 6, 1997) ("Similarity of marks is a factor of considerable weight. . . . [C]ourts must view marks in their entirety and focus on their overall impressions, not individual features.").
6. *Groeneveld Transp Efficiency, Inc v Lubecore Int'l, Inc*, 730 F3d 494, 503 (CA 6, 2013) ("Trade dress might include, for example, . . . the decoration, vibe, and 'motif' of a Mexican restaurant.").
7. *See Two Pesos, Inc v Taco Cabana, Inc*, 505 US 763, 769; 112 S Ct 2753; 120 L Ed 2d 615 (1992).
8. *Abercrombie & Fitch*, *supra* n 2 at 634.
9. *Pure Power Boot Camp, Inc v Warrior Fitness Boot Camp, LLC*, 813 F Supp 2d 489, 539-540 (SDNY, 2011) (cleaned up).
10. *Fuddruckers, Inc v Doc's BR Others, Inc*, opinion of the United States District Court for the District of Arizona, issued Oct 31, 1984 (Case No. 84-1115).
11. *Prufrock Ltd, Inc v Lasater*, 781 F2d 129, 132 (CA 8, 1986) (cleaned up).
12. *Hershey Co v Art Van Furniture, Inc*, opinion of the United States District Court for the Eastern District of Michigan, issued Oct 24, 2008 (Case No. 08-14463).
13. *Abercrombie & Fitch*, *supra* n 2 at 629.
14. *See Tas-T-Nut Co v Variety Nut & Date Co*, 245 F 2d 3, 7 (CA 6, 1957) ("[I]t is the article itself and its good qualities which the public appreciates and which cause it to desire to get the genuine article made by the manufacturer who has established its reputation, rather than something made by some one else").
15. *Abercrombie & Fitch*, *supra* n 2 at 629.
16. *Qualitex Co v Jacobson Prods Co*, 514 US 159, 165; 115 S Ct 1300; 131 L Ed 2d 248 (1995) (quotation omitted).
17. *See Specialized Seating, Inc v Greenwich Indus, LP*, 616 F 3d 722, 726 (CA 7, 2010).
18. *Leapers, Inc v SMTS, LLC*, 879 F3d 731, 738 (CA 6, 2018).
19. *See Abercrombie & Fitch*, *supra* n 2 at 644 (holding that even if certain design aspects of retail clothing catalog were separately functional, design aspects could constitute "more than the sum of the catalog's non-protectable parts"); *Fuddruckers, Inc v*

Doc's BR Others, Inc, 826 F2d 837, 841-842 (CA 9, 1987) (functional elements such as a restaurant's decor, layout and style of service that are separately unprotectable can be protected together as part of a trade dress).

20. *See, eg, Paddington Corp v Attiki Importers & Distrib Inc*, 996 F2d 577, 584 (CA 2, 1993) ("[t]rade dresses often utilize commonly used lettering styles, geometric shapes, or colors, or incorporate descriptive elements, such as an illustration of the sun on a bottle of suntan lotion While each of these elements, individually would not be inherently distinctive, it is the combination of elements and the total impression that the dress gives to the observer that should be the focus of a court's analysis of distinctiveness"); *Sherwin-Williams Co v JP Int'l Hardware, Inc*, 988 F Supp 2d 815, 819 (ND Ohio, 2013) (finding the arrangement and selection of design elements on a paintbrush package to be arbitrary); *I Love Juice Bar Franchising, LLC v ILJB Charlotte Juice, LLC*, opinion of the United States District Court for the Middle District of Tennessee, issued Nov 15, 2019 (Case No 3:19-cv-00981) p 23-25 (finding the design of a juice bottle comprising (1) a clear plastic bottle rectangular at its base with sides rising essentially perpendicular from its base before beveling at the top of the bottle; (2) a black cap; (3) a label with a white circle outlined by a thin dark line surrounding the Juice Bar name; (4) a list (in white) of juice names including: "Orange You Glad," "We Got The Beet," "Sweet Greens," "Ginger Greens," "Fresh Greens," and "Coco Pro"; (5) heart-shaped bullet points next to each name on the list; and (6) the words "Shake Well" (in white) at the bottom of the bottle, "when considered as a whole [to be] at least suggestive").

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The Supreme Court continues to reshape patent law

BY LeKEISHA M. SUGGS AND COREY M. BEAUBIEN

While the pace has slowed, the past decade of U.S. Supreme Court decisions has reshaped patent law in important ways. The matters taken up included review of U.S. Patent and Trademark Office Patent Trial and Appeal Board (PTAB) decisions, secret sales as prior art, damage awards for infringement of design patents, and venue in patent lawsuits. This article reviews the Court's opinions in these areas and considers what the rulings mean for patent stakeholders.

REVIEW OF PTAB DECISIONS

After the enactment of the America Invents Act in 2011, patents issued by the U.S. Patent and Trademark Office (USPTO) can have their validity challenged at the PTAB, a tribunal within the USPTO. Whether a patented invention is new and nonobvious — requirements for patent issuance[1] — can be questioned at the PTAB. In effect, the PTAB offers a second look at patents issued by the USPTO.[2]

Many aspects of a PTAB proceeding resemble a civil lawsuit. Administrative patent judges (APJs) typically oversee PTAB proceedings and issue decisions.[3] While the secretary of commerce appoints APJs,[4] a director appointed by the president with the advice and consent of the Senate oversees the USPTO.[5] Before *United States v. Arthrex, Inc.*,[6] the PTAB was the last stop within the executive branch; a director's review could not take place. Parties could only seek review via the Court of Appeals for the Federal Circuit.[7]

In *Arthrex*, the Court held that unreviewable decision-making exercised by APJs within the executive branch was inconsistent with their appointment by the secretary of commerce as inferior offi-

cers.[8] Rather, the authority wielded by APJs is more akin to that of principal officers, an appointment that is constitutional under the appointments clause only when made by the president and confirmed by the Senate.[9] The nature of their responsibilities, in essence, is inconsistent with their method of appointment.[10]

Arthrex obtained a patent on a surgical device and sued fellow medical manufacturer Smith & Nephew for infringement.[11] The dispute made its way to the PTAB in the form of an inter partes review proceeding.[12] An APJ panel concluded that the patent was invalid, freeing Smith & Nephew from infringement.[13] Arthrex appealed to the Federal Circuit, and argued that APJs were principal officers and their appointment by the secretary of commerce was unconstitutional.[14] The Federal Circuit largely agreed.

In its ruling, the Supreme Court found that the APJs' power to render decisions without review by a superior officer was incompatible with their status as inferior officers.[15] The constitutional issue can be resolved, the Court explained, by subjecting APJ decisions to review by the USPTO director, a properly appointed principal officer.[16]

Indeed, the *Arthrex* decision ushered in a new process that provided directorial review of PTAB decisions. Dissatisfied parties can now request review of APJ decisions by the USPTO director.

SECRET SALES ARE STILL PRIOR ART

The America Invents Act (AIA) precludes patenting an invention "on sale, or otherwise available to the public" more than one year before the filing date.[17] This is known as the on-sale bar, and every patent statute since 1836 has included a version of the on-sale bar.[18] Prior to the AIA, it was established law that selling an invention to a third party could trigger the on-sale bar even if the on-sale activity was not made public.[19] These types of activities are referred to as secret sales.[20] The AIA's addition of the phrase "or otherwise available to the public" raised doubts about whether secret sales still qualified as prior art.

In 2019, the Supreme Court probed this issue in *Helsinn v. Teva*.[21] Helsinn, which had developed a drug for treating chemotherapy-induced sickness,[22] signed agreements in 2001 with a third party to market and sell the drug.[23] The agreements were public, but details regarding the drug were confidential.[24] In 2003, Helsinn filed a provisional patent application covering its drug.[25] Over the next decade, Helsinn filed several patent applications that claimed priority to the 2003 date of the provisional application.[26] Helsinn later sued Teva for patent infringement.[27] In its defense, Teva argued Helsinn's drug was on sale for more than a year before filing its provisional application.[28]

In its review, the Supreme Court presumed Congress adopted the pre-AIA judicial interpretation of on-sale when it retained the same language in the AIA,[29] emphasizing that the addition of "or otherwise available to the public" was not enough to alter the meaning of a reenacted term and "would be a fairly oblique way" for Congress to overturn an established body of law.[30] The Court held that "an inventor's sale of an invention to a third party who is obligated to keep the invention confidential can qualify as prior art" under the AIA.[31]

The *Helsinn* decision is a reminder that the timing for filing patent applications is crucial. When developing a product, it is important to file patent applications early — and before any activity that may constitute a sale or offer for sale.

TOTAL PROFITS FOR DESIGN PATENT INFRINGEMENT

Design patents protect ornamental aspects of an invention rather than functional aspects, which are protected by the more widely known utility patents.[32] Distinctive to design patent infringement, the Patent Act makes it unlawful to make or sell an "article of manufacture" to which a patented design is applied and makes an infringer liable "to the extent of his total profit"[33] — long an attractive trait of their procurement and viewed as a meaningful deterrence to infringers.

Prior to 2016, infringers would have to disgorge all profits on the sale of a product even when the design patent protected a mere portion of the product and, hence, only that portion of the product infringed.[34] But in *Samsung v. Apple*, the Supreme Court read the relevant section of the Patent Act differently by finding that an "article of manufacture" for a multicomponent product could be the product sold to consumers as well as a component of that product.[35] Under the reading, an infringer's "total profit" need not be assessed based on the end product embodying a protected component, and could be assessed based on only the protected component.[36]

The dispute involved several design patents covering certain aspects of Apple's iPhone.[37] One of the patents (reproduced in the image below) protected the front face of the device while leaving the rear portion outside of the protected design.

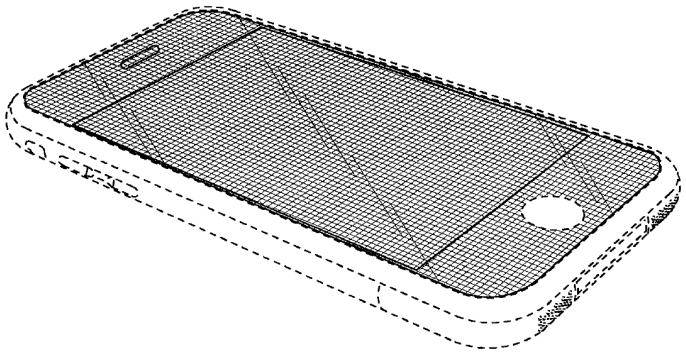

FIG. 1

A lower court found Samsung's smartphones infringed, and Apple was awarded $399 million in damages, the total profit made from sales of the infringing smartphones.[38] An appeals court affirmed the award, but the Supreme Court granted certiorari and reversed.[39]

The Court ruled that "reading 'article of manufacture' in § 289 [i.e., the relevant section of the Patent Act] to cover only an end product sold to a consumer gives too narrow a meaning to the phrase."[40]

The holding in *Samsung v. Apple* meant that design patent infringers will not always have to give up all profits from their end products when the design patent only protects a component of those end products. For multicomponent products, the case serves as a reminder to consider design patent protection of varied scope — for the overall product and components of the product.

PATENT VENUE AFTER *TC HEARTLAND*

A patent owner must consider many factors when determining possible venues in which to file suit after the Supreme Court's decision in *TC Heartland LLC v. Kraft Foods Group Brands LLC*.[41] TC Heartland, which was headquartered in Indiana and operated under Indiana law,[42] was sued by Kraft for patent infringement in the District of Delaware.[43] TC Heartland argued that the venue was improper because it neither resided in Delaware nor did business there[44] and its only connection was allegedly shipping the infringing products there.[45]

The patent venue statute, 28 USC 1400(b), provides that venue is proper "where the defendant resides" or "where the defendant has committed acts of infringement and has a regular and established place of business." In 1957, the Supreme Court held that a domestic corporation resides only in its state of incorporation for purposes of the patent venue statute.[46] Later in *VE Holding Corp. v. Johnson Gas Appliance Co.*, the Federal Circuit broadened this definition, holding that "resides" in the patent venue statute carried the same meaning as in the general venue statute, 28 USC 1391(c)(2), which defines "resides" as any place "defendant is subject to the court's personal jurisdiction."[47]

In *TC Heartland*, the Supreme Court once again considered the question of where a domestic corporation resides for venue purposes in patent lawsuits.[48] The Court reviewed the legislative history of patent and general venue statutes; Congress amended the general venue statute in 2011 to read that "[e]xcept as otherwise provided by law ... this section shall govern the venue of all civil actions."[49] This language shows that Congress contemplated that other venue statutes may retain a different definition of "resides."[50] The Supreme Court reversed the Federal Circuit, ruling that a domestic corporation "resides" only in its state of incorporation for purposes of the patent venue statute.[51]

The holding in *TC Heartland* highlights the importance of investigating the location and extent of a defendant's business activities to determine where venue may be proper under the tightened venue restrictions.

