

The background of the cover is a scenic photograph of a city skyline across a body of water. On the left, there are green trees. In the center and right, several tall buildings are visible, including one with a construction crane on top. A bridge spans the water in the middle ground. The sky is blue with some light clouds. The text is overlaid on the top half of the image.

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JULY/AUGUST 2024

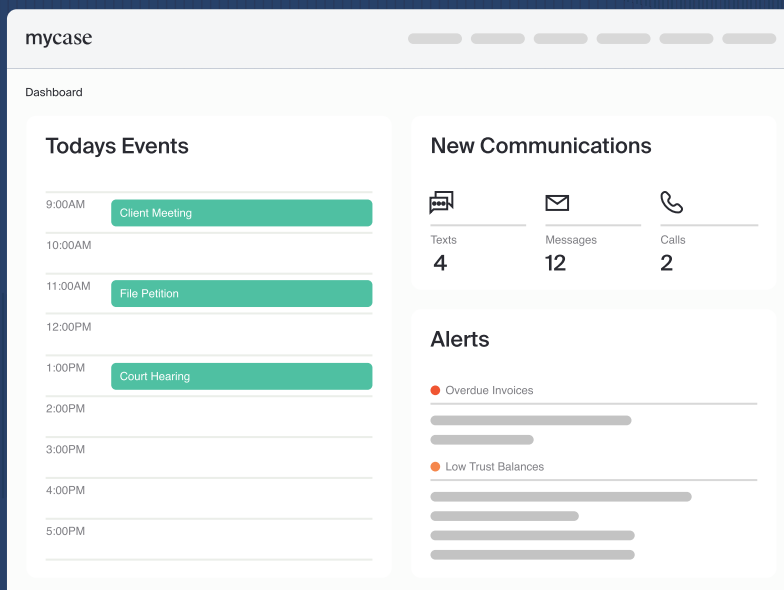
Business Law

- Litigating a business fraud case? Don't overlook the red flag defense
- Trial experts beware! Court's duties under newly amended FRE 702
- Succession planning and the approaching massive transfer of wealth
- Privacies of life in commercial e-discovery: Modern opinions on employers' duties to preserve evidence on employees' personal cellphones



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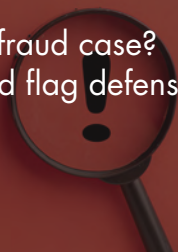
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BAR JOURNAL

JULY/AUGUST 2024 | VOL. 103 | NO. 07

16




Litigating a business fraud case?
Don't overlook the red flag defense
Jonathan B. Frank

20



Trial experts beware! Courts' duties under the newly amended FRE 702
Linda Watson and Magy Shenouda

24



Succession planning and the approaching massive transfer of wealth
Gerard V. Mantese and Ian Williamson

30



Privacies of life in commercial e-discovery
Paul A. McCarthy and Elizabeth M. Badovinac

OF INTEREST

- 10 IN MEMORIAM
- 10 NOTICE OF APPOINTMENT OF INTERIM ADMINISTRATOR
- 11 NEWS & MOVES
- 15 IN FOCUS: BUSINESS LAW
- 37 INTEREST RATE FOR MONEY JUDGMENTS
- 49 MSBF AWARD WINNERS

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JULY/AUGUST 2024 • VOL. 103 • NO. 07

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COLUMNS

12 FROM THE PRESIDENT

Wither law school and the bar exam?

Daniel D. Quick

34 PLAIN LANGUAGE

Readable contracts (Part 2)

Wayne Schiess

38 LIBRARIES AND LEGAL RESEARCH

Researching ADR in Michigan and beyond

Shay Elbaum

42 BEST PRACTICES

Check all the boxes when practicing election law

Christopher M. Trebilcock

46 ETHICAL PERSPECTIVE

Reviewing the obligation to report potential misconduct

Austin D. Blessing-Nelson

NOTICES

50 PUBLIC POLICY REPORT

52 ORDERS OF DISCIPLINE & DISABILITY

58 FROM THE MICHIGAN SUPREME COURT

62 CLASSIFIED

CORRECTION

In the June Michigan Bar Journal titled "Proposed Advancements in Mediation Practices: Placing Clients at the Center of Mediation" by Tom McNeill, an invitation to readers to share their ADR experiences, proposals, thoughts, comments, and ideas with a work group looking at the topic was inadvertently omitted.

The group asks readers to offer their feedback on ADR at [MediationEnhancements.com](https://www.MediationEnhancements.com).

The Michigan Bar Journal regrets the error.

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MCL 600.6013 governs how to calculate the interest on a money judgment in a Michigan state court. Interest is calculated at six-month intervals in January and July of each year from when the complaint was filed as is compounded annually.

For a complaint filed after Dec. 31, 1986, the rate as of July 1, 2024, is 4.359%. This rate includes the statutory 1%.

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

13% per year, compounded annually; or

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

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

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

DUTY TO REPORT AN ATTORNEY'S CRIMINAL CONVICTION

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

WHAT TO REPORT:

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

WHO MUST REPORT:

Notice must be given by all of the following:

1. The lawyer who was convicted;
2. The defense attorney who represented the lawyer; and
3. The prosecutor or other authority

WHEN TO REPORT:

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

WHERE TO REPORT:

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

Grievance Administrator

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

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333 W. Fort St., Suite 1700
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RECENTLY RELEASED

MICHIGAN LAND TITLE STANDARDS

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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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SEPTEMBER 19



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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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IN MEMORIAM

THOMAS A. BRUINSMA, P43791, of Grand Rapids, died April 24, 2024. He was born in 1952, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1990.

FRANCINE CULLARI, P34613, of Olympia, Washington, died June 4, 2024. She was born in 1947, graduated from Detroit College of Law, and was admitted to the Bar in 1982.

TIMOTHY THOMAS DOTY II, P75614, of Center Line, died May 19, 2024. He was born in 1965, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 2011.

JOHN L. ETTER, P13233, of Ann Arbor, died April 4, 2024. He was born in 1937, graduated from University of Michigan Law School, and was admitted to the Bar in 1961.

SUSAN S. FRIEDMAN, P31206, of Huntington Woods, died June 10, 2024. She was born in 1943, graduated from Wayne State University Law School, and was admitted to the Bar in 1980.

MELISSA ANN HALLACK, P73405, of Centreville, died May 30, 2024. She was born in 1979, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 2009.

KENNETH E. MARKS, P48021, of Lansing, died May 31, 2024. He was born in 1955, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1993.

CHARLES R. RUTHERFORD, P19784, of Grosse Pointe Park, died May 11, 2024. He was born in 1929, graduated from University of Detroit School of Law, and was admitted to the Bar in 1957.

THOMAS S. VAUGHN, P32007, of Detroit, died May 11, 2024. He was born in 1955 and was admitted to the Bar in 1980.

ANNE CLAIRE VAN ASH, P38913, of Grosse Pointe Park, died May 26, 2024. She was born in 1946, graduated from University of Detroit School of Law, and was admitted to the Bar in 1986.

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

LEGAL NOTICE

NOTICE OF APPOINTMENT OF INTERIM ADMINISTRATOR

The 6th Circuit Court has ordered that:

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

is hereby appointed Interim Administrator to serve on behalf of:

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

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

NEWS & MOVES

ARRIVALS AND PROMOTIONS

GABRIELLA HAVLICEK has joined the St. Joseph office of Berez & Associates.

KELLIE L. HOWARD and **DONALD C. CAMPBELL** have been elected as CEO and president, respectively, at Collins Einhorn Farrell in Southfield.

DEION A. KATHAWA has joined Varnum's Birmingham office.

JACQUELYN KMETZ has joined the Lansing office of Abdnour Weiker.

FRANK T. MAMAT, **DENNIS R. BOREN**, **ERIK G. BRADBERRY**, and **BRIAN K. MITZEL** have joined the Bloomfield Hills office of Plunkett Cooney.

RYAN C. MOLONEY has joined Collins Einhorn Farrell in Southfield.

ADAM OSTRANDER has joined the Kalamazoo office of Warner Norcross & Judd as an associate.

ANTHONY T. PIETI has joined Plunkett Cooney in Bloomfield Hills.

JOHN W. REES has joined Reising Ethington in Troy as a senior attorney.

PETER SCHINKAI has joined Conybeare Law Office in St. Joseph.

ANDREW SITTO has joined Kitch Attorneys & Counselors as an associate in its Mount Clemens office.

GREGORY A. STOUT has joined Plunkett Cooney as a member at its Columbus, Ohio, office.

JUSTIN WOLBER has joined Varnum's Grand Rapids office.

AWARDS AND HONORS

BERECZ AND ASSOCIATES was selected by the Moody on the Market website as one of the 2024 Best Places to Work in Southwest Michigan.

AARON BURRELL with Dickinson Wright in Detroit and Troy received the 2024 Trailblazer Award from the D. Augustus Straker Bar Association.

PHILLIP KOROVESIS with Butzel in Detroit received Leadership Oakland's Distinguished Alumni Award on May 16.

JEROME PESICK, a shareholder with Williams Williams Rattner & Plunkett in Birmingham, has been admitted to the American College of Real Estate Lawyers.

LEADERSHIP

Wayne County Circuit Court judge **HON. CHANDRA W. BAKER-ROBINSON** has joined the board of directors of the Wayne County Jail Outreach Ministry.

BENJAMIN M. GLAZEBROOK, a partner with Plunkett Cooney in Detroit, was elected to the board of directors of the Detroit Bar Association.

DAVID L.J.M. SKIDMORE, a partner with Warner Norcross & Judd in Grand Rapids, has been appointed chair of the board of directors for Broadway Grand Rapids.

VIC WEIPERT JR. of East Lansing has been appointed to the Michigan Board of Social Work by Gov. Gretchen Whitmer for a term ending in 2025.

OTHER

VARNUM has acquired **YOUNG, GARCIA & QUADROZZI**.

UPCOMING

The **ATTORNEY'S RESOURCE CONFERENCE** will be held from Wednesday, July 31-Friday, Aug. 2, at Treetops Resort in Gaylord.

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

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FROM THE PRESIDENT

DANIEL D. QUICK



Wither law school and the bar exam?

In the 1990s, free trade was all the rage. An interesting coalition of disparate interests coalesced to convince everyone that this was a good thing. It included academics (either doctrinaire laissez faire economists or those just looking to make a splash), well-intentioned do-gooders (who argued, among other things, that it would raise the standard of living in foreign countries while allowing nearly obsolete blue-collar workers in the U.S. to upgrade their credentials, their jobs, and their fortunes), and, of course, big business which, in spite of whatever words they spoke, were thinking with their wallets.

Decades later, the consensus is that most of the rosy predictions about free trade never happened for the average American. Of course, the issue is far more nuanced than this; trade, economics, and the passage of 30 years makes overgeneralizations foolish. But I revisit this history because some of those dynamics seem to be playing out in our own legal backyard.

We have all heard of the justice gap in this country, and it is definitely real — masses of people unable to afford legal representation effectively barred from accessing and fully participating in the justice system. Part of the reason this exists, and has gotten worse, is dramatic cuts to legal aid support. Another is that the cost of items deemed higher priorities — notably housing, education and health care — have increased astronomically; people are forced to decide where to spend their money and health and their children's futures beats lawyers. Another problem is on the attorneys' side; the cost of undergraduate and law school tuition has far outpaced inflation, leading more graduates to chase higher-paying jobs, often outside the state where they grew up.

Years ago, there was a significant push to limit or eliminate Model Rule of Professional Conduct 5.4, which bars non-attorney ownership of law firms. Pushed mostly by big businesses seeking access to the legal services industry, it was suggested that it would be good for law and make it more accessible. The effort failed, and rightly so.

A decade ago, the debate started anew. This time, in addition to big businesses like LegalZoom, others weighed in: academics looking to make a splash (one does not get published defending the status quo) and well-intentioned access to justice advocates figuring that any help is better than no help — even if it means abandoning the traditional foundations of the profession. Again, the efforts largely failed, although some states (notably Utah and Arizona) launched “sandboxes” for regulatory reform. Despite some optimism from advocates and academics, there is still precious little proof that these reforms actually reach the population most in need or that any alternative business model is sustainable.

Here in Michigan, many stakeholders — from the Supreme Court to your Bar — are devoting tens of thousands of hours to improving our system and crafting new solutions. This includes increasing access for pro se citizens in high-need areas like landlord-tenant or veterans' care, making our courthouses more accessible and user-friendly, and revising court forms to reflect plain English. This effort also includes pilot programs endorsed by the Justice for All Commission that expand the ability of paralegals and associated professionals to help clients navigate the legal system.¹ And, of course, we are pushing for increased legal aid spending and greater donations of time and treasure by our attorneys, whether to pro

The views expressed in From the President, as well as other expressions of opinions published in the Bar Journal from time to time, do not necessarily state or reflect the official position of the State Bar of Michigan, nor does their publication constitute an endorsement of the views expressed. They are the opinions of the authors and are intended not to end discussion, but to stimulate thought about significant issues affecting the legal profession, the making of laws, and the adjudication of disputes.

bono services or contributing a minimum of \$300 annually to the Michigan State Bar Foundation Access to Justice Fund.

There are others pushing more dramatic proposals. Some of the same groups which previously pushed for deregulation of the practice of law now want to dramatically change the definition of what it means to be a lawyer. In their sights are two pillars of traditional attorney practice: law school and the bar examination. One leader in the deregulation push now advocates, for example, that law schools should eliminate all written exams.² The American Bar Association Legal Education Section council (currently chaired by former Michigan Supreme Court Justice Bridget McCormack) also recently voted to continue the push for accreditation of fully online law schools.³

These same groups advocate for alternatives to the bar examination, something that has caught on in Oregon⁴ and Washington.⁵ The ABA Legal Education Section council has urged states to “create diverse pathways to licensure.”⁶ Yet some resist. As reported recently regarding reform efforts in California:

Consumer Attorneys of California CEO Nancy Drabble addressed the topic ... at the organization’s annual convention in San Francisco[.] She noted that other states are also engaged in similar efforts to find an alternative to the test.

“There is a movement in other parts of the country, primarily being spearheaded by academics, who say the way to improve access to justice is to have these people who are not lawyers and may not even be human beings, it’s going to be an app providing legal services,” Drabble said. “We in California so far have been successful in derailing this.”⁷

Notably, most of these proposals reinforce law schools’ role in the process (as supervisor of clinical programs, for example) while failing to address how any standard at all will actually exist as to the quality of the “diverse” experiences purportedly standing in for the bar exam or who will enforce it.⁸ Indeed, this is all a bit of “dépà vu all over again,” since it is a return to a patchwork of quasi-requirements administered locally with little promise of rigor, which is what we had prior to widespread adoption of the bar exam.⁹ The bar exam has its conceptual defenders¹⁰ but any Google search will lead you to a lot of academic literature advocating for abolition.

A number of factors contribute to the vexing nature of these issues. First among them is the dire need for more attorneys serving the less affluent among us and greater access to the legal system for citizens. But law schools (let alone undergraduate institutions) aren’t interested in reducing tuition and, even if they did, the availability of higher paying jobs will always drive attorneys away from public interest. So adjusting the system to let a lot more lawyers in the door doesn’t necessarily correlate to addressing the most pressing needs.

Moreover, while academics hypothesize about alleged benefits of tearing down these institutions — not unlike when they advocated for tearing down MPRC 5.4 — they do so without any evidence of either benefits or the scope of (intended or unintended) harm.

Perhaps the most infuriating aspect of this debate is that whenever lawyers speak up in opposition, they are pilloried as trade union protectionists looking out for their own skin. Perhaps, on the contrary, it is attorneys who know precisely the value of these institutions and foundations for practice and know the mischief that can ensue when standards are lowered. Not all barriers to entry are unfair, nor is it just about creating obstacles. While undoubtedly flawed and subject to improvement, rigorous academic training and basic skills competency matter, just as they do in any other profession. And the value goes far beyond skills. If the law wants to continue as a profession with obligations beyond those to ourselves, that foundation has to come from somewhere. Law school and the bar exam both contribute to that, although obviously not guaranteeing it.

None of this is to say that reform or even abolition of the bar exam is not the right answer. But this is pushback on the frankly disrespectful way many of the so-called reformers treat these venerable institutions and those who find some merit in them. And it is a plea that as the push for change continues, those who live in the real world — that’s you, my fellow attorneys — think deeply about these questions and contribute your voice. As the famous quote goes, hope is not a plan. Any alternatives need to be based upon more than frustration with the status quo and the hope that something else will work. It must be rigorously tested and deeply considered. Our pledge to protect the public, as well as our judicial system, requires nothing less.

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1. Michigan Courts, *Michigan Justice for All Commission: Report and Recommendations on Increased Access to Justice Through Paralegal and Associated Professionals Pilot Programs* <<https://www.courts.michigan.gov/4928c8/siteassets/reports/special-initiatives/justice-for-all/final-regulatory-reform-non-attorney-report.pdf>> [perma.cc/KG4T-V89W] (all websites accessed June 20, 2024).
2. University of Denver Institute for the Advancement of the American Legal System, *Building a Better Bar: Capturing Minimum Competence* <<https://iaals.du.edu/projects/building-better-bar-capturing-minimum-competence>> [perma.cc/Z73G-PGKX].
3. ABAJournal.com, *Journey toward fully online law schools inches forward after ABA Legal Ed council vote* <https://www.abajournal.com/web/article/journey-toward-fully-online-law-schools-inches-forward-after-aba-council-vote?utm_source=sfmc&utm_medium=email&utm_campaign=monthly_email&promo=&utm_id=852995&sfmc_id=45514986#google_vignette> [perma.cc/TL4A-PW7W] (posted May 20, 2024).
4. Reuters, *No bar exam required to practice law in Oregon starting next year* <<https://www.reuters.com/legal/government/no-bar-exam-required-practice-law-oregon-starting-next-year-2023-11-07/>> (posted November 7, 2023).
5. Reuters, *Washington adopts new lawyer licensing paths as other states mull bar exam bypasses* <<https://www.reuters.com/legal/government/washington-adopts-new-lawyer-licensing-paths-other-states-mull-bar-exam-bypasses-2024-03-18/>> (posted March 18, 2024).

6. Reuters, *Bar exam alternatives, long out of favor with ABA, make inroads* <<https://www.reuters.com/legal/government/bar-exam-alternatives-long-out-favor-with-aba-make-inroads-2024-05-09/>> (posted May 9, 2024).

7. Daily Journal, *State Bar sends Supreme Court another unpopular alternative to exam* <<https://www.dailyjournal.com/articles/375827-state-bar-sends-supreme-court-another-unpopular-alternative-to-exam>> [perma.cc/GZX7-4UPP] (posted November 20, 2023).

8. Michigan already took a partial step down this path when it eliminated the Michigan component of the bar exam and instead simply asks applicants to watch some basic videos. See amendments to BLE 2, 3, 4, 5, 6, and 7 and additions of BLE 3a and 4a. <https://www.courts.michigan.gov/4902eb/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/adopted-orders/2019-34_2021-10-13_formattedorder_adoptionube.pdf> [https://perma.cc/QB5R-AF9R] (posted October 13, 2021).