CONCLUSION

The U.S. Supreme Court remains a significant arbiter of patent law jurisprudence, continuing to take on important matters that have reordered this area of law. Review of PTAB decisions, prior art in the form of secret sales, design patent infringement remedies, and venue in patent lawsuits are among the topics affected. Whether the pace of change continues is uncertain. Still, patent stakeholders — already accustomed to change — are wise to ready themselves for more to come.

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ENDNOTES

1. 35 U.S.C 102, 35 U.S.C. 103.
2. 35 USC 6(b)(2)–(4).
3. 35 USC 6(c)
4. 35 USC 6(a).
5. 35 USC 3(a)(1).
6. *United States v Arthrex, Inc*, 594 US 1; 141 S Ct 1970; 210 L Ed 2d 268 (2021).
7. 35 USC 319.
8. *Arthrex, supra* n 5 at 23.
9. *Id.* at 12.
10. *Id.* at 13.
11. *Id.* at 9-10.
12. *Id.* at 10.
13. *Id.*
14. *Id.*
15. *Id.* at 23.
16. *Id.* at 24.
17. 35 USC 102(a)(1) (emphasis added).
18. *Plaff v Wells Electronics, Inc*, 525 US 55, 65; 119 S Ct 304; 142 L Ed 2d 261 (19.98).
19. *Special Devices, Inc v OEA, Inc*, 270 F3d 1353, 1357 (CA Fed, 2001).
20. *Id.*
21. *Helsinn Healthcare SA v Teva Pharms USA, Inc*, 586 US 123; 139 S Ct 628; 202 L Ed 2d 551 (2019).
22. *Id.* at 126-127.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 131.
30. *Id.*
31. *Id.* at 132.
32. 35 U.S.C. 171 (design); 35 U.S.C. 101 (utility).
33. 35 USC 289.
34. *Samsung Electronics Co, Ltd v Apple Inc*, 580 US 53; 137 S Ct 429; 196 L Ed

2d 363 (2016).
35. *Id.* at 60.
36. *Id.* at 59.
37. *Id.* at 57-58.
38. *Id.*
39. *Id.*
40. *Id.* at 62.
41. *TC Heartland LLC v Kraft Foods Group Brands LLC*, 581 US 258; 137 S Ct 1514; 197 L Ed 2d 816 (2017).
42. *Id.*
43. *Id.* at 258.
44. *Id.*
45. *Id.*
46. *Fourco Glass Co v Transmirra Prods Corp*, 353 US 222, 226; 77 S Ct 787; 1 L Ed 2d 786 (1957).
47. *VE Holding Corp v Johnson Gas Appliance Co*, 917 F2d 1574 (CA Fed, 1990)
48. *TC Heartland, supra* n 39 at 261.
49. 28 USC 1391(a).
50. *TC Heartland, supra* n 39 at 269.
51. *Id.* at 270.

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Thinking ahead: What you should know about termination and reversion of copyright

BY SPENCER M. DARLING

The U.S. Copyright Act gives authors the right to terminate copyright assignments and licenses granted to third parties 35 years after those grants were effective.[1] Termination rights are codified in 17 USC §§ 203 and 304 and apply to all works of original authorship — literature, music, architecture, software, movies, photography, choreography, sculpture, and more. However, termination rights do not apply to "works made for hire."[2]

Business and general practice attorneys often recommend that clients conduct business through a separate legal entity. Some of the reasons are well-established, including projecting a more businesslike structure, risk management, and protection of personal assets. However, in situations involving creative clients, conducting business through a separate legal entity where the distinction between artist and company is not clear can lead to problems when artists seek to terminate prior grants of copyright. The question, then, is whether the creative work product is a "work made for hire" for their own company?[3] If yes, then termination and reversion under § 203 is not available.[4]

This article illustrates how attorneys can create business entities for creative clients (referred to throughout this article as "artists" but includes software engineers, architects, songwriters, and other creators) to allow them to license their copyrighted work while preserving § 203 termination rights by structuring the relationship between the artist and their entity in such a way that precludes a work-made-for-hire argument.

THE IMPORTANCE OF TERMINATION RIGHTS

Generally, an artist (especially early in their career) will assign their work to third parties in exchange for "promotion and commercialization."[5] Then, "when an artistic work turns out to be a 'hit,' the lion's share of the economic returns" goes to the third parties rather than the artist.[6] Termination rights offer artists the chance to capitalize on their early success.

The story of Victor Miller, screenwriter of the film "Friday the 13th," illustrates the importance of termination rights and the risks of an appearance of a work-made-for-hire relationship. Miller was paid $9,282 for the screenplay to "Friday the 13th."[7] Released in 1980, the film made nearly $60 million at the global box office[8] and spawned a universe of sequels and crossovers.

When Miller attempted to exercise his § 203 rights, he was promptly met with litigation. The film's production company argued that Miller wrote the screenplay as a work made for hire and, therefore, termination under § 203 was not available.[9] While the U.S. Court of Appeals for the Second Circuit ultimately held that no work-made-for-hire relationship existed,[10] a lack of foresight nearly prevented the reversion of Miller's extremely lucrative copyright.

Miller's story also illustrates that concerns about termination rights are not merely for established entertainment industry players. While "Friday the 13th" is now a horror classic, at the time of its creation it had a small budget of around $500,000. At its inception, one could have dismissed "Friday the 13th" as an independent project with little long-term monetary value. However, Miller's screenplay demonstrates the need to account for the possibility of a creative client's breakout success. Thus, preservation of termination rights should be considered as a matter of course.

UNDERSTANDING WORKS MADE FOR HIRE

Preserving termination rights involves avoiding the creation of facts indicative of a work-made-for-hire relationship. When a work is truly a work made for hire, the hiring party (not the artist/creator) is considered the author.[11] Thus, no termination rights attach to the individual creating a work made for hire. While there are two ways a work can qualify as a work made for hire, this article focuses on works "prepared by an employee within the scope of his or her employment."[12]

The definition of "employee" for the purposes of copyright law may differ from its definition in certain labor law contexts. In *Community for Creative Non-Violence v. Reid*, the U.S. Supreme Court held that whether someone is an employee is not a matter of state law or contract law but is governed by principles of "the general common law of agency."[13] Under agency law, whether someone is an employee depends on a number of factors. One of the most important factors is "the hiring party's right to control the manner and means by which the product is accomplished."[14]

The Supreme Court has provided "other factors relevant to this inquiry" including:

> [1] the skill required; [2] the source of the instrumentalities and tools; [3] the location of the work; [4] the duration of the relationship between the parties; [5] whether the hiring party has the right to assign additional projects to the hired party; [6] the extent of the hired party's discretion over when and how long to work; [7] the method of payment; [8] the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; [9] whether the hiring party is in business; [10] the provision of employee benefits; [11] and the tax treatment of the hired party.[15]

While this test falls short of a brightline rule,[16] it is still instructive. A guiding principle for avoiding the creation of facts indicative of a work-made-for-hire relationship is ensuring that there is a separation between the artist and their entity so that it is clear the artist retains control over the manner and means by which the product is accomplished. The remaining factors (where applicable) provide additional considerations for reinforcing the separateness of the artist and their entity.

STRATEGIES FOR PRESERVING § 203 RIGHTS

The overall goal of any § 203 termination preservation strategy is ensuring that the structure of the entity, as well as the language of any contracts entered into by the entity, clearly illustrate that the artist is the creator of the work and maintains control over the manner and means through which the product is accomplished.

Articles of organization/incorporation are an opportunity to define the relationship between the artist and their entity. Rather than listing the purpose of the entity as being for all lawful purposes, the purpose could specify that the entity was established to exploit works of authorship created by the artist. The entity can also maintain its own policies designed to limit its control over the manner and means by which the product is accomplished. These policies can be drafted with reference to the 11 factors from *Reid*.

After the artist's entity has been structured in a way that ensures the relationship between artist and entity does not resemble a work-made-for-hire relationship, attorneys can use other strategies to reinforce this relationship. Copyright registrations are public records and present an opportunity for lawyers to implement the relationship between artist and entity. The most important fields for defining this relationship are the author and claimant fields; the author field discloses the legal author of a work, whereas the claimant field names the work's owner(s).[17]

Authorship and ownership are distinct concepts in copyright law. In general, a company is only listed as an author when a work is a work

made for hire.[18] Mistakenly listing a company as an author opens the door for grantees to argue that the work is a work made for hire.[19]

The relationship between an artist and their entity can also be reinforced in contracts between the company and third parties. When an artist is licensing their works through their entity to a third party, care should be taken to create a clear chain of conveyance — for the artist's entity to assign rights in the artist's copyright, it must have either acquired rights from the author or is itself the author by virtue of a work made for hire. Hence, avoiding § 203 termination issues requires that attorneys ensure the artist formally executes a written assignment (or license) of copyright to their entity, making it clear that a conveyance by the artist's entity to a third party originates from the initial conveyance from the artist to their company. This conveyance can be recorded with the U.S. Copyright Office, which provides the benefit of constructive notice.[20]

Finally, when an artist uses their company to provide creative services that result in the creation of a copyrighted work, attorneys should take care to use appropriate contractual language. Artists' companies are generally party to service agreements where the company agrees to "cause" the artist to perform certain services. Where the goal is for the artist to merely license the work created as a result of the service contract (i.e., where the goal is not for the work to be a work made for hire), the service contract should specify that the artist is the *author* of the work. Any language regarding assignments should also specify that the artist's company will *cause* the artist (the author) to make the assignment. Once again, this creates a chain of conveyance that originates with the artist and strengthens the client's position if a grantee later disputes termination and argues that the work was a work made for hire.

CONCLUSION

Termination rights are unique in that the value of these rights may be unknown at the time a copyright assignment or license is granted. Thirty-five years later, the rights to a copyrighted work could be priceless or, even if not commercially successful, could fare better in the hands of the original author or their heirs. On a more human level, copyright termination can be an important tool for an artist or their heirs to control an artist's legacy. In the year 2059, someone will be grateful that an attorney, in setting up a business entity for an artist and drafting contracts relating to that entity, gave priority consideration to the issue of copyright termination.

Spencer M. Darling is an associate at Bodman in Ann Arbor where he represents clients in connection with intellectual property disputes, trademark prosecution, copyright termination and reversion, and brand protection matters.

ENDNOTES

1. The policy rationale for this right of termination is due to the "unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited." House Report No. 94-1476.
2. 17 USC §§ 203, 304.
3. This argument has been attempted outside of the § 203 context. It is usually unsuccessful. *See Clancy v Jack Ryan Enters*, opinion of the United States District Court for the District of Maryland, issued Feb 10, 2021 (Civil Action No. ELH-17-3371); *Jules Jordan Video, Inc v 144942 Canada Inc*, 617 F3d 1146, 1155 (CA 9 2010); *Woods v Resnick*, 725 F Supp 2d 809, 824 (WD Wis 2010). Despite this, 3 Nimmer on Copyright § 11.02 treats this work made for hire argument as viable.
4. 17 USC § 203 (stating that termination is available "In the case of any work other than a work made for hire…").
5. *Waite v UMG Recordings, Inc*, opinion of the United States District Court for the Southern District of New York, issued Jan 27, 2023 (Case No. 19-cv-1091 (LAK)).
6. *Id.*
7. *Horror Inc v Miller*, 15 F4th 232, 237 (CA 2 2021).
8. *Friday the 13th (1980)*, The Numbers <https://www.the-numbers.com/movie/Friday-the-13th-(1980)#tab=summary> [https://perma.cc/6ERA-PR4H] (website accessed December 6, 2024).
9. *Horror Inc*, *supra* n 7.
10. *Id.*
11. 17 USC § 201.
12. 17 USC § 101.
13. *Community for Creative Non-Violence v Reid*, 490 US 730, 751; 109 S Ct 2166; LEd2d 811 (1989).
14. *Id.*; *Aymes v Bonelli*, 980 F2d 857, 861 (CA 2 1992) (noting that some factors, including "the hiring party's right to control the manner and means of creation" are always relevant to the agency law inquiry and holds more importance than other factors).
15. *Reid*, *supra* n 13.
16. *Aymes*, *supra* n 14, noting that the *Reid* test can be "easily misapplied, since it consists merely of a list of possible considerations that may or may not be relevant in a given case.")
17. Compendium of US Copyright Office Practices 3d § 404.
18. Compendium of US Copyright Office Practices 3d § 405.
19. *See Horror Inc*, *supra* n 7.
20. Compendium of US Copyright Office Practices 3d. § 101.3(A).

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BEST PRACTICES

Who's got you? Embedded appellate counsel

BY GAËTAN GERVILLE-RÉACHE

Trial lawyering is tough. The work is demanding, confrontational, public, and indelible. It takes some chutzpah to do the job. There's a lot at stake, especially in the eyes of the client. Any litigator who cares about the client is going to feel a tremendous weight on their shoulders. But there is a way to take some weight off, create a safety net, and mitigate risk: embed appellate counsel into the litigation team.

Nearly every case with enough at stake to warrant hiring a trial lawyer and going to trial also warrants retaining appellate counsel for an appeal. But too often, clients and trial lawyers fail to engage appellate counsel early enough in the case. They hurry appellate counsel in at the last minute — when the "cake is already baked" and all that's left to do is the "icing and slicing" of the record to make it palatable for an appellate panel. We appellate attorneys, of course, love dissecting the record to find the best issues and present them in a compelling way to win an appeal; that is our mainstay. But is it really the best litigation strategy to drop the freshly baked record in appellate counsel's lap and wish them luck on appeal?

Good litigation strategy is largely about evaluating and managing risk. When a case arrives in the appellate court, the client now faces a whole new set of risks, some of which must be managed in the trial court because after that, it is too late. Among the greatest of these are the risks that appellate judges will disfavor the client's legal position or find the lower court record inadequate. Neither element can change much on appeal. After all, this is appellate review. Finding, framing, developing, and clarifying the best arguments on appeal greatly influences the outcome, but the record influences it even more so because it is the only material the appellate attorney has to work with. Managing appellate risk, therefore, must start well before the case arrives in the appellate court, not after the record and legal position are set.

Managing appellate risk requires a different mindset from trial lawyering. Appellate judges often have a different take from the trial court on the law, the procedures, or the record, which in part explains why the Michigan Court of Appeals grants appellate relief (at least partial reversal or vacatur) in one third of all cases it hears.[1] Appellate judges focus more on nuances in the law and less on nuances in the record, more on process and principles and less on equities, and more on the case's jurisprudential impact and less on the outcome for the parties. It goes without saying that a seasoned appellate attorney — someone who has substantial experience with the appellate judges, knows their appellate procedures and principles of review, and has studied how they think — will be in the best position to manage that sort of risk. Failing to properly manage that risk can be far more costly than paying for appellate consultation early in the litigation.

Adding someone else to the team requires a certain degree of vulnerability, I know. It is natural to worry that egos might get in the way, which is not good for the client and adds to the trial lawyer's stress. But as explained below, that risk can be managed in the same way — by developing the relationship with appellate counsel at the start of the case instead of surprising them with the record after it is made. Given that appellate attorneys offer a different but complementary set of risk-management and problem-solving tools, put those tools to good use as you build the case.

There are a variety of ways to involve or consult with appellate counsel depending on the client's resources and trial counsel's case-management needs.

Pre-complaint strategy consultant: Before the complaint or answer is filed, involve appellate counsel in a discussion about the case, the legal theories, the legal or procedural obstacles, and the strategies for achieving the client's objectives. If the law is not on the client's side,

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

it is time to consider whether it can realistically be changed on appeal. If the case is unprecedented, the trial court is more likely to toss it before discovery even begins. An appeal could be just around the corner, and appellate counsel will be better prepared for it. This can be a short conversation or trial counsel can have appellate counsel vet the complaint or affirmative defenses. If the relationship with appellate counsel is new, this is a good time to size them up to see if they are good fit. If not, it is very safe to switch horses at this point.

Dispositive motion advisor/advocate: When the time for a dispositive motion or response comes, ask appellate counsel to provide strategic input, research certain tough issues, review or draft a brief outline, or even write the brief. If it has not happened already, this is a good time to discuss the overarching strategy for achieving the client's objectives in the case. The prospect of an early appeal by either side from the judge's ruling can inform the motion strategy. If you already involved appellate counsel pre-complaint, the discussion will be efficient as they are already familiar with the case. Here again, appellate counsel can be tested: are they a team player, supportive, constructive, helpful, adding value? You are not yet stuck with this person as a teammate.

Trial strategy consultant/trial teammate: Appellate counsel's involvement at trial can range from being on call for timely strategic advice to serving as a second chair of sorts depending on appellate counsel's skillset. Having appellate counsel provide strategic input at end-of-day strategy sessions can be helpful to bring key developments into focus for the whole team, prepare for the next day, and tweak the trial strategy, if necessary, to keep it aligned with the appellate strategy and manage risk. Prior to trial, discuss with appellate counsel how you can best leverage their skills and time during trial given the client's budget.

Monitoring for and preserving appealable issues: Trial counsel has more than enough to think about without having to track appealable issues and ensure the record is adequate to preserve them for appeal. But it is an essential task, one which should include making sure critical off-record discussions are timely stated on the record and ensuring an adequate proffer of excluded evidence. The client is better served if trial counsel stays focused on winning the case at trial rather than worrying what happens if the client loses. Assign an appellate attorney who is removed from the fray to worry about this. This will take a huge load off trial counsel's shoulders and mitigate the risk of oversights.

Assisting with jury instructions and verdict forms: Well-written and precise instructions can be critical not only to the outcome of the trial but also to success on appeal. These instructions are where the law intersects with the evidence and the jury. Involving appellate counsel in the preparation and negotiation of those instructions can be a good way to ensure the appellate strategy marries well with the trial strategy and avoid regrets after the jury renders its verdict. Often, the model instructions fall short and need to be revised or supplemented. Appellate attorneys are good at wordsmithing and should be adept at aligning the instructions with the law and eliminating dangerous ambiguities.

Handling one-off motions or objections: In complex litigation, bringing appellate counsel in to argue a complicated or time-consuming motion can be a practical way to lighten trial counsel's load and preserve an issue for appeal at the same time. In an emotionally sensitive case, having appellate counsel play the role of bad cop by bringing unpopular motions or objections necessary to preserve the record can help trial counsel maintain a good rapport with the judge or jury deciding the case.

Assisting with directed-verdict and post-trial motions: Covering the bases in dispositive motions during and after trial can be critical to success on appeal. The briefing for typical post-trial motions is a precursor to the appellate briefing because it is usually focused on applying the law to the record already made. There is no better way to get appellate counsel involved at the trial level. This task will be a lot more difficult, however, for an appellate counsel not yet familiar with the case, which is why it is better to involve appellate counsel early and often.

Strategic advisor, law maven, brief writer, jury instruction nitpicker, critical motions advocate, record preserver, motion maker — these are all roles well-suited to appellate counsel and roles they can serve without disrupting an entrenched trial team's dynamic. Having appellate counsel serve in some or all of these roles provides the client better risk management and some appellate insurance of sorts. Additionally, appellate counsel will be better prepared, more knowledgeable, and more efficient when it comes time for the appeal. This engagement also provides trial counsel with a trusted advisor or teammate who will watch their back and relieve pressure at trial, leaving trial counsel with more time and energy to focus on winning.

It is tempting for trial counsel to do it all. After all, who can they trust more than themselves? But we litigators — trial attorneys and appellate attorneys alike — are human; we are not superheroes who can do everything and do it all well at the same time.

There's an iconic scene in the 1978 movie "Superman" where the Man of Steel catches Lois Lane in midair as she falls from a helicopter hanging off the side of the Daily Planet skyscraper.

"Easy, miss, I've got you," he says.

"You've got me?" Lois asks. "Who's got you?"[2]

That's the question every trial counsel and their client should be asking before they start litigation. Who's watching trial counsel's back, lifting them up, giving them the support they need to do what they do best? With appellate counsel on the team, there is a great answer.

Gaëtan Gerville-Réache is a partner with Warner Norcross + Judd in Grand Rapids, where he focuses much of his practice on appellate matters.

ENDNOTES

1. Michigan Court of Appeals, *Annual Report 2023*, p 4 <https://www.courts.michigan.gov/4963ef/siteassets/reports/coa/annualreports/annualreport2023.pdf> (all websites accessed December 18, 2024).
2. *Superman: The Movie >> Awesome Moments*, TV Tropes <https://tvtropes.org/pmwiki/pmwiki.php/Awesome/SupermanTheMovie>.

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PLAIN LANGUAGE

Colloquiality in law

BY BRYAN A. GARNER

Within the bounds of modesty and naturalness, colloquiality ought to be encouraged — if only as a counterbalance to the frequently rigid and pompous formalities that generally pervade legal writing.

Many people, however, misunderstand the meaning of *colloquiality*. The term is not a label for substandard usages; rather, it means "a conversational style." The best legal minds, such as Learned Hand, tend to look kindly on colloquiality: "[A]lthough there are no certain guides [in the interpretation of a statute], the *colloquial* meaning of the words [of the statute] is itself one of the best tests of purpose . . . ."[1] Nearly 30 years earlier in his career, Hand wrote, as a trial judge: "The courts will not be astute to discover fine distinctions in words, nor scholastic differentiations in phrases, so long as they are sufficiently in touch with affairs to understand the meaning which the man on the street attributes to ordinary everyday English."[2]

In formal legal writing, occasional colloquialisms may give the prose variety and texture; in moderation, they are entirely appropriate even in judicial opinions. Still, the colloquial touches should not overshadow the generally serious tone of legal writing and should never descend into slang.

Good writers do not always agree on where to draw that line. Some judges feel perfectly comfortable using a picturesque verb such as *squirrel away*: "This sufficed, in the absence of any record-backed hint that the prosecution . . . squirreled the new transcript away . . . ."[3] Others would disapprove. Some, like Justice Douglas, would use *pellmell*: "The Circuits are in conflict; and the Court goes pellmell for an escape of this conglomerate from a real test under existing antitrust law."[4] Others would invariably choose a word like *indiscriminately* instead. Some, like Chief Justice Rehnquist, would use the phrase *Monday morning quarterbacking*.[5] And some would use *double-whammy*.[6]

For my part, I side with the colloquialists. In a profession whose writing suffers from verbal arteriosclerosis, some thinning of the blood is in order. But progress comes slowly. The battle that Oliver Wendell Holmes fought in 1924 is repeated every day in law offices and judicial chambers throughout this country. Holmes wanted to say, in an opinion, that amplifications in a statute would "stop rat holes" in it. Chief Justice Taft criticized, predictably, and Holmes answered that law reports are dull because we believe "that judicial dignity require[s] solemn fluffy speech, as, when I grew up, everybody wore black frock coats and black cravats . . . ."[7] Too many lawyers still write as if they habitually wore black frock coats and black cravats.

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Bryan A. Garner is president of LawProse Inc., distinguished research professor of law at Southern Methodist University, chief editor of *Black's Law Dictionary*, and author of more than 25 books on language, advocacy, and law. He is the author of the "Grammar and Usage" chapter of *The Chicago Manual of Style* and of two books with the late Justice Antonin Scalia: *Making Your Case* (2008) and *Reading Law* (2012). Recently, he and Joseph Kimble published the book *Essentials for Drafting Clear Legal Rules* (2024), available for free online.

ENDNOTES

1. *Brooklyn Nat'l Corp v CLR*, 157 F2d 450, 451 (CA 2, 1946) (Hand, J.) (emphasis added).
2. *Vitagraph Co of America v Ford*, 241 F 681, 686 (SD NY, 1917).
3. *United States v Chaudhry*, 850 F2d 851, 859 (CA 1, 1988).
4. *Missouri Portland Cement Co v Cargill, Inc*, 418 US 919, 923; 94 S Ct 3210 (1974) (Douglas, J., dissenting).
5. See *Vermont Yankee Nuclear Power Corp v Natural Resources Defense Council, Inc*, 435 US 519, 547; 98 S Ct 1197 (1978).
6. See *American Bankers Ass'n v SEC*, 265 US App DC; 804 F2d 739, 749 (1986).
7. Howe, ed, *Holmes–Pollock Letters* (Cambridge: Harvard University Press, 1941), vol 2, p 132.