9. For a brief and neutral history of the bar exam, see Sarah Friedman, Library of Congress Blogs, *The History of the U.S. Bar Exam* <<https://blogs.loc.gov/law/2024/02/the-history-of-the-u-s-bar-exam-part-i-the-laws-gatekeeper/>> [perma.cc/JP6K-XZMT] (posted February 13, 2024).

10. Suzanne Darrow-Kleinhaus, The Bar Examiner, *A Response to Criticism of the Bar Exam* <<https://thebarexaminer.ncbex.org/wp-content/uploads/PDFs/740205-darrowkleinhaus-1.pdf>> [perma.cc/F8A9-CGXN]; Thomas N. Wheatley, Bloomberg Law, *The Bar Exam is 'Monster of a Test,' But Worth Keeping* <<https://news.bloomberglaw.com/us-law-week/the-bar-exam-is-monster-of-a-test-but-worth-keeping>> [perma.cc/H2AA-MNUM] (posted September 24, 2020); Peter Kalis and Michael Kalis, National Law Journal, *Like Father Like Son, Bar-Exam Ritual Is a Necessity of the Profession* <https://marketingstoragerags.blob.core.windows.net/webfiles/Kalis_Like_father_like_son.pdf> [perma.cc/X9MM-P5S7] (posted May 11, 2015).

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IN FOCUS

BUSINESS LAW: THE RIPPLE EFFECTS OF OUR WORK

BY GERARD V. MANTESE

In "A Christmas Carol," Charles Dickens wrote:

"Business!" cried the Ghost, wringing its hands again. "Mankind was my business. The common welfare was my business; charity, mercy, forbearance, and benevolence, were all my business. The dealings of my trade were but a drop of water in the comprehensive ocean of my business!"

Business attorneys are invited to the front row of the high-stakes drama of commerce and relationships. Consider all the people we affect as business attorneys — owners, employees, vendors, customers, and beyond. We get involved in the very dreams of women and men.

Case law on business litigation and transactions is generated at a rapid pace, and the daily checking of the eJournal for business law decisions is necessary to stay abreast of developments in the law and not be left behind. Mastery of the Business Corporations Act and the Limited Liability Act is also essential. Practicing business law without reading both acts every few years is like playing a complicated card game with only a vague recollection of the rules.

In the following pages, several authors discuss important ideas and perspectives on four areas critical to business attorneys:

- Jon Frank provides an excellent discussion about claims of business fraud and the nuanced red flag defense.
- Linda Watson and Magy Shenouda write on a hot topic — changes to FRE 702 and the increasing number of challenges of experts in business litigation.
- In our article on succession planning, Ian Williamson and I explain how businesses can effectively plan for future growth and changes in control.
- Finally, Paul McCarthy and Elizabeth Badovinac describe nuances of important e-discovery considerations.

Business attorneys are problem solvers, strategic planners, and champions for their clients. I hope these articles help you in your endeavors. Enjoy!



Gerard Mantese has a national practice in business law at Mantese Honigman focusing on shareholder and member disputes, where he has handled leading cases in many states. A former adjunct professor at Wayne State University School of Law, he is co-chair of the LLC and Partnership Committee of the SBM Business Law Section. A graduate of the University of Missouri-St. Louis and St. Louis University School of Law, Mantese's firm recently opened a new office in St. Louis.



LITIGATING A BUSINESS FRAUD CASE?

Don't overlook the red flag defense

BY JONATHAN B. FRANK

A potential client comes to you complaining about a business deal gone awry. In heated, likely scandalous terms, the potential client airs a grievance about being lied to, cheated, and generally taken advantage of.

It's a compelling story. But is it fraud?

Business deals that don't work out may lead to tremendous — and even financially ruinous — consequences. A buyer of a business may find it to be far less profitable than expected. A buyer of real or personal property may find its condition to be surprisingly poor. A contracting party may find its counterpart's performance lacking, perhaps part of a well-planned scheme.

But that doesn't mean there was fraud.

According to Michigan courts, unhappy investors or buyers — especially those sophisticated enough to be engaging in

business transactions — bear significant responsibility for their post-transaction circumstances. This article focuses on the recently published case of *DBD Kazoo, LLC v. Western Michigan, LLC*, the reliance element of a fraud claim, and the red flag defense.¹

BASIC ELEMENTS OF A BUSINESS FRAUD CASE

A plaintiff in a fraud case has to prove:

1. the defendant made a representation that was material,
2. the representation was false,
3. the defendant knew the representation was false or the defendant's representation was made recklessly without any knowledge of the potential truth,
4. the defendant made the representation with the intention that the plaintiff would act on it,
5. the plaintiff actually acted in reliance, and
6. the plaintiff suffered an injury as a result.²



The burden of proof is high. To prevail on a fraud claim, a plaintiff must first plead the claim with particularity and prove each element by clear and convincing evidence.³ Clear and convincing evidence is defined as evidence that produces “a firm belief or conviction as to the truth of the allegations sought to be established.”⁴ To put it colloquially, the defendant will likely get the benefit of the doubt.

WAS THERE A REPRESENTATION?

The first element of a business fraud case seems clear, but it presents a formidable hurdle: there must be a representation, or some statement of fact.⁵ Promises regarding the future are generally contractual and will not support a fraud claim.⁶ While a plaintiff may claim to have been misled by a promise of future action, such a promise only supports a fraud claim when made recklessly and/or without a present intent to perform.⁷ If there are material misrepresentations of future conduct, a plaintiff may be entitled to rescission.⁸ Counsel must therefore identify both facts and promises and apply the appropriate standard to each.

In addition, counsel should evaluate the possibility of a silent fraud claim. The focus here is whether the client inquired about certain facts and received an incomplete response, indicating suppression of the truth.⁹ These circumstances could give rise to a claim for silent fraud since the inquiry or contract places a duty on the responding party to disclose the complete truth.

In *DC Mex Holdings, LLC v. Affordable Land, LLC*, for example, the state Court of Appeals affirmed a silent fraud judgment.¹⁰ The case involved a real estate development project in Mexico in which the defendant had made a side deal to settle litigation in Mexico related to the project but failed to reveal this deal to his partner (the plaintiff), who specifically asked about it. As a result, the plaintiff lost an opportunity to salvage the project. In support of its decision, the court focused on the duty to disclose created by the direct inquiry.

WAS THE REPRESENTATION FALSE?

Even if there is a misrepresentation or material omission, it must be knowingly false or reckless when made and not just mistaken.¹¹ To prove recklessness in the context of fraud, a plaintiff must prove the “functional equivalent of willfulness” by showing an indifference to whether harm will result as the equivalent of a willingness that harm will result.¹²

DID THE PLAINTIFF JUSTIFIABLY RELY — OR WAS THERE A RED FLAG?

Establishing a false representation may seem sufficient to file a fraud claim, but perhaps the most challenging element is proving that the plaintiff acted in reliance.¹³ The reason is simple: most business deals involve significant due diligence. Focusing on the purpose and scale of typical precontract investigations, Michigan cases provide an in-depth analysis of the reliance element.

The Michigan Court of Appeals most recently addressed the issue in *DBD Kazoo, LLC v. Western Michigan, LLC*.¹⁴ The facts are complicated, but the key fact is that the plaintiff (standing in the shoes of the lender as its assignee) alleged that the defendants provided false information and representations to the borrower/purchaser regarding the property's physical and financial condition, thereby inducing the borrower/purchaser to purchase the property and also inducing the lender to make a nearly \$20 million loan. The plaintiff sued for fraud.¹⁵

The lower court granted summary disposition to the defendants in part because there was no genuine issue of material fact about the reliance element, and the Court of Appeals affirmed. After reviewing the elements of a fraud claim, the court summarized the current state of the law in this area thusly:¹⁶

- Parties do not have an independent duty to investigate and corroborate representations unless they were presented with some information or affirmative indication that further investigation was necessary. For the purposes of this article, this will be called a "red flag."¹⁷
- "A plaintiff cannot claim to have been defrauded where he had information available to him that he chose to ignore."¹⁸
- There is no fraud where means of knowledge are open to the plaintiff and the degree of their utilization is circumscribed in no respect by defendant.

The court rejected the plaintiff's argument that it could rely on alleged oral misrepresentations and disregard the information it possessed that contradicted those misrepresentations. Instead, it pointed to the following evidence in the record:

1. the sellers provided routine financial documentation that accurately described tenant delinquencies and bad debt — there was no evidence the sellers cooked the books. This was a red flag;
2. the lender was able to inspect the physical condition of the property and received inspection reports, another red flag;
3. the lender obtained all information it requested to underwrite the loan;
4. the purchase agreements did not contain any warranties regarding the physical condition of the property;
5. the purchase agreement contained a merger clause;¹⁹ and
6. the loan documents did not require any specific performance metrics.

As a result, the court concluded that even if there were oral misrepresentations by the seller or its agents, the lender had accurate information in its possession before it closed the loan, contradicting the alleged misrepresentations — the lender saw a red flag and had "the unimpeded ability to know the truth but chose to ignore it."²⁰ Therefore, as a matter of law, the lender could not reasonably rely on any alleged misrepresentations by defendants.

The Court of Appeals just applied *DBD Kazoo* in *2701 Dettman, LLC v. RIGTV, LLC* to dismiss a fraud claim based on failure to prove the reliance element.²¹ The plaintiff bought commercial property from the defendant and was authorized under the purchase agreement to inspect the property as part of its due diligence. The plaintiff alleged that when it questioned the defendant prior to closing about a payment due to the defendant's tenant, the defendant misrepresented that the payment had been made. However, when the plaintiff followed up and asked for written confirmation, the defendant did not respond. In fact, the defendant had not made the payment; after closing, the tenant contacted the plaintiff demanding the payment, leading to the fraud claim. Citing *DBD Kazoo*, the court held that the plaintiff was on notice that additional investigation was required — there was a red flag. By contacting the tenant directly, the plaintiff would have learned the truth. As a result, the plaintiff could not establish that it reasonably relied on the alleged misrepresentation.

The Court of Appeals reached a similar result in *Nino Salvaggio Investment Co Ltd v. Beaumont Hospital, Inc.*,²² affirming a lower court's dismissal of a fraud claim because the plaintiff could not have reasonably relied on the alleged misrepresentations. Certain allegedly false statements were inconsistent with express written statements, while others were contrary to known facts.

On the other hand, the Court of Appeals affirmed a jury verdict for silent fraud in *Alfieri v. Bertorelli*.²³ After discussing the general rules regarding reliance set forth above, the court concluded that the plaintiff had not been presented with any information that would have led him to believe additional inquiry was needed — there was no red flag.

Given the centrality of the reliance element and the red flag analysis, counsel for a client evaluating a potential business fraud case must take great care to assemble all information provided to the client before the transaction was consummated, review the relevant contracts for express representations, and evaluate the scope of a merger clause if there is one. Close attention should be paid to any potential red flags disclosed, especially ones relating to allegedly false representations or omissions. Even if the red flags were embedded in voluminous due-diligence documents, Michigan courts applying the analysis in *DBD Kazoo* will hold that the buyer should have noted them and followed up with additional investigation if necessary.

WAS THERE A SEPARATE LEGAL DUTY?

In addition to evaluating each element of a fraud claim, there is one more important obstacle to consider: whether the alleged claim simply restates the failure to perform a contractual duty. Parties to a contract generally cannot sue in tort over relationships governed by contract.²⁴ The "threshold inquiry is whether the plaintiff alleges violation of a legal duty separate and distinct from the contractual obligation."^{25,26}

In *MD Holdings LLC v. RL Deppman Co*, the Court of Appeals affirmed summary disposition of a fraud claim.²⁷ After purchasing commercial real estate from the defendant, the plaintiffs had difficulty getting an occupancy permit for the premises, primarily because the physical state of the property did not match the approved site plan with the city. The differences were attributable to improvements previously made without getting permits or approvals from the City of Southfield.

Rejecting the fraud claim, the court held that the alleged misrepresentations were not extraneous to the defendant's contractual promises. Rather, the subject matter of the misrepresentations was covered in the contractual warranties. The court also rejected the plaintiff's silent fraud claim, holding that there was no duty independent from the contract to disclose. When fiduciaries are involved, however, courts may find an independent duty to disclose.

IS AN INDIVIDUAL LIABLE?

Finally, a word about individual liability for corporate action. An individual is liable for corporate torts they personally commit or participate in.²⁸ Therefore, when representing a potential plaintiff, counsel should fully investigate the identity of the individual(s) responsible for making misrepresentations or concealing material facts despite a duty to disclose them. Although adding an individual party may not have practical significance if the corporate entity is collectible, the dynamics of the litigation will nonetheless change if individual decision-makers must face their own potential liability. On the defense side, representing an individual defendant will certainly involve an effort to distance the individual from the allegedly fraudulent activity.

CONCLUSION

Proving business fraud is difficult. It should be. Damages for fraud can be significant; they may also be nondischargeable in bankruptcy.²⁹ Therefore, counsel litigating a business fraud case must carefully examine how the specific facts match the elements as described by Michigan courts, with special attention paid to the reliance element and the existence of red flags that would have put the plaintiff on notice to investigate further



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ENDNOTES

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2. *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012).
3. *MCR 2.112(B)(1)*; *Flynn v Korneffel*, 451 Mich 186, 199; 547 NW2d 249 (1996).
4. *Kefgen v Davidson*, 241 Mich App 611, 625; 617 NW2d 351 (2000) (citation and quotation marks omitted).
5. *M & D, Inc v McConkey*, 231 Mich App 22; 585 NW2d 33 (1998).
6. *Cummins v Robinson Twp*, 283 Mich App 677, 696; 770 NW2d 421 (2009).
7. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).
8. *Custom Data Solutions, Inc v Preferred Capital, Inc*, 274 Mich App 239, 242-243; 733 NW2d 102 (2006) ("Fraud in the inducement to enter a contract renders the contract voidable at the option of the defrauded party . . .").
9. *Lucas v Awaad*, 299 Mich App 345, 363-364; 830 NW2d 141 (2013).
10. *DC Mex Holdings, LLC v Affordable Land, LLC*, unpublished per curiam opinion of the Court of Appeals, issued May 05, 2015 (Docket No. 318791).
11. See *Coosard v Tarrant*, 342 Mich App 620; 995 NW2d 877 (2022) (summary disposition for defendant affirmed where defendant did not knowingly lie, even though the representation was incorrect).
12. *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 443; 683 NW2d 171 (2004), rev'd on other grounds 472 Mich 192 (2005).
13. This article will not address the fourth element, since proving elements one through three generally proves element four.
14. *DBD Kazoo, LLC*, *supra* n 1.
15. The plaintiff also sued for negligent misrepresentation. This theory of relief is a means for holding a party liable for the negligent performance of a contract to third parties who are foreseeably injured by the negligent performance. See *Williams v Polgar*, 391 Mich 6, 20-23, 215 NW2d 149 (1974). In a negligent misrepresentation case, a plaintiff who was given evidence that information was unreliable cannot, nonetheless, reasonably rely upon it. See *Fejedelem v Kasco*, 269 Mich App 499, 503-504; 711 NW2d 436 (2006) (reliance on unaudited financial statements).
16. The court also addressed an agency issue not relevant for this article. It found that statements made by the seller's management company were not binding on the seller because the management company did not have actual or apparent authority.
17. This phrase appears in *JPMorgan Chase Bank, NA v Orca Assets GP, LLC*, 546 SW3d 648, 653 (Tex 2018), and subsequent cases decided under Texas law. Although no Michigan court has used the term, the *Titan* Court overruled an earlier Court of Appeals decision holding that a fraud claim could be barred if the plaintiff "had some other indication that further inquiry was needed." As a result of rejecting the "some other indication" standard, the focus is only on whether the plaintiff was "presented with information" requiring it to investigate — the "red flag." The Court of Appeals recently drew a distinction between whether it would have been prudent for a plaintiff to gather information and whether the plaintiff needed to gather information. *Coosard v Tarrant*, 342 Mich App 620; 995 NW2d 877 (2022) (emphasis in original).
18. *DBD Kazoo, LLC*, *supra* n 1 at 9, citing *Nieves v Bell Indus, Inc*, 204 Mich App 459, 465; 517 NW2d 235 (1994).
19. "Fraud that relates solely to an oral agreement that was nullified by a valid merger clause would have no effect on the validity of the contract. Thus, when a contract contains a valid merger clause, the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself, i.e., fraud relating to the merger clause or fraud that invalidates the entire contract including the merger clause." *Barclae v Zarb*, 300 Mich App 455, 480; 834 NW2d 100 (2013).
20. *DBD Kazoo, LLC*, *supra* n 1 at 12.
21. *2701 Dettman, LLC v RIGTV, LLC*, unpublished per curiam opinion of the Court of Appeals, issued June 13, 2024 (Docket Nos. 364495; 365842).
22. *Nino Salvaggio Investment Co Ltd v Beaumont Hospital, Inc*, unpublished per curiam opinion of the Court of Appeals, issued August 03, 2023 (Docket No. 362212).
23. *Alfieri v Bertorelli*, 295 Mich App 189; 813 NW2d 772 (2012).
24. *Hart v Ludwig*, 347 Mich 559, 563; 79 NW2d 895 (1956) ("As a general rule, there must be some active negligence or misfeasance to support a tort. There must be some breach of duty distinct from breach of contract."); see also *In re Bradley Estate*, 494 Mich 367, 381; 835 NW2d 545 (2013).
25. *Rinaldo's Constr Corp v Mich Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647 (1997).
26. The Court of Appeals explained in *MD Holdings, LLC v R L Deppman Co*, unpublished per curiam opinion of the Court of Appeals, issued October 27, 2022 (Docket No. 357462), p 9, that this doctrine is distinct from the "economic loss" doctrine applicable to UCC cases.
27. *Id.* at 16.
28. *Dept of Agriculture v Appletree Marketing, LLC*, 485 Mich 1; 779 NW2d 237 (2010); *Elezovic v Bennett*, 274 Mich App 1; 731 NW2d 452 (2007).
29. 11 USC §523(a)(2); *Bartenwerfer v Buckley*, 598 US 69; 143 S Ct 665; 214 L Ed 2d 434 (2023).



Trial experts beware! Courts' duties under the newly amended FRE 702

BY LINDA WATSON AND MAGY SHENOUDA

Experts at trial can make or break a case. However, not all expert testimony is admissible. Expert testimony must meet the guidelines imposed by Federal Rule of Evidence 702 to be admissible at trial. It is the federal judge's gatekeeping role to employ the guidelines to assess the admissibility of expert witness testimony.

Effective Dec. 1, 2023, FRE 702 was amended due to a growing concern that some federal judges were allowing unreliable expert testimony to be admitted mostly because they were not properly applying the guidelines.¹ In that regard, the amendment was portrayed not as a change but simply a clarification. In the months since it took effect, the rule's impact has been immediate.

Notably, appellate and trial courts are paying close attention to the amended rule and citing it in opinions, which likely means it

is serving its purpose — uniform application of the admissibility requirements of FRE 702 when expert testimony is challenged. This article looks at the impact of the amendment on federal appellate and trial courts and provides tips and tools for practitioners as they encounter it in practice.

FRE 702 HISTORY

In 1975, Congress issued the Federal Rules of Evidence to provide a standard for the use of expert witness testimony. In 1993, the U.S. Supreme Court granted certiorari in *Daubert v. Merrell Dow Pharmaceuticals* and addressed whether expert evidence and testimony should be generally accepted or meet some other set of requirements.² In *Daubert*, the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony and set forth a non-exclusive

checklist for trial courts to use in assessing the reliability of scientific testimony.

Later, in *Kumho Tire Co. v. Carmichael*,³ the Court “clarified that this gatekeeper function applied to all expert testimony, not just testimony based on science.”⁴ Over the last 20 years, despite a 2000 amendment to codify guidelines set forth in *Daubert* and *Kumho Tire*, there has been a growing concern that FRE 702 has not been properly administered by some federal judges, enough to warrant the 2023 amendment.

AMENDED FRE 702

Last year, FRE 702 was amended in two ways. First, it was changed to make clear that the preponderance of evidence standard applies to the assessment of whether expert witness testimony meets the admissibility requirements of FRE 702.⁵ Second, the rule was amended to clarify to trial courts that expert opinions must be reliable to be admissible. In other words, trial courts must assess whether the opinion is “within the bounds of what can be concluded from a reliable application of the expert’s basis and methodology.”⁶ Trial courts cannot simply let the jury determine if expert testimony is reliable, which was what was happening in some cases.

Whether these changes will correct the misapplication of the rule by trial courts will take time to assess. Likewise, whether the amendment will lead to unintended increased scrutiny of expert witnesses will also be borne out over time. In the months since the rule took effect, appellate and trial courts — as well as attorneys — are most certainly paying attention to it.

AMENDED FRE 702’S IMMEDIATE IMPACT

Scrutiny of Pre-Amendment *Daubert* decisions

Since the amendments took effect, appellate courts have been reviewing trial courts’ *Daubert* rulings with added emphasis on whether the correct standard was used to ascertain the admissibility of expert testimony and the reliability of methods used by the expert. In *re Onglyza and Kombiglyze Products Liability Litigation* is a multidistrict class action litigation alleging that certain diabetes drugs can cause heart failure.⁷ With the amendments to FRE 702 at the forefront of its analysis, the U.S. Sixth Circuit Court of Appeals examined whether the trial court correctly excluded testimony of the plaintiffs’ proffered expert. The plaintiffs’ expert concluded that a causal link existed between the drug and heart failure and relied on only one study which did not find causation, but a statistical significance. The trial court found the expert testimony unreliable because it simply inferred a causal link without pointing to studies of causation. The court also criticized the expert’s cherry-picking of some of the factors of causation instead of addressing and applying all of the factors, which is the industry standard. The trial court also found the expert’s use of animal data unreliable due to his inexperience in interpreting it. The plaintiff’s attorney appealed the trial court ruling excluding the testimony. The court of appeals affirmed,

finding that the trial court correctly applied FRE 702 as amended by examining the expert’s methodologies to conclude that his testimony did not meet the preponderance of evidence standard.

Some trial courts, perhaps with their eyes on potential appellate review, have even begun to rethink their own previous *Daubert* rulings and have called for a do-over of *Daubert* motions and hearings.

One of the most notable cases impacted by the amended FRE 702 is the *Johnson & Johnson* talcum powder multi-district litigation, which began in 2016 and has grown to involve around 53,000 plaintiffs.⁸ The court agreed to bifurcate the case to focus on the causation element first since resolving that element could mean dismissal. The parties spent more than a year engaging in expert discovery and submitted thousands of pages in *Daubert* briefs followed by an eight-day *Daubert* hearing. The court then issued its 141-page opinion in April 2020 in which it dove into the *Daubert* factors and ultimately decided to preclude some of the proffered experts from testifying regarding certain issues.⁹

In her *Daubert* opinion, Chief Judge Freda L. Wolfson, who has since retired from the federal bench, did a deep dive into the experts, their backgrounds, reports, and testimonies and did not shy away from weighing the evidence each of them offered. Although the court cited the correct standard that “[t]he proponent bears the burden of establishing admissibility by a preponderance of the evidence,” the court went on to apply that standard to the weight of the evidence rather than the admissibility of the expert testimony.¹⁰ For example, the court held that one of the plaintiffs’ experts was not permitted to testify as to whether there is a causal link between use of talcum powder and ovarian cancer.¹¹ In reaching this conclusion, the court examined in detail the expert’s in vitro study and compared it to his deposition testimony, finding it to be “damning to his own conclusion.”¹² In other words, the court rendered the expert’s testimony unreliable by impeaching him using his deposition.

The case proceeded through its natural trajectory and the parties’ experts either provided new reports or amended their original ones based on the court’s *Daubert* opinion — that is, until March 27, 2024, when the court issued a text-only order directing “a full re-filing of *Daubert* motions [due to] recent changes to Federal Rule of Evidence 702, the emergence of new relevant science, and the language of Chief Judge Wolfson’s previous *Daubert* opinion.”

In another case, *Coblin v. Depuy Orthopaedics, Inc.*,¹³ the trial court cited the amendment to FRE 702 and allowed the plaintiff’s expert to revise his report for another round of *Daubert* motions. Specifically, the expert, a pathologist, failed to address any of the defendants’ alternate cause of death theories in his report. Relying on Sixth Circuit precedent, the trial court held that while an expert need not address every other conceivable cause of death, he or she must fulfill the rule-out requirement by providing “a reasonable

explanation as to why ‘he or she has concluded that any alternative cause suggested by the defense was not the sole cause.’”¹⁴ These cases suggest that trial courts may, for some short period of time, allow litigants the opportunity to correct or supplement flawed expert reports or findings proffered pre-amendment.

Trial Court Application

In addition to reviewing their previous *Daubert* decisions, trial courts are increasingly making note of the amendments in their new *Daubert* decisions and analyzing whether a party’s challenges go to weight versus admissibility with a more critical lens. Rather than just mentioning the amendment to the rule in the legal standard section of their opinions, courts appear to be paying closer attention to the expert’s methodologies and are careful of slipping into the rabbit hole of weighing evidence on the jury’s behalf.

In *CSX Transportation, Inc v. Zayo Group, LLC*, the trial court interpreted the amendments to impose an additional task of ensuring that “the proponent has made the requisite showing under the ‘more likely than not’ standard.”¹⁵ Using the preponderance of the evidence standard, the *CSX Transportation* court concluded that the plaintiff failed to show its expert was more likely than not to meet the reliability requirements under 702.¹⁶ In addition to examining the methods used by the proposed expert, the court looked at whether the proposed expert used reliable information and was critical of his failure to apply industry standards to reach his conclusion or provide evidence to support his opinion.¹⁷ The expert in this case had access to various materials exchanged in discovery “and a reliable methodology would have consisted of using that information” to reach his conclusion.¹⁸ However, without citing to any evidence, the expert’s conclusions were deemed mere speculations and baseless assumptions.¹⁹ Thus, the expert’s testimony did not meet the preponderance of evidence standard of admissibility.

Despite the clarification the amended FRE 702 provides, some litigants continue to take a “kitchen sink” approach to their *Daubert* challenges and attack the weight of the expert’s testimony rather than its admissibility. Litigants defending against *Daubert* challenges should be careful of these tactics, as they can be used to try to confuse the court into conflating weight and admissibility.

In *Maney et al v. Oregon et al*, the defendants argued that the plaintiffs’ expert had “reviewed an insufficient subset of discovery provided by counsel, skimmed some documents, did not review other relevant documents, and failed to conduct an independent investigation,” and therefore, his testimony was inadmissible.²⁰ Citing the FRE 702 amendment and finding the expert had “reviewed a significant number of documents in forming his opinion and adequately identified the documents upon which he relied,” the trial court disagreed and refused to exclude his testimony merely because he reviewed only a subset of the discovery conducted.²¹ The court further concluded that the defendants’ challenges “go to the

weight of his opinion, not its admissibility” and, therefore, were not grounds for exclusion under FRE 702.

In May, the U.S. District Court for the Eastern District of Michigan issued the first of a series of opinions regarding the admissibility of expert testimony in the *Bellwether III* case involving the Flint water crisis.²² The court highlighted that the preponderance of proof standard applies to whether the expert meets the FRE 702 factors, not to the weight of the proffered testimony. The court then dissected the defendants’ objections and compared them to the expert’s proffered testimony and isolated any credibility-based objections that were more appropriately addressed via cross examination rather than a *Daubert* challenge.

Similarly, in *AFT Michigan v. Project Veritas*, the U.S. District Court for the Eastern District of Michigan rejected a challenge to a damages expert where the defendants asserted the expert’s opinion was “unreliable and inadmissible” because it was based on estimated figures rather than accurate numbers.²³ The court determined that although the figures were technically estimates, they were reliable under the circumstances because accurate numbers were not available. The court opined that the “proper method for [d]efendants to challenge that opinion is to identify for the jury the facts and circumstances that undermine their probable amount” and that the opinion was not considered unreliable under FRE 702.

PRACTICE TIPS AND CONSIDERATIONS

Anticipating that the amendment will increase the likelihood that federal trial courts will closely scrutinize whether an expert’s trial testimony reflects a reliable application of the principles and methods to the facts of the case (as we’ve already begun to see), trial practitioners must now reconsider how they prepare expert witnesses. First, expert witnesses must be carefully selected. In addition, an expert’s application of reliable methodologies must closely align with the facts of the case. In other words, the methodology must be reliably applied to the facts. Moreover, attorneys should advise experts of the amended rule at the time of engagement and review with them the burden of proof regarding admissibility.

Attorneys should also ensure that the expert is able to defend their opinions in light of the amendment to FRE 702. When objecting to expert witness testimony, motions filed with the court should remind the court of the preponderance standard required by FRE 702. Further, trial attorneys should make certain to avoid citing outdated precedent in briefings and arguments that may distract the court or tarnish credibility.

CONCLUSION

The amended FRE 702 was not designed to create a more arduous threshold for having an expert’s trial testimony deemed admissible. It was designed to create a more uniform application of the rule by federal trial courts and prevent its misapplication. The amendment may even encourage filing of more *Daubert* motions by litigants.

Regardless, the need to understand the amendment and the court's gatekeeper role under it is key to success when challenging or defending expert testimony.



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ENDNOTES

1. See FRE 702, comment 1 to 2023 amendments.
2. *Daubert v Merrell Dow Pharm*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).
3. *Kumho Tire Co v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999).
4. FRE 702, Advisory Committee Notes on Proposed Rules <https://www.law.cornell.edu/rules/fre/rule_702>.
5. *Id.*
6. *Id.*
7. *Onglyza and Kombiglyze Prod Liability Litigation*, 93 F4th 339, 343; 117 Fed R Serv 3d 1585 (CA 6, 2024).
8. *In re Johnson & Johnson Talcum Powder Prod Mktg, Sales Practices & Prod Litigation*, 509 F Supp 3d 116 (D NJ 2020).
9. *Id.* at 198.
10. *Id.* at 148 (citing *Crowley v Chait*, 322 F Supp 2d 530, 537 (D NJ 2004)).
11. *Id.* at 198.
12. *Id.* at 135-40.
13. Opinion of the United States District Court for the Eastern District of Kentucky, issued April 11, 2024 (Case No. 3:22-cv-00075-GFVT-MAS), p 4.
14. *Id.* (quoting *Best v Lowe's Home Ctrs, Inc*, 563 F3d 171, 179 (CA 6, 2009)).
15. Opinion of the United States District Court for the Southern District of Indiana, issued April 23, 2024 (Case No. 1:21-cv-02859-JMS-MJD), p 2.
16. *Id.* at 6.
17. *Id.* at 5-6.
18. *Id.* at 5.
19. *Id.*
20. Opinion of the United States District Court for the District of Oregon, issued April 19, 2024 (Case No. 6:20-cv-0057-SB), p 8.
21. *Id.* at 7.
22. *In re Flint Water Cases*, Opinion of the United States District Court for the Eastern District of Michigan, issued May 17, 2024 (Case No. 5:16-cv-10444-JEL-EAS).
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Succession planning and the approaching massive transfer of wealth

BY GERARD V. MANTESE AND IAN WILLIAMSON

Said the Eye one day, "I see beyond these valleys a mountain veiled with blue mist. Is it not beautiful?"

The Ear listened, and after listening intently a while, said, "But where is any mountain? I do not hear it."

Then the Hand spoke and said, "I am trying in vain to feel it or touch it, and I can find no mountain."

And the Nose said, "There is no mountain, I cannot smell it."

Then the Eye turned the other way, and they all began to talk together about the Eye's strange delusion. And they said, "Something must be the matter with the Eye."

— Kahlil Gibran, "The Eye"¹

Like the Eye in Gibran's story, successful businesspeople and business attorneys are visionary and see things that others do not. Astute vision is important in succession planning and with the U.S. about to witness the greatest transfer of wealth in its history, succession planning is one of the hottest issues for today's business lawyer.

The Wall Street Journal recently reported that "more than \$84 trillion in wealth has been, or is set to be, transferred by estates big and small between 2021 and 2045[.] That wave of inheritance has brought a rise in lawsuits and other conflicts over family assets."² These transferred assets will include ownership interests in companies, which will inevitably lead to intergenerational disputes among business owners. Conflicts over entity control, fortunes, fame, and long-simmering emotions are often bruising, as was brilliantly depicted in HBO's riveting series "Succession." To avoid calamity, business lawyers need the

foresight of Gibran's Eye, seeing far into the distance and planning for the continued success of our clients.

Here, we discuss some key issues to consider when drafting operating agreements, shareholder agreements, and buy-sell agreements. We also address several salient cases relating to succession, control, and fights over business interests. Finally, we identify some important tax and estate planning considerations.

KEY CONTRACT CLAUSES

The Magnificent Seven stocks³ have outsized standing and influence in the stock market. Similarly, while all contract clauses are important and even a comma placement can mean millions of dollars,⁴ the following seven provisions are critical in succession planning and control disputes.

Management: Who is the Top Executive, and Can She Be Removed?

Among other things, top officers may make employment decisions, set salaries, and have significant influence over profit distributions. Governing documents should be clear as to when and how these executives may be dismissed. The authors litigated one case in which one officer/owner assaulted the company's president and argued that despite his no contest plea, he could not be discharged under the shareholder agreement. While the contractual duty of good faith and the law of oppression provided potential remedies, it's best to have an agreement that delineates when, how, and why top executives may be discharged.

Employment: Do Owners Have the Right to be Employed?

Michigan's oppression statutes provide that termination of an owner's employment can be oppressive if it disproportionately interferes with that owner's rights in comparison to other owners.⁵ Despite this statutory protection, which can have varying applicability, it is best to specify in an operating agreement or shareholder agreement when and under what circumstances owners have a right to employment and the mechanism for determining compensation.

Distributions: What are Owners' Rights to Profit Distributions?

Owners' rights to dividends and other distributions have been litigated as long ago as the famous *Dodge v. Ford Motor Co.* case.⁶ Business owners generally intend to make money and business lawyers should clearly define when monies will be distributed. Unscrupulous co-owners often use squeeze-out techniques such as dividend starvation or, perhaps even more painful, refusing to issue tax distributions to owners in pass-through entities such as limited liability corporations or S corporations. *Franks v. Franks*, a leading oppression case in Michigan, involved a refusal to declare dividends, leading the court to find shareholder oppression and order \$2.1 million in dividends and interest to the plaintiffs after an 11-day trial.⁷

Liquidity: Do Owners Have Put Rights?

When owners have no easy ability to sell their ownership interests

to third parties and no redemption rights, those locked-in equity interests may be mere paper wealth. One of the most important elements that a business attorney can address in a contract is when, if ever, equity owners have a right to liquidity.⁸ When parties fail to outline this important issue, the control group may financially exploit the minority owners knowing that they have no recourse to exit the company outside of abusive, low-ball stock redemptions. In addition, contract clauses on put rights should carefully explain what value will be paid for subject shares.

Valuation: What is the Value of an Owner's Interests?

Shareholder agreements, operating agreements, and buy-sell agreements may provide for buyouts of owners if they die, retire, or leave the business, but how to value ownership interests is not always discussed. Appropriate and mutually agreed-upon valuation formulae can mean the difference between a fair transaction and an abusive one that sets the stage for oppressive conduct and likely litigation. In *Franks v. Franks*, the trial court found shareholder oppression where the control group made a redemption proposal at a fraction of the value calculated by professionals, which they followed with a denial of dividends for two years.⁹ To minimize the risk of litigation, redemptions should be based on professional valuations using predetermined and memorialized formulae.

Dilution: Can Owners be Diluted?

Business owners should always recognize if and how their ownership interest can be diluted. Frequently, the control group can require additional capital infusions or pursue outside investors' capital; owners who don't contribute may be diluted by these transactions. These capital events frequently incur at inflection points where the business' current financial situation or growth potential is uncertain, leading to outsized impacts (positive or negative) on valuation, which drives the amount of dilution.

In *Frank v. Linkner*,¹⁰ the Michigan Supreme Court held that oppression may occur at the moment a plan for future dilution is implemented, even if the actual dilution occurs years later. This is exemplified in the 2010 film "The Social Network" in which the protagonist procured the chief financial officer's signature (who was promised 30% ownership of Facebook) on seemingly standard corporate documents that then allowed the protagonist to dilute the CFO's stake to below 1%. Bottom line: business attorneys should ensure their clients understand when and how owners may be diluted.

Competition: May Owners Engage in Competing Businesses?

While noncompetition agreements have become less favored and the Federal Trade Commission proposed a rule banning them for employees, Michigan law still provides certain protections against competition by business owners. The corporate opportunity doctrine dictates that in certain circumstances, shareholders must first provide corporate opportunities to the company before pursuing them.¹¹ Moreover, owners may contractually establish clear rules about engaging in competing or parallel businesses with, for ex-

ample, restrictive covenants. Failing to establish such guideposts from the outset can ultimately result in resentment between owners and protracted and expensive legal battles. This can be more complicated when interests pass to new owners who may already hold competing businesses.

EXEMPLARY CASE LAW

Recent cases highlight the confusion and power struggles that can arise from a lack of robust succession planning.

Ray v. Raj Bedi Revocable Tr

Faced with a deficient buy-sell agreement, the 50/50 shareholders in *Ray v. Raj Bedi Revocable Trust*¹² took their buyout litigation on tour through state court in Michigan to state and federal court in Indiana. When Bedi died, Ray exercised his purchase option under the parties' buy-sell agreement, which required arbitration by certified public accountants to determine fair market value in the event of a valuation dispute. This inevitably materialized because the agreement failed to include a valuation standard and procedure. Bedi sued in Michigan, Ray sued in Indiana, and Bedi removed to federal court. *Both* sides sought dismissal of the federal action on competing terms; Ray wanted remand back to Indiana, while Bedi wanted dismissal in favor of the original Michigan action. The federal court agreed with Bedi and sent the parties back to Michigan state court — all of which could have been avoided if the parties had a clearly defined valuation procedure.

Seokoh, Inc v. Lard-PT, LLC

Some buy-sell agreements contain a mechanism known as a shotgun clause; when deadlock occurs, one party can name a price and then, like the resolution of Abraham and Lot's conflict, the other party has the option to either purchase the first party's interests or sell its own interests at that price. As shown in *Seokoh, Inc v. Lard-PT, LLC*,¹³ the failure to include key terms in the buy-sell can doom these otherwise desirable separation mechanisms.