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

ETHICAL PERSPECTIVE

Ethics news: Looking back at the 2023-2024 Bar year

BY DELANEY BLAKEY

At the core of legal practice are the ethical principles that guide the conduct of attorneys and judges, setting the standards they are expected to uphold throughout their careers. While adhering to these standards may seem straightforward, there are moments when the ethical boundaries are less clear.

This is where the State Bar of Michigan Standing Committees on Judicial Ethics and Professional Ethics comes in. These committees assist members in interpreting and applying the Michigan Rules of Professional Conduct (MRPC) through ethics opinions, frequently asked questions, articles, and other resources. During the 2023-2024 Bar year, both committees published several opinions and other resources for SBM members.

STANDING COMMITTEE ON PROFESSIONAL ETHICS

Prosecutors' offices must refer prosecution of an employee or intern to a special prosecutor or request transfer of the case to another prosecutor's office.

The Standing Committee on Professional Ethics published Ethics Opinion RI-389, which clarifies that a prosecutor's office should not represent the people when charges are brought against an employee or intern employed within that prosecutor's own office because there is an inherent conflict of interest. The office should either appoint a special prosecutor or request that the case be transferred to another county when charges are filed against an employee or intern to maintain the integrity of both the prosecutor's office and the criminal justice system.

Lawyers should use caution when accepting client property for safeguarding.

For years, lawyers have grappled with the ethical and legal challenges surrounding their responsibilities when handling clients' physical property, especially when it involves items that are illegal to possess. Therefore, the Standing Committee on Professional Ethics published Ethics Opinion RI-390, which advises that lawyers and their staff should only accept client property that is both legal to possess and directly related to the underlying representation. Lawyers should not accept illegal property from a client without first discussing confidentiality, their obligations to the court and opposing parties, and the duty to turn over illegal property to the appropriate authorities. Before accepting any property, lawyers must educate clients on the legal implications of possessing it and clearly explain the risks and consequences of retaining it to allow clients to make informed decisions about how to handle the property in question.

It is important to note that lawyers are not required to hold client property. If a lawyer chooses to do so, they must conduct a thorough inquiry into the nature of the property. Lawyers should analyze and research the issue as thoroughly as possible before thoughtfully applying their findings to the specific situation.

In light of this analysis, the committee concluded in RI-390 that lawyers and their staff should only accept property that is legal to possess and directly relevant to the representation. If a client requests that the lawyer hold illegal property, the lawyer should refuse and inform the client of the risks and potential liabilities associated with possessing such property as well as the option of turning it over to the authorities, all while maintaining client confidentiality. If the lawyer agrees to hold illegal property, they must inform the client that the property will be promptly handed over to the authorities with an effort to maintain confidentiality. If the lawyer chooses to retain property unrelated to the representation, they must inform the client that doing so may create an additional, independent representation.

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

STANDING COMMITTEE ON JUDICIAL ETHICS

Judicial security

In response to recent events that have raised concerns about the safety and security of judicial officers, the Standing Committee on Judicial Ethics issued Ethics Opinion JI-157, which clarifies that judicial officers should assess the need for disqualification if they or their family are threatened or physically attacked. It is important to note that filing a grievance against an attorney who has threatened or attacked a judicial officer does not automatically result in the judge being disqualified from overseeing the case. The judicial officer must conduct a disqualification analysis to determine whether the incident has affected their impartiality. Given that such incidents affect judicial officers in different ways, a case-specific disqualification analysis should be conducted under Michigan Code of Judicial Conduct 3 and Michigan Court Rule 2.003 to determine if recusal is necessary.

ADDRESSING LAW FIRM EVENTS

Both the Standing Committee on Professional Ethics and the Standing Committee on Judicial Ethics determined that guidance was essential on a topic that often challenges judges and lawyers alike — how to ethically approach law firm social events. The SBM Ethics Helpline regularly fields questions from legal professionals about navigating ethical concerns at these events including issues around confidentiality, interactions with opposing counsel, and the extent to which networking or socializing may influence professional relationships.

The committees released Ethics Opinions RI-391 and JI-156 and one related FAQ to provide guidance. Ethics Opinion RI-391 provides detailed guidance for lawyers hosting social events, ensuring they stay within ethical boundaries. Key rules include MRPC 7.2 prohibiting valuable items in exchange for referrals, and MRPC 7.3 restricting solicitation for financial gain without a preexisting relationship. Lawyers should avoid direct solicitations for legal services at events and invitations should be generalized, not targeted to individuals with known legal needs. As far as invitations to judges, details such as event hosts, sponsors, gifts, and media presence should be provided to help them comply with judicial ethics requirements.

Ethics Opinion JI-156 further clarifies that judges and judicial candidates must be cautious when attending social events hosted by lawyers and law firms to avoid any appearance of impropriety. Canon 4(E)(4)(b) allows for "ordinary social hospitality," but judges should evaluate factors such as event exclusivity, host affiliations, and the potential for gifts or promotional purposes. Ethical considerations under Canon 2 also require judges to avoid actions that might suggest favoritism. Events that imply a special relationship, involve sponsors likely to appear in court, or risk impartiality may compromise judicial integrity, potentially necessitating recusal.

The Judicial Ethics Committee also published an FAQ regarding law firm social events in hopes of providing fast access to specific advice for judges and judicial candidates.

MORE ETHICS ADVICE FROM THE STATE BAR

The Professional Ethics Committee and Judicial Ethics Committee not only issue formal opinions but also offer guidance through FAQs and guidebooks, all available on the SBM ethics homepage at michbar.org/opinions/ethicsopinions.

Both committees issue advisory, nonbinding written ethics opinions. Any attorney may ask for an ethics opinion; details on how to submit a request are available at michbar.org/generalinfo/ethics/request. The committees research and draft each opinion. To promote openness and encourage members to seek advice, all requests for written ethics opinions — along with the identity of the requester, relevant facts, and draft opinions — remain confidential.

Further, with the help of several members from the Professional Ethics and Judicial Ethics committee, seven Ethical Perspective columns were published in the Michigan Bar Journal last year. These articles addressed issues on topics ranging from judicial appointments to the duty to report potential misconduct to the evolving role of law students in the legal profession. Each column is designed to provide insights and guidance on navigating complex ethical considerations in practice.

Lastly, within the past Bar year, the State Bar offered members five ethics webinars to support attorneys in maintaining high ethical standards. Two of these sessions, titled "Tips and Tools," covered general ethics guidance for attorneys. The remaining three sessions, titled "Lawyer Trust Accounting," focused on addressing the ethical responsibilities and best practices for managing client funds in accordance with the Michigan Rules of Professional Conduct.

CONCLUSION

Ethics rules provide the foundation for the legal profession in today's culturally diverse and complex society. Navigating these challenges requires clear guidance, and ethics opinions play a vital role in helping legal professionals address the intricate situations they encounter daily. As the practice of law becomes increasingly multifaceted, it is essential to create frameworks that support decision-making aligned with the core principles of law. To achieve this, SBM members must stay informed about the Rules of Professional Conduct and their application. One of the most effective ways to do so is by relying on ethics opinions drafted by attorneys and judges who face these issues firsthand.

Delaney Blakey is ethics counsel at the State Bar of Michigan.

LIBRARIES & LEGAL RESEARCH

Generative artificial intelligence: Legal ethics issues

BY KINCAID C. BROWN

Generative artificial intelligence (GenAI) is transforming nearly every sector of society including the practice of law. Legal professionals are increasingly using AI tools for research, drafting, contract review, and even predicting judicial outcomes with as many as one third of respondents to a survey using GenAI daily.[1] But with this rapid adoption come questions that go beyond efficiency and instead point to the core of legal ethics including issues such as competence, confidentiality, and professional judgment.

ATTORNEY COMPETENCE

The main ethical challenges with GenAI, like with other forms of technology, is competence. Rule 1.1 of the American Bar Association Model Rules of Professional Conduct[2] requires lawyers to provide competent representation. Historically, competence has meant being knowledgeable in the relevant areas of law and using traditional tools effectively. The 2009-2013 ABA Commission on Ethics formally included technology within the Rule 1.1 framework under the "Maintaining Competence" comment: "[A] lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology[.]"[3] The Michigan Rules of Professional Conduct (MRPC) follow the ABA's lead and include technological competence ("including the knowledge and skills regarding existing and developing technology that are reasonably necessary to provide competent representation for the client …")[4] within the meaning of Rule 1.1 competence.

While the competence mandate regarding technology originally would have been relevant for using the internet, redacting PDFs, and efficiently using Microsoft Word, it now encompasses the use of GenAI and, in the future, will reach to technologies not yet available. How well do lawyers need to understand the algorithms behind their AI tools to use them competently? This question is difficult, especially given the "black box" nature of many machine-learning models which make complete, in-depth knowledge of these systems a near impossibility. The comment to ABA Rule 1.1 points to understanding the "benefits and risks" of a technology; if a lawyer truly has that understanding, they will then understand additional steps that they may need to take to make sure they are competently representing their client. Without that understanding, lawyers may find themselves relying on tools that make predictions or generate content without fully grasping how these outputs are created. This reliance can lead to errors, as we saw early on with the Avianca Airlines case.[5] Lawyers must be able to critically assess the reliability of AI systems and understand the implications of delegating parts of their work to an algorithm.

CONFIDENTIALITY

Confidentiality is another major concern for attorneys using GenAI. Under both the ABA Model Rules[6] and the MRPC,[7] lawyers must protect client information from unauthorized disclosure. AI tools, particularly those that rely on cloud computing or external data sources (e.g., ChatGPT), may expose sensitive client information to third parties either inadvertently or through security vulnerabilities.

For instance, using GenAI tools like chatbots to draft documents could mean that confidential data is sent to servers where the lawyer has limited control over how that information is processed or stored. Even when providers promise data security, the very act of transferring sensitive information introduces risks that require careful consideration. Additionally, GenAI systems trained on large datasets could, theoretically, learn from and retain information provided during client consultations. Lawyers need to take proactive steps to ensure the tools they use comply with ethical standards, including carefully reviewing the terms of service and privacy policies associated with GenAI technologies.

BIAS AND FAIRNESS

AI systems are trained on data, and that data carries the biases present in the real world and on the internet. This becomes an ethical issue when lawyers rely on AI tools for predictive analysis, sentencing recommendations, or even jury selection. If an AI system is trained on biased data, it will likely perpetuate unfair outcomes — contrary to a lawyer's duty to uphold justice. For example, studies have shown that some AI algorithms used in criminal justice settings are more likely to misclassify individuals from marginalized communities, leading to biased policing,[8] sentencing,[9] or parole

decisions.[10] Lawyers using such tools must be vigilant, questioning the fairness of these algorithms and ensuring that they are not reinforcing systemic inequalities.

The challenge here is twofold: lawyers must educate themselves about how biases can infiltrate AI systems, and they must advocate for transparency in AI development. One possible improvement would be to require developers to disclose datasets used for training AI models so biases can be discovered and countered.

PROFESSIONAL JUDGMENT

Human judgment is an important part of a lawyer's role. AI tools can automate the drafting of contracts, perform legal research, and even suggest litigation strategies — tasks that were once solely within the lawyer's purview. While this automation can save time, there's a risk that overreliance on AI might erode the exercise of professional judgment.

Professional judgment is nuanced, context sensitive, and deeply rooted in experience. AI, however, works by identifying patterns and making probabilistic predictions based on historical data. It lacks the ability to fully appreciate the subtleties that might inform a lawyer's strategy or the ethical considerations that might come into play in a particular case. Lawyers must be cautious not to let AI make decisions for them, especially in areas that require nuanced judgment. AI should augment, not replace, the critical thinking and ethical considerations that lie at the heart of legal practice.

CONCLUSION

Artificial intelligence has the potential to transform the legal profession for the better by helping lawyers work more efficiently, reduce costs, and provide better service to clients. However, lawyers must remain vigilant, ensuring that they use AI tools in a manner consistent with their professional responsibilities. This means not only understanding the tools but also questioning their limitations, biases, and impact on the justice system.