The parties in *Seokoh* spent nearly a year negotiating the terms of Lard's election to purchase Seokoh's shares. Seokoh declared Lard to be in breach of his purchase obligation which, per the buy-sell, gave Seokoh the option to purchase Lard's interest at a 30% discount of the shotgun price. Seokoh sued for specific performance in New York and deadlock-based dissolution in Delaware. Lard moved to dismiss, arguing that the parties had a shotgun agreement for resolving deadlock. The vice chancellor disagreed — the shotgun clause had completely failed in its mission of preventing deadlock because it was missing key terms such as a pricing method and a timeline for closing.

*Coster v. UIP Companies, Inc*¹⁴

When Wout Coster, a 50% owner of UIP, developed leukemia, he began negotiations with 50% owner Steven Schwat and two executives for a buyout of his shares. After a year of failed negotiations, Wout died and his shares passed to his widow, Marion. The parties

deadlocked over electing directors and Marion sued to appoint a custodian to resolve the deadlock. Schwat then sold a one-third ownership interest to one of the executives, which resolved the deadlock and mooted the custodian action.

The stock sale diluted Marion's ownership, and she sued to cancel it. The Delaware Supreme Court held¹⁵ that the sale met the state's strict entire fairness standard and was not undertaken for inequitable purposes — it was a justified response to the existential crisis of the custodian action and implemented the succession plan Wout Coster favored in the first place. Ultimately, nearly a decade of fraught negotiations and litigation passed between Wout's diagnosis and the final decision with Marion no closer to receiving the financial security Wout had desired for her — all of which could have been avoided with a clear buy-sell agreement.

*Franks v. Franks*¹⁶

Successor generation control groups often resent sharing profits with owners who choose not to work at the company and are content to receive distributions while pursuing other careers. Here, the control group, all employed at the company, sought to divest the non-employed 50% owners through a combination of low buyout offers and no dividends. On appeal, the Michigan Court of Appeals held¹⁷ that, among other things, pleading a *prima facie* case for shareholder oppression inherently negated the business judgment rule.

*Allen & Allen Properties, LLC v. Smith*¹⁸

Without effective succession planning, an owner's death or disability can result in uncertainty as to the company's ownership structure and may even threaten the company's continued existence. Two brothers, Howard and Curtis Smith, co-founded Allen & Allen Properties in 2004 — Howard owned 90% and Curtis owned the remaining 10%. After Howard passed away in 2020, defendant Jason Smith asserted that in 2014, Howard executed a handwritten amendment to the operating agreement that gave Jason an ownership interest. Curtis disputed the amendment's validity and sought a declaration that he was the sole owner. Jason moved to dismiss, invoking an arbitration provision in the operating agreement. Curtis countered that Jason was not a member and had no ability to enforce the provision. The trial court ruled that an arbitrator should determine whether Jason was a member. The Michigan Court of Appeals reversed,¹⁹ emphasizing that under Michigan law, the court — not an arbitrator — decides the threshold question of an arbitration clause's enforceability, which was dependent on Jason's undetermined membership status.

*Castle v. Shoham*²⁰

Edward Castle and Bill Down formed The Filter Depot, LLC to sell air filtration products. Castle owned 49% and Down owned 51% via Midwest Air Filter, Inc. (MAF). Castle and Down made a handshake deal that Filter Depot would pay MAF monthly for administrative services but did not adequately document how to calculate that fee.

The arrangement went smoothly until Down died in 2013 and his daughter and son-in-law (the defendants) purchased his ownership interest in Filter Depot. After hostilities arose, Castle sued, asserting various claims including member oppression under MCL 450.4515. According to Castle, the defendants' wrongful conduct included terminating his employment, issuing an improper capital call, and increasing MAF's monthly fee. The Michigan Court of Appeals reversed²¹ the dismissal of all claims, holding that the capital call could constitute oppression despite the absence of identifiable damages because financial injury is not required to demonstrate harm.²² Further, Castle's un rebutted expert testimony undermined the defendants' assertion that there was a reasonable basis for the increased monthly fee.²³

TAX ISSUES²⁴

Significant transactions almost always have tax ramifications, so succession planning requires the guidance of great tax attorneys. These ramifications can differ based on whether the transaction is a redemption or a buyout. Similarly, tax treatment differs for cash-versus-accrual partnerships/LLCs; "hot assets" is a phrase that may take on newfound significance for the seller of a cash-basis LLC. Purchase prices involving promissory notes greater than \$5 million can result in elevated tax liabilities from imputed interest. It's also important to remember that a put- or call-driven market created via the terms of a buy-sell agreement and the purchase amounts/payment terms set forth in it can have relevance to the value of a decedent's taxable estate, determination of fair market value for a lifetime gift, and, for divorcing parties, determining the division of their marital estate.

Owners will often buy life insurance on a key or controlling owner to facilitate a family's continued ownership of a company; then, when the owner passes, the proceeds are used to redeem that owner's shares. *Connelly v. United States Dep't of Treasury, Internal Revenue Service*²⁵ addresses how to treat the funds that flow into the corporation. There, the remaining shareholders argue that the insurance proceeds do not increase the company's value because the moment the funds are received, they must be used to redeem shares; the IRS argues that the proceeds increase the corporation's assets. This case was argued in the U. S. Supreme Court in March, and a decision was released on June 6, 2024, where the Court ruled in favor of the IRS and held that the insurance proceeds do in fact increase the company's value.²⁶

ESTATE PLANNING

Estate planning attorneys should also weigh in on the transition of ownership interests with the following objectives:

1. avoiding costs and delays associated with probate, possibly by transferring ownership interests to revocable living trusts;
2. minimizing the federal estate tax, possibly by making gifts of ownership interests to irrevocable trusts, keeping in mind that shares in an S corporation must be held in either an intentionally defective grantor trust or by a qualified subchapter S trust;
3. ensuring that ownership interests are given and/or sold to beneficiaries best suited to operate the business; and
4. protecting beneficiaries from creditors.

Business owners must also incorporate successor management into their estate planning while addressing family issues that often accompany leadership and ownership decisions and assuring sufficient liquidity to avoid a forced sale of the business. Owners should develop detailed contingency plans in case they die or become unable to continue working sooner than anticipated and consider alternative corporate structures or stock-transfer techniques that might help the business achieve its succession goals. And where the most valuable asset in a business owner's estate is the business itself, the owner's trust should contain language waiving the successor trustee's duty to diversify trust assets under the prudent investor rule.²⁷

CONCLUSION

Succession planning efforts and fights over succession will require substantial legal services — both transactional and litigation — as baby boomers transition into retirement. The key documents for corporations and LLCs must be given special attention to facilitate smooth succession of the company. Tax and estate planning experts should also be intimately involved in the process.

The authors acknowledge the substantial contributions of their talented associates, Brian Markham and Matthew Rose; renowned estate planning attorneys Julius Giarmarco and Paul Wakefield; and the excellent insights of certified public accountant Thomas Frazee.



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Ian Williamson is a partner at Mantese Honigman and a key member of the firm's business litigation practice group. He handles all manner of business disputes, representing both plaintiffs and defendants, and has successfully resolved numerous disputes among owners of closely held business entities. Williamson is vice-chair of the State Bar of Michigan Business Law Section and has published and presented extensively on business law issues.

ENDNOTES

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2. Ashlea Ebeling, *Hash Out the Inheritance Now, or Fight your Family Later*, *The Wall Street Journal* (April 6, 2024) <<https://www.wsj.com/personal-finance/hash-out-the-inheritance-now-or-fight-your-family-later-5fd836b9>>.
3. The Magnificent Seven stocks are Nvidia, Meta Platforms, Apple, Amazon, Tesla, Alphabet, and Microsoft. See Rocco Pendola, *et al*, *What are the Magnificent 7 stocks?*, <<https://www.cnn.com/cnn-underscored/money/magnificent-7-stocks>> (updated June 10, 2024).
4. See, eg, *O'Connor v Oakhurst Dairy*, 851 F3d 69 (CA 1, 2017).

5. See MCL 450.1489 and MCL 450.4515.
6. *Dodge v Ford Motor Co*, 204 Mich 459, 467; 170 NW 668 (1919).
7. Mantese and Williamson represented the successful plaintiffs in *Franks v Franks*, 330 Mich App 69; 944 NW2d 388 (2019).
8. Mantese recently handled a case where virtually all other owners were given put rights — the right to require the company to redeem their shares at a specified value — except the plaintiffs. The plaintiffs sued claiming that this uneven treatment was shareholder oppression and the plaintiffs recently defeated a motion to dismiss.
9. *Franks*, *supra* n 6.
10. *Frank v Linkner*, 500 Mich 133; 894 NW2d 574 (2017). Mantese argued this case in the Michigan Supreme Court.
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12. *Ray v Raj Bedi Revocable Trust*, 611 F Supp 3d 567 (ND Ind, 2020).
13. *Seokoh, Inc v Lard-PT, LLC*, Opinion of the Delaware Court of Chancery, issued March 30, 2021 (Case No CV 2020-0613-JRS).
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17. *Id.*
18. *Allen & Allen Props, LLC v Smith*, unpublished per curiam opinion of the Court of Appeals, issued July 28, 2022 (Docket No. 358047).
19. *Id.*
20. *Castle v Shoham*, unpublished per curiam opinion of the Court of Appeals, issued August 7, 2018 (Docket No. 337969).
21. *Id.*
22. See *Frank*, *supra* n 9, argued by Mantese.
23. MCL 450.4515(2).
24. The discussion of tax issues and estate planning issues is not intended to provide tax or estate planning advice and one's tax and estate advisors must be consulted.
25. *Connelly v United States Dep't of Treasury, IRS*, 70 F4th 412, 415 (8th Cir), *cert granted sub nom Connelly v United States*, 144 S Ct 536 (2023).
26. *Connelly v. United States*, 602 U.S. ____ (2024).
27. MCL 700.1501, *et seq.*

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PRIVACIES OF LIFE IN COMMERCIAL E-DISCOVERY

Modern opinions on employers' duties to preserve evidence on employees' personal cellphones

BY PAUL A. MCCARTHY AND ELIZABETH M. BADOVINAC

Personal cellphones contain the fabric of their owners' lives. Phones often store a person's most important – and most intimate – personal information: texts to spouses and family, calendars and emails, banking data, search history, and pictures and videos. Indeed, “[m]odern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans the privacies of life.”¹

In litigation, employees have a duty to preserve electronically stored information (ESI) within their possession or control. But do employers have control over its employees' *personal* phones? Can an employer be sanctioned if it does *not* take steps to preserve information stored on these devices?

Courts began addressing employer-targeted discovery in the early 2000s.² However, opinions on this topic largely predate the development of smartphones, which have complicated the question of

what information an employer actually controls. In fact, many employers now allow employees to use their own phones *at work and for work*, blurring the line between employees' work and personal lives. Employees might use personal phones to check work emails, send personal texts, and scroll through social media during the same workday — or even within a 10-minute period. Do employers have control of these devices? Do they have the responsibility to preserve and produce information stored on them? And where is the line of relevance and proportionality?

Corporate employers face these questions in e-discovery. An opposing party might request that a company produce information from its employees' personal phones. Absent a contract regarding device privacy, this request places the company in an impossible position. It can demand that its employees turn over their personal phone data and risk additional litigation for employee privacy violations, or it can refuse and face a motion to compel. Worse, the



opposing party could seek sanctions against the employer for its employees' personal data deletion or loss.

Thankfully, courts have adapted with the times, providing a reasonable safe harbor for employers facing these issues. This article showcases how recent opinions correctly hold that employers have no categorical duty to preserve or produce evidence or information on employees' personal devices. Modern courts instead encourage context-specific analysis regarding employers' actual control over personal devices before determining whether its duty to preserve arises. Recognizing the legal quagmire employer-targeted discovery creates for employers, they favor nonparty discovery to obtain employees' personal data; given the ever-increasing use of personal phones in the modern workplace, similar opinions are likely on the horizon.

CURRENT FRAMEWORK FOR PRESERVING EMPLOYEE ESI

The Michigan Court Rules were amended in 2009 and refined in 2020 to provide a framework for ESI preservation and sanctions for spoliation of ESI.³ MCR 2.313(D) now echoes Fed R Civ P 37(e) in providing specific requirements that must be met before a court may issue spoliation sanctions for failure to preserve ESI.

First, MCR 2.313(D) provides that a court should not impose sanctions unless the ESI "should have been preserved in the anticipation

or conduct of litigation." Courts have held that "[t]he obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or ... should have known that the evidence may be relevant to future litigation."⁴

Second, ESI must be "of a type that should have been preserved."⁵ MCR 2.310 provides practical guidance here,⁶ stating that the scope of discovery for documents and other things covers relevant materials in the "possession, custody, or control of the party on whom the request is served" (emphasis added).⁷

In other words, parties "have an obligation to preserve evidence within their custody or control upon notice that the evidence is relevant to litigation."⁸ In the context of an employer-employee relationship, the requesting party bears the burden of establishing the employer's control over the devices by proving that it "has the legal right to obtain the documents on demand" from its employees, such as the "right to command release from the party with actual possession."⁹

EMPLOYER CONTROL OVER PURELY PERSONAL EMPLOYEE PHONES

Courts generally agree that where an employee's phone is personally owned and used only for personal reasons, an employer has no legal right to obtain its data — even if the employee uses the phone at work. A seminal case in this regard is *Cotton v. Costco Whole Corp*, where a plaintiff sought text messages sent or re-

ceived by certain Costco employees.¹⁰ The court noted that Costco had not issued the phones, the employees had not used the phones for any work-related purpose, and the plaintiff had not alleged that Costco “otherwise has any legal right to obtain employee text messages on demand.”¹¹ Thus, the phones were not in Costco’s control and it had no duty to preserve or produce them.¹²

Similarly, the court in *Goolsby v. County of San Diego* held that employees’ personal devices were not under their employer’s control.¹³ In that case, a prisoner plaintiff speculated that defendant deputies used “their personal devices while at work,” but the court held that there was “no evidence that the use of personal devices was for ‘business purposes.’”¹⁴

The law is clear, then, that allowing employees to bring their own phones to work alone is not dispositive of employers having possession, control, or custody of such devices. Employers do not have the right to collect information from an employee’s personal phone solely by virtue of the employee using it at work.

The corollary of the above rule is also generally true: courts may favor the company’s duty to preserve data when employees are issued company-owned phones. For example, in *Ewald v. Royal Norwegian Embassy*, the court held that while an employer need not produce employees’ personal devices, it would compel the employees’ company-provided phones.¹⁵ Rather than a categorical rule, however, the issue of preserving data on company-issued phones is likely best addressed using the context-specific analysis described below.

CONTEXT-SPECIFIC APPROACH TO CONTROL

Although helpful, the cases above hardly solve the many questions that arise in determining whether employers must preserve employees’ personal phone data. Realistically, employees often use personal phones for both personal and business-related purposes. Though whether a phone was used for business purposes was a factor the *Goolsby* court considered,¹⁶ it offered no insight as to whether such use sufficiently establishes employer control. Do the purposes for which a phone is used have significant bearing on a company’s legal obligation to preserve employees’ personal phone data?

Case law largely suggests no. The court in *Lalumiere v. Willow Springs Care, Inc.* only ordered an employer’s production of its employees’ texts or emails made “via work phones or company email accounts” (emphasis added).¹⁷ It otherwise held that “a company does not possess or control the text messages from the personal phones of its employees and may not be compelled to disclose text messages from employees’ personal phones.”¹⁸ Other courts have echoed this.¹⁹

Perhaps the most well-articulated opinion on this subject is the 2020 U.S. District Court for the Eastern District of Michigan case *Halabu Holdings, LLC v. Old National Bancorp.*²⁰ The plaintiff, Halabu Holdings, moved to compel production of records generated on Old National Bancorp (ONB) employees’ “personal and/or individual electronic devices/equipment and similar records, when such records were generated in the scope or course of their performance of their responsibilities for the [b]ank.”²¹ The court denied the request, holding that it had failed to show ONB exercised any “indicia of control” over the devices in its particular workplace:

Control, then, is context-specific. Some workplaces have, by agreement and practice, defined rights and responsibilities regarding personal cell phone and computer device use in connection with the employer’s business. For example, employers may contract for the right to access the employees’ personal devices, and employers and employees may agree to use software that segregates employer data from the rest of the device. Such agreements and practices are entitled to judicial respect.

Despite its obligation to do so, Halabu has made no effort to establish that ONB has any such control over the personal devices of its employees. It has pointed to no ONB agreement or practice in this regard. Without such a showing or some other set of circumstances demonstrating control, it has not met its burden.

* * *

[A]n employee’s sense of privacy and ownership of information should not be forfeited without an adequate discovery process to address those interests. Requiring a discovering party to meet the rigors of a control rule does precisely that. Because Halabu has not satisfied that rule, its motion to compel discovery must be denied.²²

Halabu Holdings finally articulates a context-specific control rule consistent with other courts’ analyses, but properly and clearly focuses on a company’s legal right to obtain the devices rather than the purposes for which it is used. It stands for the principle that absent a clear contract or practice regarding an employer’s access to employees’ personal devices — i.e., a means by which a company obtains a legal right to obtain the devices — a company does not sufficiently control personal devices for a duty to preserve/produce to arise.

This context-specific analysis is especially important due to the very issue the *Halabu* court next emphasized: employee privacy concerns.²³ In fact, the *Halabu* court nodded to *Riley v. California*, a

U.S. Supreme Court case forbidding phone searches without a warrant.²⁴ While the Court indicated that judicial deference should be given to contracts between employers and employees as to device access, phones and personal devices should otherwise be protected from employer invasion.²⁵

ALTERNATE MEANS OF DISCOVERY FOR EMPLOYEE DEVICES

Parties wishing to conduct employee discovery are not without options. Though the *Halabu* court went so far as to characterize an employer-targeted route as “onerous and potentially invasive,”²⁶ it recognized that “personal devices owned by non-defendant employees are not immunized from discovery.”²⁷ Rather, the court noted that the route which “better addresses the privacy and property concerns raised by a document request to an employer” is a non-party subpoena under Fed R Civ P 45.²⁸ MCR 2.305 provides an identical mechanism.

CONCLUSION

Modern courts have refused to apply categorical rules regarding an employer’s possession, custody, and control of its employees’ personal devices. A company’s control over its employees’ personal devices, and thus its duty to preserve or produce the same during e-discovery, is properly viewed in context of the company’s contractual agreements. This context is not only important to capture the nuances and complexities of cellphones in the workplace, but to sufficiently protect businesses from violating their employees’ privacy rights. While case law will undoubtedly develop given the increased role of personal devices in the workplace, existing opinions provide a helpful framework and defense for employers facing discovery requests for their employees’ personal devices.



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ENDNOTES

1. *Riley v California*, 573 US 373, 403; 134 S Ct 2473; 189 LEd 430 (2014) (citation and quotation marks omitted).
2. One of the most cited federal cases on this topic is *Zubulake v UBS Warburg*, 220

FRD 212 (SD NY 2003), where UBS Warburg failed to preserve so-called backup tapes containing email correspondence of key employees. The court held that “the duty to preserve extends to those employees likely to have relevant information — the ‘key players’ in the case.” *Id.* at 218. It is tempting to apply *Zubulake* to a broader modern context, as applying to employees who have relevant information in their possession on their personal devices. However, the court did not address personal devices; rather, it addressed emails stored on company systems and subject to company deletion practices. *Id.* Further, the court could not have foreseen, and clearly did not address, employees’ use of personal devices as described in this article.