The legal community needs to engage in ongoing dialogue about the role of AI in practice. Ethical frameworks must adapt to ensure that the core values of the profession are upheld even as technology reshapes the landscape. This might involve revisiting current ethical rules and issuing new guidelines that specifically address the challenges posed by AI. By integrating AI thoughtfully and ethically, lawyers can ensure that technology serves as a force for justice rather than a threat to it. As AI continues to evolve, so too must our understanding of what it means to be an ethical legal practitioner in the digital age.

Kincaid C. Brown is the director of the University of Michigan Law Library. He is a member of the SBM Michigan Bar Journal Committee and a former member of the Committee on Libraries, Legal Research and Legal Publications.

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LAW PRACTICE SOLUTIONS

The basics of lawyer podcasting (Part II)

BY JONATHAN SPENCER

You've chosen podcasting as a way to promote your practice, share subject matter expertise, and grow your business. You may even have a few recorded episodes in the pipeline (perhaps after reading the first article in this series last month.) Now what?

No matter how dynamic or captivating your show might be, podcasting is not a build-it-and-they-will-come proposition. Like any other marketing activity, it requires a sustainable strategic plan focused on the target audience you want to attract.

WHERE SHOULD YOUR PODCAST LIVE?

Every podcast needs a hosting platform, which is the place where you upload episodes and make them available to your audience. Fortunately, you have options.

You could self-host your podcast. WordPress, Squarespace, Podpage, and other website builders let you add a podcast plug-in or template to an existing site, or you can create a standalone website for your podcast with its own domain. While this checks the box for giving your show a home, it can require technical know-how and generally won't deliver episodes to directory services like Apple Podcasts, YouTube Music (formerly Google Podcasts), and Stitcher — which is essential for increasing your audience.

Alternatively, there are all-in-one platforms that host your show, generate an RSS feed to distribute episodes, and syndicate them through the big podcasting directories. They let you customize your podcast site with graphics and branding, add bios for you and your guests, connect with social media, invite visitors to subscribe, and collect reviews and ratings. Plus, they're very affordable: free subscriptions for outlets like Buzzsprout, Podbean, and Spotify for Podcasters may be sufficient for your early needs, and paid subscriptions offering additional tools run $30 per month or less.

PACKAGING YOUR PODCAST FOR DISTRIBUTION

Your podcast now has a home from which you can share your wisdom with the world, and you know the directories where it should be shared. But there's still work to do to prepare it for syndication and make it easier to find and more user-friendly.

Properly naming each episode is critical. If your show addresses probate litigation, constitutional issues, or real property transactions, refrain from being cagey or overly clever; instead, include "will contests," "freedom of speech," or "commercial real estate leases" in the title. If you have a guest, add their name to the title as well. Think like future audience members who don't know you but are looking for specific answers, information, or experts.

Next, describe each episode with show notes, a summary that will pique interest. You will also need to transcribe each podcast episode to create a text-based version. Google, Bing, and other search engines index transcripts and serve up your show in response to matching keyword queries. Thanks to the democratization of technology and the prevalence of artificial intelligence, the tools you may have started using for production and hosting — Descript, Buzzsprout, etc. — include automated transcription. Don't expect 100% accuracy or perfect formatting, but the time saved far outweighs the time you may spend doing cleanup.

For interview or discussion-oriented podcasts, spotlight your guests with a brief bio and photo. After all, they invested their time and knowledge. When you honor them with some extra attention, they will

Law Practice Solutions is a regular column from the State Bar of Michigan Practice Management Resource Center (PMRC) featuring articles on practice, technology, and risk management for lawyers and staff. For more resources, visit the PMRC website at michbar.org/pmrc/content or call our helpline at 800.341.9715 to speak with a practice management advisor.

be more likely to share the episode with their social media followers and other connections, drawing more eyes and ears to your show.

PROMOTING YOUR PODCAST

Creating exposure for your podcast is a push-pull effort consisting of passive and active steps.

The push part involves attracting an audience that's largely unknown to you in the hopes that they will tune in. Hosting platforms and syndication tools handle the heavy lifting for you by automatically distributing shows to the major directories and ensuring subscribers receive new episodes.

Unless your show goes viral and enjoys far-reaching, self-perpetuating popularity, you shoulder at least some of the burden for the pull part — bringing people in and developing your audience. There are various tactics for this, many of which you may already use to market your practice or firm.

Let's start with your website. Call out the podcast in your bio and specifically mention you're the host. If you have a blog or news page, announce the podcast launch and create a post for each new episode. You can repurpose existing elements (carefully crafted titles, show notes, transcripts, etc.) to streamline the process and if you're using a hosting service, it may generate a media player to embed in the post. Depending on the size of your firm and your role there, consider highlighting the podcast on the homepage with a link to where it's hosted.

Many podcasters create social media pages for their shows on LinkedIn, Facebook, X (formerly Twitter), and Instagram. These offer yet another set of platforms to share episodes and, more importantly, engage with your audience and repost other content. Even if you don't have accounts for your podcast, you should definitely make it a routine to post new episodes to your own social media channels. Give a quick summary, tag your guest's name and organization, and include the link to where people can listen.

While many podcasts are audio only, that doesn't mean you should ignore visual elements, especially for social media. A photo of you in a studio or a screenshot of you and a guest is great for teasing an upcoming show or in a follow-up post after its release. You can also produce audiograms, which are short clips from the show with animated captions that play in someone's social media feed, even if the sound is muted. And don't be shy about recycling social media posts about podcast episodes a week, a month, or a year later, especially for shows with evergreen content and long-lasting appeal.

Enlisting colleagues to share your social media posts capitalizes on their connections to amplify the reach exponentially. Politely ask guests to post or share your posts to their connections, tagging you in a caption or comment.

Email can also be effective for inviting people to listen or look at your podcast. Services such as Constant Contact and MailChimp are efficient for reaching a large group with one customized message, a worthy option if you and your firm maintain a central contact database or as you grow a subscriber list. But don't overlook the power of sending one-to-one emails from Outlook or Gmail to important and influential connections; the personal touch often makes a more meaningful impression.

And the list goes on. Incorporate an embedded link to your podcast in your email signature block. Tell people you host a podcast in your speaker and author bios for articles and presentations. Add your podcast name and web address to your business cards. If you're proud of the episodes you produce, let people know!

MAINTAINING YOUR PODCASTING MOMENTUM (AND HAVING FUN)

At some point, your enthusiasm may wane, putting your show at risk for podfading. It's been said that it takes creators 10 episodes to become comfortable with the recording and production process, yet an estimated 90% of podcasters don't last more than three episodes.[1] The secret to sustaining your stamina is strict adherence to a schedule. If you tell your audience you'll drop new episodes weekly, monthly, or somewhere in between, you need to keep your promise. When you don't, it's not just the podcast's brand that gets tarnished.

An editorial calendar is where you plan and schedule episodes in advance and ensure a regular cadence. With a bit of foresight and advanced planning, you can build a cushion of four to five shows to let yourself breathe easier.

Your hosting platform should have a dashboard showing how your podcast is performing, including the number of website visits and downloaded episodes; most of the big directories offer other audience metrics. If a particular topic generates more buzz than others, consider a follow-up show or invite your guest back for another conversation. Google Analytics may give you further insight into your audience's demographics, which might warrant changes to your approach or subject matter focus.

You may be the chief content officer of your podcast, but you don't have to make all the decisions. When in doubt, ask your audience to offer suggestions for topics and guests, either during an episode or on social media. Guests are also wonderful resources, so tap into their experience on your show to help you generate ideas.

A podcast won't make you rich and there are better ways to bring in new clients, so inject some fun into your regimen. If you want to boost your podcast's awareness or grow your subscriber list, have a contest by pulling a random name from all the people who leave a comment under a social media post, become a new subscriber by a certain date, or write a review. Announce the winner, tag

them in a post, and send them a Starbucks gift card, a book written and signed by one of your guests, or an appearance on a future show. If an upcoming trial, vacation, or holiday disrupts your production schedule, re-release a top-performing episode or pull excerpts from several shows into a greatest hits compilation. Ask a colleague or former guest to co-host an episode or switch things up and have them interview you.

One last piece of advice: enjoy the ride! If you make it past the statistical podfading hump, you may discover that you're not only a capable creator, but that podcasting entertains you, fulfills you, and makes you a better attorney and counselor. The satisfaction and pleasure you experience will become evident to your audience, too.

Jonathan Spencer is a business development and marketing consultant with Rain BDM, which helps law firms across the country build outstanding relationships with clients and others. He advises lawyers on new client opportunities, content and social media strategy, marketing technology, website management, video production, and podcasting.

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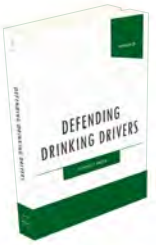
- Sentencing Mitigation Memorandums and Character Letters



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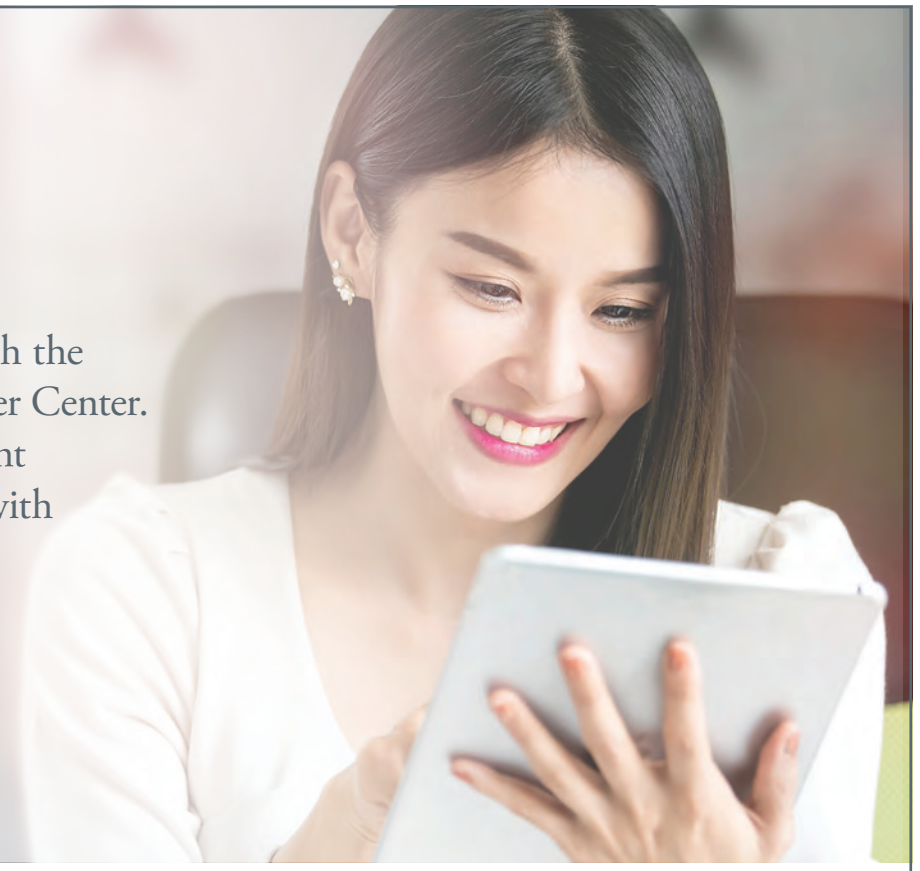

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PRACTICING WELLNESS

Men's health: More than just a New Year's resolution

BY DR. MICHAEL LUTZ

Death and taxes are inevitable. However, when it comes to men's health, we can do better ... much better. Men own nine of the top ten causes of death when compared to women; heart disease, malignancies, suicide, and workplace deaths, just to name a few.[1] Over the past century, men have progressively shorter lifespans than their female counterparts, now dying at a rate of five years earlier.[2] When it comes to healthcare, women are 76% more likely than men to have visited a healthcare professional within the previous year.[3]

As is a common refrain in this column, the outlook of legal professionals is even more bleak when compared to the general population. According to a 2021 study of legal professionals, 67% of male respondents indicated working more than 40 hours per week on average, 49% admitted experiencing moderate or severe stress, 39% experienced mild symptoms of anxiety, 39% experienced mild symptoms of depression, and 17% said that they have contemplated leaving the profession altogether.[4]

Over the years, I have been repeatedly asked, "Why are men so stupid?" The reality is that men are far from stupid despite the same end result — premature and unnecessary suffering and death. Men are typically more reactive than proactive and place health low on life's list of priorities. Part of this behavior pattern in men begins as young boys when they're told to "brush it off," "rub some dirt on it," or that "big boys don't cry."

This negligent personal healthcare pattern is exacerbated in adulthood when men, no longer under the care and advice of their parents, become the primary decision makers regarding their health. This has not boded well for men aged 20 to 40, who suffer the highest death rate secondary to drugs, alcohol, and risky behaviors.[5]

As you can tell, men's health is important personally, socially, and in the workplace. This is not a binary decision; it should not be interpreted as saying women's health should be ignored. Rather, we should believe that whether we are supporting men's, women's, or children's health, a rising tide raises all boats and leads to greater health and wellbeing overall.

Moreover, the health of the male in a family unit can help ensure a more successful outcome for the family. And conversely, if the male of the family should become ill or die, there is a significantly higher chance that the children will not achieve higher levels of education and suffer from drug and/or alcohol issues.

The first thing men can do to get healthy is perform an honest self-assessment. Be frank about your mental, physical, and social self. Find a healthcare provider with whom you can share personal perceptions and realities and get a baseline medical assessment. The reality is that getting healthy and staying healthy results from small steps, not giant leaps.

There are many smartphone applications that allow you to track and monitor your progress. One of our favorite men's health partners, the Canadian Men's Health Foundation, has a campaign called "Don't Change Much"[6] which focuses on the role of small changes in each aspect of one's life; those changes, taken together, become more effective and durable over time.

Once you are on the road to a healthier self, try to become a source of inspiration and guidance for others. I can state with absolute certainty that nothing feels as good as being healthy. When you are truly healthy, you can fully enjoy and participate in life's journey.

"Practicing Wellness" is a regular column of the Michigan Bar Journal presented by the State Bar of Michigan Lawyers and Judges Assistance Program. If you'd like to contribute a guest column, please email contactljap@michbar.org

Our healthcare system is continually evolving, and we need to find our own best way to become engaged with it. Primary care assessments can be performed by physicians or advanced practice providers such as physician assistants, nurse practitioners, or nurses. Routine maintenance care is best achieved through medical offices, urgent care centers, and quick clinics; try to avoid costly emergency room visits. In the future, home care testing and digital services via smartphones and other electronic devices will be assessment options.

The key to a healthier and more successful life journey is educating yourself on your personal healthcare needs and your familial healthcare risks. The next step is developing an action plan based upon your personal needs, but know that your needs will change throughout your life. By starting now, you can prioritize your health beyond more than just a New Year's resolution.

If you feel overwhelmed and don't know where to start, try calling the confidential Lawyers and Judges Assistance Program (LJAP) helpline at (800) 966-5522 for a free consultation or to receive referrals for providers experienced in treating lawyers. LJAP also hosts a confidential virtual support group on Wednesdays from 6-7 p.m., which is a great way to hear from other lawyers on how they handle the rigors and stressors of practice. E-mail contactLJAP@michbar.org to receive the password.

The Michigan Men's Health Foundation also hosts an annual event for men that provides free screenings to assess their current health, educates men on staying healthy, and shares information about advances in healthcare.

Dr. Michael Lutz is president and CEO of the Michigan Men's Health Foundation. Over the past 16 years, thousands of men have benefitted from the foundation's community outreach events and health-related services. Contact MIMensHealthFoundation.org or call (855) 66-HELP-MEN for more information or to take advantage of their services.

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ORDERS OF DISCIPLINE & DISABILITY

DISBARMENT

Lenore LuAnn Albert, P85667, Laguna Beach, California. Disbarment, effective Nov. 22, 2024.

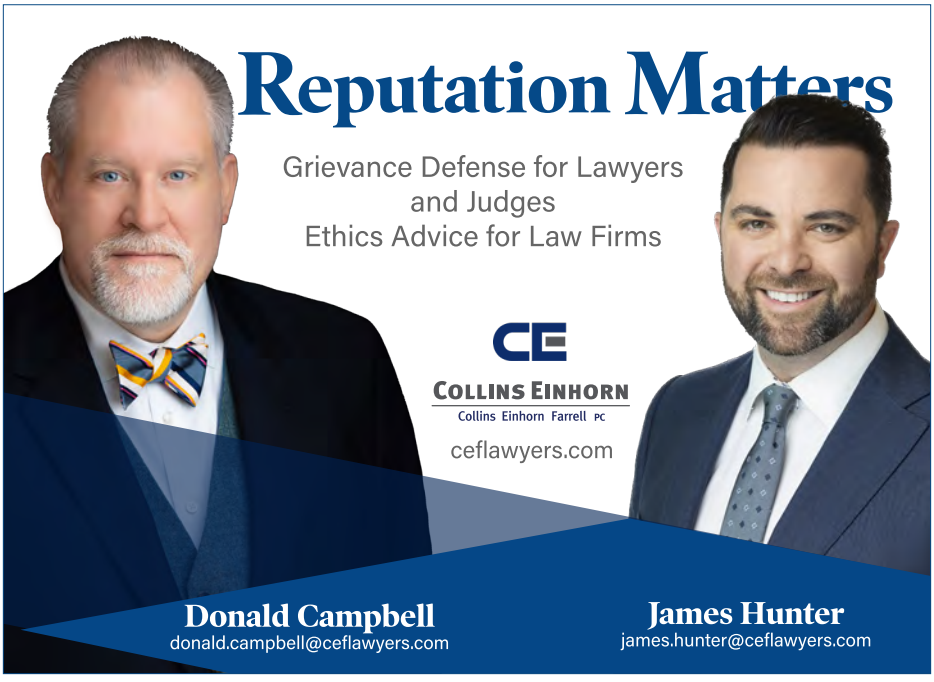
The grievance administrator filed a Notice of Filing of Reciprocal Discipline that attached a certified copy of an order from the Supreme Court of California dated June 17, 2024, disbarring the respondent from the practice of law in California. In *re Lenore LuAnn Albert on Discipline,* Case No. S284532. An order regarding imposition of reciprocal discipline was issued by the board on July 30, 2024, ordering the parties to, within 21 days from service of the order, inform the board in writing (i) of any objection to the imposition of comparable discipline in Michigan based on the grounds set forth in MCR 9.120(C)(1) and (ii) whether a hearing was requested. The respondent filed a motion to expand the record and an objection on Aug. 14, 2024, and requested a hearing. The matter was assigned to Washtenaw County Hearing Panel #4 for disposition.

The panel denied the respondent's motion to expand the record and request for a hearing, finding that the respondent was afforded due process in the disciplinary proceedings conducted by the California State Bar and that it would not be clearly inappropriate to impose comparable discipline in Michigan. On Oct. 31, 2024, the panel issued an order disbarring the respondent from the practice of law in Michigan, effective Nov. 22, 2024. Costs were assessed in the amount of $1,525.32.

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

Elizabeth Dallam Ayoub, P65413, Holland. Interim suspension, effective Nov. 14, 2024.

The respondent failed to appear for a Nov. 1, 2024, hearing and satisfactory proofs were entered into the record that she possessed actual notice of the proceedings. As a result, Muskegon County Hearing Panel #1 issued an Order of Suspension Pursuant to MCR 9.115(H)(1) [Failure to Appear], effective Nov. 14, 2024, and until further order of the panel or the board.



SUSPENSION WITH CONDITION (BY CONSENT)

R. Scott A. Baker, P62511, Onsted. Two years, effective Dec. 1, 2024.

The respondent and the grievance administrator filed a Stipulation for Consent Order of a Two-Year Suspension with Condition in accordance with MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by Washtenaw County Hearing Panel #2.

The stipulation contained the respondent's no contest plea to the factual allegations and allegations of professional misconduct as set forth in the notice of filing of judgment of conviction and the formal complaint. Specifically, the formal complaint alleged that the respondent committed misconduct during his representation of two separate clients seeking assistance in their divorce matters, including showing one client orders purportedly issued by Lenawee County Circuit Court that were in fact created, stamped, and signed by the respondent. The notice of filing of judgment of conviction sets forth that the respondent was convicted by guilty plea of willful neglect of duty—public officer, a misdemeanor, in violation of MCL 740.478, in *People v. Robert Scott Allen Baker,* 2A District Court, Case No. 222067.

Based on the respondent's no contest plea and the stipulation of the parties, the panel found that the respondent neglected a legal matter entrusted to the lawyer in violation of MRPC 1.1(c) [counts 1 and 2]; failed to act with reasonable diligence and promptness in representing a client in violation of MRPC 1.3 [counts 1 and 2]; failed to keep a client reasonably informed about the status of a matter in violation of MRPC 1.4(a) [counts 1 and 2]; failed to expedite litigation consistent with the interests of a client in violation of MRPC 3.2 [count 2]; engaged in conduct involving dishonesty,

fraud, deceit, or misrepresentation, or violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b) [counts 1 and 2]; engaged in conduct prejudicial to the administration of justice in violation of MCR 9.104(1) and MRPC 8.4(c) [counts 1 and 2]; engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach as proscribed by MCR 9.104(2) [counts 1 and 2]; engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3) [counts 1 and 2]; and 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) [judgment of conviction].

The panel ordered that the respondent's license to practice law in Michigan be suspended for two years, effective Dec. 1, 2024, as agreed to by the parties and that he be subject to a condition relevant to the established misconduct. Costs were assessed in the amount of $950.76.

DISBARMENT

Marco M. Bisbikis, P79478, Novi. Disbarment, effective Nov. 20, 2024.[1]

The respondent was convicted by jury trial on May 23, 2024, of one count of first-degree premeditated murder, two counts of felony firearm, one count of conspiracy to commit first-degree premeditated murder, and one count of assault with intent to commit murder which constituted violations of MCL 750.316, MCL 750.227b, and MCL 750.83, all felony offenses, in a matter titled *People v. Marco Bisbikis,* Oakland County Circuit Court, Case No. 2023-284941-FC. In accordance with MCR 9.120(B)(1), the respondent's license to practice law in Michigan was automatically suspended effective May 23, 2024, the date of respondent's felony convictions.

Based on his convictions, Tri-County Hearing Panel #12 found that the respondent committed professional misconduct when he engaged in conduct that violated criminal laws of the state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615 pursuant to MCR 2.615 in violation of MCR 9.104(5).

The panel ordered that the respondent be disbarred from the practice of law in Michigan. Total costs were assessed in the amount of $1,861.18.

1. The respondent has been continuously suspended from the practice of law in Michigan since May 23, 2024, the date of his felony convictions. Please see Notice of Automatic Interim Suspension issued June 6, 2024.

DISBARMENT (BY CONSENT)

Charles Hua Cui, P65379, Chicago, Illinois. Disbarment, effective Dec. 21, 2023.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Disbarment pursuant to MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by Tri-County Hearing Panel #73. The stipulation contained the respondent's admission that he was convicted on Dec. 21, 2023, by guilty verdict, of one count of bribery involving federal programs in violation of 18 USC § 666(a)(2); one count of false statements to Federal Bureau of Investigation in violation of 18 USC § 1001(a)(2); and three counts of use of interstate commerce to facilitate illegal activity in violation of 18 USC § 1952(a)(3), in a matter titled *United States v. Charles Cui,* United States District Court for the Northern District of Illinois, Case No. 1:19-cr-00322(3).

Based on the stipulation of the parties, the panel found that the respondent committed professional misconduct when he engaged in conduct that violated a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615 in violation of MCR 9.104(5) and engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b).

In accordance with the stipulation of the parties, the panel ordered that the respondent be disbarred from the practice of law in Michigan with good cause existing for the respondent's disbarment to begin on Dec. 21, 2023, as agreed to by the parties. Total costs were assessed in the amount of $789.08.

REPRIMAND (BY CONSENT)

Kelly D. Ellsworth, P78595, Saginaw. Reprimand, effective Nov. 15, 2024.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Reprimand in accordance with MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by Genesee County Hearing Panel #3.

The stipulation contained the respondent's admission that he was convicted by guilty plea of operating a motor vehicle when visibly impaired, a misdemeanor, in violation of MCL/PACC 257.6253-A in *People of the State of*

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ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

Michigan v. Kelly Daniel Ellsworth, 70th District Court, Case No. 22-001104-OD, as set forth in a notice of filing of judgment of conviction by the grievance administrator.