3. MCR 2.313(E) (2009) created a safe harbor for a party losing ESI as a result of routine deletion practices (“Absent extraordinary circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system”). This safe harbor was later subsumed by MCR 2.313(D). See James L Liggins, et al, *Civil Discovery: The Guidebook to the New Civil Discovery Rules* (State Bar of Michigan, 2020), pp 47-54.

4. *Zubulake*, *supra* n 2 at 216; *Forest Laboratories, Inc v Caraco Pharm Laboratories, Ltd*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued April 14, 2009 (Docket No 06-CV-13143); see also *Hollis v CEVA Logistics US, Inc*, 603 F Supp 3d 611, 619 (ND Ill 2022).

5. *Konica Minolta Bus Solutions, USA, Inc v Lowery Corp*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued August 31, 2016 (Docket No. 15-CV-11254).

6. MCR 2.310(B)(1)(ii).

7. *Id.*

8. *Flagg v City of Detroit*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued August 3, 2011 (Docket No 05-74253), fn 1 (quotation marks and citation omitted).

9. *Halabu Holdings, LLC v Old Nat Bancorp*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued June 9, 2020 (Docket No 20-10427); see also *Cotton v Costco Wholesale Corp*, unpublished opinion of the United States District Court for the District of Kansas, issued July 24, 2013 (Docket No 12-2731-JW).

10. *Cotton*, *supra* n 9.

11. *Id.* (footnotes omitted).

12. *Id.*

13. *Goolsby v County of San Diego*, unpublished opinion of the United States District Court for the Southern District of California, issued August 19, 2019 (Docket No 3:17-CV-564-WQH-NLS).

14. *Id.*

15. *Ewald v Royal Norwegian Embassy*, unpublished opinion of the United States District Court for the District of Minnesota, issued November 20, 2013 (Docket No 11-CV-2116 SRN/SER).

16. *Goolsby*, *supra* n 14.

17. *Lumiere v Willow Springs Care, Inc*, unpublished opinion of the United States District Court for the Eastern District of Washington, issued September 18, 2017 (Docket No 1:16-CV-3133-RMP).

18. *Id.*

19. *RightCHOICE Managed Care, Inc v Hosp Partners, Inc*, unpublished opinion of the United States District Court for the Western District of Missouri, issued August 21, 2021 (Docket No 4:18-CV-06037-DGK).

20. *Halabu Holdings*, *supra* n 10.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* See also *City of Ontario, Cal v Quon*, 560 US 746; 130 S Ct 2619; 177 L Ed 2d 216 (2010) (holding that a violation of privacy can occur where an action invades the employee’s “reasonable expectation of privacy”); *In re Reserve Fund Securities and Derivative Litigation*, 275 FRD 154 (SD NY 2011) (holding that expectation of privacy is possible even when email is transmitted over and maintained on a company server).

25. *Halabu Holdings*, *supra* n 10.

26. *Id.*

27. *Id.*

28. *Id.* See also *Ewald*, *supra* n 16 (emphasizing use of a nonparty subpoena for employee discovery).

Readable contracts (Part 2)

BY WAYNE SCHIESS

MY OWN RESEARCH

I contacted the authors of the article discussed in Part 1,¹ accessed a portion of the two corpora they used, and conducted my own assessments. My resulting corpus of contracts and my corpus of everyday written English both had more than a million words.

I assessed the text for average sentence length, Flesch Reading Ease, and Flesch–Kincaid Grade Level and also included those averages from my last ten columns on legal writing in my local bar magazine, *Austin Lawyer*:

	Average Sentence Length	Flesch Reading Ease	Flesch–Kincaid Grade Level
Everyday written language	17	56	9
Contract language	42	20	19
Schiess's last ten pieces	17	52	10

These results give us information we likely knew already and suggest why the original study's authors undertook their research in the first place. I'll say a bit more about these results here.

AVERAGE SENTENCE LENGTH

The average for the everyday English — 17 words — is short but typical: everyday-English sentences average 15 to 20 words. The 42-word average for the contracts is, well, huge. As I pointed out in Part 1, these are commercial contracts entered by sophisticated parties represented by counsel, so the long sentences aren't as troubling as they might be if the contracts were apartment leases, credit-card agreements, or car-insurance policies. But the 42-word average means that there are some really long sentences, and even experienced transactional lawyers might find reading those long sentences difficult.

FLESCH READING EASE SCORES

This formula, included in Microsoft Word, was finalized in 1948 by Rudolf Flesch (an Austrian lawyer who fled the Nazis in 1938 and earned a Ph.D. in education in the United States). It assesses the number of syllables and sentences per each 100 words and uses that assessment to produce a score from 0 to 100: 30 is difficult, and 60 is plain English.²

At 56, the everyday-English text comes close to Flesch's standard for plain English — as we'd expect. And as we might have predicted, the Flesch Reading Ease score for the contract language is, at 20, quite low — what Flesch labels "very difficult."³ The long average sentence length doubtless contributes to this low score, but the average number of syllables per word surely does too.

One reminder about readability measures, and particularly the two mentioned here (above and below): a good score doesn't ensure that the writing will be clear and plain, but a poor score at least indicates that the writing is likely to be difficult.

FLESCH–KINCAID GRADE LEVELS

This scoring system was derived from the Flesch Reading Ease score by J.P. Kincaid⁴ and reports the number of years of formal education that a reader needs in order to understand the text. My everyday-English corpus scored a 9, meaning that one who has completed the ninth grade should be able to read and understand it. My own writing — which is mostly *about* writing — tends to hover around the tenth-grade level.

The Flesch–Kincaid Grade Level for the contract language is high at 19, although I once read a decision from an administrative-hearing appeal that scored a 20. But grade-level 19 is, unsurprisingly, the equivalent of the reading level of a person with a high-school education (12), a college degree (16), and a law degree (19).

Thus, the grade level is appropriate given the context: these contracts were prepared by and for attorneys.

Recommendations. Still, the 42-word average sentence length is taxing at best and borders on impenetrable. Anything we can do to reduce that average will make a contract easier to read and understand and, therefore, easier to draft, easier to review, and easier to explain to the client. Often, the fixes are not too hard.

ARCHAIC LEGAL WORDS

Here I conclude with my comments on a few words found in my million-word corpus of commercial contracts. But first, I'll acknowledge reality.

Lawyers prepare commercial contracts by using forms and templates, and that saves time and money. It also provides some assurance — risk avoidance. Suppose the form contract has been used in 20 or 30 or 50 other transactions, all of which closed and were performed without litigation. By relying on that form, you probably avoid risk, reassuring yourself and your client that this transaction, too, will be performed without serious problems. So retaining and reusing forms can be a good practice, even if the forms use some archaic legalese.

But may I offer a few suggestions?

The following words are unnecessary because they have everyday equivalents, and some of them cause problems — albeit rarely — so I recommend deleting and replacing them. Parentheses show the number of appearances in the contracts corpus.

aforementioned (15), aforesaid (49)

The main problem with *aforementioned* is not that it's a multisyllabic monster; the problem is that it's vague. As I said of *aforementioned* in 2008: "Why use this outdated word when its shorter cousin, *aforesaid*, is available? I'm kidding. Eliminate them both and specify what you're referring to."⁵ In addition, the meaning of *aforesaid* has had to be construed in reported appellate decisions at least five times.⁶

herein (1,093), hereinabove (7), hereinbefore (10), hereinafter (120)

Again, the problem is vagueness. As the legal-language expert David Mellinkoff put it, "Where? This sentence, this paragraph, this contract, this statute? *Herein* is the start of a treasure hunt rather than a helpful reference. The traditional additives are equally vague: *hereinabove* . . . *hereinbefore* . . . *hereinafter* . . ."⁷ And I'll add that *herein*'s meaning has been litigated in at least 11 reported cases.⁸

said (214)

When used as a demonstrative pronoun or "pointing word," *said* adds no precision, only a legalistic tone. As the contract-drafting expert Tina Stark says, "*Said* and *such* are pointing words. They refer to something previously stated. Replace them with *the*, *a*, *that*, or *those*."⁹ So if the phrase "that party" is vague, changing it to "said party" won't clear it up. And *said*'s meaning has been litigated at least 30 times.¹⁰

whereas (224)

This word appears in the formal, archaic recitals that proceed with a series of paragraphs beginning with "WHEREAS" and conclude with "NOW, THEREFORE . . ." But Kenneth Adams, a leading expert on contract language, doesn't like *whereas*: "The recitals tell a story. They're the one part of a contract that calls for straightforward narrative prose. Don't begin each recital with *whereas*, although that's the traditional option. This meaning of *whereas* — 'in view of the fact that; seeing that' — is archaic, and the repetition is inane."¹¹

witnesseth (21)

At first, I found only 8 occurrences of *witnesseth* in the contracts corpus, and I was surprised but happy to think that its use was declining. Then I searched for it with a space after each letter — W I T N E S S E T H — and found 13 more. I think it needs to go, and the legal-language expert Bryan Garner agrees: "This archaism is a traditional but worthless flourish. . . . There's absolutely no reason to retain *witnesseth*. It's best deleted in modern contracts."¹²

Ultimately, retaining these words is probably harmless, but removing them is too. And your contracts will be much less musty.

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

ENDNOTES

1. Martinez, Mollica & Gibson, *Poor Writing, Not Specialized Concepts, Drives Processing Difficulty in Legal Language*, 224 *Cognition* 105070 (2022) <<https://doi.org/10.1016/j.cognition.2022.105070>> [perma.cc/XBW7-25E7] (all websites accessed June 11, 2024).
2. DuBay, *Smart Language: Readers, Readability, and the Grading of Text* (BookSurge Pub, 2007), p. 56; Flesch, *How to Write Plain English* (Harper Collins, 1979), p. 25.
3. Flesch at 25.
4. DuBay at 90–91.
5. Schiess, *Ten Legal Words We Can Do Without*, *Austin Lawyer* (May 2008), p. 6 <<https://law.utexas.edu/faculty/wschiess/legalwriting/2008/06/ten-legal-words-and-phrases-we-can-do.html>> [perma.cc/4TMC-37TC].
6. 2D *Words & Phrases* (2020), p. 294.
7. Mellinkoff, *Mellinkoff's Dictionary of American Legal Usage* (West Pub Co, 1992),

- p 283.
8. 19A *Words & Phrases* (2007 & Supp 2021), pp 36–37.
9. Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* (2d ed, Aspen Pub, 2014), p 257.
10. 38 *Words & Phrases* (2002 & Supp 2021), pp 29–31.
11. Adams, *A Manual of Style for Contract Drafting* (5th ed, ABA, 2023), p 35.
12. Garner, *Garner's Guidelines for Drafting & Editing Contracts* (West Academic, 2019), p 454.

THE CONTEST WINNER

In May, I revived a feature that had not appeared in the column for some years: a redrafting contest. I asked readers to redraft the following, Federal Rule of Evidence 104(c) before the Evidence Rules were “restyled” more than a decade ago:

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

I suggested that participants start with the active voice by naming a subject and also use a three-item vertical list. Here’s the current (restyled) rule:

The court must conduct a hearing on a preliminary question so that a jury cannot hear it if:

1. the hearing involves the admissibility of a confession;
2. a defendant in a criminal case is a witness and so requests; or
3. justice so requires.

The one submission that I rated an “A” was from David Fordyce, now retired, who was a sole practitioner and then chief in-house counsel for Burrough’s, Inc. (I’ve added a couple of edits in brackets):

The court will [must] conduct a hearing on preliminary matters outside the presence of the jury [outside the jury’s presence] when:

1. the matter concerns the admissibility of a confession;
2. the accused party is a witness and so requests; or
3. the interests of justice otherwise so require.

He receives a copy of my book *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law* (new 2d edition). Congratulations!

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

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

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

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

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

LIBRARIES & LEGAL RESEARCH

Researching ADR in Michigan and beyond

BY SHAY ELBAUM

The June Michigan Bar Journal was full of valuable analysis of alternative dispute resolutions issues, but you don't need to wait for the next ADR special issue for more. In this column, I highlight some additional Michigan-focused resources followed by a selection of resources that practitioners and scholars in any jurisdiction may find useful.

MICHIGAN DISPUTE RESOLUTION JOURNAL

The Michigan Dispute Resolution Journal¹ is published three times a year by the Alternative Dispute Resolution Section of the State Bar of Michigan. It features timely articles on ADR issues in Michigan and updates on arbitration and mediation case law along with section news and upcoming events. It is an excellent resource for anyone seeking to stay updated on ADR issues in Michigan.

MICHIGAN BAR JOURNAL SPECIAL ISSUES

In addition to the June 2024 issue, the February 2019, June 2015, and June 2010 issues of the Michigan Bar Journal² were also curated by the Alternative Dispute Resolution Section. Some articles may be outdated, so be sure to check if the cases, court rules, and so on referred to are still good law. Some articles, though, are timeless, e.g. "Practical Tips for Taking the Mediation Road to the Intended Destination" by Sheldon J. Stark and Shon A. Cook from the February 2019 issue.³

MICHIGAN JUDGES GUIDE TO ADR PRACTICE AND PROCEDURE

Created in 2015 by the Office of Dispute Resolution within the State Court Administrative Office, this guide⁴ is intended for judges but is of relevance for practitioners as well. It includes an overview of different ADR processes; deeper dives into the facilitative, evaluative, and adjudicative ADR processes; and an exploration of the trial judge's role in ADR. It includes citations to Michigan court rules and statutes throughout and closes with useful links to Michigan-specific ADR organizations and resources.

CIVIL PROCEEDINGS BENCHBOOK

Chapter 6 of this benchbook,⁵ titled "Trial Alternatives," discusses, but is not limited to, ADR processes. It is not as thorough as the "Michigan Judges Guide to ADR Practice and Procedure" but is significantly more current; while the guide was published in 2015, the benchbook is regularly updated and was last revised about two weeks before this writing.

ICLE PUBLICATIONS

While the Institute of Continuing Legal Education doesn't currently publish a book focused on ADR in Michigan, it has several book chapters, forms, checklists, and videos⁶ that ADR researchers will find useful. You'll find chapters on ADR in the titles "Michigan Basic Practice Handbook;" "Michigan Civil Procedure;" "Employment Litigation in Michigan;" and "Michigan Family Law." If you have an ICLE online resources account, you can browse and search across ADR-related material by selecting the Alternative Dispute Resolution practice area on the My Resources page.

NONJURISDICTIONAL ADR RESOURCES

You may already have a go-to general reference on ADR; if not, the Nutshell Series published by West Academic includes some great options. These compact volumes present concise, in-depth summaries of areas of law with thorough citations and extensive bibliographies. The series includes "Mediation in a Nutshell," "Alternative Dispute Resolution in a Nutshell," and "Legal Negotiation in a Nutshell."⁷

The resources presented thus far have been practice-focused. For a crash course in ADR scholarship and its history, see "Discussions in Dispute Resolution: The Foundational Articles" edited by Art Hinshaw, Andrea Kupfer Schneider, and Sarah Rudolph Cole.⁸ This 2021 collection brings together 16 foundational articles in the areas of negotiation, mediation, arbitration, and dispute resolution public policy spanning the years from 1926 to 1997. Each article is

followed by comments from four different scholars; some are from the original authors, reflecting on the article's impact in the years following its publication. Each of the articles is classic in its own right, but collected and contextualized, they present a fascinating history of the study of dispute resolution and an orientation to the modern state of the field.

Resources abound for staying updated on ADR developments nationwide. The American Bar Association Dispute Resolution Section publishes its Dispute Resolution Magazine three times a year in addition to a monthly newsletter, Just Resolutions; the Resolutions podcast; and the Ohio State Journal on Dispute Resolution, which is the section's official law journal. Some items are limited to section members, but articles from the magazine and newsletter can be accessed by all on the section's website and the journal is available through HeinOnline, Westlaw, and Lexis.⁹

Beyond the ABA's resources, the following three blogs each have a slightly different focus and are (as of this writing) regularly updated. The Program on Negotiation, part of the Harvard Law School blog, mostly posts negotiation advice but also covers negotiation-related news topics.¹⁰ JAMS ADR Insights, published by the major dispute resolution services provider JAMS, focuses on arbitration and mediation practice¹¹ and posts original content as well as articles by JAMS staff published elsewhere which may otherwise require a subscription to view. Last but not least, if you're interested in the intersection of ADR scholarship and practice, Indisputably is the blog for you.¹² The list of contributors includes prominent ADR scholars from around the country, and posts include new publication highlights, musings on current events, calls for paper submissions, and information about upcoming conferences and programs.

CONCLUSION

I've aimed to gather resources here to meet a variety of needs and interests from the foundational works in the study of ADR to the latest updates on ADR processes in Michigan. But there's always more. If

these resources just aren't answering your questions or if you'd like a deeper dive, a law librarian can always help you find more.



Shay Elbaum is faculty research librarian at the University of Michigan Law Library. He received his law degree from the University of Michigan Law School and his master's degree in library and information science from Simmons College. He is a member of the Alaska Bar Association.

ENDNOTES

1. Alternative Dispute Resolution Section of the State Bar of Michigan, Michigan Dispute Resolution Journal <<https://connect.michbar.org/adr/journal/>> (all websites accessed June 3, 2024).
2. 98 Mich B J (Feb. 2019); 94 Mich B J (June 2015); 89 Mich B J (June 2010).
3. Stark & Cook, *Practical Tips for Taking the Mediation Road to the Intended Destination*, 98 Mich B J 24 (Feb 2019).
4. Michigan Supreme Court State Court Administrative Office, Office of Dispute Resolution, *Michigan Judges Guide to ADR Practice and Procedure* (Lansing: Michigan Supreme Court, 2015).
5. *Civil Proceedings Benchbook—Second Edition* (Lansing: Michigan Judicial Institute, 2024), ch 6, p 6-1.
6. *Michigan Basic Practice Handbook* (Ann Arbor: Institute for Continuing Legal Education, 2024), ch 12; *Michigan Civil Procedure* (Ann Arbor: Institute for Continuing Legal Education, 2024), ch 16; *Employment Litigation in Michigan* (Ann Arbor: Institute for Continuing Legal Education, 2024), ch 14; *Michigan Family Law* (Ann Arbor: Institute for Continuing Legal Education, 2024), ch 8.
7. Kovach, *Mediation in a Nutshell* (St. Paul: West Academic Publishing, 2014); Nolan-Haley, *Alternative Dispute Resolution in a Nutshell* (St. Paul: West Academic Publishing, 2021); Teply, *Legal Negotiation in a Nutshell* (St. Paul: West Academic Publishing, 2023).
8. Hinshaw, Kupfer Schneider & Cole, eds., *Discussions in Dispute Resolution: The Foundational Articles* (New York: Oxford Academic, 2021).
9. ABA Dispute Resolution Section, Publications <https://www.americanbar.org/groups/dispute_resolution/publications/>.
10. Program on Negotiation, Daily Blog <<https://www.pon.harvard.edu/blog/>>.
11. JAMS, JAMS ADR Insights <<https://www.jamsadr.com/blog/>>.
12. Indisputably <<http://indisputably.org/>>.