Based on the respondent's conviction, admission, and the parties' stipulation, the panel found that the respondent committed professional misconduct when he engaged in conduct involving 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) and violated a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615 in violation of MCR 9.104(5).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be reprimanded. Costs were assessed in the amount of $761.54.

SUSPENSION WITH CONDITIONS (BY CONSENT)

Kiana E. Franulic, P73015, Southfield. Suspension, 30 days, effective Nov. 15, 2024.

The respondent and the grievance administrator filed an Amended Stipulation for Consent Order of 30-Day Suspension with Conditions pursuant to MCR 9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contained the respondent's admission to being hired by a client to represent her in a medical malpractice and wrongful death suit which the respondent later neglected but falsely claimed to her client that she was working on the case long after the suit had been dismissed by the court.

Based on the respondent's admissions and the amended stipulation of the parties, the panel found that the respondent neglected a legal matter entrusted to the lawyer in violation of MRPC 1.1(c); failed to act with reasonable diligence and promptness in representing a client in violation of MRPC 1.3; failed to keep the client reasonably informed about the status of her matter and comply promptly with reasonable requests for information in violation of MRPC 1.4(a); failed to withdraw from the representation of a client when the lawyer's physical or mental condition materially impaired the lawyer's ability to represent the client in violation of MRPC 1.16(a)(2); knowingly disobeyed an obligation under the rules of a tribunal in violation of MRPC 3.4(c); engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3); and engaged in conduct that vio-

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- Over 24 years complex litigation experience
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lates the standards or rules of professional conduct in violation of MRPC 8.4(a) and MCR 9.104(4).

In accordance with the amended stipulation of the parties, the hearing panel ordered that the respondent's license to practice law in Michigan be suspended for 30 days, effective Nov. 15, 2024, as agreed to by the parties, and that the respondent be subject to conditions relevant to the established misconduct. Total costs were assessed in the amount of $759.92.

SUSPENSION WITH CONDITION

Catherine A. Jacobs, P32996, Lakeview. Suspension, 179 days, effective Dec. 4, 2024.

Based on the evidence presented at hearings held in this matter in accordance with MCR 9.115, Kent County Hearing Panel #5 found that the respondent committed professional misconduct while filing petitions for appointment of a temporary or permanent guardian for incapacitated individuals on behalf of Sparrow Hospital as alleged in four of the counts set forth in a five-count amended formal complaint filed by the grievance administrator. Count 3 of the amended formal complaint was dismissed when the panel granted the respondent's motion for summary disposition.

Specifically, with regard to count 1 of the amended complaint, the panel found that the respondent engaged in a conflict of interest by representing a client when the representation was materially limited by the lawyer's responsibilities to a third person and the lawyer could not reasonably believe a statutorily prohibited conflict of interest would not adversely affect the representation and the client could not consent to violating a statutorily prohibited conflict of interest (MCL 700.5313(1)) in violation of MRPC 1.7(b)(1) and (2). The panel also found that the respondent knowingly made a false statement of material fact to a tribunal or failed to correct a false statement of material fact previously made to the tribunal by the lawyer in violation of MRPC 3.3(a)(1).

With regard to count 2 of the amended complaint, the panel found that the respondent knowingly made a false statement of material fact or law to a tribunal or failed to correct a false statement of material fact or law previously made to the tribunal by the lawyer in violation of MRPC 3.3(a)(1); engaged in conduct prejudicial to the proper administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1); and engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3).

With regard to count 4 of the amended complaint, the panel found that the respondent knowingly made a false statement of material fact or law to a third person in violation of MRPC 4.1; engaged in conduct involving dishonestly, 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); engaged in conduct that is prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1); and engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2).

With regard to count 5 of the amended complaint, the panel found that the respondent acted as a fiduciary for a client when the representation was materially limited by the lawyer's own interest and the lawyer could not reasonably believe a statutorily prohibited conflict of interest would not adversely affect the representation and the client could not consent to violating a statutorily prohibited conflict of interest (MCL 700.5421(2)(b)) in violation of MRPC 1.7(b)(1) and (2); engaged in conduct that is prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); and engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3).

The panel ordered that the respondent's license to practice law be suspended for a period of 180 days and that she be subject to a condition relevant to the established misconduct. Costs were assessed in the amount of $3,908.87.

The respondent timely filed a petition for review and a petition for stay of the effective date of the hearing panel's order of suspension with condition. On Feb. 22, 2024, the board entered an order granting

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ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

the respondent's petition for stay, thereby staying the hearing panel's order of suspension with condition pending completion of the review proceedings before the board.

After conducting review proceedings according to MCR 9.118, the board reduced the discipline imposed by the hearing panel from a 180-day suspension to a 179-day suspension of the respondent's license to practice law in Michigan and affirmed the condition imposed by the hearing panel.

SUSPENSION WITH CONDITION (BY CONSENT)

John A. Janiszewski, P74400, Detroit. Suspension, 90 days, effective Dec. 15, 2024.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Suspension with Condition which was approved by the Attorney Grievance Commission and accepted by Tri-County Hearing Panel #18. The stipulation contained the respondent's admission that he was convicted of driving while visibly impaired, a misdemeanor, and of disorderly person, a misdemeanor, on July 28, 2022, in the matter *People v. John A. Janiszewski,* 56A District Court, Case No. 22-0129-SM, and that he violated his probation by failing to report to his probation officer and testing positive for alcohol. The stipulation also contained the respondent's no contest plea to the factual allegations in paragraphs 13-20 and 22 regarding a subsequent arrest for operating under the influence of intoxicating liquor, second offense, and the remaining grounds for discipline as set forth in the formal complaint.

Based on the respondent's admissions, no contest plea, and stipulation of the parties, the panel found that the respondent knowingly disobeyed an obligation under the rules of a tribunal contrary to MRPC 3.4(c); engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b); engaged in conduct that is prejudicial to the administration of justice in violation of MCR 9.104(1) and MRPC 8.4(c); engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); engaged in conduct that is contrary to justice, ethics, honesty or good morals in violation of MCR 9.104(3); engaged in conduct that violates the standards or rules of professional conduct adopted by the Supreme Court in violation of MCR 9.104(4); and engaged in conduct that violates a criminal law of a state contrary to MCR 9.104(5).

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 90 days, effective Dec. 15, 2024, as agreed to by the parties, and that he be subject to a condition relevant to the established misconduct. Total costs were assessed in the amount of $1,174.84.

AUTOMATIC INTERIM SUSPENSION

Justin Blair Miller, P66930, Harrison Township. Effective Oct. 8, 2024.

On Oct. 8, 2024, the respondent was convicted by guilty plea of Operating While Intoxicated—Third Offense, a felony and violation of MCL 257.625(1), in *State of Michigan v. Justin Miller,* 57th Circuit Court Case No. 2024-0000005679-FH. Upon the respondent's conviction and in accordance with MCR 9.120(B)(1), the respondent's license to practice law in Michigan was automatically suspended.

Upon the filing of a judgment of conviction, this matter will be assigned to a hearing panel for further proceedings. The interim suspension will remain in effect until the effective date of an order filed by a hearing panel under MCR 9.115(J).

AUTOMATIC SUSPENSION FOR NON-PAYMENT OF COSTS

Carl C. Silver, P26501, Ossineke. Effective Nov. 13, 2024.

On Oct. 1, 2024, an Order of Reprimand with Conditions was issued by Tri-Valley Hearing Panel #4 in *Grievance Administrator v. Carl C. Silver,* 24-20-JC. Pursuant to that order, the respondent was ordered to

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pay $1,874.18 in assessed costs on or before Oct. 23, 2024. The respondent failed to do so and a certification of nonpayment of costs was issued on Nov. 5, 2024, in accordance with MCR 9.128(C).

In accordance with MCR 9.128(D), the respondent's license to practice law in Michigan was automatically suspended, effective Nov. 13, 2024. The suspension will remain in effect until the costs have been paid or the Attorney Discipline Board approves a suitable plan for payment, and until the respondent complies with MCR 9.119 and 9.123(A).

REPRIMAND WITH CONDITIONS

Kent Alan Lee Wood II, P70596, Lansing. Reprimand, effective Nov. 6, 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 Ingham County Hearing Panel #4. The stipulation contained the respondent's admissions to the factual allegations and allegations of professional misconduct set forth in the formal complaint, namely that the respondent committed professional misconduct by paying referral fees to nonlawyers and otherwise sharing legal fees with nonlawyers.

Based upon the respondent's admissions and the parties' stipulation, the panel found that the respondent entered into an agreement for, charged, and/or collected an illegal or clearly excessive fee in violation of MRPC 1.5(a); shared legal fees with a nonlawyer in violation of MRPC 5.4(a); gave something of value to a person for recommending the lawyer's services in violation of MRPC 7.2(c); engaged in conduct that is prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); and engaged in conduct that is contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3).

In accordance with the stipulation of the parties, the panel ordered that the respondent be reprimanded and subject to certain conditions. Costs were assessed in the amount of $761.54.

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FROM THE MICHIGAN SUPREME COURT

ADM File No. 2022-38
Amendments of Rules 2.625, 7.115, 7.219, and 7.319 of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 2.625, 7.115, 7.219, and 7.319 of the Michigan Court Rules are adopted, effective January 1, 2025.

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

Rule 2.625 Taxation of Costs

(A)-(F) [Unchanged.]

(G) Stay of Collecting Taxed Costs. The court or the clerk must stay the enforcement of an award taxing costs to a prevailing party under subrule (F) until expiration of the time for filing an appeal in the appropriate appellate court, or if an appeal is filed, while a claim of appeal or application for leave to appeal in the appropriate appellate court is pending.

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

Rule 7.115 Taxation of Costs~~;~~ Fees~~.~~

(A)-(D) [Unchanged.]

(E) Stay of Collecting Taxed Costs. The clerk must stay the enforcement of an award taxing costs until expiration of the time for filing an appeal in the appropriate appellate court, or if an appeal is filed, while a claim of appeal or application for leave to appeal in the Court of Appeals is pending.

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

(G~~F~~) Taxable Costs and Fees. Except as otherwise provided by law or court rule, a~~A~~ prevailing party may tax only costs awarded in the court below as permitted by MCL 600.2445(4) and the reasonable costs and fees incurred in the appeal, including:

(1)-(8) [Unchanged.]

Rule 7.219 Taxation of Costs; Fees

(A) [Unchanged.]

(B) Time for Filing. Within 49~~28~~ days after the dispositive order, opinion, or order denying reconsideration is mailed, the prevailing party may file a certified or verified bill of costs with the Court of Appeals clerk and serve a copy on all other parties. If the Supreme Court reverses the decision of the Court of Appeals, then within 28 days of the Supreme Court decision, the new prevailing party may file a certified or verified bill of costs with the Court of Appeals clerk and serve a copy on all other parties. Each item claimed in the bill must be specified. Failure to file a bill of costs within the time prescribed waives the right to costs.

(C)-(D) [Unchanged.]

(E) Stay of Collecting Taxed Costs. The clerk must stay the enforcement of an award taxing costs until expiration of the time for filing an application for leave to appeal in the Supreme Court, and if an application is filed, while the application in the Supreme Court is pending.

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

(G~~F~~) Costs Taxable. Except as otherwise provided by law or court rule, a~~A~~ prevailing party may tax only costs awarded in the court below as permitted by MCL 600.2445(4) and the reasonable costs and fees incurred in the Court of Appeals, including:

(1)-(6) [Unchanged.]

(7) other expenses taxable under applicable court rules or statutes.

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

Rule 7.319 Taxation of Costs; Fees

(A) Rules Applicable. Unless this rule provides a different procedure, t~~T~~he procedure for taxation of costs in the Supreme Court is as provided in MCR 7.219.

(B) [Unchanged.]

(C) Taxation and Stay. The clerk will promptly verify the bill and tax those costs allowable. If the Supreme Court retains jurisdiction in a case, the clerk must stay the enforcement of an award taxing costs until the Supreme Court no longer has jurisdiction over the case.

(C)-(D) [Relettered as (D)-(E) but otherwise unchanged.]