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LAWYERS & JUDGES ASSISTANCE

MEETING DIRECTORY

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

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

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

ALCOHOLICS ANONYMOUS & OTHER SUPPORT GROUPS

Bloomfield Hills

WEDNESDAY 6 PM*

Kirk in the Hills Presbyterian Church
1340 W. Long Lake Rd.
1/2 mile west of Telegraph

Detroit

MONDAY 7 PM*

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

East Lansing

WEDNESDAY 8 PM

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

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

Bloomfield Hills

THURSDAY & SUNDAY 8 PM

Manresa Stag
1390 Quarton Rd.

Detroit

TUESDAY 6 PM

St. Aloysius Church Office
1232 Washington Blvd.

Detroit

FRIDAY 12 PM

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

Farmington Hills

TUESDAY 7 AM

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

Monroe

TUESDAY 12:05 PM

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

Rochester

FRIDAY 8 PM

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

Troy

FRIDAY 6 PM

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

GREAT LAKES LEGAL CONFERENCE

Thank you to all who attended this year's Great Lakes Legal Conference! Mark your calendars for the 2025 Great Lakes Legal Conference scheduled for June 13-14 at the Grand Hotel on Mackinac Island.



BEST PRACTICES

Check all the boxes when practicing election law

BY CHRISTOPHER M. TREBILCOCK

We know the names and the associated conduct which gave rise to historic disciplinary actions, court-ordered sanctions, or both as a result of participating or appearing in one of the 62 lawsuits filed nationwide in the aftermath of the 2020 general election.¹ Rudy Giuliani. Sidney Powell. L. Lin Wood. John Eastman.

In Michigan, U.S. District Court Judge Hon. Linda Parker ordered eight attorneys licensed to practice law in the state to pay sanctions in the “Kraken” lawsuit disputing the 2020 election results.² As noted by Benjamin E. Griffith, an adjunct professor of election law at the University of Mississippi School of Law:

[W]hen [these] lawyers loaned their credibility to the idea that the election was stolen, they crossed an important line. That line was between taking on unpopular or challenging cases to ensure a fair hearing and making allegations about core features of our democracy that were either knowingly false or unlikely ever to have evidentiary support.³

Renee Knake Jefferson, a professor and chair of legal ethics at the University of Houston Law Center, correctly concluded that “[w]hen lawyers misuse their law licenses by lying about the established results of a fair election before a judge or jury, they violate their oath and the very ethics rules affording them the right to practice law.”⁴

Regardless of political affiliation, there should be little dispute that these high-profile matters distract from the significant number of election-related lawsuits and administrative challenges State Bar of Michigan members file on a regular basis. Many of those lawsuits and administrative actions have merit. However, too many lack

good faith arguments, are not well-grounded in law, or are procedurally deficient and a waste of judicial resources.

When courts and administrative bodies are flooded with the latter and not the former, there is an increased risk that meritorious claims are glossed over and the public loses faith in members of the bar.

For those who routinely practice election law, these matters can bring great personal and professional satisfaction. Often, these matters occur under tight timelines and intense public scrutiny. Clients rely on the attorney’s legal acumen, work ethic, judgment, and creativity. Election litigation requires stamina and, often, a willingness to simply outwork your opponent.

Election law litigation is not for the faint of heart. Lawyers should not merely dip their toes into the election law pool. I was fortunate — and remain blessed — to have learned the statutory and procedural rules governing election matters from some of the best practitioners in the state.⁵ What follows are a few key lessons I have learned during my 23 years of practice.

KNOW THE LAW

Michigan is one of eight states that administers elections at the local level.⁶ While the secretary of state has the authority to “[a]dvise and direct local election officials as to the proper methods of conducting elections,” elections are administered by Michigan’s 83 county clerks, 280 city clerks, and 1,240 township clerks.⁷ According to the Michigan Bureau of Elections, ours is one of the most decentralized election systems in the United States.⁸

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

Article II of the 1963 Michigan Constitution provides the baseline for the rights of registered voters and statutory rules governing elections.⁹ As a result of the passage of Proposal 2 in 2022, certain voting rights and election procedures are enshrined in the Constitution. This includes requiring nine days of early voting, drop boxes, and the right to vote by absentee ballot for any reason.¹⁰

The Michigan Election Law (MEL), MCL 168.1 *et seq.*, implements the constitutional foundation for elections established by Article II. Included in its 37 chapters are provisions governing the conduct of state and local elections including election schedules, rules for nominating and electing candidates for various state and local offices, and the implementation of the constitutional right of initiative and referendum. In addition, the process for certifying elections through the county and state canvass, any ensuing recounts, and the recall of public officials is detailed.

**Election law litigation is
not for the faint of heart.
Lawyers should not merely
dip their toes into the
election law pool.**

On top of this, the U.S. Constitution empowers Congress to regulate federal elections.¹¹

This says nothing of the related laws contained in the Michigan Campaign Finance Act (MCFA), MCL 169.201 *et seq.*, that govern all contributions and expenditures made in furtherance of or related to state and local elections.

The bottom line: at virtually every step leading up to election day, on election day, and after election day, the rules governing how a candidate or ballot question appears and how all these activities are funded are specifically addressed in one way or another in the MEL or MCFA. Knowing where to find the rules is only half the battle. Understanding them, their interrelation, and how the courts have (or have not) interpreted these laws is crucial to successfully practicing election law.

KNOW THE TIMELINES

Similar to statutes of limitations, MEL contains numerous deadlines for candidates and proposals that must be strictly followed in order to qualify for the ballot. For example, absentee voter ballots must be delivered at least 47 days before any election or primary election.¹² The Board of State Canvassers must complete its canvass and determine a winner of an election no later than the 20th day after the

election.¹³ However, unlike other statutes of limitations, courts lack the authority to move election day, certification of election deadlines, and other time limits for printing and mailing ballots.¹⁴ Thus, failure to timely challenge the qualifications of a candidate or ballot proposal or the results of an election will likely lead to dismissal of the challenge for no other reason than being too late.¹⁵

KNOW YOUR CLIENT

According to former Secretary of State Henry Kissinger, “Ninety percent of the politicians give the other 10% a bad reputation.”¹⁶ Candidates for office and those running ballot committees often want the assistance of good lawyers to help further their political ends. However, when it comes to paying fees for those services, many candidates and ballot-question committees see greater value in contributions being spent on voter persuasion and contact as opposed to legal fees. After 20-plus years of practice, my advice is to make sure you get a retainer for your services sufficient to cover your anticipated first two weeks of fees and do not let invoices go stale. If you wait to get paid until the campaign is over, you are destined to be listed on the final campaign finance report as a debt to the committee with little hope of recovering those fees.

KNOW YOUR REPUTATION MATTERS

Typically, your client has not spent thousands of dollars on law school or countless hours studying during law school or in preparation for the bar exam. Your client most likely does not risk losing the ability to practice law every time a pleading is filed or a statement is made in court. As members of the bar, we attorneys wear those badges. And as members of the bar, we must ensure that we do not allow ourselves to be used by candidates or ballot committees to pursue frivolous legal theories or engage in improper legal tactics to further a political agenda.

CONCLUSION

Balancing your professional ethics and duty of candor to the courts and your client in matters that have local, state, and national significance is never easy. However, with the right preparation and remembering to keep your ethical obligations as the ultimate check, practicing election law can be rewarding.

Christopher M. Trebilcock is a member and senior director of public strategies at Clark Hill in Detroit. He routinely advises candidates, elected officials, political action committees, and ballot question committees on all matters involving campaign finance, ballot access, recounts, and other election law issues.

ENDNOTES

1. Cummings, Garrison, and Sergeant, *By the Numbers: Donald Trump's Failed Efforts to Overturn the Election*, USA Today (January 6, 2021) <<https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/>> [perma.cc/N5XA-X3VV] (All websites accessed May 31, 2024).
2. *King v Whitmer*, 2:20-cv-13134 (ED Mich, 2021).

3. Benjamin E. Griffith, ABA Standing Committee on Election Law & ABA Cybersecurity Legal Task Force, *What Went Right: Addressing Claims of Widespread Voter Fraud in One of the Most Secure Elections in American History* <<https://static1.squarespace.com/static/530d48bce4b097f846417f0b/t/600847eb73c39b3f521058f9/1611155435982/What+Went+Right.pdf>> [perma.cc/ZE2R-FTGL] (posted January 19, 2021).

4. Jefferson, *Lawyer Lies and Political Speech*, 131 Yale LJ Forum (Oct 2021) <<https://www.yalelawjournal.org/forum/lawyer-lies-and-political-speech>> [perma.cc/S9LL-Y4QJ].

5. In no particular order, I count Mike Hodge, Mark Brewer, Gary Gordon, Mary Ellen Gurewitz, Kelly Keenan, and John Pirich as friends and mentors who have offered sage advice and perspective on more than one occasion.

6. Michigan Bureau of Elections, *Election Officials' Manual*, ch 1 p 1 <https://www.michigan.gov/-/media/Project/Websites/sos/01mcalpine/I_Structure_of_MI_Elections_System.pdf?rev=8ade2e2574f140debc8c28af9ca878dc> [perma.cc/E4ZD-Z4C8].

7. MCL 168.31(1); *Election Officials' Manual*, supra n 6.

8. *Election Officials' Manual*, supra n 6.

9. Const 1963, art 2.

10. *Id.* at § 2.

11. US Const, art I, § 4.

12. MCL 168.713.

13. MCL 168.842.

14. MCL 168.713; MCL 168.714; MCL 168.822(2); MCL 168.842(2); see also *Nykoriak v Napoleon*, 334 Mich App 370; 964 N.W.2d 895 (2020).

15. See *Nykoriak*, supra n 14 (Doctrine of laches applied to bar candidate's attempt to disqualify incumbent competing with candidate in primary election even though candidate filed action seeking writ of mandamus more than 28 days before date of primary election where, after filing objections to incumbent's affidavit of identity, candidate waited another 24 days for county clerk and county board of election commissioners to disqualify incumbent before filing action in circuit court); MCL 168.845a(2) (an aggrieved candidate must bring an action within 48 hours after the certification of the presidential election results).

16. BrainyQuote.com, *Henry Kissinger Quotes* <https://www.brainyquote.com/quotes/henry_kissinger_122694?src=t_politicians> [perma.cc/S3NQ-PA9D].

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- ▶ Renewal notices will be emailed in mid-September



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ETHICAL PERSPECTIVE

Reviewing the obligation to report potential misconduct

BY AUSTIN D. BLESSING-NELSON

I have discovered that many attorneys are unfamiliar with their obligations regarding reporting allegations of attorney misconduct. Lack of reporting is problematic for multiple reasons, including that failure to report may itself be professional misconduct. I hope to provide some guidance and clarification regarding reporting obligations in an effort to educate both the Bar and the public and hopefully prevent attorneys from landing themselves in trouble!

First, it must be acknowledged that reporting misconduct is vital because it allows for self-regulation of the profession and facilitates investigations into misconduct that could reveal bigger issues or patterns that would otherwise go unnoticed.¹ Often, reporting suspected misconduct is optional, but there are circumstances where it is mandatory. Failure to report when mandatory could result in a finding that the non-reporting lawyer engaged in misconduct. Most importantly, Michigan Rule of Professional Conduct (MRPC) 8.3(a) states: "A lawyer having knowledge that another lawyer has committed a significant violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer shall inform the Attorney Grievance Commission."²

MRPC 1.0 and the comment to MRPC 8.3 define and discuss some relevant terms, including what it means to have knowledge. Similar to MRPC 8.3(a), MRPC 8.3(b) states that "[a] lawyer having knowledge that a judge has committed a significant violation of the Code of Judicial Conduct that raises a substantial question as to the judge's honesty, trustworthiness, or fitness for office shall inform the Judicial Tenure Commission."

Because judges are also lawyers, they can sometimes be obligated to report misconduct pursuant to MRPC 8.3.³ Judges also have additional duties to report certain types of misconduct.⁴

MANDATORY REPORTING

You may wonder why reporting misconduct is not always mandatory. This is because imposing a duty to report all misconduct, even minor transgressions, is an impractical requirement to impose on lawyers.⁵ Instead, a system has been designed where, subject to some exceptions, the most severe and egregious misconduct must be reported while most other misconduct may be reported.

Examples of when reporting is mandatory (unless MRPC 1.6 applies, which is discussed later) include a lawyer practicing with a suspended license, attempting to enter into an agreement that restricts reporting violations of the rules of ethics, and repeatedly failing to meet filing deadlines.⁶ Additional examples of when reporting may be required include (but are not necessarily limited to) when you know another lawyer has not communicated a settlement offer to their client,⁷ has negotiated a settlement directly with a party represented by counsel,⁸ misappropriation,⁹ fraudulent billing practices,¹⁰ when a lawyer misses a hearing without informing the court and securing stand-in counsel,¹¹ unethical fee arrangements,¹² serious neglect of a case,¹³ and other significant acts of misconduct.¹⁴ An attorney's failure to pay court-ordered sanctions does not always trigger the duty to report, but it can depending on the circumstances.¹⁵

Though it is only tangentially related, this is a good place to remind lawyers of their duty pursuant to MRPC 3.3 to take remedial steps if you discover that false evidence has been introduced, which

sometimes requires revealing information that would otherwise be protected from disclosure by MRPC 1.6.¹⁶

Attorneys and judges who become aware that another lawyer has not promptly turned over funds which were to be held in a trust or fiduciary capacity may have a reporting obligation under MRPC 8.3. Probate cases are a particularly ripe area for misappropriation; probate judges and attorneys should be extra vigilant of any irregularities.

Attorneys should also report the unauthorized practice of law to the State Bar of Michigan Unauthorized Practice of Law Committee.¹⁷ When the unauthorized individual is a disbarred or suspended attorney (regardless of whether the suspension is administrative or disciplinary), a report should be made to the Attorney Grievance Commission.¹⁸

A supervising lawyer with knowledge that a subordinate lawyer has committed significant violations is required to report under MRPC 8.3.¹⁹ Also, MRPC 5.1 requires a supervising lawyer to take precautionary and remedial measures to ensure that subordinate lawyers do not violate the MRPCs and “[a] failure to take remedial action or to notify the Attorney Grievance Commission may subject that supervising lawyer to discipline.”²⁰

Lawyers may also be obligated to report certain actions of law students to bar admissions authorities.²¹

Sometimes, the duty to report is clear; other times, it requires careful analysis of relevant facts and consulting ethics resources. If you are in doubt about whether you are required to file a report, the best course of action is usually filing just to be safe.

LIMITS TO REPORTING

As earlier noted, sometimes an attorney cannot report misconduct even if otherwise required to.²² Reporting misconduct is limited when doing so requires revealing information protected by the duty of confidentiality (MRPC 1.6) and the client has not consented to the disclosure of protected information.²³ Attorneys should familiarize themselves with MRPC 1.6 to determine what information is protected and when a disclosure may be made.²⁴

Even when MRPC 1.6 applies, the comments to MRPC 8.3 state that an attorney should encourage a client to consent to a lawyer reporting misconduct when doing so would not substantially prejudice the interests of the client. An attorney is not excused from the obligation to report if reporting would not violate MRPC 1.6 but the client does not want a report to be made.²⁵

To encourage judges and lawyers to seek assistance, MRPC 8.3(c)(2) does not require disclosure of “information gained by a lawyer while serving as an employee or volunteer of the substance abuse counseling program of the State Bar of Michigan, to the extent the information would be protected under Rule 1.6 from disclosure if it were a communication between lawyer and client.” The comment

to MRPC 8.3 further states that “[t]he duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.”

TIMELINESS IN REPORTING

So, you’ve determined that an attorney has committed a violation that triggers your duty to report and MRPC 1.6 doesn’t prevent you from reporting. How quickly do you have to file the report?

Unfortunately, neither MRPC 8.3 nor its comment provide a time-frame. Attorney discipline case law and ethics opinions likewise provide limited guidance. In fact, in this author’s review of case law, only one case squarely addressed the timeliness of a report — *Grievance Administrator v. Michael L. Stefani*.²⁶

In dismissing an allegation that the respondent had violated MRPC 8.3, the hearing panel in *Stefani* found that whether a report was timely was an issue of first impression in Michigan. The panel then reviewed case law from other jurisdictions suggesting that reports must be made promptly,²⁷ although, as was the case in *Stefani*, “promptly” does not necessarily mean immediately and determining what constitutes “prompt” requires looking at the specific circumstances of the case. The panel’s decision regarding MRPC 8.3 was not challenged on appeal — even though other aspects of the ruling were — and was thus not addressed by the Attorney Discipline Board (ADB). Therefore, while the panel’s reasoning may be used as guidance, it is not considered binding precedent.

Also, it should be noted that unlike ADB opinions and orders, complete panel reports and orders aren’t normally available on the ADB website — typically, a short summary of the outcome is posted — so it is possible that other panels have addressed this issue. Given the ambiguity of what is considered timely, a good rule of thumb is that an attorney should report misconduct as soon as possible after their duty to report is triggered to avoid any issues.

OTHER REPORTING REQUIREMENTS

In addition to the obligations pursuant to MRPC 8.3, attorneys also have other reporting requirements. MCR 9.120(A)(1) mandates that when an attorney is convicted of a crime, the convicted attorney, their defense attorney, and the prosecutor must report the conviction to the ADB and Attorney Grievance Commission within 14 days. Reports made directly to the State Bar do not fulfill the requirement. The 14-day clock starts on the date of conviction, not the date of sentencing.²⁸ Sometimes, one letter jointly signed by the convicted attorney, their defense attorney, and the prosecutor fulfills the reporting obligation.²⁹ If the defense attorney is providing notice on behalf of the convicted attorney, it should be signed by both or at least state the report is made on behalf of the convicted attorney. A “c.c.” with the convicted attorney’s name is not sufficient. The reporting obligations under MCR 9.120(A) are separate from, and not satisfied by, any required disclosures on your annual license renewal.³⁰

The duty of confidentiality under MRPC 1.6 does not prevent lawyers from reporting the criminal conviction of the lawyer's attorney client. Civil infractions are not criminal convictions and need not be reported under MCR 9.120(A), although MRPC 8.3 could still be implicated depending on the circumstances.³¹ If a lawyer is convicted of a crime in another state that is a civil infraction in Michigan, it still needs to be reported pursuant to MCR 9.120(A)(1). Criminal contempt convictions need to be reported under MCR 9.120(A). Civil contempt findings do not trigger MCR 9.120(A) but may implicate the reporting obligation of MRPC 8.3. Failure to report a conviction in violation of MCR 9.120(A)(1) may result in a finding of misconduct and can be viewed as an aggravating factor in disciplinary proceedings that may arise from the conviction.³²

Similarly, MCR 9.120(A)(2) states:

A lawyer who has been the subject of an order of discipline or transferred to inactive status by any court of record or any body authorized by law or by rule of court to conduct disciplinary proceedings against attorneys, of the United States, or of any state or territory of the United States or of the District of Columbia, or who has resigned from the bar or roster of attorneys in lieu of discipline by, or during the pendency of, discipline proceedings before such court or body shall inform the grievance administrator and board of entry of such order, transfer, or resignation within 14 days of the entry of the order, transfer, or resignation.