Staff Comment (ADM File No. 2022-38): The amendments of MCR 2.625, 7.115, 7.219, and 7.319: (1) require courts to stay enforcement of taxed costs while an appeal is pending or until time for filing an appeal has passed, (2) expand the timeframe for filing a bill of costs in the Court of Appeals, (3) incorporate into MCR 7.219 the Court of Appeals internal operating procedure 7.219(B) that allows, upon reversal of a Court of Appeals decision, the new prevailing party to file a new bill of costs in the Court of Appeals, and (4) include in the lists of taxable costs those costs awarded in the lower court in accordance with MCL 600.2445(4).

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.

ZAHRA, J. and VIVIANO, J., would have declined to adopt.

ADM File No. 2024-06
Amendment of Rule 3.306 of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 3.306 of the Michigan Court Rules is adopted, effective immediately.

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

Rule 3.306 Quo Warranto

(A) [Unchanged.]

(B) Parties.

(1)-(2) [Unchanged.]

(3) Application to Attorney General.

(a) [Unchanged.]

(b) If, on proper application and offer of security, the Attorney General refuses to bring the action, the person may apply to the appropriate court for leave to bring the action himself or herself. The court must not grant leave under this subrule if the action relates to the offices of electors of President and Vice President of the United States.

(C)-(E) [Unchanged.]

Staff Comment (ADM File No. 2024-06): In accordance with MCL 600.4501(2), the amendment of MCR 3.306(B)(3)(b) prohibits a court from granting leave to a private individual who is bringing a quo warranto action that relates to the offices of electors of President and Vice President of the United States.

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

ADM File No. 2022-56
Amendment of Rule 3.7 of the Michigan Rules of Professional Conduct

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 3.7 of the Michigan Rules of Professional Conduct is adopted, effective Jan. 1, 2025.

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

Rule 3.7. Lawyer as Witness.

(a)-(b) [Unchanged.]

(c) Nothing in this rule prohibits a lawyer from appearing as attorney of record in a case in which the lawyer is a party and is representing themselves.

[Official comment unchanged.]

Staff Comment (ADM File No. 2022-56): The amendment of MRPC 3.7 clarifies that in accordance with Const 1963, art 1, § 13, a lawyer can appear in pro per.

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

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

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided on two separate proposals at 508 Mich 1211 (2021) and 513 Mich (2024), and consideration having been given to the comments received, the following amendment of Rule 6.302 of the Michigan Court Rules is adopted, effective January 1, 2025. Further, the Court declines to adopt the proposed amendments of Rules 6.302 and 6.310 in the order dated Nov. 17, 2021.

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

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

Rule 6.302 Pleas of Guilty and Nolo Contendere

(A)-(B) [Unchanged.]

(C) A Voluntary Plea.

(1) [Unchanged.]

(2) If the plea involves a statement by the court that it will sentence to a specified term or within a specified range, the court must:

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

(b) advise the defendant whether any sentencing guidelines range discussed at the plea hearing is part of the plea such that they have a right to withdraw their plea under MCR 6.310(B) if the final sentencing guidelines range determined by the court at sentencing is different, and

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

(2)-(4) [Renumbered (3)-(5) but otherwise unchanged.]

(D)-(F) [Unchanged.]

Staff Comment (ADM File No. 2021-05): The amendment of MCR 6.302(C) requires a court, that states during a plea hearing that it will sentence the defendant to a specified term or within a specified range, to: (1) inform the defendant that the final sentencing guidelines range may differ from the original preliminary estimate, (2) advise the defendant regarding their right to withdraw the plea pursuant to MCR 6.310(B) if the final sentencing guidelines range as determined at sentencing is different, and (3) provide a numerically quantifiable sentence term or range when providing the preliminary estimate.

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

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

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 7.103 of the Michigan Court Rules is adopted, effective Jan. 1, 2025.

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

Rule 7.103 Appellate Jurisdiction of the Circuit Court and Judicial Authority

(A)-(B) [Unchanged.]

(C) An appeal under this subchapter must be heard by a judge other than the judge that conducted the trial.

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

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

ADM File No. 2024-01 Appointments to the Committee on Model Civil Jury Instructions

On order of the Court, pursuant to Administrative Order No. 2001-6, the following members are reappointed to the Committee on Model Civil Jury Instructions for full terms beginning on Jan. 1, 2025, and ending on Dec. 31, 2027:

- Hilary Ballentine (attorney – defense)
- Debra Freid (attorney – plaintiff)
- Hon. Michael F. Gadola (Court of Appeals judge)

Additionally, the following individuals are appointed to the Committee on Model Civil Jury Instructions for first full terms beginning on Jan. 1, 2025, and ending on Dec. 31, 2027:

- Kyle Asher (attorney – defense)

- Jennifer Grieco (attorney – commercial)
- Martin Hogg (attorney – plaintiff)
- Daniel Ravitz (attorney – commercial)

ADM File No. 2024-01
Appointments to the Committee on Model Criminal Jury Instructions

On order of the Court, pursuant to Administrative Order No. 2013-13, the following member is reappointed to the Committee on Model Criminal Jury Instructions for a second full term beginning on Jan. 1, 2025, and ending on Dec. 31, 2027:

- Lisa Coyle (prosecutor)

In addition, the following individuals are appointed to the Committee on Model Criminal Jury Instructions for first full terms beginning on Jan. 1, 2025, and ending on Dec. 31, 2027:

- Hon. Bradley L. Cobb (circuit court judge)
- Hon. Cheryl A. Matthews (circuit court judge)
- Amanda Morris Smith (prosecutor)

In addition, effective Jan. 1, 2025, Sara Swanson (prosecutor) is appointed for the remainder of a partial term ending on Dec. 31, 2025.

Hon. Michael C. Brown is appointed as chair of the Committee on Model Criminal Jury Instructions until further order of the Court.

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

On order of the Court, pursuant to MCR 8.128, the following members are reappointed to the Michigan Judicial for second full terms beginning on Jan. 1, 2025, and ending on Dec. 31, 2027:

- Hon. Demetria Brue (Michigan District Court Judges Association)
- Thomas W. Cranmer (attorney)
- Hon. Kameshia D. Gant (Association of Black Judges of Michigan)
- Valerie J. Robbins (probate register)
- Justin F. Roebuck (county clerk)
- Hon. John D. Tomlinson (Michigan Probate Judges Association)
- Hon. Jon A. Van Allsburg (Michigan Judges Association)

In addition, the following members are appointed to the Michigan Judicial Council for first full terms beginning on Jan. 1, 2025, and ending on Dec. 31, 2027:

- Frank Hardester (trial court administrator)
- Hon. Casandra Morse-Bills (at-large judge)

Additionally, effective immediately, Brian Harger (trial court administrator) is appointed to the Michigan Judicial Council for the remainder of a term ending on Dec. 31, 2026.

Pursuant to MCR 8.128, the following individuals will serve by virtue of their role within their organization for as long as they hold their respective roles:

- Supreme Court Chief Justice Elizabeth T. Clement
- State Court Administrator Thomas Boyd
- Court of Appeals Chief Judge Michael F. Gadola (or designee)

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

On order of the Court, pursuant to Mich CJE R 3, the following members are reappointed to the Judicial Education Board for first full terms beginning on Jan. 1, 2025, and ending on Dec. 31, 2028:

- Hon. Nicholas S. Ayoub (district court judge)
- Hon. Anica Letica (Court of Appeals judge)
- Hon. John D. Tomlinson (probate court judge)

Additionally, Magistrate Julie Nelson-Klein (quasi-judicial officer) is appointed for a first full term beginning on Jan. 1, 2025, and ending on Dec. 31, 2028.

Hon. Christoper M. Murray is reappointed as chair and Hon. Kathleen M. Brickley is reappointed as vice-chair of the Judicial Education Board for terms ending on Dec. 31, 2025.

ADM File No. 2024-01
Appointments to the Justice for All Commission

On order of the Court, pursuant to Administrative Order No. 2021-1, the following members are reappointed to the Justice for All Commission for full terms beginning on Jan. 1, 2025, and ending on Dec. 31, 2027:

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

- Nicole Huddleston (nonprofit local community organizations)
- Deborah Hughes (self-help centers)
- Bianca McQueen (public)
- Brittany Schultz (business community)
- Sandra Vanderhyde (court administrators/probate registers)
- Carmen Wargel (nonprofit local community organizations)
- Michelle Williams (education community)
- Lynda Zeller (health care community)

In addition, the following individuals are appointed to the Justice for All Commission for first full terms beginning on Jan. 1, 2025, and ending on Dec. 31, 2027:

- Thomas Howlett (State Bar of Michigan)
- Dan Hutchins (Michigan libraries)

Pursuant to Administrative Order 2021-1, the following individuals, or their designees, will serve by virtue of their role within their organization:

- Supreme Court Justice Brian K. Zahra
- State Court Administrator Thomas Boyd
- State Bar of Michigan Executive Director Peter Cunningham
- Michigan State Bar Foundation Executive Director Jennifer Bentley
- Michigan Legal Help Director Nora Ryan
- Michigan Indigent Defense Commission Director Kristen Staley

ADM File No. 2024-01 Appointments to the Commission on Well-Being in the Law

On order of the Court, pursuant to Administrative Order No. 2023-1, the following members are reappointed to the Commission on Well-Being in the Law for first full terms beginning on Jan. 1, 2025, and ending on Dec. 31, 2027:

- Ieisha Humphrey (University of Detroit Mercy Law School)
- Hon. Michael Jaconette (Michigan Probate Judges Association)
- Marla McCowan (Michigan Indigent Defense Commission)
- Steven Meerschaert (law student)
- Wendy Neeley (Attorney Discipline Board)
- Hon. Brock A. Swartzle (Michigan Court of Appeals)
- Tish Vincent (licensed mental health professional)
- Karissa Wallace (attorney, midsize firm)

In addition, the following individuals are appointed to the Commission on Well- Being in the Law for first full terms beginning on Jan. 1, 2025, and ending on Dec. 31, 2027:

- Kelly James-Jura (Michigan Probate and Juvenile Registers Association)
- Janey Lamar (Michigan Association of District Court Magistrates)
- Hon. Kathy Tocco (Michigan District Judges Association)

In addition, Shannon Topp (on behalf of the Michigan Court Administrators Association) is appointed for a partial term effective immediately and ending on Dec. 31, 2025.

Pursuant to Administrative Order No. 2023-1, the following individuals, or their designees, will serve by virtue of their role within their organization:

- Supreme Court Justice Megan K. Cavanagh
- State Bar of Michigan Lawyers and Judges Assistance Program Director Molly Ranns
- State Bar of Michigan Executive Director Peter Cunningham
- State Court Administrator designee Elizabeth Rios-Jones

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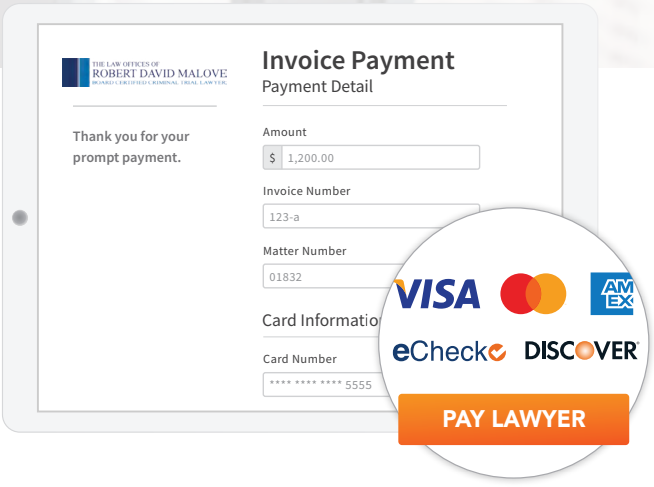

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LAWYERS & JUDGES ASSISTANCE
MEETING DIRECTORY

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

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

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

ALCOHOLICS ANONYMOUS & OTHER SUPPORT GROUPS

Bloomfield Hills
WEDNESDAY 6 PM*
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.)

SUNDAY 7 PM*
Virtual meeting, WOMEN ONLY
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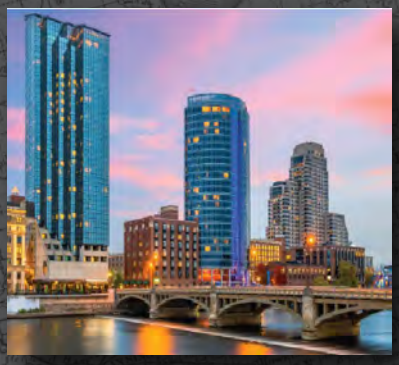

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