The duty to report criminal convictions and discipline orders from other jurisdictions is not explicitly mentioned in the MRPCs, which sometimes causes confusion and delays in reporting or failures to report. However, the fact that the MRPCs do not explicitly mention the duty to report criminal convictions and discipline orders from other jurisdictions is not a valid excuse for failing to properly report because attorneys must be familiar with the rules governing them. Information about MCR 9.120 is available on the SBM website³³ and reminders routinely appear in the Michigan Bar Journal.³⁴

CONCLUSION

Attorneys must know their reporting obligations to avoid landing in trouble and help facilitate proper self-regulation of our profession. Information on reporting attorney misconduct can be found on the Attorney Grievance Commission website;³⁵ likewise, information on reporting judicial misconduct can be found on the Judicial Tenure Commission website.³⁶ Attorneys with questions regarding their reporting obligations can contact the SBM Ethics Helpline or review the various ethics opinions and other materials available on the SBM Ethics website.³⁷

Austin D. Blessing-Nelson is an associate counsel at the Michigan Attorney Grievance Commission.

ENDNOTES

1. See Comment to MRPC 8.3; SBM Informal Ethics Opinion RI-088.
2. See e.g., SBM Informal Ethics Opinion RI-195.
3. See SBM Informal Ethics Opinion RI-088; *Matter of Hocking*, 451 Mich 1; 546 NW2d 234 (1996); *Grievance Administrator v Attorney Discipline Bd*, 444 Mich 1218; 515 NW2d 360 (1994); *Grievance Administrator v Fieger*, 476 Mich 231; 719 NW2d 123 (2006) [M. CORRIGAN, R. YOUNG, AND S. MARKMAN concurring].
4. See e.g., Code of Judicial Conduct, Canon 3(B)(3); Katherine S. Gardner, *Addressing the Unauthorized Practice of Law in the Courtroom*, Mich B J (Sep 2023); SBM, *Judicial Ethics—Frequently Asked Questions* <<https://www.michbar.org/opinions/ethics/judicialgeneralFAQs>> (all websites accessed June 3, 2024); SBM Informal Ethics Opinion JI-085.
5. See Comment to MRPC 8.3; SBM Informal Ethics Opinion RI-088.
6. SBM, *General Attorney—Frequently Asked Questions* <<https://www.michbar.org/opinions/ethics/generalattorneyFAQs>>.
7. SBM Informal Ethics Opinion RI-171.
8. SBM Informal Ethics Opinion RI-145.
9. See *Grievance Administrator v Ronald W Crenshaw*, ADB Notice of Revocation and Restitution, Issued October 7, 1997 (Case No. 97-043-GA).
10. See *Grievance Administrator v Teresa Hendricks*, ADB Notice of Reprimand, issued May 16, 2000 (Case No. 96-94-GA).
11. *People v Harris*, unpublished per curiam opinion of the Michigan Court of Appeals, issued August 21, 2001 (Docket No. 224552).
12. SBM Informal Ethics Opinion RI-122.
13. *LeBlanc v Berghuis*, unpublished opinion of the United States District Court for the Western District of Michigan, Southern Division, issued October 30, 2006 (Case No. 1:02-CV-594).
14. See e.g., *Chaban v Rathore*, unpublished per curiam opinion of the Court of Appeals, issued November 21, 2013 (Docket No. 308326); *Gjelaj v Seven Bros Painting, Inc*, unpublished opinion of the United States District Court for the Eastern District of Michigan, Southern Division, issued November 19, 2018 (Case No. 18-CV-11709); *Burks v Napoleon*, report and recommendation of the United States District Court for the Eastern District of Michigan, Southern Division, issued June 7, 2022 (Case No. 2:19-CV-10027).
15. See *Grievance Administrator v Gregory J Reed*, ADB Opinion, issued September 16, 2014 (Case No. 10-140-GA).
16. See e.g., SBM Informal Ethics Opinions RI-151 & RI-272.
17. Gardner, *supra* n 4.
18. SBM Informal Ethics Opinion RI-101.
19. SBM Informal Ethics Opinion RI-149.
20. SBM Informal Ethics Opinion RI-149.
21. SBM Informal Ethics Opinion RI-029.
22. MRPC 8.3(c)(1).
23. See SBM Informal Ethics Opinions RI-088, RI-220 & RI-314.
24. See *Frequently Asked Questions*, *supra* n 6.
25. See SBM Informal Ethics Opinion RI-314.
26. *Grievance Administrator v Michael L. Stefani*, ADB Order, issued May 11, 2011 (Case No. 09-47-GA).
27. The relevant panel report is attached to the version of the board opinion in *Grievance Administrator v Michael L. Stefani* at <<https://records.adbmich.org/adbmich/op/en/1606/1/document.do>> [perma.cc/4H9L-H59E].
28. MCR 9.120(A)(1). See also MCR 9.120(B)(1) ("A conviction occurs upon the return of a verdict of guilty or upon the acceptance of a plea of guilty or nolo contendere.").
29. See Cynthia C Bullington, *Impaired Driving Convictions and the Disciplinary Process (Part 1 of 2)*, Mich B J (Nov 2009).
30. See *Grievance Administrator v Timothy P Murphy*, ADB Order Increasing Discipline, issued August 8, 2013 (Case No. 12-57-JC).
31. *Frequently Asked Questions*, *supra* n 6.
32. See *Grievance Administrator v Peter J Harrington*, ADB Notice of Disbarment, issued November 22, 2013 (Case No. 13-131-JC).
33. *Frequently Asked Questions*, *supra* n 6. Notably, as of the date of writing, these FAQs only cover the duty to report criminal convictions, not the duty to report orders of discipline from other jurisdictions.
34. Short reminders regarding the duty to report criminal convictions run in every edition of the Michigan Bar Journal. The duty to report orders of discipline from other jurisdictions is not mentioned by these reminders, or at least not by the ones reviewed by this author.
35. Attorney Grievance Commission, *How to File a Request for an Investigation* <<https://www.agcmi.org/for-the-public/investigation>> [perma.cc/YP6W-AUG4].
36. Judicial Tenure Commission, *How to File a Grievance*, <http://jtc.courts.mi.gov/file_a_grievance/index.php> [perma.cc/8BZH-ULGA].
37. SBM, *Ethics* <<https://www.michbar.org/opinions/ethicsopinions>>.

OF INTEREST

Michigan State Bar Foundation names 2024 award recipients

The Michigan State Bar Foundation has announced its 2024 award recipients. Reginald M. Turner, member emeritus at Clark Hill in Detroit, will receive the Founders Award recognizing a lawyer who exemplifies professional excellence and outstanding commitment to serving the community. Wendy W. Richards, principal and pro bono counsel at Miller Canfield in Detroit, will receive the Access to Justice Award honoring an individual who significantly advances access to justice for low-income individuals in the state.

"The Michigan State Bar Foundation is pleased to recognize the contributions and commitments of these remarkable professionals," MSBF President Craig Lubben said.

FOUNDERS AWARD



Reginald M. "Reggie" Turner is an accomplished litigator and government affairs advocate with an impressive career spanning over 30 years, and he has consistently exemplified professional excellence and outstanding contributions to the community. Passionate about access to justice and diversity and inclusion, Turner — who once described himself as a

"serial volunteer" — has an extensive list of civic, community, and cultural involvement.

Turner served as president of the American Bar Association in 2021-2022 and president of the State Bar of Michigan in 2002-2003. A White House fellow under former President Bill Clinton, Turner represented Mayor Dennis Archer on the Detroit Board of Education from 2000-2003. In 2003, Gov. Jennifer Granholm appointed Turner to the Michigan State Board of Education, and he won a state election

for a full term in 2006. Turner also served on several boards including Comerica Bank, the Hudson-Webber Foundation, the Detroit Institute of Arts, and the Community Foundation for Southeast Michigan. He is a fellow of the Michigan State Bar Foundation and the American Bar Foundation and has provided leadership to the development of the Access to Justice Campaign.

ACCESS TO JUSTICE AWARD



Wendy W. Richards has significantly advanced access to justice through her skilled advocacy efforts and work in her role as Miller Canfield's pro bono counsel, where she leads the firm's nationally recognized pro bono program. Her impressive career as a commercial litigator includes working on class action cases and other complex matters.

Richards has led cases involving high-impact immigration litigation matters, community development projects, and entrepreneurship opportunities for individuals living in disadvantaged communities. She also has extensive pro bono experience related to voting rights. Richards is a fellow of the Michigan State Bar Foundation and a member of the Access to Justice Campaign Steering Committee and the Statewide Fundraising Committee.

The Michigan State Bar Foundation is a tax-exempt charitable organization established in 1947. It provides leadership and grants to improve access for all to the justice system including support for civil legal aid to the poor, law-related education, and conflict resolution. The foundation administers the Access to Justice Campaign. More information about the foundation can be found at msbf.org.

PUBLIC POLICY REPORT

AT THE CAPITOL

HB 4427 (Young) **Civil rights: public records; Corrections: prisoners.** Civil rights: public records; limited access to public records; provide for incarcerated individuals. Amends secs. 1, 2, 3 & 5 of 1976 PA 442 (MCL 15.231 et seq.).

POSITION: Support.

HB 5689 (O'Neal) **Courts: juries.** Courts: juries; local jury boards; eliminate, and create a centralized jury process. Amends secs. 857, 1301a, 1304a, 1307a, 1326, 1332, 1334, 1343, 1344, 1345, 1346, 1371 & 1372 of 1961 PA 236 (MCL 600.857 et seq.); adds secs. 1306 & 1307 & repeals secs. 1301, 1301b, 1302, 1303, 1303a, 1304, 1305, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1327, 1328, 1330, 1331, 1338, 1339, 1341, 1342, 1353, 1375 & 1376 of 1961 PA 236 (MCL 600.1301 et seq.) & repeals 1929 PA 288 (MCL 730.251 - 730.271) & repeals 1951 PA 179 (MCL 730.401 - 730.419).

POSITION: Support.

HB 5690 (Hope) **Courts: juries.** Courts: juries; reference in the uniform condemnation procedures act; amend to reflect repeal. Amends sec. 12 of 1980 PA 87 (MCL 213.62).

POSITION: Support.

HB 5691 (Tsernoglou) **Courts: juries; Crimes: other.** Courts: juries; prospective jurors with certain criminal records and protected statuses; amend eligibility for service and peremptory challenges. Amends sec. 1307a of 1961 PA 236 (MCL 600.1307a) & adds secs. 1307b & 1356.

POSITION: Support HB 5691, Section 1356 (1)-(5), (7), and (8). (Position adopted by roll-call vote. Commissioners voting in support of the position: Andreson, Bennett, Bryant, Burrell, Christenson, Cripps-Serra, Detzler, Easterly, Evans, Gant, Hamameh, Howlett, Larsen, Lerner, Low, Mansoor, Mantese, Mason, McGill, Murray, Newman, Nyamfukudza, Ohanesian, Perkins, Potts, Reiser, Simmons, Walton, Washington. Commissioners voting in opposition of the position: Quick.)

No position adopted on Section 1356 (6).

HB 5692 (Wilson) **Appropriations: supplemental; Courts: other.** Appropriations: supplemental; funding for jury selection program; provide for. Creates appropriation act.

POSITION: Support.

HB 5693 (Young) **Courts: juries.** Courts: juries; reference in the probate code; amend to reflect repeal. Amends sec. 17, ch. XIA of 1939 PA 288 (MCL 712A.17).

POSITION: Support.

HB 5724 (Breen) **Courts: judges; Civil rights: public records.** Courts: judges; personal information and physical safety protections for judges, their families, and household members; enhance. Creates new act.

POSITION: Support. (Position adopted by roll-call vote. Commissioners voting in support of the position: Andreson, Bennett, Bryant, Burrell, Clay, Detzler, Evans, Hamameh, Howlett, Larsen, Lerner, Low, Mantese, Mason, McGill, Murray, Newman, Nyamfukudza, Ohanesian, Perkins, Quick, Reiser, Simmons, Walton, Washington. Commissioners abstaining: Christenson, Gant.)

SB 723 (Santana) **Criminal procedure: mental capacity; Criminal procedure: trial.** Criminal procedure: mental capacity; evaluation of competency to waive Miranda rights; require. Amends 1974 PA 258 (MCL 330.1001 - 330.2106) by adding secs. 1080, 1081, 1082 & 1083.

POSITION: Support with the following amendments:

- The statute should track the procedure in MCL 768.20a(3);
- There should be some penalty when a defendant declines to participate in the examination consistent with MCL 768.20a(4); and
- The presumption of competency should be removed.

SB 813 (Cherry) **Criminal procedure: evidence; Children: protection; Criminal procedure: pretrial procedure; Criminal procedure: preliminary examination.** Criminal procedure: evidence; consideration of videorecorded statements in certain proceedings; allow. Amends sec. 2163a of 1961 PA 236 (MCL 600.2163a).

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

SB 871 (Chang) **Courts: judges; Civil rights: public records.** Courts: judges; personal information and physical safety protections for

judges, their families, and household members; enhance. Creates new act.

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

IN THE HALL OF JUSTICE

Proposed Amendment of Rule 7.306 of the Michigan Court Rules (ADM File No. 2024-05) – Original Proceedings (See Michigan Bar Journal May 2024, p 55).

STATUS: Comment period expires July 1; public hearing to be scheduled.

POSITION: Support.

Proposed Amendment of Rule 8.126 of the Michigan Court Rules (ADM File No. 2022-10) – Temporary Admission to the Bar (See Michigan Bar Journal May 2024, p 52).

STATUS: Comment period expires July 1; public hearing to be scheduled.

POSITION: Support Alternative B, but recommend that “Permission for a foreign attorney to appear and practice is within the discretion of the tribunal” be retained in MCR 8.126(B)(1), and urge the Court to consider the concerns raised by the Alternative Dispute Resolution Section.

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ORDERS OF DISCIPLINE & DISABILITY

AUTOMATIC INTERIM SUSPENSION

Marco M. Bisbikis, P79478, Novi. Effective May 23, 2024.

On May 23, 2024, the respondent was convicted by guilty verdict 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 constitute violations of MCL 750.316, MCL 750.227b, and MCL 750.83, felony offenses, in *People v. Marco Bisbikis*, Oakland County Circuit Court, Case No. 2023-284941-FC. 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).

REPRIMAND (BY CONSENT)

Manda L. Danielecki, P62597, Saginaw. Reprimand, effective May 30, 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 Tri-Valley Hearing Panel #1. The stipulation contained the respondent's no contest plea to the factual allegations and grounds for discipline set forth in the formal complaint, namely, that the respondent committed professional misconduct during her representation of a client in an action against the client's employer by threatening to withdraw as counsel if they did not accept a settlement offered by the employer.

Based upon the stipulation of the parties and the respondent's no contest plea to the factual allegations and allegations of professional misconduct, the panel found that the respondent failed to abide by a client's decision whether to accept an offer of settlement in violation of MRPC 1.2(a) and engaged in

a conflict of interest related to the lawyer's own interests in violation of MRPC 1.7(b). The panel also found violations of MCR 9.104(1)-(3).

In accordance with the stipulation of the parties, the panel ordered that the respondent be reprimanded. Costs were assessed in the amount of \$770.32.

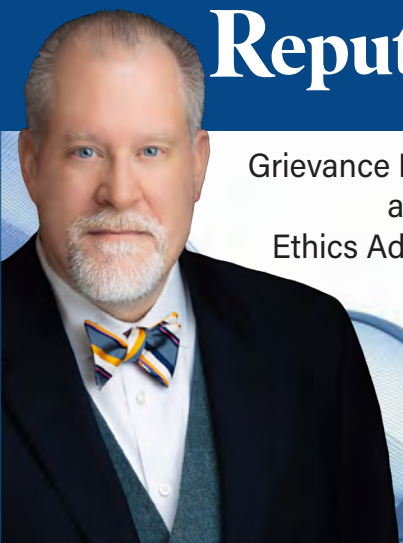
TRANSFER TO INACTIVE STATUS PURSUANT TO MCR 9.121(B)

Vanessa G. Fluker, P64870, Detroit. Transfer to inactive status, effective June 13, 2024.

The grievance administrator filed a formal complaint which charged that the respondent committed acts of professional misconduct warranting discipline. At a virtual pre-hearing conference on March 4, 2024, counsel for the grievance administrator indicated that MCR 9.121, which provides for the transfer of a respondent to inactive status when the respondent is incapacitated and unable to practice law, is appropriate here, and orally moved for the panel to consider the application of MCR 9.121. The respondent stated she agreed and consented to an order issued under MCR 9.121 placing her on inactive status.


Tri-County Hearing Panel #13 reported its findings and conclusions as to the circumstances that led to the request for transfer by the grievance administrator and agreed to by the respondent. Based on the respondent's own admissions and the evidence presented, the panel unanimously determined that the respondent is incapacitated from continuing to practice law as defined in MCR 9.121(B)(3). The panel issued an order transferring the respondent to inactive status pursuant to MCR 9.121(B) for an indefinite period, effective June 13, 2024, to allow the respondent to complete the winding down of her practice, and until further order of a panel or the board in accordance

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with MCR 9.121(E). The panel further ordered that the allegations of professional misconduct contained in Formal Complaint 24-5-GA are to be held in abeyance pursuant to MCR 9.121(B)(4).

No costs were assessed in this matter.

SUSPENSION (WITH CONDITIONS)

Raymond Guzall III, P60980, Farmington Hills. Suspension, 90 days, effective April 20, 2024.

Based on the evidence presented at hearings held in this matter in accordance with MCR 9.115, Tri-County Hearing Panel #62 found that the respondent committed professional misconduct, originally arising from a dispute with his former law partner, as set forth in a three-count formal complaint filed by the administrator.

The panel found that as to count 1, the respondent engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); engaged in conduct that was contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3); and engaged in conduct that violated the standards or rules of professional conduct adopted by the Supreme Court in violation of MCR 9.104(4).

As to count 2, the panel found that the respondent knowingly disobeyed an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists in violation of MRPC 3.4(c); engaged in undignified or discourteous conduct toward a tribunal in violation of MRPC 3.5(d); engaged in conduct that was prejudicial to the administration of justice in violation of MCR 9.104(1); engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); engaged in conduct that was contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3); and engaged in conduct that violated the

standards or rules of professional conduct adopted by the Supreme Court in violation of MCR 9.104(4).

As to count 3, the panel found that the respondent brought a frivolous proceeding and/or controverted asserting a frivolous issue in violation of MRPC 3.1; engaged in undignified or discourteous conduct toward a tribunal in violation of MRPC 3.5(d); engaged in conduct that was prejudicial to the administration of justice in violation of MCR 9.104(1); engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); engaged in conduct that was contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3); and engaged in conduct that violated the standards or rules of professional conduct adopted by the Supreme Court in violation of MCR 9.104(4).

The panel ordered that the respondent's license to practice law be suspended for a period of 179 days and that he be subject to a condition relevant to the established misconduct. The respondent timely petitioned for review and a stay, and the panel's order of discipline was stayed pursuant to MCR 9.115(K). After conducting review proceedings according to MCR 9.118, the board reduced the discipline imposed by the hearing panel from a 179-day suspension to a 90-day suspension and modified the condition. On Oct. 20, 2023, the respondent filed a motion for reconsideration of the board's order pursuant to MCR 9.118(E) which was denied on Nov. 28, 2023.

On Dec. 18, 2023, the respondent filed a timely application for leave to appeal with the Michigan Supreme Court pursuant to MCR 9.122(A) and a motion to supplement on Feb. 20, 2024. On March 29, 2024, the Court issued an order granting the respondent's motion to supplement and denying his application for leave to appeal. On April 15, 2024, the respondent filed a motion for reconsideration of the Court's March 29, 2024, order. On May 29, 2024, the Court denied the respondent's motion. Costs were assessed in the total amount of \$5,672.05.

SUSPENSION

Matthew D. Novello, P63269, Highland. Suspension, 90 days, effective March 11, 2023.¹

A show cause hearing was held in this matter on the grievance administrator's motion to increase discipline and petition for an order to show cause why discipline should not be increased for the respondent's failure to comply with Tri-County Hearing Panel #58's Feb. 17, 2023, Order of Suspension and Restitution, effective March 11, 2023. The hearing panel found that based upon the respondent's admissions, stipulations, and testimony, the respondent violated an order of discipline in violation of MCR 9.104(9). Specifically, the panel found that the respondent failed to pay restitution as ordered in the Feb. 17, 2023, Order of Suspension and Restitution; failed to remove a website and online listing that indicated he is a practicing attorney with an operating

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ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

law office in violation of MCR 9.119(E)(4); failed to comply with MCR 9.119(A) by failing to notify all active clients regarding his disqualification; failed to comply with MCR 9.119(B) by failing to inform all tribunals regarding his disqualification; failed to comply with MCR 9.119(C) by failing to file an affidavit of compliance with the Attorney Discipline Board and the Attorney Grievance Commission within 14 days after the effective date of the order; failed to provide proof of payment of costs; and used an email address that implied he is a practicing attorney in violation of MCR 9.119(E)(4).

The hearing panel ordered that the respondent's license to practice law in Michigan be suspended for 90 days, effective March 11, 2023, to run concurrently with the 180-day suspension imposed in *Grievance Administrator v. Matthew D. Novello*, 22-76-GA. Costs were assessed in the amount of \$2,360.47.

1. The respondent has been continuously suspended from the practice of law in Michigan since Dec. 8, 2022. Please see Notice of Interim Suspension issued Dec. 12, 2022, Case No. 22-76-GA.

SUSPENSION (WITH CONDITION)

Andrew A. Paterson, P18690, Ann Arbor. Suspension, 100 days, effective May 29, 2024.

The grievance administrator filed a nine-count amended complaint against the respondent. Based on the evidence presented at hearings held in this matter in accordance with MCR 9.115, the hearing panel found that the respondent committed professional misconduct during his representation of various clients in numerous cases against governmental entities, their employees, and elected government officials.

Specifically, the panel found that respondent brought a proceeding or asserted an issue therein that was frivolous in violation of MRPC 3.1 (counts 1, 4, 5, 7, and 8); 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) (counts 6, 7, and 9); knowingly disobeyed an obligation under the rules of a tribunal in violation of MRPC 3.4(c) (counts 6 and 7); in the course of representing a client, knowingly

made a false statement of material fact or law to a third person in violation of MRPC 4.1 (count 9); engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b) (counts 6, 7, and 9); and engaged in conduct that is prejudicial to the administration of justice in violation of MRPC 8.4(c) (counts 1 and 4-9).

The panel also concluded that the respondent committed the following violations of the Michigan and Federal Court Rules: failed to abide by and violated the requirements of MCR 1.109(E) (counts 4 and 5); filed a motion that was presented for an improper purpose, such as to embarrass or harass the litigants before trial, in violation of MCR 2.302(G)(3) (count 9); engaged in conduct prejudicial to the administration of justice in violation of MCR 9.104(1) (counts 1 and 4-9); engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2) (counts 1 and 4-9); engaged in conduct contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3) (counts 1 and 4-9); and filed a motion that was presented for an improper purpose in violation of FRCP 11(b) (count 9). The hearing panel also determined that the grievance administrator failed to establish that the respondent violated any rule of professional conduct or court rule as set forth in counts 2 and 3 of the formal complaint, so those counts were dismissed.

The panel ordered that the respondent's license to practice law in Michigan be suspended for a period of 100 days and that he be subject to conditions relevant to the established misconduct. The respondent timely filed a petition for review and a petition for stay, which resulted in an automatic stay of the hearing panel's order of suspension with conditions, and complainants filed a cross-petition for review.

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Former Senior Associate Counsel -
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Former District Chairperson -
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**ROBERT E. EDICK**

Senior Attorney -
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Former Deputy Administrator -
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After review proceedings in accordance with MCR 9.118, on April 30, 2024, the board affirmed the hearing panel's order suspension, affirmed a condition, and vacated a separate condition. Total costs were assessed in the amount of \$6,295.

SUSPENSION (WITH CONDITIONS)

John Koby Robertson, P62137, Bloomfield Hills. Suspension, 180 days, effective May 18, 2024.¹

The respondent was convicted by guilty plea of attempted failure to pay child support in violation of MCL 750.92 in the matter titled *People v. John Robertson*, 44th Circuit Court Case No. 21-026886-FH. In accordance with MCR 9.120(B)(1), the respondent's license to practice law in Michigan was automatically suspended effective Dec. 3, 2021, the date of the respondent's conviction.

Based on the respondent's conviction, Tri-County Hearing Panel #64 found that 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).

The panel ordered that the respondent's license to practice law in Michigan be suspended for 180 days and that he be subject to conditions relevant to the established misconduct. Costs were assessed in the amount of \$1,921.04.

1. The respondent has been continuously suspended from the practice of law in Michigan since Dec. 3, 2021. Please see Notice of Automatic Interim Suspension issued Jan. 25, 2022.

REPRIMAND (BY CONSENT)

Keith W. Turpel, P27605, Kalamazoo. Reprimand, effective May 18, 2024.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Discipline in accordance with MCR

9.115(F)(5) which was approved by the Attorney Grievance Commission and accepted by Kalamazoo County Hearing Panel #3. The stipulation contained the respondent's no contest plea to the factual allegations and charges of professional misconduct set forth in the formal complaint in its entirety, namely that the respondent committed professional misconduct during his tenure as a public defender with the Kalamazoo Public Defender's Office when he was appointed to represent a defendant in a felony murder and first-degree child abuse matter.

Based upon the respondent's no contest plea as set forth in the parties' stipulation, the panel found that the respondent failed to adequately prepare for a case under the circumstances in violation of MRPC 1.1(b); neglected a matter entrusted to him in violation of MRPC 1.1(c); failed to seek the lawful objectives of a client in violation of MRPC 1.2(a); failed to act with reasonable diligence and promptness in representing a client in violation of MRPC 1.3; made false statements of material fact to a tribunal in violation of MRPC 3.3(a)(1); violated or attempted to violate the Rules of Professional Conduct in violation of MRPC 8.4(a) and MCR 9.104(4); engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal

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

In accordance with the stipulation of the parties, the panel ordered that the respondent be reprimanded. Costs were assessed in the amount of \$925.94.

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- Past member, SBM Professional Ethics Committee, Payee Notification Committee and Receivership Committee

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

REINSTATEMENT

On July 25, 2023, Tri-County Hearing Panel #58 entered an Order of Reprimand (By Consent) in this matter, reprimanding the respondent and ordering her to pay costs in the amount of \$789.20. The board entered an order on Aug. 16, 2023, granting the respondent's motion to request payment plan. On April 3, 2024, the board vacated the respondent's payment plan for failure to comply. Pursu-

ant to MCR 9.128, a Notice of Automatic Suspension for Non-Payment of Costs was issued, suspending the respondent's license to practice law in Michigan effective April 11, 2024.

On May 30, 2024, the respondent paid her costs and on June 3, 2024, submitted an affidavit pursuant to MCR 9.123(A) stating that she has fully complied with all requirements of the Notice of Automatic Suspension

Pursuant to MCR 9.128. The board was advised that the grievance administrator has no objection to the affidavit; and the board being otherwise advised;

NOW THEREFORE,

IT IS ORDERED that the respondent, **Clarice Y. Williams**, is **REINSTATED** to the practice of law in Michigan, effective June 12, 2024.

Timothy A. Dinan

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FROM THE MICHIGAN SUPREME COURT

**ADM File No. 2023-11
Amendment of Rule 3.967 of the
Michigan Court Rules**

To read this file, visit perma.cc/JB93-3MSH

**ADM File No. 2022-54
Amendments of Canon 7 of the Michigan Code
of Judicial Conduct and Rule 9.301 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 Canon 7 of the Michigan Code of Judicial Conduct and Rule 9.301 of the Michigan Court Rules are adopted, effective Sept. 1, 2024.

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

Canon 7 A Judge or a Candidate for Judicial Office Should Refrain From Political Activity Inappropriate to Judicial Office.

A.-B. [Unchanged.]

C. Wind up of law practice.

- (1) A successful elected candidate who was not an incumbent has until midnight Dec. 31 following the election to wind up the candidate's law practice, and has until June 30 following the election to resign from organizations and activities, and divest interests that do not qualify under Canon 4. If a successful elected candidate has remaining funds in a trust account after June 30 following the election and the funds remain unclaimed, the candidate must promptly transfer control of the funds to the elected candidate's interim administrator in accordance with subchapter 9.300 of the Michigan Court Rules and Rule 21 of the Rules Concerning the State Bar of Michigan. The interim administrator must make reasonable efforts to locate the owner of the property and continue to hold said funds in a trust account for the required statutory period in accordance with the Uniform Unclaimed Property Act, MCL 567.221 et seq. This transfer of control to the interim administrator does not create a client-lawyer relationship.

- (2) Upon notice of appointment to judicial office, a candidate shall wind up the candidate's law practice prior to taking office, and has six months from the date of taking office to resign from organizations and activities and divest interests that do not qualify under Canon 4. If an appointee has remaining funds in a trust account six months after taking office and the funds remain unclaimed, the appointee must promptly transfer control of the funds to the appointed candidate's interim administrator in accordance with subchapter 9.300 of the Michigan Court Rules and Rule 21 of the Rules Concerning the State Bar of Michigan. The interim administrator must make reasonable efforts to locate the owner of the property and continue to hold said funds in a trust account for the required statutory period in accordance with the Uniform Unclaimed Property Act, MCL 567.221 et seq. This transfer of control to the interim administrator does not create a client-lawyer relationship.

Rule 9.301 Definitions

- (A) "Affected Attorney" means an attorney who is either temporarily or permanently unable to practice law because the attorney has:

- (1) become a successful elected candidate or an appointee who is subject to Canon 7C of the Michigan Code of Judicial Conduct;

(1)-(8) [Renumbered (2)-(9) but otherwise unchanged.]

(B)-(G) [Unchanged.]

Staff Comment (ADM File No. 2022-54): The amendments of MCJC 7C and MCR 9.301(A) provide a procedure for handling remaining funds in an attorney's trust account if the attorney is elected or appointed to a judicial office.

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. 2022-42
Amendments of Rules 2.508 and 4.002
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 2.508 and 4.002 of the Michigan Court Rules are adopted, effective Sep. 1, 2024.

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

Rule 2.508 Jury Trial of Right

(A) [Unchanged.]

(B) Demand for Jury.

(1)-(2) [Unchanged.]

(3)(a) [Unchanged.]

(b) If part of a case is removed from circuit court to district court, or part of a case is removed or transferred from district court to circuit court, but a portion of the case remains in the court from which the case is removed or transferred, then a demand for a trial by jury in the court from which the case is removed or transferred is not effective in the court to which the case is removed or transferred. A party who seeks a trial by jury in the court to which the case is partially removed or transferred must file a written demand for a trial by jury and pay the applicable jury fee within 21 days of the removal or transfer order, and must pay the jury fee provided by law, even if the jury fee was paid in the court from which the case is removed or transferred, within 28 days after the filing fee is paid in the receiving court, but no later than 56 days after the date of the removal or transfer order.

(c) The absence of a timely demand for a trial by jury in the court from which a case is entirely or partially removed or transferred does not preclude filing a demand for a trial by jury in the court to which the case is removed or transferred. A party who seeks a trial by jury in the court to which the case is removed or transferred must file a written demand for a trial by jury and pay the applicable jury fee within 28 days after the filing fee is paid in that court, but no later than 56 days after the date of the removal or transfer order within 21 days of the removal or transfer order, and must pay the jury fee provided by law.

(d) [Unchanged.]

(C)-(D) [Unchanged.]

Rule 4.002 Transfer of Actions From District Court to Circuit Court

(A)-(C) [Unchanged.]

(D) Payment of Filing and Jury Fees After Transfer; Payment of Costs.

(1) [Unchanged.]

(2) If the jury fee has been paid, the clerk of the district court must forward it to the clerk of the circuit court to which the action is transferred as soon as possible after the case records have been transferred. If the amount paid to the district court for the jury fee is less than the circuit court jury fee, then the party requesting the jury shall pay the difference to the circuit court within 28 days after the filing fee is paid under subrule (D)(1).

(3) [Unchanged.]

Staff Comment (ADM File No. 2022-42): The amendments of MCR 2.508(B)(3)(b)-(c) and 4.002(D)(2) make the rules consistent with MCR 2.227 regarding the timing of payment of the jury fee in cases that are removed or transferred.

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

ADM File No. 2023-34 Amendment of Rule 3.967 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 3.967 of the Michigan Court Rules is adopted, effective Sept. 1, 2024.

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

Rule 3.967 Removal Hearing for Indian Child

(A)-(C) [Unchanged.]

(D) Evidence. An Indian child may be removed from a parent or Indian custodian, or, for an Indian child already taken into protective custody pursuant to MCR 3.963 or MCR 3.974(B), remain removed from a parent or Indian custodian pending further proceedings, only upon clear and convincing evidence, including the testimony of at least one qualified expert witness, as described in MCL 712B.17, who has knowledge about the child-rearing practices of the Indian child's tribe, that active efforts as defined in MCR 3.002 have been made to provide remedial services and

FROM THE MICHIGAN SUPREME COURT (CONTINUED)

rehabilitative programs designed to prevent the breakup of the Indian family, that these efforts have proved unsuccessful, and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The active efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. The evidence must include the testimony of at least 1 qualified expert witness, who has knowledge of the child rearing practices of the Indian child's tribe, that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child.

(E)-(F) [Unchanged.]

Staff Comment (ADM File No. 2023-34): The amendment of MCR 3.967(D) aligns the rule with MCL 712B.15, as amended in 2016, to clarify the applicability of qualified expert witness testimony in a removal hearing involving an Indian child.

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. 2024-09 Proposed Amendment of Rule 8.128 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 8.128 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

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

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

Rule 8.128 Michigan Judicial Council

(A)-(B) [Unchanged.]

(C) Membership

(1) [Unchanged.]

(2) All members shall be appointed by the Supreme Court. Members serving on the Judicial Council by nature of their positions designated in subparagraphs (C)(1)(a), (c) and (d) shall serve on the Judicial Council so long as they hold that position. Of the remaining members appointed by the Supreme Court, one-third shall initially be appointed to a two-year term, one-third appointed to a three-year term and one-third appointed to a four-year term. All members appointed or reappointed following these inaugural terms shall serve three-year terms. Terms commence January 1st of each calendar year. Unless otherwise specified in MCR 8.128(H) or the member is required or nominated to serve under MCR 8.128(C)(1)(a), (b), (c), or (d), no member may consecutively serve more than two full consecutive terms.

(D)-(G) [Unchanged.]

(H) Vacancies. In the event of a vacancy on the Judicial Council, a replacement member shall be appointed by the Supreme Court for the remainder of the term of the former incumbent. After serving the remainder of the term, the new member may consecutively serve be reappointed for up to two full consecutive terms.

(I)-(K) [Unchanged.]

Staff Comment (ADM File No. 2024-09): The proposed amendment of MCR 8.128(C) and (H) would clarify the number of allowed terms for members of the Michigan Judicial Council.

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

A copy of this order will be given to the secretary of the State Bar and to the state court administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by Sept. 1, 2024, by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2024-09. Your comments and the comments of others will be posted under the chapter affected by this proposal.

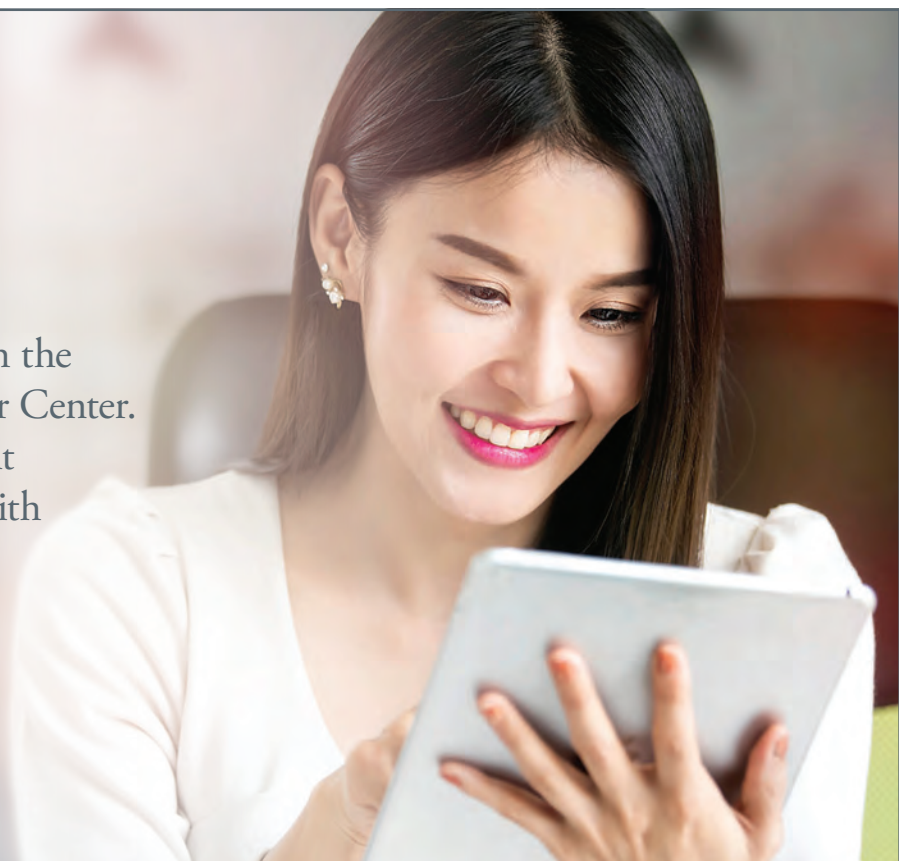
ADM File No. 2024-01 Appointment to the Michigan Judicial Council

On order of the Court, pursuant to MCR 8.128 and effective immediately, Hon. Beth Gibson (At-Large Judge) is appointed to the Michigan Judicial Council for the remainder of a term ending on Dec. 31, 2026.



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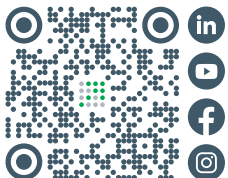


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